

THIRD-PARTY “CLOSING” OPINIONS

*A Report of The TriBar Opinion Committee*¹

Introduction

This is a Report about legal opinion letters that lawyers in business transactions render to non-clients. Among the issues covered by this Report are (i) the content of opinion letters, (ii) the procedures opinion givers follow when conducting the factual and legal investigations required to support their opinions, and (iii) the meaning of language often used in opinion letters.

The TriBar Opinion Committee was formed more than twenty years ago, at a time when third-party legal opinion practice was as much folklore as analysis. Drawing its members from the three largest New York bar associations, the Committee consisted of lawyers from throughout New York State, from big firms and small, from larger cities as well as smaller ones. The Committee members began their work by exchanging information about and discussing their own opinion practices. The Committee members came to see that those on both sides of the opinion process—opinion givers and their clients on the one hand and opinion recipients and their counsel on the other—had a need for practical and continuing guidance on customary practices in giving and receiving legal opinions. The various TriBar Reports followed.

This Report is generally consistent with TriBar’s prior reports. It reexamines and replaces TriBar’s first report (the “1979 Report”), the two Addenda to it and the Committee’s Special Report on the Remedies Opinion.² This revision considers the nearly two decades of court decisions,

1. Reflecting the broad use of its Reports, the Committee in recent years has expanded its membership beyond New York. The TriBar Opinion Committee (“Committee” or “TriBar”) now consists of designees of the following organizations functioning as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers’ Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York, and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, Delaware and Ontario Bar Associations and of the State Bar of Texas are also members of the Committee. The members of the Committee and the Reporters and Editorial Group for this Report are listed in Appendix C.

2. See *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979); *An Addendum—Legal Opinions to Third Parties: An Easier Path*, 36 BUS. LAW. 429 (1981); *Second Addendum to Legal*

legal opinion literature,³ changes in corporate law and practice, and developments in legal opinion practice since the 1979 Report.⁴

The following three TriBar reports, each of which addresses a specialized area, are not affected by this Report:

- *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717 (1991);
- *Use of the ABA Legal Opinion Accord in Specialized Financing Transactions*, 47 BUS. LAW. 1719 (1992); and
- *U.C.C. Security Interest Opinions*, 49 BUS. LAW. 359 (1993).

A NOTE ON USING THIS REPORT

Article I of this Report addresses matters having general application and thus applies to all subsequent Articles. Users of this Report should read Article I (including the Glossary in Section 1.9) as well as the particular Article they are concerned with to assure that they understand the context of that particular Article.

Article VI comments on specific opinions that are commonly rendered. It uses as a vehicle for discussion four **Illustrative Opinion Letters**, two on a loan (outside and inside counsel) and two on a related securities sale (outside and inside counsel). The opinion letters of inside counsel cover certain matters not covered (but which might have been covered) in the opinion letters of outside counsel.

An **Index of Typical Opinion Letter Features** precedes Article I and provides an alternative way to access materials about particular opinion provisions.

Citations to certain materials frequently referred to in this Report are in note 3 below.

Opinions to Third Parties: An Easier Path, 44 BUS. LAW. 563 (1989); *Special Report of the TriBar Opinion Committee: The Remedies Opinion*, 46 BUS. LAW. 959 (1991).

3. The following are of special relevance and are generally consistent with this Report: RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 73, 152 (Tentative Draft No. 8, 1997); RESTATEMENT (SECOND) OF TORTS § 552 (1976); and the “Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions” (hereinafter “ABA Guidelines”) in *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167, 224 (1991) [hereinafter “ABA Opinion Report”]. The ABA Guidelines are not limited to opinion letters that adopt the Accord contained in the ABA Opinion Report.

4. This Report has not been approved by the governing body or membership of any of the bar associations whose Committees or members were involved in its preparation. Accordingly, the views expressed are solely those of TriBar. This Report reflects a consensus of the Committee. It does not, however, necessarily reflect the views of individual members or their firms, organizations or associations on any particular point.