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## Drafting and Use of Opinion Letters of Counsel

Linn J. Raney\*

**I**N MANY BUSINESS TRANSACTIONS counsel is required to render his opinion to non-client parties prior to or at the closing. Such opinions are required to be expressed in a letter, which is prepared by counsel for his client, for the benefit of another party, or parties, to the transaction, or is addressed directly to the non-client party or parties. Extraordinarily large sums, compared to an individual's net worth, may be involved in even the most ordinary business transactions, and the question of whether counsel might be personally liable to a non-client party to a transaction, based on an inaccuracy in his opinion letter, becomes relevant when economic injury to such party occurs from the transaction.

This article outlines the kinds of opinions which counsel may render to a non-client via letter, the functions of such opinions in a transaction, and the preparation of opinion letters in view of the possibility of counsel's liability thereon to a non-client party. Material for the article was obtained in part from interviews with a number of individuals familiar with transactions commonly involving opinion letters and more particularly transactions wherein opinion letters are transmitted to non-clients for their reliance. Transactions specifically referred to are: capital financing transactions, transactions and proceedings involving corporate securities, including preparation of registration statements for filing with the Security and Exchange Commission, agreements among underwriters for the sale of securities, and mergers, and sales of property involving corporate parties.

Opinion letters drafted by counsel representing a corporate entity for the purpose of transmission to a non-client party to a transaction are necessarily more elaborate than letters which might be drafted by counsel representing an individual person. Because this is so, this article focuses upon transactions involving corporate parties. Nevertheless, applicability of the article to opinions of counsel in conjunction with transactions involving individuals is apparent.

### Kinds of Opinions and the Attorney's Role in Preparing Them

There are generally two kinds of opinions which may be contained in any opinion letter regardless of the party to whom it is addressed. One is an opinion as to a *legal fact*. For example, an opinion as to whether a particular state legislature has passed a particular statute or whether a corporation is qualified to do business in a particular state.<sup>1</sup> Such an

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<sup>1</sup> See, Restatement, Torts § 545, comment *a* (1938).

opinion may be thought of as informational and is, for practical purposes, either correct or incorrect. The second kind is an opinion *as to the law*, which predicts the result if a given fact situation reaches the courts. There may be no correct opinion in this second situation, depending upon the novelty of the situation, and the state of the law on the question involved.<sup>2</sup> Most frequently opinion letters addressed to a non-client party to a transaction are in the nature of a verification of the *legal facts* represented by counsel's client to the non-client party. Letters of this nature are generally required as a condition precedent to closing the transaction and for the most part are neither advisory in function nor, in the final analysis, expressive of opinions.<sup>3</sup>

Opinion letters to non-clients might be thought of as distinguishable from opinion letters to clients in that counsel is serving two masters in preparing his opinion in the former instance. Counsel might well find himself in the position of rendering an opinion adverse to his own client's interests and which could prevent his client from consummating an important transaction. When counsel's professional judgment is at odds with his client's best interests he may find it extremely difficult to be objective in formulating his opinion.<sup>4</sup> Accordingly, counsel may be tempted to assume his role as an advocate of his client's position, or avoid a definite opinion where possible. Serving one client and rendering an opinion to an adverse party, seems to many counsel significantly at variance with their traditional role as an advocate.

Is the "two master" distinction valid? If it is, then counsel's traditional role as his client's advocate has not been altered by the development of the law relating to economic injury in business toward favoring full disclosures and good faith dealings.<sup>5</sup> The trend in the law toward such concepts and the extent of its development might well present some nice questions as to how counsel's traditional adversary role has been affected. However, as a practical matter, if there is a present possibility that counsel, by advocating his client's position in a transaction or considering himself an adversary to non-clients, may subject himself to personal liability to the party relying on his opinion the shift in the law is far enough.

<sup>2</sup> *Ibid.* The Restatement suggests that if a representation as to a matter of law in a transaction is a representation of fact, it may be relied on as though it were a representation of any other fact. But a representation as to a matter of law is a representation of opinion of legal consequences of facts known or assumed by the maker and recipient, and the recipient is justified in relying on the representation as if it were a representation of any other opinion. See also Prosser, Torts § 104 (1964).

<sup>3</sup> One Cleveland, Ohio, attorney interviewed in March 1967 said: "Don't give opinions of facts," meaning that it is rather senseless to express an opinion relative to a hard fact which may be found by investigation. This logic is not disputable but since the "facts" involved in closing letters are "legal facts," attorneys can hardly refuse to give their "opinions" relative to them.

<sup>4</sup> Interview with Cleveland attorney, March, 1967.

<sup>5</sup> Prosser, Torts § 103 (3rd ed. 1964); Uniform Commercial Code § 1-203.

The present state of the law relating to business dealings is believed to be such that there is a possibility that counsel can be found to be liable to a non-client party who relies upon counsel's opinion to his detriment in a transaction. Accordingly, counsel is acting against his own interest in viewing himself as a partisan when rendering his opinion to the non-client party. Counsel's responsibility in rendering his opinion is both to the party relying on it and to himself as a professional; his opinion as far as possible must be objective, and independent of his relationship with his client. It is important that counsel preparing an opinion be aware that his role in a business transaction deviates from that in litigation.

### Functions of Opinion Letters in Specific Transactions

There are certain basic representations of *legal facts* which counsel are required to verify and which are relied upon by non-clients in most transactions involving corporate parties. Such representations are typically: that the corporation in question is duly organized and in good standing under the laws of the state in which it is incorporated; that it is authorized to do business in all states in which it is transacting business; that it has the capacity under its charter, bylaws, and applicable state and federal laws, to enter into the subject transaction; and that the necessary corporate action has been taken to enable it to conclude that transaction.<sup>6</sup>

In agreements involving financing, additional *legal facts* required to be verified by counsel's opinion may run the gamut of the items required in the aforementioned examples of transactions. Such transactions generally require opinions to the effect that entering into the agreement will not violate the terms and conditions of any pre-existing contract of the corporation; that the corporation is not involved in any unusual litigation, or any litigation not set forth in its financial statements; that the condition of the corporation's title to various assets listed in its financial statements is as represented; and appropriate statements relative to the corporation's debt structure and long term contracts. If stock or property is pledged for collateral under the terms of the agreement, counsel's opinion will state that the stock is duly authorized, validly issued and fully paid, or will disclose the state of the title to the pledged property and the priority of the lender's claim to the property under the agreement in the event of default.<sup>7</sup>

Opinions of counsel in connection with security registrations are drafted in accordance with the requirements of the Securities and Exchange Commission Form S-1. Form S-1 requires an "opinion of counsel

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<sup>6</sup> Interviews with Cleveland attorneys, February, March 1967.

<sup>7</sup> *Ibid.*

as to the legality of the securities being registered, indicating whether they will when sold be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant.”<sup>8</sup> Opinions of counsel relative to the legality of the issuance of capital shares are also required where a discount on such shares is shown as a deduction from capital stock on the most recent balance sheet filed by the registrant. Opinions as to the legality of such shares must recite applicable constitutional and statutory provisions and cite cases thought by counsel to be controlling.<sup>9</sup>

In addition, where any shares of the registrant have a liquidation preference exceeding their par or stated value, counsel must file an opinion as to whether the excess valuation of such shares places a restriction on surplus, and as to remedies of security holders before and after any dividend reducing surplus below the amount of the excess. Citation of constitutional and statutory authority, as well as controlling cases, is also required in such an opinion.<sup>10</sup>

It is apparent that opinion letters drafted in accordance with the requirements of Form S-1 in conjunction with discounts on capital shares and shares having liquidation preferences of the character referred to are more elaborate than opinions relative to the legality of the securities being registered. These would seem to be an opinion *as to the law*, rather than as to a *legal fact*. This is particularly so where the authorities relied upon are not on all fours with the facts surrounding the issuance of the securities in question. Opinions of counsel as to the legality of securities being registered, on the other hand, would appear to be more in the nature of an opinion of *legal fact* in many instances.

Purchase agreements between a selling corporation, or stockholder, and the representative of a group of underwriters require extensive opinions of counsel for the selling party, as well as counsel for the representative. The underwriters may be liable to persons subsequently buying the securities if they cannot establish the burden of proof that, in the exercise of reasonable care, the underwriters could not have known of any untruth or omission in a prospectus used in the sale.<sup>11</sup> The underwriters rely on the opinions of counsel to aid in meeting this obligation.<sup>12</sup>

As a condition to the obligations of the selling group, various representations and warranties made by the seller must be verified by counsel's opinion. Such opinions commonly state that the company is duly

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<sup>8</sup> Securities and Exchange Commission, Form S-1: Registration Statement Under The Securities Act of 1933, as in effect 2-20-58, Instructions As To Exhibits (6) (Hereinafter cited as Form S-1).

<sup>9</sup> Form S-1 at (8).

<sup>10</sup> Form S-1 at (9).

<sup>11</sup> Securities Act of 1933 § 12 (2).

<sup>12</sup> *Op. cit. supra* n. 3.

incorporated and in good standing in its state of incorporation, empowered to carry on the business in which it is engaged, duly qualified to do business and in good standing in states in which it is doing business, opinions as to the standing of subsidiaries of the company, if any, the nature and validity of the company's interest in them, that the corporation has an authorized capitalization as disclosed in the financial statements, and that the stock of the company is validly issued, fully paid and non-assessable.<sup>13</sup>

If bonds or other evidence of indebtedness are sold under the agreement, the opinion will state that the bonds are validly authorized and issued obligations of the company and binding on the company according to their terms, and that the security for such bonds is validly authorized, executed and delivered.<sup>14</sup> Counsel must further state that he has no reason to believe the registration statement or prospectus contain any untrue statement of a material fact or fail to state any material facts.<sup>15</sup>

Counsel's opinions in merger transactions include verification of statements relative to the validity of issuance of the stock involved, as well as other appropriate corporate matters similar to the statements noted above. Such opinions also commonly include counsel's opinion relative to the tax consequences of the transaction.<sup>16</sup>

In sales of property, opinions of the seller's counsel to the buyer generally recite that the title to the property being sold is good and unencumbered, and that the sale is one which the selling party is capable of making. In addition, opinions as to other matters of import to the buyer, relative to the particular property, will be required. A common example is an opinion as to the nature of applicable zoning restrictions.<sup>17</sup> To some extent counsel's opinions relative to real property are similar to opinions rendered by abstracters of titles, although they may not be issued in the same context, nor guaranteed or insured, as those of a title company usually are.

The opinions required in the transactions referred to here are principally of the *legal fact* variety and this kind of opinion predominates in letters connected with closings involving corporate parties. One attorney interviewed referred to this type of opinion as routine.<sup>18</sup> Under particular circumstances an *opinion of law* may be required in any of these transactions, but since the facts involved in such opinions are characterized by their novelty, it is not meaningful to treat these opinions individually or attempt to list them.

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Interview with Columbus, Ohio attorney, March 1967.

<sup>17</sup> Interview with Cleveland, Ohio attorneys, February 1967.

<sup>18</sup> *Op. cit. supra* n. 4.

### Possible Liability to a Non-Client

Opinions of *legal fact* are analogous to opinions of title rendered by abstracters or attorneys in conveyance transactions and presumably the law governing the liability of counsel with respect to such opinions is analogous to the law which has developed in the area of opinions of title. However, in such transactions the attorney rendering his opinion is not in a situation wholly comparable to counsel for either party in a typical business transaction. It is apparently settled that abstracters of title are liable to their clients for negligence in preparation of an opinion of title.<sup>19</sup> This liability arises out of the contract of employment with the duty of care toward the client being provided by the contractual link between them. Good faith on the part of the abstracter in performing his contract of employment has no effect on his liability to the client.<sup>20</sup>

Since the abstracter's duty arises from his contract of employment, he is generally not liable to any party not in privity with him but who may rely on his opinion and suffer an injury therefrom.<sup>21</sup> An exception is made where the opinion is rendered for the benefit of a third party and the abstracter has notice that the opinion will be relied upon by that particular designated or identified third party.<sup>22</sup> The fact that it is customary to procure certification of title when interests in land are to be conveyed is not a basis for liability of the abstracter to an injured purchaser who has relied on the title report.<sup>23</sup>

Liability of counsel for his opinions has also generally been limited to his clients only, based upon the theory of privity between counsel and his client. If counsel negligently renders an opinion which injures his client, the client may recover damages for counsel's negligent breach of the contract of employment between them.<sup>24</sup> However, recovery by non-clients for "wrong" opinions negligently rendered by counsel to his client and resulting in damage to such parties by reason of their reliance on such opinions, has been denied due to the absence of privity.

An exemplary case is *National Savings Bank v. Ward*<sup>25</sup> in which the defendant, an attorney, rendered an opinion stating that the client's title to real estate was good and unencumbered. In fact the property had been conveyed out by the client. The plaintiff bank took a mortgage on the client's non-existent interest, and when the client defaulted, the bank sued counsel for the resulting loss. The Supreme Court (with three

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<sup>19</sup> 1 C.J.S. Abstracts of Title § 11 (1936).

<sup>20</sup> *Id.* § 11(a).

<sup>21</sup> *Id.* § 11(c).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Gleason v. Title Guarantee Company*, 317 F.2d 56 (5th Cir. 1963).

<sup>25</sup> 100 U.S. 195, 25 L. Ed. 621 (1880).

Justices dissenting)<sup>26</sup> denied recovery to the bank on the ground that there was no privity between the bank and defendant counsel. It reasoned that injury to the bank was not foreseeable by counsel since counsel rendered the opinion to his client and had no knowledge of any transaction that the client may have been involved in at the time.

The aspect of foreseeability of harm as a limitation to the liability of the party rendering the opinion is really the essence of the privity doctrine. As such, it presents a significant problem of jurisprudence, since, in the area of many commercial transactions at least, the identity of persons who ultimately may be injured and the extent of the damages may not be reasonably foreseeable by one rendering an opinion upon which these persons may rely. On the other hand, the parties injured may suffer extensive losses as a direct and proximate result of reliance on an opinion of counsel, and it is of little comfort to them to say that they had no right to rely on the opinion.

The competing interests of the specifically unforeseeable injured party and the designer of an opinion were attempted to be rationalized in the case of *Ultramares Corp. v. Touche, Niven and Co.*<sup>27</sup> Here the plaintiff, a factor, sued an accounting firm which had certified the inaccurate balance sheet of a borrower, one cause of action was based on the firm's alleged negligence in certifying the borrower's balance sheet. With respect to that cause of action the court noted the decay of the doctrine of privity, but held that where the negligent act is an "honest blunder," the liability is limited by the contract. The defendant accountants did not know that their certification was to be relied on by the plaintiff and the court pointed out that if there was liability for negligence in such a case, it would subject the accountants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>28</sup>

The import seems to be that the privity limitation is a mechanism by which liability for inordinately large and remote damages to unforeseeable plaintiffs is limited.<sup>29</sup> When viewed from this standpoint the doctrine of privity appears to be not only reasonable in its effect, but perhaps a necessary limitation to the liability for ordinary negligence of individuals in the business of rendering opinions since the personal risks for mistake in such a vocation would otherwise be prohibitive.<sup>30</sup>

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<sup>26</sup> The dissenting Justices argued that the attorney was chargeable with knowledge of a sale or similar transaction by virtue of the fact that he was asked for an opinion of title by the alleged owner of the property and therefore the harm to the bank was reasonably foreseeable even though the attorney was not aware that the plaintiff bank was involved in the transaction.

<sup>27</sup> 255 N.Y. 170, 174 N.E. 441 (1931).

<sup>28</sup> *Id.*, 174 N.E. at 444.

<sup>29</sup> See generally, Meek, Liability of the Accountant to Parties Other Than His Employer for Negligent Misrepresentation, 1942 Wis. L. Rev. 371.

<sup>30</sup> *Ultramares Corp. v. Touche*, *supra* n. 27.



The doctrine of privity is not without limits. In the *Ultramares* case the court held that although the accountants did not owe a duty of due care to the plaintiff because of the lack of privity, a duty of not committing fraud in rendering their opinion was owed to the plaintiff.<sup>31</sup> In its decision relating to a cause of action for fraud, the court found that if the certification was so negligently performed that the accountants could not have known whether their statements were correct, they would be guilty of fraud, regardless of whether they honestly believed their statements to be true. The difference between "honest blunder" and "fraud" therefore depends on the degree of negligence involved in the particular facts being litigated; the limits of privity lack definiteness.

The protection afforded by privity is also contingent upon the party to whom the representations are made. When the declarer of negligent misrepresentations is aware of the specific party who is to rely on the representations, liability for the negligence can attach.<sup>32</sup> Limitation of liability to a specific known party is reasonable as far as it goes, but strictly applied seems somewhat arbitrary and mechanical. The *Restatement of Torts*,<sup>33</sup> which does not rely on privity,<sup>34</sup> suggests that the liability for negligent misrepresentation should extend to the class of persons for whose guidance the information is prepared and who rely on the information in the transaction for which the information was prepared. In such a case, the privity concept is replaced, at least in part, by a requirement of knowledge of the nature of the immediate transaction and the facts surrounding it on the part of the one making the representations.<sup>35</sup> Counsel with knowledge of a given transaction can reasonably be found to know the class of individuals who may rely on his opinion, and the nature of their possible injuries, even if he cannot foresee their individual identities.

In the case of *Lucas v. Hamm*<sup>36</sup> a beneficiary under a will sued the attorney who drafted the will when the interest given the beneficiary failed to vest within the period of the rule against perpetuities. The court found a privity relationship between plaintiff and defendant on the basis of a third-party beneficiary, or tri-partite, contract of employment between the testator and counsel. It was held that an attorney can be liable to a non-client party damaged by counsel's failure to "properly

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<sup>31</sup> *Id.*, 174 N.E. at 444.

<sup>32</sup> *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922); *Cole v. Vincent*, 229 App. Div. 520, 242 N.Y. Supp. 644 (1930).

<sup>33</sup> *Restatement, Torts*, § 552. Liability of Abstractors of Title held to be in contract or tort. See also *Hawkins v. Oakland Title Insurance and Guarantee Co.*, 165 Cal. App. 2d 116, 331 P.2d 742 (1958).

<sup>34</sup> *Id.* at comment c.

<sup>35</sup> *Id.* at comment g.

<sup>36</sup> 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).

fulfill his obligations under his contract" in such a situation.<sup>37</sup> It was further held, however, that counsel was not liable under the facts of the case due to the technicalities and intricacies involved in application of the rule against perpetuities.<sup>38</sup>

*Lucas v. Hamm* is perhaps the first case in which a court has asserted that there is liability on the part of an attorney for negligent injury to a non-client party by breach of the attorney-client contract. This decision is specific to the drafting of wills, yet it is possible that its rationale may be extended to establish privity between counsel and a non-client party to a business transaction involving counsel's client, where counsel's opinion is rendered to a non-client party.<sup>39</sup> Whether an action brought on such a contract theory will have the effect of enlarging the *specific person* exception to the privity doctrine toward the *class of persons* limitation recommended by the *Restatement of Torts* remains to be seen, but such an extension would seem to provide a contract oriented parallel to the pragmatic *Restatement of Torts* outlook.<sup>40</sup>

### Statutory Liability

The Securities Act of 1933, Section 11, provides a liberal theory of recovery which could be asserted against counsel for opinions rendered in conjunction with a Registration Statement. Section 11 provides that where a Registration Statement contains a false statement of a material fact, or fails to state a material fact required to be stated, anyone acquiring the security has standing to bring suit against any person with respect to the statement made, which person's profession gives authority to the statement made by him and who has, with his consent, been named as having prepared or certified any report or valuation used in connection with the Registration Statement.<sup>41</sup> In such an instance, the party bringing the action apparently does not have to prove reliance upon the misrepresentation unless he purchased the security in question more than twelve months *after* the Registration Statement became effective *and* subsequent to a financial report being published by the company.<sup>42</sup>

<sup>37</sup> *Id.*, 15 Cal. Rptr. at 825.

<sup>38</sup> *Id.*, 15 Cal. Rptr. at 826.

<sup>39</sup> See generally Martindale, Attorneys Liability in Non Client and Foreign Law Situations, 14 Clev.-Mar. L. Rev. 44 (1965).

<sup>40</sup> This suggestion is not new; see *Ultramares Corp. v. Touche*, 174 N.E. at 445 and the cited materials. The discussion does not purport to be an exhaustive analysis of the metastable state of the law relative to misrepresentation, either negligent or "fraudulent." Certainly it would behoove counsel to approach the preparation of an opinion letter for a non-client as if he could be held liable both for negligent misrepresentation and fraud (conscious ignorance) as a result of any material error in his opinion.

<sup>41</sup> Sec. 11(a)(4) of the Act.

<sup>42</sup> House Committee Report No. 1838 (conference report) 73rd Congress, Second Sess. (p. 41).

Counsel, since he is not an expert as defined by Section 11 (a) (4) of the Act, may avail himself of various defenses made available by the Act.<sup>43</sup>

There are a number of lawsuits currently pending against firms of Certified Public Accountants in which the alleged liability is based upon reliance of non-client parties on the opinions of the Certified Public Accountants.<sup>44</sup> In view of the popularity of such actions it is not unreasonable to assume that sooner or later a party, injured as a result of a business transaction, will seek to recover damages from counsel for another party to the transaction based upon a "wrong" opinion. The possibility of liability of attorneys to non-clients in such an action is no secret, there just has not been a recent test of the old barriers.<sup>45</sup>

Lenders are aware of the possibility of recovery from counsel for a borrower when the lender has relied on counsel's opinion to his detriment in the transaction.<sup>46</sup> It appears, however, that some financing institutions, while fairly certain that they can recover, are reticent to litigate for business reasons.<sup>47</sup> Such reticence decreases as the damage to the institution is significant and counsel for the borrower is the only solvent party. One bank counsel interviewed harbored little doubt that an attorney could be successfully sued as a result of an incorrect opinion.<sup>48</sup>

One private practitioner stated that certain "loan sharks" require counsel for the borrower to render opinions which counsel, in good conscience, could not have reason to believe to be true.<sup>49</sup> Since such opinions are required at the closing, it is a matter of "no letter, no loan." As indicated previously, counsel thus is placed in a conflict with his client. By their actions such lenders would seem to be aware of the possibility of counsel's liability. In trying to force counsel into the position of rendering ill advised opinions they may, in effect, obtain a guarantor. Certainly counsel's acquiescence to such demands should not be given merely because the lender's insistence would be a possible defense in a later suit by the lender against the attorney. Here if counsel protests the requirement that he render an "opinion" relative to facts as to which he has no knowledge, stating his reasons in writing before acquiescing to continuing unreasonable demands, it would be difficult for the lender later to establish reliance on that opinion.

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<sup>43</sup> Letters submitted to the S.E.C. in connection with a Registration Statement commonly include a paragraph authorizing counsel's name to be listed under the "Legal" Section of Prospectuses.

<sup>44</sup> Metz, *Accounting Profession, Vexed By Lawsuits, Weighs Responsibility to Shareholders*, New York Times, November 20, 1966 (33) p. 1.

<sup>45</sup> *Glanzer v. Shepard and Cole v. Vincent*, *supra* n. 32.

<sup>46</sup> Interview with bank counsel, February 1967.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Interview with Cleveland attorney, March 1967.

Opinions of counsel relative to the registration and sale of corporate securities are also such as could subject counsel to personal claims against him. Counsel involved in these areas of practice expressed the opinion that there is a definite possibility of liability upon opinions involved in such transactions.<sup>50</sup>

Opinions of counsel relative to property being sold are already within the ambit of the decisions establishing the liability of abstracters of title to parties other than their clients.<sup>51</sup>

### Considerations in Preparing Opinion Letters

Obviously counsel is not liable for every opinion he renders which eventually turns out to be wrong. Attorneys are not insurers of the correctness of their opinions.<sup>52</sup> Certainly where the opinion required is one which is of the *opinion of law* type, counsel who predicts the outcome of future litigation incorrectly cannot be said to have been negligent in reaching his opinion by reason of mere incorrectness alone. Additionally, the complexity of the area of the law to which the opinion relates tends to limit the liability of counsel for his errors, as is indicated in *Lucas v. Hamm*.<sup>53</sup> *Opinion of law* opinions are undoubtedly the most difficult opinions to formulate and draft from counsel's standpoint, but it seems that counsel's personal liability resulting from an incorrect opinion of this type is a more remote possibility than for an incorrect opinion of *legal fact*. This is particularly so where counsel is aware of the distinction and is guided accordingly.

Notwithstanding the remoteness of liability for *opinions of law*, there are matters of format and content in such letters which, if adhered to by counsel, will produce a more satisfying letter to its recipient and which will help avoid future questions relative to the basis for the opinion. It is basic that the opinion be understood by the person to whom it is transmitted.<sup>54</sup> An opinion which hedges, or is couched in esoteric language which the ordinary person would not readily understand, does not fulfill its purpose.<sup>55</sup> Moreover, the *Restatement of Torts* places a duty of exercising care and competence in communicating the information which the recipient is justified in expecting.<sup>56</sup> Apparently under the *Restatement* view, counsel can assiduously research the law and come up with a satisfactory opinion for his own purposes, but nevertheless subject himself to

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<sup>50</sup> Interview with Cleveland attorney, March 1967.

<sup>51</sup> 1 C.J.S. Abstracts of Title § 11(c) (1936).

<sup>52</sup> *National Savings Bank v. Ward*, *supra* n. 25.

<sup>53</sup> *Supra* n. 36.

<sup>54</sup> See, Cooper, *Effective Legal Writing* (1953).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Op. cit. supra* n. 33.

the possibility of liability on his opinion for failing to communicate his thoughts to the recipient of the letter. As far as counsel's legal liability upon his *opinion of law* is concerned, the safest opinion would appear to be one which is unhedged and direct.

The letter should specifically state all of the facts relied on by counsel in formulating his opinion, whether supplied to him by the parties, determined by investigation of counsel or inferred by counsel, and the opinion should be expressly limited to these facts.<sup>57</sup> Such statements not only assure the recipient of the letter that counsel is answering the question asked of him, but will protect counsel in the future when the facts have changed, or if the facts were not as represented.<sup>58</sup> Counsel often cite cases which they have found to support their conclusions so that there is a memorandum of record which discloses how a particular conclusion was reached.<sup>59</sup>

It is apparent that the opinions of counsel referred to in connection with closings are generally of the *legal fact* kind, and while these opinions are more easily arrived at than an *opinion of law*, they can be demonstrated to be wrong as a matter of fact. Moreover, the preponderance of these opinions are critical to the rights and obligations of the parties to the transaction. It is reasonable, therefore, to assume that if counsel is liable on his opinion to a non-client party in a transaction, this is the kind of opinion upon which his liability can be most easily predicated.

The content of opinion letters delivered at closings is to a large extent dictated by the agreement between the parties. Financial institutions generally use form paragraphs in loan agreements, particularly in the warranty or "acts" sections of the agreements, and counsel's opinion with respect to warranties made are expected to conform to the language of these sections.<sup>60</sup> Any variance is closely scrutinized and lenders may refuse to accept opinions containing material variances from the language of the agreement without adequate justification.<sup>61</sup> Some agreements, such as underwriting agreements, include exhibits of opinion letters to be received by the various parties on the closing date.<sup>62</sup>

Where counsel is involved in drafting the agreement, he will have some control over the content of the letter to be drafted for the closing. Thus counsel may be able to eliminate from the requirements of the opinion letters subject matter with respect to which he may be unwilling,

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<sup>57</sup> *Op. cit. supra* n. 6.

<sup>58</sup> *Op. cit. supra* n. 53.

<sup>59</sup> *Id.* Citations are also apparently in vogue as a means for justifying bills as well as feeding the client's ego.

<sup>60</sup> *Op. cit. supra* n. 46.

<sup>61</sup> *Ibid.*

<sup>62</sup> Interview with Cleveland attorney, March 1967.

or unable, to render his opinion;<sup>63</sup> an example of such subject matter might be facts not germane to counsel's function or with which counsel has no familiarity.

With the opinion portion of counsel's letter substantially fixed as to content and form by the language and terms of the agreement, the remainder of the letter should be devoted to setting forth the facts upon which counsel relies, how he was informed of the facts, what steps he has taken to investigate and determine the facts, and references to corroborating material of which he is aware.<sup>64</sup>

Where counsel represents a corporate party to a transaction, he will in many cases find it necessary to examine the constitution and statutes of the state of the incorporation, the charter and bylaws of the corporation, the records of the proceedings of its incorporators, directors and stockholders, the contracts which the corporation is a party to, state and federal regulations, if any, which may affect the corporation relative to the agreement, as well as other records which are pertinent in the circumstances.<sup>65</sup> If counsel renders numerous opinions relative to the corporation in question, it has been suggested that he update his most recent investigation of the same facts from the date of his last opinion.<sup>66</sup> However, undiscovered errors in prior investigations may be compounded by adherence to such a practice.

Counsel should list in his letter the investigative steps he has taken in formulating his opinion. If he relies entirely on information given him by parties to the transaction, he should so state in the letter and state that he has made no investigation relative to the information but does not have reason to believe it to be false. In cases where great masses of documents are reviewed and investigation is otherwise extensive, it may be impractical to limit the opinion to the investigative steps taken and in such cases counsel should concentrate on disclosing in the letter what steps were not undertaken.

Counsel should obtain corroboration for his opinions wherever possible. Certificates of good standing should be obtained which bear the date of the opinion letter and such certificates should be referred to in the letter. Opinions relative to title of property should be supported by opinions from title companies. Opinions relative to tax incidents to transactions, such as mergers, should be supported by obtaining Revenue Rulings where possible. In short, counsel should seek to rely on independent materials which support the *legal facts* represented by his opinions.

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<sup>63</sup> Interview with Cleveland attorney, February 1967.

<sup>64</sup> *Op. cit. supra* n. 61.

<sup>65</sup> See generally Riordan and Wragg, Examination Of Corporate Books In Connection With Stock Offerings And Acquisitions, 18 Bus. Law 677 (1963).

<sup>66</sup> *Ibid.*

As previously noted, counsel should be careful to limit his opinions to the facts known to him either by inclusion of the facts relied on and expressly limiting the letter thereto, or by disclosing the facts relied on by him but which he has not personally determined. Most often opinions which are rendered without investigation are conditioned by a statement that counsel has no reason to believe the statements or warranties made by a party to be false, although counsel has not personally checked their accuracy. Obviously, the most important consideration in drafting any such portion of an opinion letter is that of leaving no doubt in the mind of a reader that counsel has not determined the absolute accuracy of such facts so that the reader is not justified in relying on any investigation counsel might have, but did not make.

There are circumstances in which counsel should take care to expressly decline to render any opinions. Generally counsel should decline to render his opinions with respect to any fact other than a *legal fact* since it is not counsel's function to attest to non-legal matters relative to the transaction, and further since it is meaningless to render an *opinion* as to a fact determinable by anyone. An example of a fact relative to which counsel should unequivocally decline to make any statement is that the financial statements of his client are accurate. If accountants can be liable on their opinions relative to financial statements, counsel is clearly in no position to render his opinion on such matters, as he is not professionally equipped to do so.

Where counsel is to render his opinion relative to the accuracy of statements made in a document separate from the agreement, counsel should review the document to determine what portions, if any, are not subject matter for his opinion and expressly render no opinion with respect to them. Such a situation arises in underwriting agreements where counsel is required to state that he has no reason to believe that a registration statement and prospectus contain an untrue statement of a material fact or fail to state any material fact, since registration statements and prospectuses contain financial data with respect to which counsel should render no opinion.

It should be apparent from the foregoing that although opinion letters at closings may be routine in nature, counsel must diligently investigate the facts to which his opinion relates, obtain corroborating data for the facts found whenever possible, expressly delimit the bases for opinions where appropriate, and expressly render no opinions relative to matters outside of counsel's responsibility or competence.

### Conclusions

It is believed that counsel can be held liable to a non-client based upon counsel's opinion relative to a *legal fact*. There are large numbers of legal facts to which counsel attests in opinion letters written in conjunction with a closing; the subject matter of these *legal facts* opinions is often of material importance in the transaction; the letters at closing are required as a condition precedent to the closing and are relied on; and non-clients commonly require such letters to be addressed to them rather than to counsel's client. Under such circumstances liability can be based on a conscious ignorance, fraudulent misrepresentation theory, as well as on negligent misrepresentation. There are apparently no recently decided cases on point, but analogies to existing case law are possible. Moreover, the development of the law relating to misrepresentation is perceptible, particularly in view of the continuously diminishing protection afforded by the doctrine of privity. In addition, there is an increasing awareness of the possibility of liability on the part of sophisticated counsel frequently involved in such transactions.

The elements of *legal facts* opinions which make them dangerous are those that make rendering opinions relative to legal facts relatively easy. Accordingly, thorough investigation and thoughtful drafting of the opinion should keep counsel well clear of the frightening consequences of a business transaction which has not worked out.