

## So You Want To Be An Insurance Company? July 2005

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For you computer savvy people, or anyone with a teenager, you know that “IMO” stands for “in my opinion,” in internet-speak. (If you have a teenager and don’t know this, you need to spend more time with him/her). After all, why go through the effort to spell all those words, when three letters will adequately communicate your thinking to the recipient.



The same cannot be said of rendering a legal opinion in connection with a sale and purchase transaction, loan agreement or other transaction where your client is asked to deliver an opinion of counsel (which means you). Less is not more. What you deliver, and what you do before you deliver it, may have far reaching implications. The Florida Supreme Court recently extended the liability of an attorney for malpractice to investors in a private placement, adding another exception to the long standing requirement that there be privity between the client and the lawyer as a predicate to a lawyer’s liability. (*Cowan Liebowitz & Latman, P.C. v. Kaplan*, 2005 WL 610162 (Fla. 2005)) (Holding lawyers preparing private placement have duty to third party investors and malpractice claim could be assigned to third party investors). So lawyer beware.

A legal opinion is an insurance policy. Your written opinion may result in an assertion by a third party that they relied to their detriment on your opinion or, worse yet, that you had a fiduciary duty to that third party.

Note: For an excellent, though somewhat dated review of this topic, direct your browser to [www.clarkhill.com/law\\_media/liabilit.html](http://www.clarkhill.com/law_media/liabilit.html). In addition, the American Bar Association website on legal opinions is also instructive in the world of legal opinions. Although, to date there has not been wide acceptance of the ABA's Tribar opinion form (see [www.buslaw.org](http://www.buslaw.org)).

So if insurance is about risk, to reduce the risk, your opinion requires sufficient underwriting before you "issue" it. Your first form of underwriting is to determine the scope of the legal opinion itself. Often a transaction document will ask for a legal opinion in "form and substance" acceptable to buyer or lender's counsel. This requirement is usually hidden in the conditions to closing, so you might be inclined to gloss right over it. Stop reading, pick up the phone, or dash off an e-mail to your opposing counsel, and ask for the actual form of opinion to be sure that you can render it. You can choose to ignore this issue until closing, but when the opinion arrives with the other fifty closing documents and then you tell your client you cannot render it, it tends to make a happy client, a former client. Alternatively, if the form of opinion is delivered to you, review it in the early stages of the transaction and promptly identify those areas that may create a problem.

Your next step in the underwriting process is to reduce or eliminate any obligation to opine on factual matters. For example, a standard opinion requested is that the agreement executed by the client does not conflict with, nor contravene, any agreement or contract of the client already in existence. To render this opinion would require you to have the client produce every agreement to which it is a party, and to inquire of the client regarding any oral agreements. You would then have to read each and every agreement to determine whether your opinion is correct and also potentially receive some affirmative assurance from the other party to an oral

contract that the terms of the contract are as your client describes them. Obviously, this is not practical and is cost prohibitive. Incidentally, it is not an acceptable practice for another attorney to ask for this level of inquiry.

Contrast this with a more limited opinion. For example, one that opines the transaction document does not contravene nor conflict with the corporate organizational documents of the client (e.g., the articles of incorporation and by-laws). Pretty simple. First, get a copy of the document(s) and have the client certify it is true and correct (or provide in the opinion that you have assumed all documents provided to you by the client are true and correct, thus eliminating any factual issue). Next, read it. Lastly, apply your legal knowledge.

The key is to clearly delineate the level of your due diligence and knowledge as to all factual matters. Our firm practice is to rely solely on the client's factual assertions set forth in an officer's certificate and to affirmatively state that our opinions are based solely on our actual knowledge with no inquiry of any kind.

### **Oh Yeah, and Don't Forget About the Law**

An opinion often sought is one that asks you to state an agreement is fully enforceable according to its terms. A very common provision in a legal opinion is that the opinion as to the "enforceability" of the transaction document does not mean that any particular portion of the agreement is specifically enforceable, rather, the recipient will be able to realize the benefit of his or her bargain (a/k/a "a carve out"). This is a pretty good reduction in risk, but it is not always enough.

What if the state of the law is simply unclear? In Florida, we have a statute that governs non-competes (which are common in sales transactions and often a significant consideration to a

buyer). There is probably at least one case per month on this statute and all are difficult to reconcile into a coherent legal theory. Thus, it is not possible to opine without equivocation that a non-compete is fully enforceable under Florida law largely because it may not be! We specifically state so in our legal opinions.

So based on the law, you may not be able to give the opinion requested, but rather will have to explain the state of the law and the issues confronting the recipient if it seeks to enforce a portion of the transaction document.

Always remember that you may not be able to render the opinion. For example, you may be asked to render an opinion on the validity of a dealer's franchise agreement. Are you qualified to do this? This raises a number of ethical issues, including the fact that a lawyer is not permitted to undertake work for which he or she is not qualified. Special counsel may be required (but for lack of space I won't address the issue of relying on the opinions of local counsel).

Finally, two heads are always better than one. Adopt a legal opinion policy which requires another lawyer, or more than one, if feasible and cost efficient, to review all legal opinions rendered by anyone in your firm. If you are a solo practitioner, I highly recommend you review the ABA Tribar opinion reports (although I would not recommend the opinion form itself, as few practitioners use it) and the other myriad continuing legal education materials dealing with legal opinions.

Now back to the beginning. I was taught that your conclusion is just a restatement of your introduction. IMO, an ounce of prevention is, well, you know the rest.