A Revival of the Opinion Newsletter

Some years ago Steve Weise (now our Section Chair-elect) as chair of the Opinion Committee circulated a Committee Newsletter. The reasons for its discontinuance are lost in the sands of time. This newsletter therefore begins Volume 2.

It will continue as long as you find it useful, provide feedback to the editor and offer your comments for subsequent issues. We hope to have three issues of the newsletter this year.

Let us hear from you.

Seasons Greetings

&

Good Wishes for the

New Year!

Arthur Norman Field, Chair
E. Carolan Berkley, Vice Chair
Donald W. Glazer, Immediate Past Chair
Delaware Law and Article 9 Filing Requirements
William Yemc and Scott Matthews of the Richards, Layton firm in Wilmington have prepared for this Newsletter an article (printed below) on changes in Delaware law and how they fit into the new Article 9 filing requirements. Please let the editor know if there are any cases or legislation in your jurisdiction relevant to Article 9 filing.

In-House Counsel Opinion Report
At its August meeting, the Committee completed work on its Report on in-house counsel opinions. It is hoped that the Report will be published in the May 2003 issue of the Business Lawyer. The Reporters for this Report were Carolan Berkley, Don Glazer and Seth Hoogasian. The latest version of the Report (still subject to editorial changes) is below.

What is TriBar Up To?
TriBar is dealing with three proposed reports. The first that is likely to be published is a new Article 9 Opinion Report (probably in the May 2003 Business Lawyer). The Reporter is Steve Weise. Stan Keller is the Reporter for a proposed report on Remedies Opinion exceptions that is nearing completion. A report on Article 8 opinions has also been under consideration.

London Law Society Opinion Report
For more than a year drafts of a London Law Society Opinion Report have been in preparation. The drafts now seem to be abandoned or indefinitely deferred. In view of that, no action by our Committee on them is indicated.

Litigation and Opinions
A number of law firms have been sued arising out of opinions given in connection with Enron and other high profile business failures. We are trying to obtain citations that will enable you to keep track of litigated cases on opinions. Bear in mind that many of these cases are settled and thus it is often not easy to obtain relevant materials. Complaints are no more than allegations that may be insupportable at trial. Denials of summary judgment are also often not indicative of the final outcome. But we should be aware of the authority there is. The editor would be grateful for references to relevant materials that any of you are able to provide.

Please note the following decisions: (1) In re Infocure Securities Litigation, 210 F Supp. 2d 1331 (N.D.Ga.) which carefully considers the third-party opinion relationship in a securities fraud claim case. It was brought to our attention by member Norman Miller, (2) Report and Recommendation of Magistrate in Mayor Brown & Platt (N.D. Okla 2002) (Securities Act and Common Law opinion claims) 2002 US Dist Lexis 7562.
ABA Task Force on Securities Law Opinions
The Section Committee on Federal Regulation of Securities and the Opinion Committee has joined in a Task Force on Securities Law Opinions. Keith Higgins (Ropes & Gray) and Gerald S. Backman (Weil, Gotshal) are co-chairs. They are looking at Opinions to clients supporting certifications under Sections 302 and 906 of the Sarbanes-Oxley Act (Henry Lesser, hlesser@graycary.com and Dick Howe, howe@sullcrom.com) as well as Negative Assurance (Gerald Backman, Gerald.backman@weil.com) and Exhibit 5 opinions.

Sarbanes-Oxley
Much attention has been focused on the recent SEC Proposals under Sarbanes-Oxley. While opinion letters are involved, they are not at the center of the debate. The Committee has therefore not sought to comment. We will be following the proposals as they progress and will comment in subsequent issues on their impact on opinion letters.

Massachusetts Simplified Opinion Forms
The Boston Bar is working on simplified opinion forms for non-securities transactions. If interested, contact Don Glazer at dglazer@provant.com.

Have You The Time To Help? Ideas?
The Committee will be conducting programs, holding meetings and seeking to increase membership particularly among minority and younger members of the Section. We will need help in meeting our goals. Anyone interested in helping should contact the Chair. During 2002-2004 the Chair, Immediate Past Chair (Don Glazer) and Vice Chair (Carolan Berkley) will constitute an Executive Committee to guide Committee activities. Let us have your ideas for the Committee.

Books, Articles, Opinion CLE Programs
Arthur Field’s “Legal Opinions in Business Transaction” will be published by PLI early in 2003. Don Glazer’s supplement to the Second edition of Glazer & Fitzgibbon on Legal Opinions was published recently.

Committee Calendar
Please mark your calendar with the following dates:

Section meeting - April 3-6 (Los Angeles)
Section meeting - August 7-13 (San Francisco)

There will be committee meetings (not yet scheduled) at each. No other Committee meetings are now scheduled, although we are exploring a Fall meeting.
COMMITTEE QUESTIONNAIRE ON OPINION COMMITTEE

STILL TIME TO RESPOND NOW!

The Committee has circulated to members a questionnaire about opinion committees and how they are used in your firm or law department. The questionnaire allows you to respond without identifying your firm. The questionnaire will be tabulated and the results sent to committee members and any other participants. Through the questionnaire we will seek to learn what is common among firm opinion committees and trends that can be discerned. E.g., are firms moving toward second partner review? If the tabulation is useful enough to do so, it will form the basis for a Committee Report. At the Spring Meeting, our program will include a discussion of the Opinion Committee survey. We have 50 responses now.

NOTE: BOTH THE LATEST DRAFT OF THE IN-HOUSE COUNSEL REPORT AND THE YEMC AND MATTHEWS ARTICLE ON DELAWARE LAW CHANGES RELATING TO ARTICLE 9 OPINIONS FOLLOW THIS PAGE

Nominate New Members - 50 State Committee Coverage

The Committee has more than 300 members. There are many more section members who have an interest in or responsibility for opinions. Invite them to join. Let me know who you propose for membership.

It would be helpful to have Committee members in all 50 states, D.C. and Puerto Rico. Our records do not show members in Alaska, Iowa, Kansas, Montana, Nebraska, No. Dakota, So. Dakota, Vermont, W. Virginia, Wyoming. Please let the editor know about anyone who is interested in joining the Committee by completing the form below and faxing it.

Please fill in the form below suggesting new members for the Committee. We will follow up. Many thanks.

[Fax to A. N. Field (212) 504-8078]

I suggest the following lawyer(s) who are interested in legal opinions and might join the Committee. They are members of the Section. Please contact them.

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From: _________________________

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If you have not received a questionnaire, please call, e-mail or write to A. N. Field, 444 Madison Ave., 19th Fl., NY, NY 10022, e-mail: anfield@igxg.com, tel: (212) 759-1870, fax: (212) 504-8078.
COMMITTEE APPROVED DRAFT

CLOSING OPINIONS OF INSIDE COUNSEL

By The Committee on Legal Opinions*

Introduction

Although closing opinions often are rendered by inside counsel, the literature on closing opinions contains little specifically addressing opinions of inside counsel. The subject of this report is inside counsel opinions.

Inside counsel is often in a position to render all or some of the opinions required as a condition to closing. In appropriate circumstances, delivery of an opinion of inside counsel may reduce cost and avoid delay by eliminating the need for outside counsel to familiarize itself with matters already known to inside counsel or to duplicate work performed by inside counsel in the course of employment.

*Donald W. Glazer, Chair. E. Carolan Berkley and Seth Hoogasian, Co-Reporters.

This report uses the term “closing opinion” to mean a written opinion letter delivered at the closing of a business transaction by counsel for one party to another party (or parties); the term “inside counsel” to mean a lawyer who is an employee of either the company for whom the opinion is delivered or an affiliated company; and the term “inside counsel opinion” to mean a closing opinion signed by inside counsel. Inside counsel, particularly those who also serve as officers of a company, may execute certificates in connection with the closing of a business transaction, and these certificates may contain legal conclusions. Such certificates are not closing opinions as that term is used in this report.


See, e.g., TriBar Report at 592, 669; Glazer and FitzGibbon 24-25.


This report takes no position on when a recipient should accept an opinion of inside counsel or what matters it should cover.
Opinion Standards for Inside Counsel

General Principle: Duty of Care Applies to Inside as well as Outside Counsel

Lawyers who deliver closing opinions, whether they are solo practitioners, members of a law firm or employees of a company, have a duty of care to the recipient. That duty of care, as noted in Section 74 of the Restatement, is to “exercise the competence and diligence normally exercised by lawyers in similar circumstances . . . .” The Restatement does not distinguish between inside counsel and outside counsel.7

Customary Practice as Starting Point

The scope and nature of the work that an opinion giver is expected to perform are based on customary practice.8 This is so for opinions of inside counsel as well as outside counsel. As is true of outside counsel, inside counsel can limit or disclaim the obligation to exercise customary diligence.9

Who Owes the Duty of Care

The inside counsel who signs a closing opinion has personal responsibility for satisfying the duty of care owed to the recipient.10 The other members of a law department, whether large or small, do not owe a duty of care to the recipient (unless they render an opinion and expressly permit reliance on it)11 and are not vicariously liable to the recipient for violations of the duty of care by the signer of an opinion.12

7 Generally, the TriBar Report, the ABA Principles and the ABA Guidelines also do not distinguish between inside counsel and outside counsel. The TriBar Report, however, does contain two illustrative closing opinions of inside counsel, which are intended to provide context for that report. See note 4, supra.

8 See ABA Principles at § I.B.; TriBar Report at 600. See also ABA Guidelines.

9 See ABA Principles at § I C. See also TriBar Report at 618-20.

10 Indemnification by the company for liability incurred by inside counsel in rendering a closing opinion may be available to inside counsel under the corporate law of the company’s jurisdiction of incorporation, pursuant to the company’s charter or bylaws, or under a contract with the company. Inside counsel may also be protected by insurance, such as directors and officers insurance or legal malpractice insurance. As a matter of customary practice, inside counsel opinions do not normally disclose whether indemnification or insurance is available to the signer. The steps inside counsel might take to protect against personal financial loss are beyond the scope of this report.

11 See note 14, infra.

12 See RESTATEMENT § 58, comment C.

The lawyers of a corporate law department are not vicariously subject to each other’s liabilities. . . .
Responsibility for Work of Others

Inside counsel who signs a closing opinion often is the head of the law department or, when a team of lawyers is working on a transaction, the senior member of the team. In many cases, the signer may not do all the work required to render the opinion but may need the assistance of others. Whether those other lawyers are subordinates or not, the signer of an inside counsel opinion is responsible for the care exercised by other lawyers who help prepare the opinion. The only exception is when the signer expressly relies on the opinion of another lawyer (whether inside or outside).\(^{13}\)

By stating in a closing opinion that the signer is relying on the opinion of another lawyer, inside counsel, like outside counsel, may limit inside counsel’s professional responsibility for the care exercised by the other lawyer in rendering that opinion.\(^{14}\) In appropriate circumstances, the signer of an opinion may rely expressly on an opinion of another member of the law department, for example for legal matters arising under the law of a state or a specialized statute as to which the signer lacks the requisite competence.\(^{15}\)

Investigation of Facts

The duty of inside counsel to investigate the facts supporting a closing opinion is the same as for outside counsel. Thus, inside counsel may properly look to (and may properly obtain) certificates from officers of the company with regard to the factual matters underlying particular opinions.\(^{16}\)

Responsibility for Information Known to Others in Company

The signer of an inside counsel opinion is responsible for the knowledge of the lawyers who have participated in the preparation of the opinion (for factual matters relating to the opinions they have worked on). The signer also has responsibility to seek out others if the signer has identified others as having information not known to the signer that is needed to support particular opinions.\(^{17}\) Otherwise, the signer of an inside counsel opinion is not responsible for information known to others in the company.

\(^{13}\)See generally TriBar Report, Article V.

\(^{14}\)By expressly relying on the opinion of another lawyer (for example, local or specialized counsel), the signer of the opinion indicates that in the signer’s professional judgment such reliance is reasonable. To establish that reasonableness, the signer must ascertain the reputation of the lawyer relied on for competence in matters of the kind involved. TriBar Report at 638 (also pointing out that in expressly relying on the opinion of other counsel, an opinion giver is responsible for determining that the other opinion responds to the opinion giver’s needs).

\(^{15}\)In the case of express reliance on another lawyer’s opinion, the other lawyer should either address his or her opinion to the recipient of the principal opinion and grant the signer of the principal opinion permission to rely or address it to the signer and grant the recipient permission to rely. TriBar Report at 639; see Glazer and FitzGibbon § 5.3.1. Alternatively, the recipient might accept two separate opinion letters. See TriBar Report at 636-38 (discussion of umbrella opinions and unbundled opinions).

\(^{16}\)See ABA Principles § III C; TriBar Report, Article II.

\(^{17}\)See ABA Principles § III A and B. This responsibility derives from the signer’s responsibility for the care exercised by lawyers who assist in preparing the opinion. The result is the same as for opinions of outside counsel: in each case the opinion giver is
Inappropriate Opinion Requests

   Opinion requests that the legal opinion literature characterizes as inappropriate should not be directed to inside counsel any more than they should be directed to outside counsel.\(^{18}\) Thus, inside counsel, like outside counsel, should not be asked to evaluate the possible outcome of litigation\(^ {19}\) or to deliver opinions that the company is qualified in each jurisdiction in which qualification is required,\(^ {20}\) is not in default of any contract, or is in compliance with all laws.\(^ {21}\)

Formalities

   The lawyer who delivers an inside counsel opinion should sign the opinion in his or her own name and not in the name of the company or law department. This is because neither the company nor the law department is a lawyer or law firm and thus lacks the professional standing required to deliver a closing opinion.

   Often, inside counsel opinions are delivered on company letterhead\(^ {22}\) and the signer’s full corporate title (e.g., Vice President and General Counsel) appears below the signer’s manual signature. Neither the use of company letterhead nor the indication of the signer’s position with the company is understood as a matter of customary practice to change the signer’s personal responsibility for an opinion.

   In preparing a closing opinion, inside counsel should consider following the format for closing opinions recommended generally in the literature. That includes customary recitations and a statement that limits the law covered to that of a specific jurisdiction or jurisdictions.\(^ {23}\)

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\(^{18}\) The presence or absence of indemnification or insurance does not affect the appropriateness of an opinion request.

\(^{19}\) *ABA Guidelines* § 4.7.

\(^{20}\) *Id.* § 4.1.

\(^{21}\) *Id.* § 4.3.

\(^{22}\) Company letterhead is often personalized with the signer’s name and position. Larger companies may have specialized letterhead for use by their legal departments. Such personalized or specialized stationery has no legal significance. Indeed, it is not even necessary that the company for whom the opinion is delivered have its own separate stationery. In the case of affiliated companies, such letterhead may not exist.

\(^{23}\) Like outside counsel, inside counsel, in deciding what law to cover, should consider his or her competence in the applicable area of law. *See TriBar Report* at 632.
Clarifying the Law of "Registered Organizations" in Delaware
by William A. Yemc and Scott L. Matthews

This past June, the Delaware General Assembly enacted legislation to clarify its laws with respect to business entities that could be considered "registered organizations" within the meaning of the Uniform Commercial Code as in effect in the State of Delaware (the "Delaware UCC"). The statutes affected are 8 Del. C. § 103(c)(6), concerning corporations; 6 Del. C. § 18-206, concerning limited liability companies; 6 Del. C. § 17-206, concerning limited partnerships; and 12 Del. C. § 3812(a)(4), concerning statutory trusts (formerly business trusts). The legislation was effective as of August 1, 2002.

Each of the amendments to the various business entity statutes is designed to afford certainty that the State of Delaware is required to maintain the certificate of incorporation, certificate of formation, certificate of limited partnership or certificate of trust, as the case may be, as a public record, thereby satisfying one of the two elements of the definition of "registered organization" under 6 Del. C. § 9-102(a)(70). In order for a business entity to be considered a "registered organization" under the Delaware UCC, it must be "solely organized under the laws of a single State or the United States," and that State, or the United States, "must maintain a public record showing the organization to have been organized." Id.

An opinion preparer should not, however, render an opinion that a Delaware business entity is a registered organization under the Delaware UCC without first establishing (by due diligence or an opinion assumption) that the entity has no legal existence outside of the State of Delaware. There are at least two ways in which an entity may be organized under the laws of Delaware, as well as those of another jurisdiction: (1) a Delaware entity may transfer and continue in another jurisdiction, or (2) a foreign entity may transfer into Delaware while continuing its legal existence in the jurisdiction of its formation. The following discussion outlines each of the two scenarios as they relate to a Delaware corporation, limited liability company, limited partnership and statutory trust.

CORPORATIONS

A Delaware corporation may continue its legal existence in another jurisdiction (other than the United States, any state thereof, the District of Columbia, Puerto Rico, Guam or any possession or territory of the United States) that permits such a transfer and continuance, without ceasing to exist in Delaware, under 8 Del. C. § 390. The corporation must file a certificate of continuance with the Secretary of State of the State of Delaware. A search of the records of Delaware public filings (i.e., the ordering of a long-form certificate of good standing and copies of all documents on file with the Secretary of State of the State of Delaware) would provide an opinion preparer with information concerning whether a corporation was domesticated in Delaware, and if so, what jurisdiction's records must be examined in order to determine whether it remains a legal entity in the jurisdiction where it was originally incorporated.
Under 8 Del. C. § 389, any non-United States corporation may, subject to the requirements of that section and of the law of its jurisdiction of incorporation, temporarily transfer its domicile into the State of Delaware for the duration of an "emergency condition." The transferring entity does not file a certificate of incorporation, as in the case of a domestication. Rather, the name of the corporation is entered on the "reserved list" of the Secretary of State of the State of Delaware, and its constituent documents are kept confidential by the Secretary of State of the State of Delaware "unless the corporation invokes its right to transfer its domicile to Delaware in the event of an emergency." R. Franklin Balotti and Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations, § 16.2 (3d Ed. 1998). After an effective transfer in an emergency situation, "the corporation may continue to conduct its affairs under the laws of its non-United States domicile." Id. As a result, a non-United States corporation availing itself of the provisions of 8 Del. C. § 389 could have a corporate existence under both the laws of Delaware and the incorporating jurisdiction of the corporation.

LIMITED LIABILITY COMPANIES

A Delaware limited liability company may transfer to or domesticate in any jurisdiction, other than any state of the United States, that permits such transfer or domestication, and may also elect to continue its existence as a Delaware limited liability company, pursuant to 6 Del. C. § 18-213. The limited liability company must file a certificate of transfer and continuance with the Secretary of State of the State of Delaware in order to effect such a transfer and continuance. A person searching the public records of Delaware filings for a Delaware limited liability company should be able to determine that the limited liability company transferred to a jurisdiction other than any state while maintaining its Delaware existence, if the limited liability company complied with the requirements of 6 Del. C. § 18-213.

Under 6 Del. C. § 18-212, any non-United States entity may become "domesticated as a limited liability company in the State of Delaware" by complying with the requirements of the Delaware Limited Liability Company Act, including the filing of a certificate of limited liability company domestication and a certificate of formation. The limited liability company may continue its existence in the jurisdiction of its initial organization if the laws of that jurisdiction permit such continued existence, and the limited liability company may in that case be considered to be "organized" under both the laws of the State of Delaware and such foreign jurisdiction. If the limited liability company properly files the certificate of limited liability company domestication, a search of the Delaware public records should place the searcher on notice of the limited liability company's possible continued existence in the jurisdiction of its formation.

LIMITED PARTNERSHIPS

The laws governing the potential dual existence of a Delaware limited partnership are essentially the same as those for a Delaware limited liability company. A Delaware limited partnership may transfer to or domesticate in any jurisdiction, other than any state of the United States, that permits such transfer or domestication, and may also elect to continue its existence as a Delaware limited partnership, pursuant to 6 Del. C. § 17-216. Just as with a Delaware limited liability company, such a limited partnership must file a certificate of transfer and continuance with the Secretary of State of the State of Delaware. This filing would enable a person searching the public records of Delaware filings to discover the limited partnership's existence under the laws of a jurisdiction other than any state, provided that the limited partnership complied with the requirements of 6 Del. C. § 17-216.

Under 6 Del. C. § 17-215, any non-United States entity may become "domesticated as a limited partnership in the State of Delaware" by complying with the requirements of the Delaware Revised Uniform Limited Partnership Act, including the filing of a certificate of limited partnership domestication and a certificate of limited partnership. The limited partnership may continue its existence in the jurisdiction of its initial organization if the laws of that jurisdiction permit such continued existence, and the limited partnership may in that case be considered to be "organized" under both the laws of the State of Delaware and such foreign
If the Delaware limited partnership properly files the certificate of limited partnership domestication, a search of the Delaware public records should place the searcher on notice of the limited partnership's possible continued existence in the jurisdiction of its formation.

STATUTORY TRUSTS

Unlike the Delaware corporate, limited liability company and limited partnership statutes, the Delaware Statutory Trust Act does not currently have an express domestication or transfer and continuance provision. The Delaware Statutory Trust Act allows for the conversion of a business entity formed, organized or existing under the laws of the State of Delaware, any other state, the United States, any foreign country or any other foreign jurisdiction into a Delaware statutory trust. 12 Del. C. § 3820. While the statute does not contemplate that the entity may continue its legal existence in its prior form, the statute does not expressly prohibit such a continuance.

Under the provisions of 12 Del. C. § 3821, a Delaware statutory trust may convert to another type of business entity formed or organized under the laws of the State of Delaware. While the Delaware Statutory Trust Act does not expressly permit a Delaware statutory trust to transfer and continue in another jurisdiction, this could be accomplished indirectly through the conversion of the statutory trust to a Delaware corporation, limited liability company or limited partnership, which may then be domesticated or transferred and continued in another jurisdiction, as the laws of the relevant statute may allow.

CONCLUSION

The recent amendments to Delaware laws concerning business entities have provided clarification of the law of registered organizations, which will assist the opinion preparer and the opinion recipient alike in ascertaining whether an entity is indeed a "registered organization" within the meaning of the Delaware UCC. The amendments confirm that the State of Delaware is required to permanently maintain information from the certificates of incorporation, certificates of formation, certificates of limited partnership or certificates of trust, as the case may be, as public records for Delaware corporations, limited liability companies, limited partnerships and statutory trusts. Such documents show that the entities have been organized under Delaware law, thereby satisfying the "public record" prong of the registered organization analysis. In order to render an opinion that a Delaware corporation, limited liability company, limited partnership or statutory trust is a "registered organization" for purposes of the Delaware UCC, however, an opinion preparer must still satisfy the "solely organized" prong. This may be accomplished by due diligence, including a search of the Delaware public records. Such due diligence may be complicated in that one may need to consider the business entity statutes of all jurisdictions where such entity may possibly have domesticated or transferred and continued.

Alternatively, where appropriate, the opinion preparer could rely on a certificate of an officer of the entity, or take an opinion assumption that the Delaware business entity is solely organized under the laws of the State of Delaware.