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# OPINIONS OF COUNSEL: WHAT THEY ARE AND WHY AMERICAN COMPANIES ASK FOR THEM (1)

## LES OPINIONS JURIDIQUES : CE QU'ELLES SONT ET POURQUOI LES SOCIÉTÉS AMÉRICAINES LES DEMANDENT

Scott FITZGIBBON\* Donald W. GLAZER\*\*

Legal opinions - formal letters of legal advice delivered by counsel in financial transactions - are a feature of the American legal scene (2). They have also gained wide acceptance abroad (3). This article describes the standard legal opinion in an American financing and describe its uses and importance to an American lawyer. It also contains suggestions for interpreting and analyzing legal opinions (4).

### 1.1 When and Why an Opinion is Given

In a financial transaction, the parties look to legal counsel for assurance that the transaction works from a legal point of view. The assurance they expect to receive depends on the nature and size of the transaction. When a party is

Les opinions juridiques - lettres formelles contenant un avis sur le droit, délivrées par des conseils en matière de transactions financières - constituent une caractéristique du monde juridique américain. Elles ont également reçu un accueil très favorable à l'étranger. Cet article traite de l'opinion juridique type dans le financement américain, de son usage et son importance pour un juriste américain. Il contient également des suggestions pour l'interprétation et l'analyse des opinions juridiques.

### 1.1 Des raisons d'être de l'opinion juridique

Dans une transaction financière, les parties font appel à un Conseil pour s'assurer que la transaction est valable sur le plan juridique. L'assurance qu'elles attendent de recevoir dépend de la nature et de l'importance de la transaction. Quand une partie acquière des actifs incorporels tels que des

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titres, des billets à ordre ou des obligations, cette partie, le souscripteur, le prêteur ou l'investisseur - souhaite une confirmation de ce que les droits qu'elle acquière sont bien ceux qui ont été négociés. Si la transaction est suffisamment importante, elle souhaite que l'assurance soit confirmée par écrit, par une lettre du Conseil de la société et, souvent, également par une lettre de son propre Conseil.

Les opinions juridiques ne sont pas particulièrement longues : elles portent rarement sur plus de dix pages. Elles se ressemblent beaucoup, de transaction en transaction. Cependant, en pratique, elles occupent une place particulière dans le répertoire des juristes d'affaires américains. Les juristes abordent ces opinions avec un grand soin, travaillant chaque phrase et prenant la peine d'établir les bases factuelles et légales pour chaque conclusion. Ils s'inquiètent et négocient chaque finesse de syntaxe et de vocabulaire. Ils mènent des investigations étendues sur les faits, ils recherchent même des points de droit apparemment obscurs et, dans beaucoup de cabinets, soumettent leurs conclusions à une relecture formelle par d'autres juristes. En donnant des opinions juridiques, les juristes se conduisent comme si leur vie professionnelle était en jeu.

### 1.2 Du contenu de l'opinion juridique

Une personne lisant pour la première fois une opinion juridique émanant d'un juriste américain pourrait se demander «pourquoi toute cette histoire?». A première vue, une opinion juridique est un peu plus qu'une récapitulation des faits essentiels et des prétentions évidentes, des conclusions en droit qui ne semblent pas même valoir la peine d'être rappelées (la société est une personne morale, le capital a été souscrit, le contrat a été signé et délivré), et des qualificatifs émettant encore des réserves sur le peu qui a été dit. Le fait est, cependant, que ce qui pourrait sembler peu important au premier coup d'oeil - par exemple la date en haut de la première page - est souvent un élément d'une grande importance. Les opinions juridiques sont des documents très recherchés et ce qui semble simple pour un profane peut paraître complexe pour un juriste expérimenté. Conçue dans une tradition orale et écrite développée par des générations de juristes d'affaires, l'opinion juridique type est truffée de significations et limitée par des qualificatifs n'apparaissant pas lors de l'analyse des termes pris séparément.

Comme n'importe quelle lettre, une opinion juridique commence par une date, une adresse et des salutations. Ensuite, elle annonce en quelques paragraphes la demande du Conseil, les recherches menées pour concevoir l'opinion, les hypo-

acquiring intangibles such as stock, notes or promises (5), that party -- the underwriter, lender or investor -- wants that confirmation that as a legal matter the rights it is acquiring are those it has bargained for (6). If the transaction is large enough, it wants that assurance to be confirmed in writing, in a letter from company counsel (7) and, often, in a letter from its own counsel as well (8).

Legal opinion letters are not particularly long : rarely more than ten pages. They look much the same from transaction to transaction. In practice, however, they occupy a special place in the repertoire of the American business lawyer. Lawyers approach opinion letters with great care, laboring over every phrase and taking pains to establish the factual and legal bases for every conclusion. They worry and negotiate over niceties of syntax and vocabulary. They conduct an extensive factual investigation, research even seemingly obscure legal points and, in many firms, submit their conclusions to formal review by other lawyers. In rendering legal opinions, lawyers conduct themselves as if their professional lives were on the line.

### 1.2 What a Legal Opinions Says

A person reading a legal opinion from an American lawyer for the first time might well ask «why all the fuss?». On its face an opinion is little more than a recitation of basic facts and self-evident assumptions, legal conclusions that hardly seem worth saying (the company is a corporation, the stock has been issued, the contract has been executed and delivered), and qualifications that cut back on what little is said. The fact is, however, that what may seem unimportant at first blush -- for example the date at the top of the first page -- is often a matter of great significance. Opinions are sophisticated documents, and what looks simple to a layman can look complex to an experienced lawyer. Grounded in an oral and written tradition developed over generations of business lawyers, the standard legal opinion is suffused with meaning, and circumscribed by qualifications, not evident from its words alone.

Like any letter, a legal opinion begins with a date, address, and salutation. Then, in a few paragraphs, it sets forth the purpose of the opinion, the role of counsel, the investigation conducted to support the opinion, assumptions of law

and fact, limitations on the scope of the opinion, and definitions of terms. These paragraphs set the stage for the body of the opinion: a series of numbered paragraphs -- introduced by the phrase, «Based on the foregoing, it is our opinion that» (9) -- in which the lawyer states his legal conclusions. The opinion concludes with some standard exceptions and, again like a letter, closes with «Very truly yours» and the manually signed name of the law firm (10).

The first clause in the body of almost every opinion confirms the company's status as a corporation, typically stating that the company is «duly organized» and «validly existing» and often adding that it is «in good standing» in its state of incorporation and qualified to conduct business in specified other states (11). In a stock transaction, that opinion is followed by an opinion that the stock is «duly authorized, validly issued, fully paid and nonassessable» (12). Next appears what many regard as the most important opinion clause : the statement that the agreement «has been duly authorized, executed and delivered by the company» and, subject to exceptions relating to bankruptcy and equitable principles, «constitutes a legal, valid and binding obligation of the company enforceable in accordance with its terms» (13). Following these opinions, in no set order, are opinions on compliance with other agreements, compliance with laws, absence of litigation, and, in a secured loan, the status of the security interest (14).

### 1.3 Where the Opinion Fits Into the Transaction: Its Function and Purpose

#### 1.3.1 *The Legal Opinion as a Part of the Recipient's Diligence*

Before closing a financial transaction the lender, acquiring company or underwriter and its lawyers conduct a «due diligence» investigation to satisfy themselves that the company is what it has been represented to them to be from a business, financial, and legal point of view. The investigation typically includes, among other things, interviews with management, a review of financial statements, and a tour of physical facilities. At the closing the company confirms that the facts previously represented continue to be true, and officers deliver certificates containing various other factual representations. In some transactions, outside experts retained by the company deliver letters of advice : for example, a «fairness opinion» from an investment

thèses de droit et de fait, les limites de la portée de l'opinion et la définition de certains termes. Ces paragraphes établissent le plan du corps de l'opinion: une série de paragraphes numérotés - introduits par la phrase «se fondant sur ce qui précède, notre opinion est que» - dans lesquels le juriste prend position juridique. L'opinion conclut par quelques réserves types et, comme toute autre lettre, se termine par «votre bien dévoué» et la signature manuscrite du cabinet d'Avocats.

Dans la quasi-totalité des opinions, la première partie rappelle la qualité de personne morale de la société, déclarant de façon systématique que la société est «dûment constituée» et «existant valablement» ajoutant souvent qu'elle est «in bonis» au lieu de son inscription et habilitée pour exploiter son objet social dans certains autres États. Dans une transaction relative à des titres, ce rappel est suivi d'un avis au terme duquel le capital est «dûment autorisé, valablement émis, entièrement payé et non transmissible». Apparaît ensuite ce que beaucoup considère comme la clause la plus importante de l'opinion: l'affirmation que le contrat «a été dûment autorisé, signé, délivré et certifié par la Société» et, faisant l'objet d'exceptions relatives à la faillite et aux principes d'équité, «constitue une obligation légale, valable et obligatoire pour la société, exécutoire conformément à la conformité de son contenu». Ensuite, sans ordre établi, se trouvent des avis sur d'autres transactions, la conformité aux lois, l'affirmation de l'absence de tout litige, et, en cas d'emprunt garanti, la conformité à la réglementation sur le crédit.

### 1.3 De l'utilité de l'opinion juridique pour la transaction: sa fonction et son but

#### 1.3.1 *L'opinion juridique, partie des diligences de son destinataire*

Avant de mettre un terme à une transaction financière, le prêteur, en acquérant la société ou le souscripteur et leurs juristes accomplissent avec la diligence requise des recherches pour s'assurer que la société est bien ce qui leur a été présenté sur le plan commercial, financier et juridique. L'investigation inclut habituellement, entre autres, des interviews avec la direction, une vérification des états financiers, et un aperçu des moyens matériels. A la fin, la société affirme que les faits rappelés précédemment sont toujours exacts, et des responsables délivrent des certificats contenant d'autres informations diverses. Dans certaines transactions, des experts extérieurs choisis par la société délivrent des lettres de conseil : par exemple, «un avis impartial» d'un banquier d'affaires.

faïres à l'occasion d'une fusion, ou l'évaluation d'un actif par un professionnel de l'estimation en cas de rachat de la société sur fonds d'emprunts (LBO).

L'assurance de la légalité est un autre élément de la transaction financière. Une partie qui quitte la table de négociation sans autre bien que des promesses a besoin des conseils d'un juriste sur l'issue tangible de la transaction.

Une partie n'acquière l'assurance de la légalité de sa position que grâce aux services de son propre conseil. Une partie a besoin de son propre conseil pour l'aider à trouver, d'une part, la meilleure structure de la transaction et, d'autre part, à préparer et à négocier la transaction afin de protéger au mieux sa position juridique. Une partie attend également de son propre conseil qu'il repère les problèmes juridiques inquiétants et les résolve lorsqu'ils peuvent l'être. Néanmoins, la délivrance de l'opinion juridique formelle écrite n'est qu'un aspect du rôle du conseil.

La réception d'une opinion juridique du Conseil d'une autre partie (un «avis tiers») est un autre moyen pour une partie de conforter sa position juridique. Cependant, un avis tiers ne constitue qu'une part du processus de diligence plus ample que le destinataire de l'opinion cherche à découvrir quant à l'information qui pourrait peser sur sa décision de signer la transaction. L'avis tiers est l'un des éléments de construction de cette recherche, qui confirme que certains éléments de base de la transaction sont bien ce que tout le monde attend qu'ils soient. L'avis tiers n'est pas un traité sur la position juridique du bénéficiaire ni un commentaire des éventuels problèmes juridiques créés par la transaction. En conséquence, c'est un écrit court et technique, souvent accompagné de discussions substantielles. Pour un conseil juridique d'ordre général, on attend du bénéficiaire de la consultation qu'il fasse appel à son propre conseil et non au conseil adverse.

### *1.3.2 Des autres avantages de l'opinion juridique*

Les opinions juridiques sont aussi utiles à d'autres titres. Le travail requis pour émettre une opinion juridique peut révéler des manques qui pourront être corrigés avant l'aboutissement de la transaction, ou des problèmes qui pourront être évités, voire même réglés. La délivrance d'un avis tiers peut aussi empêcher, ou du moins gêner, l'autre partie d'affirmer certains moyens de défense dans l'éventualité d'un procès postérieur à la signature de l'accord: par exemple, le fait que les responsables de la société n'étaient pas habilités à signer

banker on a merger or an asset valuation from a professional appraiser in a leveraged buyout.

Legal assurance is another element of a financial transaction. A party that leaves the closing table with nothing in its briefcase but promises and other intangibles needs advice from a lawyer as to what it is bringing home.

The principal way a party satisfies itself as to its legal position is through the services of its own legal counsel. A party looks to its own counsel for advice on how best to structure the transaction and for assistance in preparing and negotiating the agreements it needs to protect itself from a legal standpoint. A party also looks to its own counsel to identify worrisome legal problems and to solve them if they can be solved. If that party's counsel renders a formal written opinion, delivery of that opinion is only one aspect of counsel's role.

Receipt of an opinion from counsel for the other side (a «third-party opinion») is another way a party helps satisfy itself as to its legal position (15). A third-party opinion, however, constitutes only a part of a larger diligence process in which the opinion recipient seeks to uncover information that may bear on its decision to proceed with the transaction. The third-party opinion is one of the building blocks in that investigation, confirming that certain basic elements of the transaction are what everyone expects them to be (16). A third-party opinion is not a treatise on the recipient's legal position nor a commentary on possible legal problems created by the transaction. As a result, it is brief, technically written, and seldom accompanied by substantive discussion (17). For general legal advice the opinion recipient is expected to look to its own counsel, not counsel for the other side (18).

### *1.3.2 Other Benefits of a Legal Opinion*

Legal opinions also have collateral benefits. The work required to support an opinion may reveal defects that can be corrected prior to closing or problems that can be sidestepped if not cured. Delivery of a third-party opinion may also foreclose, or at least make it awkward for the other party to the transaction to assert, certain defenses in the event a dispute later arises under the agreement: for example, that officers of the company were not authorized to execute the agreement or that the company lacked

authority to perform its obligations. Finally, receipt of a legal opinion may help directors and officers establish that they have not acted negligently if a transaction later turns out badly (19).

Another benefit sometimes ascribed -- wrongly -- to a legal opinion is that it serves as an insurance policy. An opinion is an expression of professional judgment, not a guarantee that a court will reach the same conclusion as opining counsel. The recipient of a legal opinion, unlike the holder of an insurance policy, has no claim simply because the opinion proves to be incorrect. Lawyers may be liable for negligence, but they are not liable merely for being wrong (20).

#### 1.4 Exegesis : How to Interpret a Legal Opinion

«Duly organized», «legal, valid and binding» and the like are the canonical phrases by which corporate lawyers consecrate financial transactions. Their delivery is a rite of closing. However, as with many traditional texts - religious and secular - what they say is not necessarily what they mean. Replete with fuzzy nouns and slippery adverbs, the standard opinion is susceptible to a broad range of interpretation. An opinion would be of little value, however, if it meant one thing to the opinion giver and another to the opinion recipient. Unlike a work of art, an opinion is not an occasion for subjective interpretation. Humpty Dumpty was wrong (21) - at least when it comes to legal opinions (22).

Despite their ambiguity, the words of a standard opinion do not, in practice, present nearly so daunting an interpretive problem as one might first suppose. Among experienced lawyers a consensus exists as to many interpretive issues (23), a consensus guided by a practical assessment of the purpose of each opinion clause. For example, lawyers do not interpret the opinion that a corporation is «duly organized» to mean that no defects exist in the incorporation process. Rather, focusing on the purpose of the opinion, they read the opinion to cover only substantial defects of the sort likely to lead a court to disregard the company's corporate status and have few qualms about rendering unqualified opinions despite the existence of minor defects (24). What experienced lawyers think an opinion means is revealed in the opinions they are willing to render notwithstanding technical problems. What expe-

l'accord ou que la société n'avait pas le pouvoir d'exécuter ses obligations. Enfin, la réception d'une opinion juridique peut aider les administrateurs et responsables à établir qu'ils n'ont pas agi par négligence, si la transaction tourne mal ultérieurement.

Une autre utilité souvent invoquée - à tort - à propos de l'opinion juridique est qu'elle est considérée comme une police d'assurance. Une opinion est l'expression d'un jugement professionnel et non une garantie qu'un tribunal parviendra aux mêmes conclusions. Le bénéficiaire d'une opinion juridique, à l'instar du titulaire d'une police d'assurance, n'a aucun recours s'il se révèle simplement que l'opinion est incorrecte. Les juristes peuvent être poursuivis pour négligence mais non pour les erreurs d'appréciation qu'ils auraient pu commettre.

#### 1.4 Exégèse : de l'interprétation de l'opinion juridique

«Dument organisé», «légal, valable, et obligatoire» et ainsi de suite, sont les phrases rituelles par lesquelles les juristes d'affaires qualifient les transactions financières. Leur remise est un rite final. Néanmoins, comme pour de nombreux textes traditionnels religieux ou séculaires - ce qu'ils disent n'est pas nécessairement ce qu'ils veulent dire. Remplie de qualificatifs flous et d'adverbes incertains, l'opinion juridique type est source de nombreuses interprétations. Une opinion aurait peu de valeur cependant si elle voulait dire une chose pour celui qui la donne et une autre pour son bénéficiaire. A l'opposé d'une oeuvre d'art, l'opinion n'est pas sujette à interprétation subjective. Humpty Dumpty avait tort - au moins à propos des opinions juridiques.

Malgré leur ambiguïté, la terminologie de l'opinion juridique type ne présente pas, en pratique, de problème d'interprétation aussi intimidant que l'on pourrait le supposer à première vue. Parmi les juristes expérimentés existe un consensus sur de nombreuses solutions d'interprétations, un consensus guidé par une évaluation pratique des objectifs de chacune des clauses de l'opinion. Par exemple, les juristes n'interprètent pas l'idée qu'une société est «dument organisée» comme signifiant qu'aucun défaut n'existe dans la procédure de constitution de la société. Ils se concentrent plutôt sur l'objet de l'opinion pour penser qu'elle ne couvre seulement que les principaux défauts qui seraient de nature à amener une juridiction à ne pas tenir compte des dispositions statutaires d'une société, et ils ont quelques scrupules à émettre une opinion sans réserves, en dépit de l'existence de quelques imperfections mineures. Ce que des juristes expérimentés pensent c'est qu'une opi-

nion est révélée dans les avis qu'ils souhaitent rendre malgré les problèmes techniques. Ce que des juristes expérimentés pensent d'un avis est également révélé par le travail qu'ils font pour le justifier. Les juristes, par exemple, ne revoient pas chaque statut et résolution avant d'affirmer qu'une transaction ne viole pas les lois applicables. Le coût d'une telle relecture serait inacceptable. Ils mènent à la place une recherche sur ces statuts et résolutions qu'ils reconnaissent comme étant applicables. Les bénéficiaires de l'avis attendent de celui-ci une assurance limitée fournie par cette recherche et l'avis, d'habitude, est interprété en conséquence.

Traditionnellement, le savoir existant relatif aux opinions juridiques passait oralement des associés aux collaborateurs dans les cabinets ayant une pratique substantielle du droit des sociétés. Aujourd'hui, cette tradition a été reprise et largement étendue dans des rapports des associations de barreaux importants, dans les ouvrages préparés pour des programmes de formation continue du droit et dans quelques livres scolaires et articles. L'attention que les opinions juridiques ont reçu ces dernières années a produit - et continue de produire - un consensus sur ce qui avait fait l'objet de vifs débats quant aux possibilités d'interprétation. Certains points importants, néanmoins, demeurent irrésolus. Quand un consensus existe sur une interprétation particulière, c'est ce consensus qui, reflétant les points de vue de ceux qui émettent l'avis et de ceux qui le reçoivent, devrait prévaloir.

Lorsqu'aucun consensus n'existe, les opinions devraient être interprétées au regard de l'économie et du bon sens. Les assurances données par une opinion ne sont pas gratuites. L'investigation factuelle et juridique souvent requise nécessite une dépense significative du temps du juriste et de l'argent du client. Ces coûts ne sont justifiés que lorsqu'ils représentent une valeur correspondante pour le bénéficiaire de l'opinion. Les bons juristes ne profitent pas de l'occasion d'une opinion pour accumuler les heures en analysant des questions qui ne nécessitent qu'un temps minime de recherche. Au contraire, la façon dont ils rédigent et interprètent chaque clause de l'opinion et le travail que cela entraîne pour eux, reflètent la valeur pratique de son objet et son importance. Interpréter une opinion n'est pas simplement une question de vérification des mots dans le dictionnaire.

Un mode d'analyse qui repose essentiellement sur ce que des juristes expérimentés disent et font, et sur ce qu'ils considèrent comme devant être pratique et important, peut être critiqué comme faisant des opinions juridiques le domaine réservé d'un club. Le fait est, néanmoins, que les opinions dans les transactions quotidiennes, comme les

rienced lawyers think an opinion means is also revealed by the work they do to support it. Lawyers, for example, do not review every statute and regulation before opining that a transaction does not violate applicable laws (25). The cost of such a review would be unacceptable. Lawyers instead conduct an inquiry into those statutes and regulations they recognize as likely to be applicable. Opinion recipients are willing to accept the limited assurance provided by such an inquiry (26), and the opinion, as a matter of custom, is interpreted accordingly.

Traditionally, what learning existed as to legal opinions was passed on orally from partners to associates in firms with substantial corporate law practices. Today, that tradition has been recorded to a large extent in reports of leading bar associations, materials prepared for continuing legal education programs, and some scholarly books and articles. The attention legal opinions have received in recent years has produced -- and continues to produce -- a consensus over what were once hotly debated interpretive issues. Several important issues, however, remain unresolved (27). When a consensus exists as to a particular interpretation, that consensus, reflecting the considered views of both opinion givers and opinion recipients, should control.

When no consensus exists, opinions should be interpreted with an eye to economy and good sense. The assurances provided by an opinion do not come free. The factual and legal investigation required often necessitates a significant expenditure of the lawyer's time and the client's money. These costs are justified only when they produce corresponding value to the opinion recipient. Good lawyers do not take opinions as an occasion to run up hours researching questions of small moment. Rather, how they draft and interpret each opinion clause and the work they do to support it reflects a practical assessment of its purpose and importance. Sound opinion interpretation is not simply a matter of looking up the words in the dictionary.

A mode of analysis that relies heavily on what experienced lawyers say and do, and on what they perceive to be practical and important, might be criticized as making legal opinions the province of an exclusive club. The fact is, however, that opinions in routine transactions, such as

bank loans, are well within the competence of any lawyer conversant with the professional literature. Complex transactions, of course, may require more. However, in all areas of the law technical matters typically require special expertise. Major financial transactions are no different (28).

### 1.5 The Opinion Hierarchy: The Relationship Between Opinion Clauses

The standard opinion clauses can be viewed as arrayed in a hierarchy. At the top are the corporate status and remedies opinions together with, in the case of an equity financing, the stock opinion and, in the case of a secured loan, the security interest opinion. Counsel is expected to render these opinions and to perform whatever work is required to support them. Few exceptions are permitted (29) and, except for the security interest opinion and the opinion on secondary sales of stock (30), their wording is virtually set in stone.

Next in the hierarchy is the cluster of opinions that back the remedies opinion, most notably the «no-conflicts» opinions. These opinions ordinarily are intended to elicit only information already known to counsel or available without extraordinary effort. They involve in balancing of the work required to support them against the benefit to the opinion recipient. Company counsel has more room to negotiate the wording of these opinions, to include appropriate limitations and qualifications, and, in some cases, to refuse to render the opinion at all (31).

At the bottom of the hierarchy are the purely «background» opinions such as those passing on the company's outstanding stock or the pendency of material litigation. The scope of such opinions is highly negotiable, and what and how much is said ultimately will depend on a balancing of the cost of preparation against the benefit to the opinion recipient. Opining counsel is often successful in resisting requests for such opinions.

### 1.6 A Final Note: Good Opinion Practice

Opinions are negotiated documents. Although custom and the literature on opinions provide considerable guidance, ample room remains for disagreement. Lawyers may have differences over major issues, such as opinion coverage, and minor issues, such as phrasing and syntax. The time to

prêts bancaires, sont bien de la compétence de n'importe quel juriste familier de cette littérature professionnelle. Les transactions complexes, bien évidemment, exigent davantage. Cependant, dans toutes les branches du droit, les matières techniques requièrent des expertises spéciales. La majorité des transactions financières se ressemble.

### 1.5 La hiérarchie des opinions juridiques: le lien entre les clauses

Les clauses type d'une opinion peuvent être classées en une hiérarchie de catégories. Au sommet on trouve ensemble les statuts de société et les avis relatifs à la régularisation avec, dans le cas d'un financement, une clause relative au capital et, dans le cas d'un emprunt garanti, une opinion sur le crédit. On attend du conseil qu'il donne ces opinions et qu'il fournisse tout le travail nécessaire pour les justifier. Quelques exceptions sont autorisées et, sauf pour l'opinion sur le crédit et la clause accessoire de vente des actions, leur rédaction est virtuellement «gravée dans la pierre».

Vient ensuite dans la hiérarchie le groupe de clauses qui suit la partie relative à la régularisation, et en particulier les clauses non originaires de conflit. Ces clauses sont ordinairement destinées à ne mettre à jour que les informations déjà connues du conseil ou disponibles sans effort particulier. Elles impliquent dans chaque cas un équilibre entre le travail requis pour les émettre et leur intérêt pour le bénéficiaire. Le conseil de la société a les mains plus libres pour négocier la formulation de ces clauses, inclure des réserves et qualifications appropriées et, dans certains cas, refuser purement et simplement d'émettre l'opinion.

En bas de la hiérarchie se trouvent les clauses de pur «contexte» telles que celles qui décrivent la transmission des titres de la société ou l'état des litiges pendants relatifs aux éléments corporels. La portée de ces clauses est largement négociable et ce qui est dit en dernier dépendra de l'équilibre entre le coût de la préparation et l'intérêt à en retirer pour le bénéficiaire. Un conseil a souvent intérêt à refuser les demandes qui lui sont faites pour donner de telles opinions.

### 1.6 Remarque finale: de la pratique de la bonne opinion

Les opinions juridiques sont des documents négociés. Bien que l'usage et la littérature sur les opinions constituent un guide considérable, une place demeure pour le désaccord. Les juristes peuvent avoir des visions différentes sur les questions majeures, telles que les matières couvertes, et sur des questions moins importantes telles que



la rédaction et la syntaxe. Le moment de résoudre ces différends survient au début de la transaction. Les opinions sont souvent une condition préalable à la signature, et tout intéressé devrait avoir une bonne compréhension de ce qu'il faut attendre de l'avis d'un Conseil quand les parties décident de continuer, et non lorsqu'elles se préoccupent de détails de dernière minute.

En négociant les termes d'une opinion, les juristes devraient être guidés par ce que le comité d'opinion de l'American Bar Association a appelé «la règle d'or»: une opinion juridique ne devrait pas demander du conseil requis une opinion qu'il ne donnerait pas lui-même s'il était dans la même situation que le donneur d'avis et avait la même expérience technique. Les opinions juridiques ne sont pas un jeu dans lequel l'une des parties gagne et l'autre perd, l'expérience et l'habileté déterminant le résultat. Elles ne sont pas non plus un jeton de marchandage dans un échange économique. La négociation et la préparation d'une opinion juridique dans une transaction financière est plutôt un exercice de professionnel dans lequel les juristes des deux parties devraient travailler ensemble pour atteindre un résultat significatif.

resolve those differences is at the beginning of a transaction. Opinions are usually a condition to closing, and all concerned should have a clear understanding of what is expected of opining counsel when the parties agree to go forward -- not when they are tending to last minute details.

In negotiating the terms of an opinion, lawyers should be guided by what the American Bar Association Legal Opinions Committee has termed «the golden rule»: an opinion should not be requested that the requesting counsel would not himself give if he were in the same position as the opinion giver and had like expertise. Opinions are not a game in which one side wins and the other side loses and experience and skill determine the outcome. Nor are they a bargaining chip in an economic exchange. Rather, the negotiation and preparation of a legal opinion in a financial transaction is an exercise in professionalism in which the lawyers on both sides should work together to reach a sensible result.

## Notes

1. The authors of this article are preparing a book on the subject of legal opinions, to be published by Little, Brown & Company in 1992. An earlier version of this article, not specifically addressed to the concerns involved in international transactions, appeared in the Boston Bar Journal.

2. A review of the documents binders at several large law firms indicates that third-party opinions date back at least to the 1930's.

3. See Storm, «Introductory Address from the Chair,» in Working Group, *The Opinion Letter*, in 1981 *Etudes et Documents pour le Juriste International* 73 («The habit of requiring opinion letters as a condition precedent to the closing of important business transactions is spreading over the world.»). See generally M. Gruson, S. Hutter & M. Kutschera, *Legal Opinions in International Transactions: Foreign Lawyers' Response to us Opinion Requests* (Report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the International Bar Association) (co-published by International Bar Association and Graham & Trotman, 2d ed., 1989).

4. Besides those cited elsewhere in this article, valuable works on the interpretation of legal opinions include *1989 Report of the Committee on Corporations of the Business - Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions* (Committee on Corporations of the Business Law Section of the State Bar of California, August, 1989), reprinted in 45 *Business Lawyer* 2169 (1990); *Report on Standards for Opinions of Florida Counsel of the Special Committee on Opinion Standards of the Florida Bar Business Law Section* (April 8, 1991); Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers Association, *Legal Opinions to Third Parties: An Easier Path*, 34 *Business Lawyer* 1891 (1979); Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *An Addendum -- Legal Opinions to Third Parties: An Easier Path*, 36 *Business Lawyer* 429 (1981); Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *Second Addendum to Legal Opinions to Third Parties: An Easier Path*, 44 *Business Lawyer* 563 (1989); TriBar Opinion Committee, *Special Report by the TriBar Opinion Committee: The Remedies Opinion*, 46 *Business Lawyer* 959 (1991). For useful material relating to governmental debt issues, see National Association of Bond Dealers, Model Bond Opinion Project and the Function and Professional Responsibilities of Bond Counsel (1987).

The Section of Business Law of the American Bar Association is currently at work on an «accord» for legal opinions. See *Legal Opinion Accord of the Section of Business Law, American Bar Association*, reprinted in 46 *Business Lawyer* (Issue No. S1, Dec. 31, 1990).

5. A party acquiring cash may want an opinion on the transaction but does not need legal advice as to the cash. Cash is cash.

6. For example, in a private placement a party purchasing stock wants assurance that the stock is valid. In a commercial loan, the lender wants assurance that it has a legal right to be repaid.

7. At one time opinions on financial transactions were the preserve of a company's outside law firm. Today, many companies have sophisticated inside legal departments, and lawyers in those departments often deliver opinions that supplement or in some cases replace opinions of outside counsel. On some matters inside counsel may be the only one who is in a position to render an opinion without extensive research. Except where expressly

noted, references in this article to «company counsel» do not distinguish between outside and inside counsel.

A request by a client that the lawyer render a third-party opinion does not automatically excuse the lawyer from protecting client confidences. Consent of the client is necessary before counsel may disclose confidential information about the client in (or outside) the opinion. See Canon Four of the Rules of Professional Conduct and Rule 2.3 of the Model Rules of Professional Responsibility. See Field A. & Ryan R., *Legal Opinions in Corporate Transactions* (Matthew Bender Business Law Monograph No. 26, 1988) § 1.05[1]:

«In relatively risk-free situations, the client's authorization may normally be assumed. But where the disclosure may pose a significant risk to a client, an appropriate presentation as to the risk is required and specific permission of the client should be obtained before the opinion is given.»

See also State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, *Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 23 State Bar Newsletter, Real Estate, Probate and Trust Law No. 2 at 20, 21 (Jan., 1985); Vereins-Und Westbank, AG v. Carter, 691 F. Supp. 704, 715-16 (S.D.N.Y. 1988) («Since Carter . . . directed his attorney to make representations to Vereins and Rockwood, he must be deemed to have waived any claim of confidentiality as to information necessary to determine the truth or falsity of such representations.»). Cf. generally Hillsborough Holdings Corp. v. Celotex Corp., 118 B.R. 866, Bankruptcy Nos. 89-9715-8P1 to 89-9746-8P1, Adv. No. 90-003 (US Bey Ct., M.D.Fla., Aug. 13, 1990) (holding that attorney-client privilege and workproduct doctrine did not protect information underlying legal opinion from discovery).

8. The opinion of counsel for the opinion recipient often does not cover as much territory as the opinion of company counsel. For example, when counsel for the underwriters in an underwritten public offering of securities is not knowledgeable about the law of the state in which the company is incorporated, its opinion may consist of little more than negative assurance as to the adequacy of the disclosure in the registration statement and prospectus. See Wolfson & Gervase, *Opinions of Counsel to the Underwriters in Public Offerings of Securities*, in *Opinions in SEC Transactions 1991* at 79 (Practising Law Institute); Halloran, *Rendering Opinions of Law—Opinions in Registered Offerings*, in *Opinion Letters of Counsel 9* (Practising Law Institute, 1984).

9. Alternative introductory phrases are discussed in W. ESTEY, *Legal Opinions in Commercial Transactions* 49 (1990):

«Occasionally, transaction opinions contain expressions such as «we wish to advise you that...», «we are of the view that...», or «we believe that...». While these expressions may be appropriate in the context of a reasoned opinion, they are not appropriate for a transaction opinion. They should therefore not be used. They carry the implication that something less than a formal closing opinion is being rendered and should accordingly be avoided.»

See also Fuld, *Legal Opinions in Business Transactions — An Attempt to Bring Some Order Out of Some Chaos*, 28 Business Lawyer 915, 922 (1973).

10. See generally State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, *Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 23 State Bar Newsletter, Real Estate, Probate and Trust Law No. 2 at 20, 25 (Jan., 1985):

«Many law firms type the name of the firm but include the signature of the individual partner. Other law firms manually sign the name of the firm, without reference to any individual partner. Either format is acceptable; however, if the law firm adopts the later format, the Lender is justified in requesting a confirmation of the responsible partner, either by the inclusion of that partner's initials on the signature page of the opinion letter or by a separate written confirmation from that partner.»

11. See Massey & Cox, *Framework of the Business Opinion Letter: Corporate Status Opinions*, in *Business Opinions 1990* at 215 (Practising Law Institute); FitzGibbon & Glazer, *Legal Opinions on Incorporation, Good Standing and Qualification to do Business*, 41 Business Lawyer 461 (1986).

12. See FitzGibbon & Glazer, *Legal Opinions in Corporate Transactions: the Opinion that Stock is Duly Authorized, Validly Issued, Fully Paid and Nonassessable*, 43 Washington and Lee Law Review 863 (1986).

13. See Field & Fuld, *Remedies Opinions and Exceptions*, in materials for National Institute on the Silverado Summit: The Standardization of Legal Opinions — Order out of Chaos (American Bar Association Section of Business Law and the Department for Professional Education program, National Institution on the Silverado Summit, November, 1989), reprinted in *Business Opinions 1990* at 241, 245 (Practising Law Institute); Olliff, *The Remedies Opinion: Precautions and Pitfalls for the Business Lawyer*, 24 Beverley Hills Bar Association Journal 43 (1990), reprinted in *Business Opinions 1991* at 743, 748 (Practising Law Institute); FitzGibbon & Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 Journal of Corporation Law 657 667-68 (1987), reprinted in 30 Corporate Practice Commentator 44 (1988).

14. See Uniform Commercial Code Committee of the Business Law Section of the State Bar of California, *Report Regarding Legal Opinions in Personal Property Secured Transactions*, 44 Business Lawyer 791 (1989); FitzGibbon & Glazer, *Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property*, 44 Business Lawyer 655 (1989).

15. See generally Joint Committee of the Real Property Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate Transactions*, reprinted in 42 Business Lawyer 1139, 1142-44 (1987); State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, *Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 23 State Bar Newsletter, Real Estate, Probate and Trust Law No. 2 at 20 (Jan., 1985).

Some institutions require as part of their overall due diligence investigation that a third-party opinion be obtained whenever they engage in a loan transaction of a certain size or character. A legal opinion may also be required by a regulatory agency: for example, the Securities and Exchange Commission requires that an opinion on the legality of a company's stock be filed as an exhibit to a registration statement under the Securities Act of 1933. See Schedule A (Part 29) of the Securities Act of 1933 and Item 601(b)(5)(i) of Regulation S-K under the Securities Act of 1933.

16. In the case of a third-party opinion, counsel for the opinion recipient plays an important due diligence function by deciding, in consultation with his client, what the requested opinion should cover and by explaining, to the extent necessary, how the opinion should be interpreted. The responsibilities of counsel for an American company with regard to an opinion rendered by lawyers in another country is the subject of a useful discussion in Gruson, Hutter & Kutschera, *supra* note 3, *passim* and especially at pages 6-8. See generally Pergam, *Transnational Opinions: Selecting and Collaborating with Foreign Counsel*, 1989 Columbia Business Law Review 413.

17. When the law is unclear, counsel may qualify the opinion or spell out his legal analysis. For a discussion of qualified or «reasoned» opinions,

## OPINIONS OF COUNSEL: WHAT THEY ARE AND WHY AMERICAN COMPANIES ASK FOR THEM

see Field & Ryan, *supra* note 7, para 2.10; TriBar Opinion Committee, *Special Report by the Tribar Opinion Committee: Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions*, 46 Business Lawyer 717 (1991); FitzGibbon & Glazer, *Legal Opinions in Financial Transactions: Their Purpose and Interpretation*, (Nov./Dec. 1990) Boston Bar Journal.

18. Cf. TriBar Opinion Committee, *Special Report by the Tribar Opinion Committee: Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions*, 46 Business Lawyer 717 (1991) (opinions to third parties «only express views on specific issues of law and do not impose an obligation of providing general advice to the recipient.»).

19. Many corporation statutes establish a defense of reasonable reliance on experts. See, e.g., Massachusetts General Laws chapter 156B § 65. Other benefits ascribed to legal opinions are that they are evidence that the parties had the mutual intent needed to form a contract (Joint Committee of the Real Property Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate Transactions*, reprinted in 42 Business Lawyer 1139, 1142-43 (1987)) and that they «may help to characterize the loan transaction as an arm's length agreement which should be upheld.» (Special Joint Committee of the Maryland State Bar Association, Inc., and the Bar Association of Baltimore City, *Special Joint Committee on Lawyers' Opinions in Commercial Transactions*, 45 Bus. Lawyer 706 (1990)). In addition, one commentator has suggested that a carefully circumscribed opinion to a client may limit the scope of the lawyer's responsibility by eliminating any implication that the lawyer is warranting to the client such matters as the enforceability of the agreement. Salsberg, *Legal Opinions in Commercial Transactions*, in Special Lectures of the Law Society of upper Canada, *Commercial Law: Recent Developments and Emerging Trends 1985* at 283, 284 (1985).

20. State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, *Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 23 State Bar Newsletter, Real Estate, Probate and Trust Law No. 2 at 20, 21 (Jan., 1985). See Lucas v. Hamm, 56 Cal.2d 583, 591-92, 364 P.2d 685, 689 (1961), cert. den., 368 U.S. 987 (1962):

«The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions ... and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.»

It has been suggested that, in the context of international transactions, a lawyer «could possibly limit his liability within a scope known to him by declaring his own national law applicable to the opinion letter.» Working Group, *The Opinion Letter*, 1981 Etudes et Documents pour le Juriste International 73, 79 (comments of Paul Storm).

21. L. Carroll, Through the Looking Glass and what Alice Found there (««When I use a word,» Humpty-Dumpty said in a rather scornful tone, «it means just what I choose it to mean -- neither more nor less.»»).

22. *But cf.* Joint Committee of the Real Property Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate Transactions*, 42 Business Lawyer 1139 (1987); FitzGibbon & Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to do Business*, 41 Business Lawyer 461, 462 (1986) (FitzGibbon and Glazer have reconsidered.).

23. A leading treatise on legal opinions in the international context takes the position that when a foreign lawyer's opinion is rendered to New York counsel, «[t]he issues and legal terms of the [foreign lawyer's opinion] ... must be understood as common-law attorneys in New York understand them.» Gruson, Hutter & Kutschera, *supra* note 3, at 9.

24. See FitzGibbon & Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to do Business*, 41 Business Lawyer 461, 468 (1986).

25. They often qualify such opinions with a «knowledge» qualification. For a discussion of knowledge qualifications, see Glazer & Macedo, *Determining the Underlying Facts: An Epistemological Look at Legal Opinions in Corporate Transactions*, 1989 Columbia Business Law Review 343.

26. They have no choice since the alternative in virtually every case would be to receive no opinion at all.

27. Perhaps the single most important unresolved issue is whether an opinion that an agreement is legal, valid, binding and enforceable covers every clause in the agreement. See *Report of the State Bar of Arizona Corporate, Banking and Business Law Section Subcommittee on Rendering Legal Opinions in Business Transactions*, 21 Arizona State Law Journal 30-32 (1989) and authorities cited in note 13, *supra*.

28. Moreover, in practice, it is unlikely in a major transaction that the lawyers already involved will not be fully conversant with the legal opinions expected to be rendered at the closing. If regular counsel are not experienced in such transactions, specialists will be brought in, and those specialists' job descriptions will almost invariably include expertise in legal opinions.

29. If a problem is identified, for example, as to the due authorization of the stock, the opinion recipient ordinarily will require that it be cured -- not merely disclosed.

30. See FitzGibbon & Glazer, *Legal Opinions on Secondary Sales of Stock*, 30 Boston Bar Journal 32 (1986), reprinted in 2 Insights: The Corporate and Securities Law Advisor 10 (1988) and in 1988 Columbia Journal of Business Law 187.

31. For example, a lawyer who is brought in for the transaction but who otherwise is not familiar with the business of the company might well resist rendering an opinion that would require him to review all of the company's contracts. That lawyer would argue that if the opinion recipient wants a review of all contracts, its own counsel should be the one to review them.