

## TRANSACTIONAL SKILLS TRAINING: OPINION LETTERS

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### INTRODUCTION

The topic of this session is transactional legal opinions.

My work with legal opinions began back in the late 80s and early 90s, when there was a huge amount of ferment going on involving these opinions.

Legal opinions, fifty to sixty years ago, were routine documents. They were routinely given at closings. This changed in the late 80s. In the materials, you will see the Fuld article.<sup>1</sup> This article provoked a lot of anxiety, a lot of reflection, and a lot of bar involvement on the issue of legal opinions. So, legal opinions really got a lot of attention in the late 80s and early 90s.

Let's talk about why we worry about legal opinions. Note here that we are not talking about the legal opinion I give my client. Rather, we are talking about the legal opinion which is normally delivered as part of a transaction. It can be a merger, acquisition, or loan transaction. The legal opinion is not issued to the client, however. Instead it is issued to the other party to the transaction, so it is a strange document. If you think about it, there is this inherent conflict of interest built into the structure.

So what in the heck are legal opinions there for in the first place? Well, they were originally a way for the buyer's lawyer or the borrower's lawyer—those are the two classic situations where it comes up—to give appropriate assurances to the bank if it was a loan, or to the acquirer, if it was an acquisition, that things had been done the way they needed to be done. So most of the classic legal opinions are pretty fundamental and seemingly simpleminded. The opinions are there to ensure that the parties have authorized the transaction and have taken the requisite action, and to ensure that the people who are signing the papers are who they say they are.

But when you think about it, these are matters of extreme importance to the acquirer or to the lender, and the acquirer or lender has no way of knowing these

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<sup>1</sup> James J. Fuld, *Legal Opinions in Business Transactions: An Attempt to Bring Some Order Out of Some Chaos*, 33 BUS. L.J. 1295 (1973).

things. In that way, legal opinions make a great deal of sense because what the recipient is really looking for is a certification from the lawyer that everything is being done correctly. And who is in a better position to give the assurance in an opinion than the lawyer who is supposed to make sure the client is doing these things?

The opinion that has caused almost all of the agony, disruption, and thousands of pages of paper is not one of these basic opinions that address power, authority, and due execution. Rather, it is the “remedies opinion.” Although it is called the “remedies opinion,” the word “remedies” does not appear in the opinion. Many lawyers in practice refer to it as the “enforceability” opinion. It is the opinion that states, “The agreement . . . is valid, binding, and enforceable in accordance with its terms.”

### I. THE ABA ACCORD OF 1991

I am a bit of an economic determinist. So, from my perspective, what we really saw in the late 80s and early 90s was a battle driven by economic forces. On one side you had the New York banks and the New York law firms who represented the money. Their aggregate wisdom on the issues affecting opinions was and is compiled in a series of reports by the TriBar Committee.

The TriBar Committee does amazing work. These reports are extraordinarily scholarly and thoughtful. But, they are also ideological. Their goal is to protect the New York lenders and to protect the New York law firms who represent those lenders.

The TriBar and the New York approach to the remedies opinion was that when a lawyer gives the remedies opinion, the lawyer is saying that every provision of the agreement is enforceable. Well, when this was written, the rest of the lawyers in this country had a heart attack. Because up until then, nobody thought that is what the remedies opinion meant. Everyone thought that the remedies opinion meant the parties had a remedy, but not necessarily every remedy listed in the document. So, the California Bar issued a report that said, “No, the remedies opinion does not mean that.” Then the Florida Bar issued a similar report. We did a similar report in Georgia. There was this huge tussle.

There was then an effort to negotiate a peace treaty among the warring bars and bar reports. The result was the ABA Accord of 1991. It is interesting they used the word “accord,” which very much has this notion of detente or treaty.

The Accord is a wonderful piece of work, and it is a great resource for teaching about legal opinions. It is written rather abstrusely—rather like a geometry book more than a law review article. But it is a wonderful source of material.

Through the ABA Accord, the warring bars tried to strike a compromise. And they thought they had a compromise. But then the New Yorkers went back and said, “We don’t like this. We don’t agree. We think you have to follow customary practice” and the New York firms generally refused to accept Accord opinions. So, the whole thing came unglued.

## II. CURRENT TRENDS

So, in that setting, what you now have is the Accord, which was a great idea whose time has come and gone, and you have a number of state bar reports that have been issued, and you have the various TriBar reports that are scholarly and very thoughtful. As to current opinions practice, the TriBar reports are probably the best place to start because they are well written, thorough, and the most useful documents in terms of reading about legal opinions.

Also, the TriBar reports codify the New York approach. You also have the big report from California report, bar reports from many other states, and an article in the ABA Journal that is cited about the role of what is called a “customary practice.”

Customary practice was an effort to move back to the time before all of this tussle started. The goal was to get back to the old days when opinions were short, and everybody thought they knew what they meant. It has had little effect that I can see.

Perhaps one of the most striking results of all this activity in the late 80s and early 90s is there has been a noticeable decline in the use of opinions ever since.

We now see two trends in opinions practice. First, we see transactions, at least M&A transactions, that are being done without any legal opinions at all. The lawyers just say, “Look, you are a lawyer. I am a lawyer. You can look at the papers. I can look at the papers. Here are the resolutions. Here are the certifications from the client. You are not going to look at anything I am not going to look at. I do not know anything you do not know. If they are lying to you, they are lying to me. What difference does a legal opinion make? What does it add?” There is considerable merit to this argument. So, first of all, one thing you are seeing more and more frequently is that transactions are done with no opinion at all.

The other thing we are seeing more and more is that the opinions given are limited to what I call the “due execution, delivery, and authority opinions.” In other words, the opinions are limited to those opinions that address whether the party has done everything the party needs to do to be bound and has authorized, executed, and delivered the agreement. What these opinions often omit is the remedies opinion.

To go back to that point, the remedies opinion is a strange opinion when you think about it. If I am doing a transaction with you, and you are buying my client’s company, then you drafted the document. If you do not know what the document says, and where the questionable provisions are, then why should I know where the issues are?

Now, here is one reason. Let us suppose that you are a New York lawyer, and you drafted the contract to comply with New York law. You know that the contract is good under New York law. New York law has a well developed body of law. There are many contract principles that are well settled in New York. In Georgia, on the other hand, we are still in the nineteenth century when it comes to contract principles. We really are. Under Georgia contract law, documents mean what they say, the court is restricted as to what it can consider, there is little addressed by implication, and, in Georgia, we have some unusual rules. So, as a New Yorker, your real anxiety is not that the agreement is not enforceable under New York law. Your concern is that there is going to be a problem if Georgia law is applied. That really is what you as a New York lawyer worry about. So, there is a tendency to attempt to use the legal opinion as a way to avoid hiring local counsel by flushing out the Georgia issues.

But, if you are worried about Georgia law, instead of asking the other party’s lawyer what the law is indirectly through giving a remedies opinion, would it not be far better to hire competent local counsel?

When I am dealing with New Yorkers, this comes up all the time. New Yorkers are often astounded by some of our Georgia contract law rules. For instance, it is more difficult to write a restrictive covenant in Georgia that is enforceable than in any other state with the possible exception of California. We have some bizarre jurisprudence in that area. So out of state counsel is often worried about things like that and use the opinion as a way to flush the issue out.

Getting a third-party legal opinion from me is not going to address whether a restrictive covenant that is drafted to be enforceable under New York law is enforceable in Georgia. If you as a New York lawyer really want to know the answer, you are going to engage local counsel. But there is a tendency to try to use

third-party opinion as a way to short circuit the need for local counsel. Often, it is an effort to save money by avoiding having to hire local counsel. But it rarely works.

Because there is so much hue and cry about giving the remedies opinion, we see more and more that rather than the acquirer's counsel requesting that opinion, what the acquirer's counsel will ask for is an opinion that basically only addresses the authority issues. Authority, due execution, and delivery opinions are very useful legal opinions. Such opinions also are not cost prohibitive because, presumably, the lawyer who is representing the party that has been acquired (or who is borrowing the money) is doing all the requisite work to approve the transaction anyway. So giving those opinions normally does not require a lot of extra work.

So to summarize, we are seeing first, either the complete omission of opinions or, alternatively, opinions limited to authority and execution and that omit the remedies opinions

There is one area where there is no decline in the use of opinions. That is in loan transactions. I think this is for various reasons. The main reason is the regulatory environment after the trauma of the 1988 real estate collapse and the enactment of FIRREA.<sup>2</sup> Since FIRREA, lenders want the extra layer of diligence that an opinion from borrower's counsel triggers. The other reason is simply that the legal opinion is on everyone's checklist: the bank, the rating agency, and the lender's lawyer. You get the distinct feeling sometimes that no one really cares what the opinion says, they just need one for the checklist.

This reminds me of a story. A friend of mine was a partner at a firm that did a lot of lending work. This firm did a loan with a borrower represented by a lawyer down in South Georgia. The lawyer was a one person shop. The Atlanta firm had asked for an opinion "in the form of Exhibit A." When the Atlanta firm received the borrower's counsel's opinion, well, the poor borrower's counsel literally photocopied, signed Exhibit A complete with blanks, and handed it back to them.

Now, we all laughed about this story because that opinion was not worth the paper it was printed on. Why? Because you cannot rely on an opinion that you know does not merit reliance. This borrower's counsel did not know what he was doing. Which is one of the interesting things about legal opinions. You can only rely on opinions if the reliance is reasonable. If someone gives you a legal opinion you know is wrong, it really does not help the recipient.

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<sup>2</sup> The Financial Institutions Reform, Recovery and Enforcement Act of 1989.

So, the setting for our discussion today is that while legal opinions are still being done, they are being done less and less often, and they are being done in more limited circumstances.

Unfortunately, all of this hubbub over legal opinions over the last twenty years has intimidated many lawyers. There is a great deal of fear about legal opinions because lawyers have the sense that they are subjecting themselves to huge liability for writing opinions. Strangely, it has always been my experience that the things that get you in trouble are not the hard things like opinion limitations. The things that get you in trouble are things like failing to notice that there was a lien on the property, that the mortgage was not recorded, or that there was a pending lawsuit that you did not bother to check out or failed to identify.

A firm recently got in trouble where the firm gave a legal opinion that there were no environmental problems when there were such problems. But they missed it. The acquisition agreement actually listed the problem right there in the schedules.

So you get in trouble for the easy things. You fail to file the UCC financing statement—that is the kind of thing where you get in trouble. It is not whether you remember to tell the recipient that after five years they need to file a continuation statement, or else the UCC financing statement expires. It seems that often people are worried about the wrong things.

One result of this anxiety is that almost every firm has developed its form or prototype opinions, and most firms have an opinions committee. Personally, I think having such a committee is a good thing because I agree with the notion that every opinion should be reviewed. And you need people dealing with opinions who understand what things mean in current custom or usage.

We have talked a little bit about purposes of opinions. The purpose of the third-party opinion is to flush things out and to make sure that the parties have done what they said they would do. There are many inappropriate opinions that are often asked for. Quite frankly this is the result of a misunderstanding of what opinions are for. A legal opinion is not an insurance policy. When I detect this approach from the other lawyer, I say, “Look, if you are looking for an insurance policy, let’s call the insurance company.” A legal opinion is a reasoned, informed judgment based on facts. And as people often fail to understand, you can be wrong and still not be liable. You just need to avoid being negligently wrong. An opinion is not a guarantee. It is not a warranty of the accuracy of the transaction. Unfortunately, some lawyers will try to ask for inappropriate opinions in a very unprofessional fashion with just this as the goal.

Regarding the requests for an opinion, the rule is the “golden rule.” In this context, the golden rule is that one should never ask for an opinion one would not give. Our firm is good about this, I think. I say, “Look, I am not going to ask this guy to do something I wouldn’t, because it’s not appropriate.”

One of the nice things we have here in Georgia is a group of lawyers who have been active in this area over the years. So when I get crosswise with somebody in New York on an opinion issue, for instance, which happens with some regularity, I can say, “Look, if you don’t believe me, let me give you six people who practice with leading firms here in Atlanta. You can call any of these people, and I will do anything they say.” There is a group of people around town who do this stuff all the time. We all know where the problem spots are. We are not going to disagree. I find that this is very effective to resolve conflicts.

In Georgia, we also have a very useful resource in that the State Bar has provided position papers on legal opinions. So, when I am arguing about a point, I can say, “If you don’t believe me, here is the State Bar’s position paper on this point. Read it. I am not making this up. I am not trying to be difficult. I am just telling you this is the standard practice down here.” The TriBar Reports are also excellent resources in these types of situations. If you can meet the TriBar Report standard, everyone is going to be happy.

I should note there is another kind of third-party opinion that is given that we are not discussing today. That is the classic “securities law” opinion. These are given in connection with offerings of securities. We are not talking about these today. Rather, we are discussing classic third-party transactional opinions.

### **III. THE FORM OPINION**

With that, I would now like to go through and talk about the opinions we use at my firm. I am going to use our firm’s form opinion.

#### **A. GENERAL ISSUES**

There are a number of general issues that come up with the giving of opinions.

*Dating.* First there are dating issues. Obviously you have to have a date for an opinion. An opinion speaks as of the date it is given. It does not speak for future events. Now the remedies opinion is an exception to that rule because the remedies opinion is predictive. As to everything else, if you give the opinion today and three

days later something happens, it is not your responsibility to supplement. Nor is there a duty to supplement. You will find most opinions will state explicitly that there is no duty to supplement and that the opinion speaks as of the date given.

*Parties Addressed.* Who is the opinion addressed to? It is usually addressed to the other party. Now in the lending area it is often addressed to the whole world as many loans are syndicated or participated and the subsequent participants want to be able to rely. Traditionally, however, the opinions are limited as to whom they are addressed. In some states, that is important because it creates a privity defense to a malpractice claim founded on the opinion.

*Identification of the Transaction.* There is usually a brief description of the transaction to set the stage and identify the parties.

*Special Counsel vs. General Counsel.* One of the issues that often comes up is the role of counsel in the representation. People used to say, "We are general counsel," "we are special counsel," "we have done this," or "we have done that." The commentary now says that these qualifications are ineffective. If you are giving an opinion, you are held to the standard of someone who has assumed the responsibility of giving the opinion. The fact that you are "special counsel" for the purposes of the opinion does not matter.

*Inquiry.* On the other hand, if the recipient will agree to let you limit your inquiry, that can be meaningful. But in the absence of such a limitation being agreed to, identifying oneself as "special counsel" or "general counsel" is not going to mean anything.

*Reason for Opinion.* Now in the opinion we turn to the reasons for the giving of the opinion. For example, "we are giving this in connection with a merger," "we are giving this opinion in connection with the making of a loan," or "we are giving this to you in connection with the making of the guarantee." So, you state the context for the opinion.

*Documents Reviewed and Other Inquiry.* When we look at our prototype opinion, there is this traditional run-on paragraph that lists all that we have considered and all the documents that we have reviewed. These documents are often listed and sometimes the list goes on for several pages. This run-on paragraph often ends by saying that we have also reviewed or considered "such other matters as we considered necessary for purposes of giving the opinion." Of course, the "such other matters" language is a potential Pandora's Box. The minute you say that, it does not matter what the list of documents is, the list no longer limits inquiry. If you want to give an opinion based on limited review, you must say that in the opinion.

*Certificates.* The issue of factual investigation also comes up a lot. How much factual investigation have we done? The opinion may say that “we have relied upon certificates of the officers without any verification.” If I have a secretary’s certificate and that secretary says that “so and so is the authorized officer,” as an opinion giver I am not going to verify that fact. I am not looking in the minute books to see if that is correct. That is very important as it reduces the opining lawyer’s factual diligence burden.

But there is a trap here. A lawyer’s job is to draw legal conclusions based on facts that are presented to the lawyer. So, I can rely on a secretary’s certificate that says, “Persons A and B are the officers.” That is fine. I can rely on that certificate because that is a factual matter. But what I cannot do is have the CEO sign a certificate that says that “this transaction will not result in the violation of any bylaw” and rely on that certificate. The reason is that the CEO is not a lawyer and it is not reasonable to think a CEO can reach that legal conclusion.

So, reliance by a lawyer on a certificate has to be reasonable reliance as to factual matters. The lawyer cannot get a certificate from a client that covers the ultimate legal conclusions which are the conclusions of the opinion and rely on that certificate. This is a frequent mistake. Some lawyers think that if they get a certificate they are home free. But, it does not work that way. The certificate is not a substitute for legal conclusions.

*Assumptions.* As you look at the form, you will see lots of assumptions. Again, the commentary talks about what are reasonable assumptions and what are not reasonable assumptions.

You will notice the assumption as to “presumption of regularity and continuity.” Unfortunately, clients tend to be sloppy. It is getting to the point now with the destruction of documents it seems that you can never find anything that is more than six years old anymore. But often you are called upon to give legal opinions about companies that have been around for a long time. And there are companies that you have not represented in the past.

Sometimes all you have got going for you is a presumption of regularity and continuity. People do lose their minute books. That has been known to happen. So that presumption can be very helpful sometimes in covering situations where you are asked to give an opinion about an entity, and you really do not have a lot of factual backup you wish you had.

*Signature.* The form for the signature is always an interesting issue. There are two schools of thought here. There is one school of thought that likes to see

“Cravath, Swain & Moore” written out. So if I were signing the opinion for that firm, I would write out the firm’s name. My individual signature would not appear. There is another school of thought, of which I am a member, that likes to know who is the son of a gun that I am going to put on the stand when I need to take a deposition about the opinion. So I prefer the opinion to be signed by the particular attorney who is responsible for the opinion, actually signing on behalf of the firm. In other words, the same way any other entity would sign a contract or agreement.

I particularly like the opinion to be signed this way when I am reviewing an opinion in my firm. I want that partner’s name on the opinion. I want that partner to be responsible. So there are two schools of thought, and either is acceptable. But I personally much prefer the latter.

*Knowledge.* One of the interesting things that came out of the battle of the New York Bar versus the rest of the world is the concept of knowledge. In most areas, New York was very strict in terms of wanting every provision of the opinion to be precise. But there was one area where the New York lawyers were really loose. That was the concept of the “knowledge” of the opining attorney when applied to legal opinions.

As we all know, law firms are generally partnerships or entities where the individual lawyers are agents for the firm. Under agency principles, we know that the knowledge of one agent is imputed to the principal. Of course in a partnership, every lawyer is an agent and every partner is a principal. So under classic agency law, I am literally deemed to know everything that some other lawyer in another office of my firm knows. That is sort of funny when you think about it.

Well, if you think that is unworkable for us with 180 attorneys, just think about how difficult this issue would be for a firm with thousands of lawyers like DLA Piper. So the imputed knowledge issue was a horrible one for the New York firms. Not surprisingly the TriBar says, “No, that’s not what “knowledge” means. When a lawyer gives an opinion, the opinion speaks only as to the lawyer who is signing the opinion and those persons with whom that lawyer would reasonably expect to consult about the client’s matters.” In other words, under the TriBar approach, imputed knowledge is significantly limited. The fact that, unbeknownst to me, I have an associate down the hall who has been in the basement digging through files for six months is not a problem because that associate’s knowledge is not automatically imputed to me, the partner, under the TriBar approach.

Again, New York won. So what you will often see in opinions now is a concept of the “primary lawyer group.” Or the opinion will say that “the opinions in this opinion letter are limited to the knowledge of the person signing this opinion

and A, B and C.” Or the opinion may use the formulation which is in the ABA Accord that knowledge is limited to the knowledge of the attorney signing the letter and “the persons with whom the signing lawyer would reasonably be expected to consult regarding the matters to which the opinion relates.”

For example, if I am signing an opinion about a client and my litigation partner handles all the litigation, I would normally be expected to ask that partner about the litigation. But I would not be expected out of the blue to ask the ERISA lawyer downstairs about whether the ERISA lawyer had some notice from the DOL about some ERISA violation, unless I had reason to think I should ask. It is a question of what is the reasonable scope of knowledge.

This “primary lawyer group” concept has caught on and is widely used. You will see that concept, or variations on that concept, in most opinions.

## B. STANDARD OPINIONS

Now there are a number of standard opinions. Skipping through the prototype very briefly, let me just tick them off and make some comments.

*Corporate Status Opinion.* The first opinion is the classic “corporate status” opinion. This is the portion of the opinion that reads, “The corporation is duly organized, validly existing and in good standing under the laws of the state of \*.” That opinion is often inordinately difficult to give for reasons we will discuss in a moment. There is an alternative version of that opinion, called the “is a corporation” opinion, that is often easier to give.

The general difference between the two is that “duly organized” is a historical fact. If you talk about a company that was organized 50 or 60 years ago, there is no way of knowing whether the company really had that first board meeting, issued its stock, etc., etc. So a lot of times the correct opinion is “the corporation is a corporation, validly existing and in good standing.” You get a lot of needless fights over this alternative because lawyers you are dealing with do not understand why the “is a corporation” opinion is appropriate. Who cares whether the company did something 60 years ago? The question is whether the company is a valid company today.

*Unincorporated Entity Opinions.* One of the treacherous areas in opinions these days is that although most opinion forms evolved for corporations, unincorporated entities such as L.L.C.’s are more and more common. And L.L.C.’s are not corporations. Many lawyers fail to realize that you cannot just take a corporate opinion and translate that opinion into unincorporated entities. Unincorporated

entities like L.L.C.'s or partnerships are ultimately creatures of contract. When giving an opinion as to an unincorporated entity, if you are not careful, all of a sudden you have picked up the substantive contract law of a foreign state. So for a Delaware L.L.C., that may be perfectly fine as long as you are prepared to be sued and held to the standard of a Delaware lawyer on Delaware contract law.

*Corporate Powers Opinion.* After you have formed your corporation, you want to make sure the corporation has the corporate power to do what it is about to do. You would be surprised how often people forget about that. A lot of times nowadays you will see corporations that have provisions in their articles or certificate of incorporation that are called "bankruptcy remote special purpose entity" provisions because of loan covenants. These provisions significantly limit the power of the corporation. You would be astounded by how often people fail to look at the charter. Again, it is easy stuff like this that gets people in trouble. So the corporate powers opinion is basically saying that, "This particular corporation does have this corporate power" to do what it is doing in the transaction. So this opinion goes back to a time when corporations tended to have more limited authority. You still have to worry about it, though for the reasons mentioned. But it is usually an easy opinion to give.

*Corporate Acts Opinion.* The corporate acts opinion is confirming that "the entity has done what it needs to do to authorize the transaction." Whether that is a board vote, a shareholder vote, both, or whatever else. Now this is an important opinion to the recipient because it is one of the few pieces of paper that the recipient really wants from the lawyer. The recipient really wants to make sure that the other party has done what that party needs to do legally to authorize the transaction. Who better than the party's lawyer to confirm that. The recipient does not want to be in a position that it closes on the deal, and some yahoo shows up and says "this transaction was not authorized and I want it rescinded." If you are the buyer and this happens, what do you do? The omelet has been made. So, does the recipient pay this person to go away or pay the lawyer to fight? This is a very serious, important, and sometimes neglected issue. People often assume that it is not a problem when, in fact, sometimes it is.

*No Violation Opinion.* The "no violation opinion" can be very dangerous. This is the opinion that basically says, "This transaction does not violate" and then lists various things. Well, opining as to the articles and bylaws is usually not hard. And, as a lawyer, presumably you know the law, and you know if it would violate the law. Where it gets tough is when you are opining that there will not be a breach or violation of any agreement the client is party to. This is particularly a problem with a large corporation or large business. Think about it. There may well be a "change of control" clause in the copier lease. As the attorney, you don't know. You are not

reading every piece of paper that the entity is subject to. So one of the issues on giving the “no violation opinion” is carving down the list of agreements.

There are several solutions to this issue. In the public company setting, we have seen the opinion look to the SEC filings identified as material agreements and limit it to violations of those agreements. So the opinion then says that you know this transaction is not going to violate any material agreements consistent with those on file with the SEC. But, even that can still be a raft of paper and a huge diligence review. What we often try to do is say that “material written agreements,” for purposes of the opinion, means the agreements that were identified in the relevant acquisition or loan documents. So that helps narrow the list. It also takes the burden off the lawyer of making the judgment about what is material and what is not.

The irony with this opinion is that usually the recipient knows more about these things than the opining counsel because the recipient has been doing due diligence and reading all of this garbage. So you have to ask yourself whether this is a meaningful opinion that is cost justified. A lot of times the argument about the opinion will stop there, because the recipient has done the due diligence, and there is no reason for my client to pay me to do the same review again.

*Cost Benefit Analysis.* This gets back to the whole issue of cost. The first time an opinion comes up, I often ask, “Do you understand that to do an opinion on this \$100,000 transaction will cost between \$7,500 and \$10,000?” You really have to put these things in perspective. I find we simply cannot do an opinion of any substance for less than five grand. It simply cannot be done. You can spend a lot of money on legal opinions really fast, so you have got to ask if the opinion is worth the cost.

*No Consent Opinion.* The “no consent opinion” is a variation of the “no violation opinion.” In this opinion, the lawyer is saying that “nobody is required to consent to this transaction.” Obviously that would include consents by the government and shareholders. But it also would apply to contracts and agreements. As such, it is a very important opinion. Again, the open-ended nature of the opinion often needs to be limited to make it cost-effective.

*Non-Corporate Entity Opinions.* I want to repeat and emphasize a point I made earlier. Non-corporate entity opinions are much more common now than they were twenty years ago. But you have to exercise extra caution when you get into the non-corporate entity world.

In Georgia, our Real Estate Opinion Report actually deals with unincorporated entities. As I said, the TriBar has recently issued a report on non-

corporate entity opinions, which is another excellent source of information. You have to be careful because corporations and non-corporate entities are not the same. You see people issuing opinions that literally have no meaning in the context of the unincorporated entity.

*The Remedies Opinion.* The remedies opinion is the nine-hundred-pound gorilla in legal opinions. This is where the big fights are, and this is where the big stresses are. One lawyer is asking the other lawyer, “Tell me that this agreement is fully enforceable.” Then immediately the qualifications come out. When you see our prototype, you will see the kind of laundry list of exceptions you have to get into.

There are a number of what are called implied exceptions that even the TriBar Committee recognizes. Just because you do not articulate a specific exception does not mean they are not there. But most people have become accustomed to the “laundry list” approach.

*The Capitalization Opinion.* The capitalization opinion is arguably an inappropriate opinion and a waste of everybody’s money. The buyer can look at stock books as well as the seller. The buyer gets reps and warranties on this issue from the seller. What does the legal opinion add other than a statement that the lawyer has gone through the minute books and says, “Yeah, these look right to me, too?”

Having said that, if you are doing a venture capital deal, the venture capitalist is going to insist on a capitalization opinion. They want the company’s lawyer to say that it looks like everything was indeed done correctly.

By the way, it is amazing what capitalization opinions flush out. You will be astounded what is not documented properly in terms of issuance of stock. So there is sometimes value in putting the opinion on the table just to flush out the problems. In effect, the opinion then becomes a supplemental disclosure document.

*The Share Transfer Opinion.* You actually have to give the opinion that the shares are existing and that they have been transferred. You would think that would be a simple opinion, but it is more subtle than one might think.

*Personal Property Transfer Opinions.* No thoughtful lawyer would ever give an opinion as to title what the seller owns. All the lawyer can say is that the seller has transferred whatever title the seller has. No one should ever give a title opinion as to the ownership of personal property. Or real estate, for that matter, except title examination lawyers who specialize in that area. That is not something that

commercial law firms do, at least not in Georgia. And that is what title insurance was invented for. The buyer (or lender) does not want my legal opinion. What the buyer (or lender) wants is a title insurance policy. It is a heck of a lot more useful, and the title company gets paid for it.

*Foreign Qualification Opinion.* A classic opinion you used to see all the time was that “the corporation is duly qualified to do business in every jurisdiction in which its conduct requires qualification.” Nobody gives that legal opinion anymore. All the commentators and bar committees agree that it is an unethical opinion. The reason is there is absolutely no reason why the recipient’s counsel cannot figure that out as well as the counsel for the seller or borrower. Even the TriBar agrees on this point.

Nowadays, what you will see are factual confirmations that say, “The corporation is incorporated in Delaware and is qualified to do business in the states that are listed on the attached Exhibit C. This opinion is based solely upon certificates from the secretaries of state of those states and has the meaning limited by those certificates.” That is a much more common way to handle the issue these days.

*No Litigation Opinion.* Another “opinion” you will sometimes see is the “no litigation opinion.” By the way, in our prototype, these are both headed as “confirmations.” A lot of commentators recommend this practice as both of these are actually factual statements. They are not actually legal “opinions.” What the opinion giver is saying is that “I am not aware of any litigation,” and “I think they are qualified in all of these states.” So there is a lot of reason to just move those out of the body of the opinion and put them at the bottom as a confirmation. Sometimes you will see other factual confirmations as well.

### C. OUR LONG-FORM OPINION

What you have is what we call our “long-form opinion.”

I would now like to run through it providing commentary.

We also have a “short-form opinion.” If I am doing a deal with another Georgia law firm, because of our State Bar Opinion Projects we can do what we call an “Interpretive Standards Opinion.” An “Interpretive Standards Opinion” is about two pages long.

Unfortunately, I can almost never get the New York lawyers or the Chicago lawyers to accept this form because they do not want to read the Interpretive

Standards. A lot of times what we will do is say, “Look, you can take the two page opinion and we will email you the Interpretive Standards and you can read those, or we will take everything in the Interpretive Standards and dump them back into the opinion.” But they will usually prefer the long-form opinion. So this is the long-form opinion. It has everything but the kitchen sink in it, and it tends to keep growing.

In the first paragraph, the opinion describes the parties to the transaction. There is the recitation of the material reviewed in the second paragraph. Notice the assumptions in the third paragraph. These are classic. If you go back, you would find this language in opinions a hundred years ago. You can almost tell it is a hundred years old because it reads so well. It has that nice flow that is so alien to modern English. Then, in the next paragraph, we talk about “knowledge.” It talks about the limitations of knowledge and what we have done in terms of independent investigation. For instance, notice in the third line the opinion talks about relying on certificates.

Then in the next sentence, we also assume and “have relied on the correctness and completeness of all representations, warranties, and other matters contained in the \_\_\_\_\_ agreement.” Sometimes people will let this slip through. Now I do not think this sentence gets the lawyer off the hook as to matters that involve legal conclusions. But as to all factual matters, it gives the lawyer issuing the opinion a lot of backstop to say, “Look the client said on page thirty-two that these were the material agreements,” or “the client said these were the only consents they needed,” or “the client said there was no litigation pending. As the opinion giver, we had no reason to believe that was incorrect.” This language can be helpful.

Then note the discussion of the “primary lawyer group.” This is for purposes of the knowledge qualifier. By the way, this language comes from the ABA Accord. It is not just “knowledge”—it is “knowledge” in the sense of conscious awareness. So if you knew something once upon a time and you forgot it, you are theoretically okay. You just have to have honestly forgotten it. So knowledge has to be your “conscious awareness.” The investment bankers would call that “top of mind.”

This next paragraph is important; it concerns the law applicable to the opinion.

As a Georgia lawyer, I limit the applicable law to Georgia and applicable federal law.

Most law firms are also comfortable and are willing to give a legal opinion regarding Delaware entities. It is neither unprofessional nor negligent to do so. It is done almost universally. This is especially true because all the New York lawyers need to practice law and all of their clients incorporate in Delaware. So everybody gives Delaware opinions. That is the good news. The bad news is if one gives an opinion under the laws of a jurisdiction, one is held at the standard of practitioner for that jurisdiction. If you are not a Delaware lawyer and you do not know something that you should, you are taking a risk.

Regarding opinions under the laws of other states, if you have a local issue, you need to have a local lawyer. We are pretty strict about that, as are most firms.

I have mentioned New York several times, so let me talk about an issue that comes up frequently. New York has a very wonderful clear choice of law. In New York, basically if you agree to it and the choice of law is not totally off the wall, the choice of law is effective. In Georgia, however, we still have the old standard of there must be a reasonable nexus between the choice of law and the contract. So we run into a common problem. We will have a document that is governed by the laws of the State of New York. The other side wants us to give an opinion. We are not licensed in New York, so we have to do one of two things. We have to say either (i) that the agreement provides that it is governed by the laws of New York, but we are going to assume it is going to be governed by Georgia law, or (ii) that the laws of New York and Georgia are the same. Those are the two ways you handle that. Although both are fictitious, either of these are fine. Of course, in a merger agreement, for example, assuming Georgia law is a little silly because under the internal affairs doctrine, if it is a Delaware merger, it is going to be Delaware law. In an acquisition or loan agreement, the issue becomes much more meaningful.

Now notice the various verbiage of the opinions we discussed earlier. Here is your “is a corporation” opinion. Notice we do have a limited liability company opinion option provided for. All the recipients usually care about for L.L.C.’s is that the entity is in good standing, that it exists, it has the power to act, and it has authorized the transaction. The next opinion addresses subsidiaries, which is one we are often called upon to do.

The third opinion is the corporate powers opinion. In other words, “the entity does have the legal power to do what it’s trying to do.” Again, what you have to watch out for are SPE provisions. We ran into this issue recently. It was very clear that a non-corporate entity had been organized for owning property A. But, now the entity wanted to buy property B. I said, “Nowhere does the governing document say anything about property B. It says property A.” So the client actually had to amend the governing document. So this is a legitimate concern.

Paragraph six contains the “valid, binding, and enforceable language” of the remedies opinion. This is the one that adds twelve pages to the opinion as you will see in a minute. Following this is the “no violation” opinion. Notice this opinion is severely restricted as to scope.

Next follows the capitalization opinion. Why should the lawyer be on the hook for that? Sue the company, don’t sue me! There are good answers to that. It may be that the lawyer is the only person who is going to do the diligence to actually make sure that everything has been done correctly.

Then follows the “no litigation” confirmation. Notice the “there is nothing pending” language. Notice that this is listed as a confirmation. These are factual statements as opposed to legal opinions. Again, a lot of the commentary agrees this is the correct way to do it.

Now, just when you think it is over, here we have more stuff. Assumptions. Yards of assumptions. It goes on and on. Then you have qualifications and limitations.

Now the first two qualifications are classic. These are the “bankruptcy and insolvency” exception and the “equitable principles” exception. Those have been around forever and ever and nobody ever bats an eye about them.

But the rest of the exceptions is where the battle between New York and the other states hits because, again, the laws are different in various states. In Georgia, we have a lot of strange case law. We have a very weak doctrine on choice of law in Georgia, for instance. That shocks a lot of New Yorkers. Waivers sometimes are not effective in Georgia. Indemnification is always an issue in Georgia. In Georgia, it used to be almost impossible to force someone to arbitrate. Our arbitration statutes have been liberalized, but it is still not as easy as under the Federal arbitration statute. These are examples of these kinds of things.

By the way, these are examples of where the opinion is helpful to the recipient. Because the opinion does flag and identify issues. But an opinion is no substitute for competent local counsel. That is always what I tell the other side. But all these limitations go on and on.

I have blown through this quickly because I think you can see, even racing through it, that there is a lot that has to be worried about.

What I want to end with is a key point: what you do to give the opinion is much more important than the words of the opinion itself. Anybody can draft the opinion. Again, the things that I have seen people nailed for are not the words of the opinion, but rather they have not done what they should have done to give the opinion: they haven't checked the UCC records; they haven't checked the GED.<sup>3</sup>

I have seen the finest law firms in the country and in Atlanta screw opinions up. For instance, people will issue stock when they have not bothered to look at the articles of incorporation and fail to realize that they have exceeded the authorized capitalization. You would be shocked how often that happens.

Fortunately, the times I have seen that, the lawyers fixed it as quickly as possible and fortunately nothing bad happened. The company still had the same shareholders, so they could fix everything. But, what do you do if you discover this a year later and the ownership has changed? I am not sure what you should do. So, one of the great values of learning how to do opinions is learning what you have to do to give the opinion.

Our firm has a good process on opinions. One of my partners does a great job. He even has a checklist where the relevant lawyer initials what the lawyer has done. So you are going to know who made the error, if one happens.

Again, some of the brightest attorneys can miss the simplest mistakes. It is the simple stuff that gets missed. The use of a checklist and the diligence that goes into it and the backup that goes into giving the opinion is essential. Wording is important, but people argue about the wording and miss the really important stuff. A little sloppy verbiage is not likely to be a problem, but failure to make sure that the filing indices have been checked and squared away likely is.

At this time, I would love to take questions.

### QUESTION

When you quote the price of the opinion letter, do you take into account what kind of reps and warranties will be given?

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<sup>3</sup> General Execution Docket

**CHARLES BEAUDROT, JR.**

The short answer is yes. A lot of times you do talk about cost. We tell people we will do these things, but ask them if it is worth the extra cost to them. We are not trying to run the fees up. The other thing is that everybody waits until the last minute. That is horrible because then the lawyer becomes the only thing standing between the client and the money, and the client often gets very angry. The client feels that the lawyer is the problem maker, not a problem solver.

So what we encourage is that if there is going to be an opinion in a transaction, get it on the table early. There are a lot of times when people say to me "I am going to send you the form of opinion." I say, "Don't send me the form. I am going to send you what I will give. Let's not waste time. Let me send you my standard opinion, and if you can live with that, we are in good shape."

I find that the attorneys who spend the most time negotiating opinions are the ones who are most insecure. The attorneys who really know what they are doing know what they can give and what is not important. But a lot of energy, money, time, and goodwill can be wasted.