Thunder Bay Law Association FALL CLE 2016

CORPORATE LAW SECTION

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Topic: Drafting an Opinion in Corporate Commercial Law: a Primer

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Preamble

The most sobering facts about a written legal opinion are that

- it will be available to intended readers the day the lawyer sends it out, and because it is permanent, it will remain forever available to those who look for it or stumble upon it;
- other than perhaps the few whose interests are immediately affected by it, it is quite likely no one else will ever ask the lawyer authoring the opinion what he or she meant by this or that passage in it; and
- many people who rely upon it will never read the whole thing but after the opinion has served its immediate purpose those few who do, in fact, read the whole thing will all too likely to be lawyers who hope to sue on it, judges who will be presented with it as evidence and the lawyer's own E&O claims manager.

So a written legal opinion needs to be the lawyer's very best thinking expressed in the lawyer's very clearest language.

Types of Opinion

Two most obvious types of legal opinion in a corporate commercial practice are

1. those a lawyer gives to the lawyer's own client; and

2. those a lawyer gives to a third party as part of the service to the lawyer's own client (often called a transactional opinions).

With respect to the first type of opinion, the client will want it in order to make decisions on a course of action in the operation of a business. That type of opinion might best proceed, therefore, by way of logical analysis beginning with a premiss, following through with an inferential analysis of pros and cons, ending up with some assessment of the certainty of result, or lack of it, that will be associated with the various alternative courses of action. The categories of issues on which legal opinions are given to commercial clients are as broad as the legal needs of clients. So too the formats in which an opinion is given are as variable as the circumstances in which the client raises the question to be addressed; for example, depending on the circumstances an opinion addressing a question raised by a client might be properly dealt with in a short reply to the client's email or a lengthy formal letter.

With respect to the second type, the transactional opinion, the categories of those opinions are as broad as the various transactions within any of the areas of corporate commercial practice. The scope of a transactional opinion is necessarily a formal statement often addressed to more than one party. The transactional opinion will be considerably more extensive in setting out the facts, law and legal conclusions relevant to the transactional issues upon which the opinion has been sought.

Transactional opinions may have a required form or be custom drafted to fit the particular transaction. The more frequently a type of transaction occurs the more likely the opinion will need to be in form and content required by documents of adhesion (e.g. an opinion to the mortgagee in a residential purchase is formatted as a fixed text required by the lender particularized only as to the specific mortgage security at issue). This paper is not intended to suggest the lawyer can alter an opinion that is one of adhesion. On the other hand, the less frequently the transaction occurs the more likely the opinion will be custom drafted to address a particular, and often the unique, need; for example, a transactional opinion on a mineral property to be given by borrower's counsel in a large-value bought-deal to fund development of a mine will be in a text drafted by the lawyer addressing the specific expectations of the client's lenders requiring the opinion.

This paper is not intended as a "how to" in fashioning an opinion suitable for a transaction in any particular specialty practice areas. Rather, this paper is intended to be elementary. Whether the lawyer starts from scratch or starts from what looks like a good precedent or two, or, to a much lesser extent, whether the lawyer is dealing with an opinion that must utilize a required format and text, this paper is intended to address what should be in the opinion a lawyer prepares and what should not be. It will look at six questions applicable to any opinion and, as a sevemth question, it will look at the special circumstances of the short (email) opinion.

A. Will the opinion given properly serve the client's needs?

B. Will the format and text of the opinion serve to properly manage the lawyer's own risk in giving it?
C. Are there drafting techniques that can help to improve the quality of the text setting out the opinion?
D. Why does language matter?

E. Are there other techniques to consider? (Rest, Relaxation and Miscellaneous)

F. Are there editing process that help refine a document?

G. Does any of this matter in a short opinion?

A. The Client's Needs

In answer to the first question, "Will the opinion given properly serve the client's needs", it is helpful to keep several points of context in mind.

1. Who is the client? Not as silly as it first sounds.

    a. In ongoing work for a commercial client it is easy to forget that the client is the business entity; for example, Opco, not Bob the Comptroller at Opco or Mary V.P Operations at Opco, although those individuals at one time or another instruct the lawyer.

2. Are there other interests involved?

    a. The opinion must be addressed to the client; however, the individual requesting the opinion may have a particular need for the opinion that is unrelated to its actual content. For example, delivering the opinion the day after, or even an hour before, the meeting at which Bob or Mary wanted to have it may well lose a client. No matter how brilliant the opinion might be the delivery of it to the client may well have a time constraint that is just as important as the opinion itself.

    b. The client opinion is often sought in order to help in the making one of the client's operational decisions. In that case, the assurance provided by the opinion might need to take into account who will be reading the opinion. Although the opinion is addressed to the corporate client the readers of the opinion may not have the same familiarity with technical issues and knowledge of legal issues as those (Bob or Mary) with whom the lawyer regularly deals.

    c. In the case of a transactional matter, the opinion may be sought by or on behalf of the client but the assurance in the opinion is to some entity or entities other than the client (e.g. one or more lenders, a purchaser of the business, etc.). Other entities may need to be assured that some business facts about the client or the client's assets are accurately set out and objectively verifiable despite them being common knowledge to those who manage the client and operate its business.

    d. The language used in the text of the opinion will need to be apt for those likely to read it. The language of the opinion should not utilize idiomatic or colloquial expressions. Informal language often has inferences or connotations that will mean different things to different readers. (E.g. the expression, "a high level view" is intended these days, for those familiar with technologies like the Google Earth, as a view that is intended to give a general overview with little detail, analogous to views from higher elevations. To those not familiar with the Google Earth or forms of photography from higher elevations,

however, “a high level view” is more likely to be understood as an opinion that has been provided by someone higher up; i.e. a very senior and authoritative individual).

B. Limiting the Lawyer’s Risk

With respect to the second question, “Will the format and text of the opinion serve to properly manage the lawyer’s own risk”, there are several safeguards that should be considered in the drafting of the opinion.

1. Establishing the Question:

   What is the legal question that the opinion is to address? The question may be broader than the legal opinion the lawyer is qualified, or able in the circumstances, to give.

   a. In crafting the legal opinion the lawyer obviously needs to be clear in his or her own mind what the legal subject of the opinion is. A legal opinion is just that: an opinion on a matters of corporate or commercial law. It is not an opinion on business matters such as asset value, management style, family succession issues, market variables or economic risk. It is often helpful, however, for the client in a small business context if the lawyer flags and addresses matters raised in the client’s question that are actually the subject for business decisions not legal ones, but do so on an informational basis and always without recommendation as to any particular course of action.

      i. For example, a question being asked by a client may be framed as a mix of legal issues with business issues. In that situation the lawyer must distinguish the issues upon which the lawyer is qualified to give a legal opinion from the client’s business or even personal issues on which the lawyer must express no opinion. That said, however, the lawyer for an inexperienced business client may have useful information (information being distinct from opinion) related to a business issue (e.g. the difference between an appraisal and a valuation; or what qualifications to look for in an appraiser or a business valuator). In doing so the lawyer must carefully distinguish the legal opinion which the lawyer is qualified to give from the business decision which is the client’s alone to make. The lawyer must be careful that the language used, in both oral and written communication, keeps that distinction clear.

      ii. Correspondingly, the assurances being sought from the lawyer in a transactional opinion may be over reaching. The lawyer needs to restrict the legal opinion to those matters of fact which the lawyer can properly investigate and assess and those matters of law that are applicable to those facts. Matters that are not within those limitations will need to be distinguished as ones on which the lawyer

declines to opine or does so with clearly stated restriction or qualification. For example, the lawyer is sometimes asked, but must specifically decline, to give a warranty beyond the lawyer's capacity to assure, or an undertaking beyond the lawyer's own personal capacity to execute.

b. There needs to be a balance struck with the client at the outset, before the professional obligation is created. The professional retainer (obligating the lawyer to provide the opinion) needs to be reasonably balanced with the lawyer's financial retainer (the commitment to a fixed or estimated range of fees and disbursements in doing so). A classic example is the situation where, in the purchase of a small business, the client, if asked, may be prepared to agree, in writing, to rely on the client's own knowledge of the business rather than incur the additional cost of certain searches that the lawyer would otherwise be obligated to conduct under the professional retainer.

c. It will be prudent to consider refining the question as the drafting process develops. Setting down ideas in writing inevitably requires greater clarity than simply thinking about them or even discussing them with others. In other words, establishing precisely what the question is ought to be considered part of the investigative process in developing the entire opinion, the question itself needs to be seen as something that gains greater clarity the more the lawyer works through the process of drafting.

2. Clarifying what Cannot be Included in the Opinion:

There may also be factors in the client's question that must be distinguished as not within the purview of the lawyer to answer.

a. The lawyer giving an opinion is not an insurer of risk, not a party liable for payment of the client's debt, not a party to the client's business transaction, not in a co-venture with the client, not meant to share the risks in the client's business decisions. It is imperative that none of the language of an opinion supports argument to the contrary.

b. If the client has a cause, a burning ambition or a crisis the lawyer must never make it his or her cause, his or her ambition or his or her crisis. If the lawyer lets it become so then the lawyer loses objectivity. A lawyer's objectivity is perhaps the most important qualification the lawyer can bring to a legal opinion.

3. Determining the Extent of the Due Diligence on which the Opinion Will Rely:

The preparatory step of deciding what will be required in the exercise of the lawyer's own professional obligation of due diligence is also part of a process. What might appear necessary at the outset of the legal analysis may prove to be unnecessary with better clarification of the question that needs to be answered by the opinion. Conversely, what initially was thought to be irrelevant may, as the analysis continues, prove to be entirely relevant.

The starting point in a lawyer's due diligence in developing a legal opinion is to identify all relevant sources of information.

a. Initial Determination as to What Sources of Information Need to be Looked At:

There are four broad categories:

i. Documents: For a broad grasp of the meaning of the term "documents" it is helpful to consider the definition of "document" in the Rules of Civil Procedure: 30.01(1),

- "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form;"

ii. Data Bases: Each area of law, particularly in the case of transactional opinions, will have publically supported data bases containing information relevant to the question that forms the basis of the opinion being sought. It is important to identify whether the data bases are searchable or non-searchable but accessible.

- Searchable data bases have publically available information open to searches based on various filters.
  Caution must be had, however, that the opinion given is consistent with the currency-date of the search data-base. For example, searchable information on the abstracts of a mining claim has a stated prior-working-day currency-date. That delay in currency-date requires that an opinion related to that data-base be given only to an effective date consistent with last currency-date. To be consistent means that a proper effective date will be sufficiently prior to the actual letter date to allow a sub search to be made not only prior to the date of the opinion-letter but also a after the currency date to be relied upon. In other words, the currency date is never in real time, always in past time (i.e. a sub search on a data base on which no further registrations for that date can appear).

- Some data-bases that are non-searchable may, however, be partly accessible by letter inquiry; for example, there is no searchable data base listing transactional documents dealing with a given mining claim. A letter inquiry directed to the Mining Lands Administrator will receive a reply listing transactional documents that have been filed with the Administrator.

iii. Statutes and Regulations: Each area of law will, obviously have relevant statues and regulations under those statutes.

iv. Policy Documents: There may also be policy documents that are relevant to the question, particularly in areas of law where activity is governed by an administrative tribunal. Policy documents may not be in a searchable data base; however, typically there are available within web-pages sponsored by the particular tribunal. For example, the Ontario Energy Board has issued numerous documents that might broadly be called policy documents, There are no databases setting out specific types of policies in a sequential or subject-matter order; however, currently material policy documents are accessible on the OEB's website in a web page entitled "Policy Initiatives and Consultations"

b. With respect to "documents" it will be important to keep in mind that the individual who is the contact for client information in a business setting (both large and small businesses alike) is, unless in-house counsel, just that, a business person. In this regard the level of sophistication of the instructing individual within the client needs to be considered but even among the most sophisticated the business person may have no idea

   i. what physically constitutes a "document" for purposes of the legal question being considered in the opinion; or

   ii. What "documents" might be relevant to the formulation of the opinion.

   Part of the lawyer's due diligence will be assessing how good a grasp the client representative who is giving instructions has on what documents exist and on where to find them. The importance in assessing that grasp lies in the fact that the opinion is being given to the client corporation, not the individual giving instructions. Gaps in material documentation may lead to gaps in the quality of the opinion even to the extent of errors. The lawyer giving the opinion will be responsible for the gaps and the errors in it.

c. Part of that sourcing of documents relevant to the opinion may well require some detective work of the part of the lawyer.

   i. It may be, for example, that document "X" that has been provided has in it a reference to previous or follow-up correspondence ("Y") or related documents ("Z") that have not been provided for review. It may well be required due diligence to ask for copies of those referred-to documents.

   ii. The response received by the lawyer to his or her request for the additional documents may well also need to be incorporated into the opinion, either in the form of the additional comment based on new documents provided (if they are made available and prove to be material), or in the form of a note within the opinion identifying a missing link by stating simply that, although requested, the correspondence "Y" or the documents "Z" referred to in document "X" were not

available for review; therefore, the writer has been unable to determine whether, and if so how, they might alter the opinion expressed.

d. It may be important for the lawyer to clarify that the best version of a document that was available for review was a copy as distinct from an original. Copies can be complete or incomplete, certified or not certified. The condition of the document might also need to be noted. Documents, whether copies or originals may be clear and legible or less so.

e. Alternatively, it may be essential to a proper analysis that the lawyer take additional steps to pursue production of the best available version of the document.

   i. A copy of an unsigned agreement or a copy of an agreement signed by only one of the intended signatories is not a complete version of the document. If the agreement is understood to have been fully executed the lawyer needs to source out a fully executed version (by single document or by counterpart documents with a proper counterparts clause). If a fully executed version is not available that fact needs to be identified in the text of the opinion.

   ii. A copy of information from a document may not be the same as the document itself. The diligence of the individual who made the copy may result in information excerpted by way of a copy that, quite innocently, is not complete.

   iii. Excerpts from a document are obviously not the same as the document itself. Information taken from a document will have been taken for a specific purpose. That purpose may have little or no connection to the question on which the opinion is being based. The best practice is that wherever possible go to the complete document as the source of any information to be taken from it for purposes of the opinion.

   iv. Be aware of anomalies in different technologies.

      - Older forms of technology were usually paper based. Care must be had to have access to the entire paper document. Large page documents such as charts, maps and township surveys will require some effort by the lawyer to ensure not only that the entire document has been produced but also that it has, in its entirety, been examined. <anecdotally a certified copy of an old Plan of Subdivision RCB>

      - Newer forms of technology also require care in finding out what constitutes the entire electronic document. It is easy to miss something. A letter completed by the usual signature may appear to be the only document in an attachment to an email; however, without scrolling below the signature in the letter, or noting that the right-margin vertical bar of the viewer panel has not reached the bottom of the electronic

document, a related schedule on a separate page in the same electronic document can get missed; it would be apparent that there were two documents had they been delivered in paper format but where both documents have been scanned sequentially they may show up as a single electronic document. A second example would be that apparently parallel email strings may not contain the same components in each string. Best practice is to get in the habit of scrolling down to the bottom of an electronic document or email string and reading up. A third example is that email strings need to be examined to ensure that there are no attachments within component attachments in a string. This becomes even more challenging given the fact that different software programs for receiving and displaying email are not consistent as to the format for signaling that there is an attachment.

f. It may be that record keeping in the business organization is not as centralized as it might be.

   i. It used to be that there would be a paper file holding all the documents relevant to a particular matter. That was when information came by paper, in the mail or by facsimile, or as a hand written notation of telephone discussion or as notes made during or immediately after a real-time conversation or meeting, or in a business setting, for example, as paper work orders and invoices. Those paper records were accumulated over time and in what would today be thought of as a leisurely pace. Standard practice back then was for all that related paper to end up in a physical file.

   ii. Today, an increasingly large proportion of the relevant information in a client's "possession" will be in paperless form and often in disparate places in one or more electronic processing systems. In addition, if the relevant time period is long enough, preservation of documents quite possibly will have taken place in different generations of technology.

      - Email documents can be in electronic receipt and storage folder systems. Attachments to those emails can be in pdf and Word format. They can be multiple attachments. They can be attachments to attachments. Large documents can be in zip files. Large volumes of documents can be delivered through drop boxes.

      - Document files may contain various drafts (with or without recoverable track changes) and final versions. Documents appearing to be final in a document storage folder may not be the same text as was forwarded by email as the final version.

- Document may also include spreadsheets, power points and slide decks, to name a few. These often residing only in electronic format.

- It may be that the software file folder storage system for emails gets corrupted periodically (e.g. during computer maintenance) and the complete version resides only in webmail.

- Documents in a client's possession may not be coordinated or centralized among the several people within the business capable of receiving or transmitting information on a particular matter within the same electronic system. It may even be that the documents reside in discrete electronic systems not even connected or synchronized (e.g. the laptop used in the field may have documents [emails, spreadsheets etc.] never circulated to others in the organization; in particular, not circulated to the individual who is the lawyer's information-source for purposes of client documents relevant to the formulation of the opinion).

- It can happen that exchange of offer and acceptance constituting a contract might not be evidenced by any formal documenting of the agreement but only by components of an email string. Even then consideration must be given to parallel email strings that only partially overlap each other as to component messages.

C. Structural Techniques that Limit Risk

1. The third question deals with structure. Our minds look for a structure to things. There is always a structure in both the documents a lawyer looks in developing an opinion, and in the document in which the lawyer expresses an opinion. We need always to be aware of the structure in documents. There are several ways of looking for the structure.

   <anecdotally: voices at sea>

   a. Upon reading through a document the organization of the information provided in the document tends to be rateable on a spectrum ranging from clear and well explained, on the one hand, to confusing and seemingly haphazard, on the other. The reader of any technical document typically does not advert to the structure the writer has used in drafting it; rather, the reader will simply be aware that the document is either clear and well explained or confusing and of dubious value.

   b. Part of the art in drafting an opinion is to inform the document with a structure that will allow the reader to move with comfortable understanding through the material documents and search results, understand the relevant law, and appreciate the conclusion that is, in fact, the opinion.

c. Obviously, the goal is to create a document that is clear and well explained. To that end there are important points for the lawyer preparing an opinion to advert to.

i. What structure is already there in the documents and search data bases assembled for the analysis? The relevance of these documents probably arises from their dealing with a common subject but there will be a structure that somehow knits them all together. Should that structure be the organizational principle for the opinion to be drafted?

For example, a mineral property will have moved from a staked claim though recording, required work, the creation of various interest along the way such as joint or divided interests or net smelter returns, to patented interests. Each of those stages has its own language that can be found in the documents, data-bases and registers that pertain to the stage of progression of the particular mining claim.

A typical mineral property that becomes the subject of a mine development may have component groups of mining claims assembled as one mineral property for purposes of mine development and therefore of a legal opinion. Some of the component claims in the mineral property may be only recently staked. Others will be recorded and be listed on abstracts as active mining claims. Still others will have been brought to patent as leaseholds (or as fee simple tenure in the earlier days of mine development in Ontario). The lawyer drafting an opinion on the mineral property as a whole must be clear as to the stage each group of claims is in and in reference to that group use the terminology applicable to that stage. The point in relation to structure is, of course, that the investigation and analysis of the type and the qualities of the respective tenure for each group of mining claims provides, therefore, the structure in the opinion letter. In other words, the nature of the component groups of claims in the mineral property becomes, quite naturally, the structure of the opinion.

ii. What structure is already there in the assembled precedents? That structure may or may not be helpful in presenting the opinion. A key concern when working with precedent material is to cut and paste from several precedents ignoring differences in terminology for similar concepts (e.g. “landlord” in one but “lessor” in another; “seller” in one “vendor” in another; “mining claim” in one and “active mining claim” in another, “executor” in one and “estate trustee” in another). Another key concern when working with precedents is to take note of and be careful to harmonize precedent material that has used different overall organizational structures (e.g. chronological in one but sequential causality in another or inferential analysis in yet another).

iii. Most importantly of all, what overall structure does the lawyer want to imbed in the opinion now being drafted. Whatever structure is utilized in drafting the opinion, the drafting should take care to create structural components that will reduce risk.

2. Risk-Reducing Structural Components Can Be Incorporated into an Opinion Letter:

a. If the lawyer is not bound by the format of a document of adhesion governing format then the first component to build into the legal opinion is a precise statement of the question on which the legal opinion is being sought.

b. The second component will be to state precisely what will be covered by the opinion to follow, and what will not be covered. That statement also needs to be both precise and clearly expressed. (Please see "Precise and Clearly Expressed" in Schedule "A" attached).

The statement can begin by setting out the categories of data that have been investigated and assessed in relation to the subject of the opinion, (see the section headed "1. Retainer" in schedule "A"). The statement can be completed by setting out the things not included as the subject of the opinion; i.e. things that a reader might want to be included as the subject of the opinion but that are not included (see the section headed "2. Limitation of our Retainer" in Schedule "A").

c. A good third component in limiting the risk involved in giving a legal opinion is the practice of specifying within the opinion itself, or in an incorporated schedule to it, factors that limit the nature or extent of the opinion in some way.

i. List documents (**a MUST for any opinion**) that
- have been available for review, and
- have not been available for review (indicating as well their possible relevance and the reason why they were not available). (anecdotally: the absence of a list LU)

ii. Where relevant, note the condition of the documents (damaged, poor quality reproduction, uncertainty as to completeness).

iii. Identify what data bases

- were available in searches of public records,

- although available for searching are subject to terms of use <anecdotally: Mining Claims Information: Ministry of Northern Development and Mines has "Terms of Use" at the access to the search data https://www.ontario.ca/page/terms-use > and

- although known to exist are not searchable;

  <anecdotally: regarding absence of a list of documents delivered to the mining recorder; a review request needs to be made> and

iv. Record what risks have been accepted by the client and therefor waived as responsibilities of the lawyer giving the opinion. [1] The client may be satisfied that a low purchase price makes the acquisition attractive irrespective of certain deficiencies. If so, the deficiencies and the consequent risk must be noted in the opinion as waived and therefore not material for the client's stated purpose. [2] The client is really acquiring market share not the value of the assets involved in the transaction; if so the restricted reliance on the opinion must be recorded in the opinion itself as an accepted risk and, where market share is the objective, special care needs to be taken in explaining things such as the difference between non-completion agreements and non-solicitation commitments, the effect of privacy legislation and the role of trade marks.

v. State the assumptions that have been made.

- Clarify that there are types of documents that have not been reviewed (e.g. drafts of documents; notes of oral discussion);

- Identify whether certain searches are limited to identified publically available data bases;

- Exclude points of possible search. It should be settled with the client beforehand but once settled it should be recorded in the opinion that if the client is better able to ascertain the status of payments of licence fees and some forms of taxes (e.g. municipal taxes where mineral properties are within a municipality) the opinion should state that the proof of current licence fee or municipal tax compliance will be demonstrated by the client directly.

- Indicate that signatures have been assumed have been properly made by persons with authority to make them. Be clear that the opinion relies on the indoor management rule. (see schedule "B")

- Clarify that copies from governmental sources (electronic or paper) have been accepted as true and complete duplicates of the original documents.

- State whether or not there has been an assumption that there has been no escheat to the crown with respect to past transfers by corporations.

3. Can the Breadth of the Opinion be limited:

   a. Once the sources on which the opinion is based have been settled as a structural element in the opinion and their inclusion or exclusion listed, the next place to look for containment of the risk the lawyer has in giving the opinion is whether the question to be addressed in the opinion is over-broad and needs in some way to be re-framed in more precise language or restricted in terms that are not as broad as those who are posing the question, or the precedents being relied upon, appear to want. There are several issues to consider in looking at the breadth of the question to be addressed in the opinion.

      i. Are the necessary facts available.-

         - What facts does the lawyer need to be in possession of in order to formulate the opinion being requisitioned?

         - Does the lawyer have access to those facts?

         - Is it cost effective to obtain the missing information?

      ii. If some information is missing or the accuracy of available information is in doubt is the lawyer bound to take exceptional steps to inquire further

         - as a matter of professional competence, or
         - as a duty to the client?

   b. If the answer is "Yes" to either of the last mentioned questions it is important to consider alternatives as a work around.

      i. Some requisitions for a transactional opinion have a considerable amount of boiler plate, some of the terms of which may seek overbroad assurances. It can happen, for example, that the requisition for the opinion is set out in boiler plate precedent material deployed by someone who either did not have an adequate grasp of the need to be addressed by the opinion or an adequate understanding of the intended use for which the precedent text was originally drafted.

         In either circumstance it may be possible to set out limits to the assurances to be given in the required opinion.

         - An example would be a standard requisition that the lawyer for the seller in the purchase of the business is expected to warrant that the seller

corporation in the purchase of a business by way of assets (or the corporation itself in the purchase of a business by way of shares) is, at time of execution of the agreement to purchase, and will continue to be at closing, properly constituted as a corporation under the laws of the indicated jurisdiction and its officers and directors have authority to enter into the agreement and effect the closing of the transaction without violation of any internal requirement or external commitment of the corporation or its shareholders.

- The problems confronted by the lawyer asked to give those opinions is that the lawyer

  - ❖ may not have acted in all matters for the corporation but only as periodically instructed;

  - ❖ has no administrative role in the functioning of the corporation (i.e. is not an officer or director, nor the CEO); and

  - ❖ has no control over what might be done between the execution of the agreement of purchase and closing date.

- The solution may be to re-frame the answer being sought to one that is within the capacity of the lawyer to provide. The lawyer in the example might be able (through revision of the draft text of the agreement, if the problem becomes apparent before execution of the agreement or through negotiation if the problem is discovered after the agreement has been executed) to qualify the requisitioned warranty by

  - ❖ providing the statutory declaration of a principal in the client corporation knowledgeable to the information on which the warranty is being sought, stating that the sought-after information is accurate at time of signing and the affiant undertakes that it will be accurate at time of closing; and

  - ❖ the assurance of the opining lawyer acting for the client corporation in the transaction can be limited to a statement that the lawyer has read over the declaration of the principal of the client corporation and has no knowledge to the contrary nor any reason to expect any material change at closing.

ii. Many transactional opinions, however, are drafted to be documents of adhesion. The requirements for the opinion are fixed as to form and content and cannot be changed.

- The lawyer giving the opinion must then consider whether the opinion being requisitioned

  - is within the capacity of the opining lawyer to give it, <anecdotally: the opinion will be required to extend to trademarks but the lawyer knows nothing about trademarks; the lawyer will need counsel or the client's authorization to engage an agent to opine on that aspect of the opinion>;

  - is within both the professional and financial retainer of the opining lawyer to provide; for example, the extent of the required opinion may be well beyond what was foreseeable as relevant at the time the retainer was accepted; in that circumstance the lawyer should advise the client immediately upon receipt of the unexpected requirement and propose a revised retainer and fee agreement; and

  - is consistent with the facts provided by the client <anecdotally: the lender requires that its loan be the only financing for the purchase but the client is known to be obtaining other financing>.

- Ultimately in some circumstances it may be necessary that the lawyer decline to give the opinion.

- Note that in these questions as to meeting the client's needs and limiting the lawyer's risks started with:

  - "that which should or should not be in the opinion"

    but has become

  - "whether or not an opinion should even be given".

b. It must be appreciated that an opinion is usually a moment or period in time (not unlike a financial statement). It may be essential in limiting the risk

   i. to set out a distinction between the date of the opinion letter itself and a date, (and possibly a time and time zone) that constitutes the effective date of the opinion; or

   ii. to propose an escrow arrangement to address the risk of subsequent action or events.

4. Establish the Limits in the Use of the Opinion:

   If not obviously implied in the circumstances the lawyer may need to declare specifically the limits for the use of the opinion. It should be clear on the face of the opinion that it has been formulated for a specific use of the named entities to which it has been addressed. Correspondingly, it should be clearly stated that the lawyer giving the opinion does not permit, and will not respond to, use of the opinion either for any entities other than those to whom it is addressed or for any purposes other than those stated in the opinion itself. (See "Limitation on Use of this Opinion" schedule "C" attached). < anecdotal note: use in application to a filing on a stock exchange>

D. Language Does Matter

1. Once the sources used in the opinion have been set out and the breadth of the question has been negotiated, as two important structural elements in the opinion, the focus then needs to turn to clarity of language. The fourth question to be looked at is: Does language matter? Yes.

   a. A legal opinion is an application of the law to facts in a real situation, in real time. It is essential, therefore, that the lawyer drafting an opinion understand and, where appropriate, use the vocabulary of the industry, business or technical area in which the opinion will be read and relied upon.

   b. The lawyer drafting the opinion needs to go back to the source of the terminology being used.

      i. If the opinion is statute based there is no room for creative writing; rather the opinion must

         - utilize the language of the material statutory or regulatory provisions at issue and

         - where appropriate, adopt the analytical processes in the language of the legislation.

      ii. Where terminology is industry based it will be necessary to go to the source for the terminology (data bases, scholarly papers, industrial processes, scientific texts). <anecdotally: see Active Mining Claim Abstract attached a Schedule "D")

c. Care must be taken to understand whether a particular term used in an industry has different meanings depending on the context or the stage of development of the item under discussion. The lawyer needs to sort out which meaning is required in which context and be sure to be consistent in using the correct meaning in the appropriate context. <anecdotally: "mining claim" vs "active mining claim" see Schedule "D">

d. Use language precisely. (E.g. the words "authorize", "approve", "adopt" and "implement" are not synonyms; neither are "various", "multiple", "alternative" and "different". In each of the sequences each word has a significantly different meaning; only one will be the most accurate word for what needs to be expressed in a particular point to be made.)

e. Consider establishing terms of art particular to the text of the opinion. A term of art is the appropriation for use within a document of one or two comprehensive words to stand for a set of related facts; the term of art can then be repeated throughout the opinion document with certainty that it will always be interpreted as referring to the same set of facts. (See "X" Properties" in schedule "A" attached: pink highlight).

f. Edit to ensure that language being used throughout the opinion is internally consistent. Note especially that if sections of precedent text have been imported from different sources it will be necessary to rationalize things like terminology, person, tense, idiom and tone to make them appear to have come from the same writer. It takes careful editing. It's not just a matter of reconciling different scripts and font sizes.

g. Write in the third person. The personal pronouns are not used. "As a result, ~~your~~ alternatives are …" becomes, "As a result, the alternatives are …". "My advice is to consider three alternatives" becomes, "There are three alternatives to be considered". Writing in the third person also keeps the text gender neutral.

h. Use word search in final editing to ensure consistency in language throughout

E. Drafting Techniques: Language Links, Titles, Paragraph Numbering and Margin Setbacks Can Flag Relationships Among Ideas Being Expressed

The fifth question for consideration is whether there are drafting techniques that can help improve organization of the ideas in any document. The answer is, yes, and most certainly that applies to drafting a legal opinion.

In an opinion document with a required form (i.e. a document of adhesion) the language will be fixed. There will be no room for the lawyer to introduce drafting techniques.

In the drafting in any other opinion document, however, the lawyer should consciously utilize drafting techniques that will lead the reader comfortably through the opinion document to an understanding of the analysis and the conclusion. Following the suggestions so far the opinion document will have the organizational structure that the lawyer thinks will best suit the content of the opinion. The next step will be to edit the opinion document to ensure that language links, titles, paragraph numbering and margin setbacks make the opinion as comfortable and informative a read as possible.

1. Utilize vocabulary that is consistent throughout. This paper, for example, uses the term, "lawyer" and occasionally "he" or "she" and "it" throughout, avoiding the more familiar personal pronouns "you" and "I". The more familiar pronouns will come up in the oral delivery of this talk based on power point slides of the same content. The written word is more formal. The seriousness of the content of written material is emphasised in the use of the third person. The spoken word tends to be informal, typically more casual and often less precise.

2. Use the most accurate terminology (e.g. Identify, at least in the initial use, the full legal name of an entity. For example, "Alfa Bravo Charlie Widget Corporation Limited", might be the initial mention of the entity but once introduced, the term of art "ABC" could be established.

3. Use appropriate language links. Looking back through this paper there are several highlighted words and expressions. They have been colour coded to identify three categories of language links.

    a. Use same terminology to reflect related concepts concepts. (Please see the yellow highlights in this paper demonstrating how repeating the same terminology can emphasize that concepts are related.)

    b. Be sure that subsections that are conceptually parallel are also grammatically parallel. Each subsection in a list must follow both conceptually and grammatically from the preamble introducing them. (Please see the green highlights in this paper.)

    c. Tell the reader where the analysis is going by setting out the relationship between the previous sections and paragraphs and those that follow. (In addition to numbering, listing and parallel indentations please see the pink highlights in this paper).

F. Editing Processes that Help Refine a Document

Having spent a considerable amount of time formulating the opinion and setting the analysis and conclusion down in writing the tendency is to be over confident that it says what was intended. There are several editing techniques that can help find out if that is in fact the case.

1. Take a Break:

Once a first draft has been set down in writing the lawyer drafting the opinion should take a break. Set the text of the opinion document aside for a period of time; for a day or two, if possible, alternatively, the lawyer should apply his or her mind to a different task (go for a walk or lunch; work on an unrelated file; even have a nap). It is invaluable to break the link between what has just been written and returning to see, in as objective a circumstance as possible, what is actually on the written page. It is natural for lawyers, like most others, to fall in love with what they have written, thinking it precise, well-reasoned, and even brilliant in places. It is also typical to read what is thought to be on the page rather than what, in fact, is there. It is usually quite sobering to come back after a break to find inconsistencies, illiteracies, wordiness and pointless repetition in what had been thought to be so clear and precise.

2. There are several other ways to see if repair is needed and if it is, how the repair can be made.

    a. Consider inserting titles and subtitles. Titles and subtitles are labels for what follows. By inserting them into the text of the opinion it is likely to become more apparent if some of what follows a title for a section or a paragraph within a section under the selected title or subtitle simply does not fit where it is and should be either relocated where it will fit or deleted entirely. Lists and margin set-backs can serve a similar purpose.

    b. Use cut and paste to ensure that a concept is actually removed from the section in which it does not belong, highlighting the location from which the cut has been taken, as a reminder to go back and clean up the sentence structure.

    c. Say it once. Use a word search feature to try to find, particularly in a lengthy piece, whether or not the same concept is being developed in two unrelated sections of text. Saying a fact, a principle or a conclusion only once is particularly important in the drafting of an opinion. It is not hard to imagine the glee of friend the litigator in finding that a concept has been stated in two or more different contexts, leaving the opinion open to destabilizing arguments as to meaning.

3. Have someone else proof read the document. That person may not have any appreciation of the legal issues but that person might be closer to the knowledge base of the client reading the opinion. If the opinion has *non sequiturs*, wordiness and inaccessible obtuseness better that be pointed out by the objective, intelligent proof reader than found by the client.

G. The Short Opinion

The formal opinion is usually document of some length set out in letter or memorandum format, developed with full attention to all of the points noted above. A huge proportion of information exchange with clients today, however, including legal advice, takes place electronically in

relatively short summary statements of law, analysis and advice embedded in a string on emails. The email-string is a categorically different format from the paper-based letter or memorandum.

At the outset of this paper reference was made to the short opinion, one sent back by reply email in response to a client's question. Is it still a legal opinion? The answer is, it can be in certain circumstances. Does it have to have all of the earmarks set out in the previous 20 pages of this paper? The answer is to some extent, yes, sort of.

Of the available electronic media, email is the most apt and frequently used for exchanges with clients on matters of legal advice and opinions.

1. Email has inherent hazards for the lawyer.

   Email is closer to conversation than it is to the formality of the paper based letter or memorandum formats; therefore, email all too readily lends itself to the informalities of conversation.

   a. A letter begins with automatic checks and balances. An email does not. A letter by its nature, particularly one giving advice or an opinion, follows conventions. The very need to compose a letter prompts thought as to who should be the addressee, to whose "Attention" it should be directed, what should the "Re" line state, and what should the salutation be. All that needs to be thought through and decided on a preparatory basis before the language in the body of the letter even begins. An email, however, requires only a simple key-tap to set up a reply email with given addressees and subject line already in place. In an email response format, therefore, there is nothing to prompt the lawyer to consider whether the given addressee(s) and the given subject line are even appropriate.

      An email is to a letter as a conversation over drinks at a party is to a meeting with the client in the office. A meeting in the office has the formalities of a desk, a word processing facility, a telephone to give access to people with additional skills, a computer to access resources, file material and preparatory work. The office also has the formality and objectivity afforded by client chairs across the desk from you and the quiet privacy of a closed door. A conversation at a party has none of these resources, checks or balances.

   b. Because an email is closer to conversation it is all too easy

      i. to fall into idiomatic language rather than formal more precise language of a letter;

      ii. to use language that sketches issues and concepts rather than develops them with precision and completeness;

iii. to frame concepts as they first come to mind and send them out with only minimal editing and revision;

iv. to speak to the individual to whom it is sent in the "To" field of the email, as though he or she was the client, forgetting, for example, that the client is the corporate entity that employs that person.

c. The substance of email communication on a given matter usually evolves over a period of time, much like a conversation. Unlike a conversation which takes place in a relatively brief time frame, however, the email string, although conversational in tone, will typically extend over a longer period of time extending to a number of days and even weeks.

d. Discerning the substance of the communication in an email typically requires a review of related emails in a string of back and forth exchanges between the senders and recipients. The thought process in email, because of its conversation-like flow, means that if the string does contains a legal opinion the opinion will be marked more by brevity than expansiveness, but despite the brevity it may well reside in more than one message within the string.

2. As with all risks, the hazards of communicating a legal opinion in email needs to be managed.

The way a lawyer's mind works, or should try to work, is to develop the facility to reduce concepts that are extensive in themselves to expressions that are concise yet clear and accessible to the recipient. The techniques cited in section "D" above can help. The opinion expressed in the context of an email discussion also needs to cover the bases set out in section "B" above utilizing risk reduction techniques in section "C" above. The point is, that having developed the skill in its detailed application the lawyer will be more readily capable of encapsulating them in the constraints of an email.

In doing so the solicitor has to develop skills similar to those required of the barrister: to be able on the instant to capture in a few well-chosen words the essence of what the recipient needs to hear. The barrister, however, has the limitation of not being able to un-say something already said while the solicitor in drafting an opinion, even in the context of an email exchange, can, and must, edit as needed both for the needs of the client and the risk management of the lawyer. Schedule "E.1" and "E.2" are examples of brief statements of legal opinion taken from the context of email strings.

Useful reading on the subject:

- Legal Opinions in Commercial Transactions, 3rd Edition; Wilfred M. Estey; LexisNexis Canada
- Usage and Abusage; Eric Partridge; Penguin Reference Books
- An ABC of English Usage; H.A. Treble and G.H. Vallins; Oxford at the Clarendon Press
- Eats, Shoots and Leaves Lynne Truss; Gotham Books, a division of Penguin Group (USA) Ltd