

THE TROUBLESOME OPINION REQUEST: DEALING WITH IT

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49th Annual William W. Gibson, Jr.
Mortgage Lending Institute
Austin, September 17-18, 2015
Dallas, November 5-6, 2015

Scope of Paper

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- The paper addresses troublesome or inappropriate requests made in connection with legal opinions rendered to a non-client third party at the closing of a business transaction.
- The paper does not address legal opinions rendered by a law firm to its own client, nor does it address opinion practices regarding certain specialized types of legal opinions (such as tax opinions).

Typical Opinion Request in a Secured Loan Transaction

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- In a secured loan transaction in which the Borrower is organized in Texas and in which the loan documents are governed by Texas law, the Lender would typically request that the legal opinion to be rendered by the Borrower's counsel address some or all of the matters set forth on Annex A to the paper.

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Troublesome or Inappropriate Opinion Requests

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Corporate Status Opinions

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- Third-party closing opinions frequently address the legal status of the client as a corporation, limited liability company or limited partnership.
- In many transactions, opinion recipients are now willing to accept an opinion as the valid existence and good standing of an entity in lieu of an opinion that the entity has been duly incorporated (or formed) or duly organized, which are rarely given.
- Many law firms now decline requests to render due formation or due organization opinions because of the cost of the due diligence required to render them.

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What is Difficult about Due Formation and Due Organization Opinions?

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- As is discussed in Part III.A.3. of the paper, the due diligence for a due incorporation (or due formation) opinion requires the opinion preparer to confirm that the necessary steps for the formation of the entity were properly taken under the law in effect at the date of its formation.
- In addition to performing the due diligence necessary to render a due formation opinion, in order to render a due organization opinion, the opinion preparer must confirm that the necessary steps (such as the holding of an organizational meeting) were properly taken under the law in effect when the entity was organized.

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First appeared as part of the conference materials for the
49th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"The Troublesome Opinion Requests: Dealing with It"