

Why Delaware Legal Opinions Matter – Part 3: A Delaware Opinion Is Not a Substitute for Local Counsel

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A Delaware legal opinion serves a specific purpose: it provides opinions regarding a Delaware entity and matters governed by Delaware law. It is not intended to address every legal issue arising from a transaction, nor is it a substitute for local counsel opinions involving the laws of other states. Understanding this distinction can help avoid unnecessary opinion negotiations, reduce closing delays, and ensure that opinion requests are appropriately tailored to the role of Delaware counsel.

When a lender requires a Delaware legal opinion, it is typically because a borrower, guarantor, or other transaction party is organized and exists under Delaware law. The lender seeks assurance that the Delaware entity has been properly formed, remains in good standing, possesses the necessary power and authority to enter into the transaction, and has properly authorized the execution and delivery of the loan documents. Depending upon the scope of the engagement, Delaware opinion counsel may also provide an enforceability opinion regarding the loan documents against the Delaware entity.¹ These opinions are important because Delaware law governs the internal affairs of Delaware corporations, limited liability companies, limited partnerships, and statutory trusts. Delaware counsel is uniquely positioned to analyze these issues and provide opinions concerning Delaware entity law.

One common misconception is that because a Delaware entity is involved in a transaction, Delaware counsel should be able to opine on all aspects of the deal. In reality, the scope of a Delaware opinion is generally limited to matters of Delaware law. For example, assume a Delaware limited liability company owns commercial real estate in Arizona and grants a mortgage to secure a loan. Delaware counsel may provide opinions regarding the existence, good standing, power and authority, due authorization, and, if requested, the enforceability of the loan documents against the Delaware entity.

However, Delaware counsel generally would not opine regarding:

- The validity of the Arizona mortgage
- General enforceability of the loan documents
- Compliance with Arizona recording requirements
- Perfection or priority of liens under Arizona real property law
- Title matters affecting the property
- State-specific licensing or regulatory requirements

Those issues are typically addressed by Arizona counsel, title companies, or other professionals familiar with Arizona law. Likewise, when collateral is located in multiple jurisdictions, local law issues may arise concerning recording statutes, fixture filings, landlord consents, or other state-specific requirements that fall outside the scope of a Delaware opinion.

To those unfamiliar with opinion practice, the requirement for several legal opinions in a single transaction may appear duplicative. In reality, each opinion addresses a different body of law. Consider a loan transaction involving a Delaware borrower, real estate located in Texas, and loan documents governed by New York law. The lender may require a Delaware opinion concerning the borrower's existence, authority, authorization, and related Delaware law matters; a Texas opinion addressing real estate and mortgage issues; and a New York opinion regarding matters governed by New York law.

Each attorney is providing opinions within the scope of his or her jurisdictional expertise. The lender is not seeking multiple attorneys to answer the same question. Rather, the lender is assembling a comprehensive package of legal assurances covering the various legal issues presented by the transaction.

Many opinion disputes arise because the parties have different expectations regarding the scope of the Delaware opinion. Opinion requests are often copied from prior transactions without considering whether the requested opinions are appropriate for Delaware counsel. When lender's counsel, borrower's counsel, and Delaware counsel clearly understand the purpose of a Delaware opinion, the process becomes significantly more efficient. Opinion requests can be tailored appropriately, revisions can be minimized, and transactions can move toward closing with fewer delays.

A Delaware legal opinion remains a critical component of many commercial lending transactions involving Delaware entities. However, it is only one piece of a broader legal due diligence framework. Delaware counsel addresses Delaware law issues relating to the entity. Local counsel addresses issues governed by the laws of other jurisdictions. Together, these opinions provide lenders with the assurances necessary to complete complex transactions while ensuring that each opinion giver remains within the scope of their expertise.

¹This is not the general enforceability of the loan documents, which is an opinion local counsel provides, it is only the enforceability as to the Delaware entity.