Why Delaware Legal Opinions Matter – Part 5: A Practical Guide to Getting the Opinion to Closing

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A Delaware legal opinion is rarely intended to drive the closing schedule, but when the workstream starts too late, it can become one of the last unresolved closing items. Usually, the issue is not the opinion itself; the issue is coordination.

The opinion request comes in late. Organizational documents are incomplete. The opinion form does not match the transaction. The authorization documents were prepared without reference to the governing agreement. Or the transaction changes, but Delaware opinion counsel does not receive the revised documents.

Most of these problems are preventable. After handling Delaware opinions in transactions of varying size and complexity, an efficient opinion workstream generally follows the same basic sequence.

Here is a practical roadmap.

Step 1: Identify the Delaware Entities and the Opinion Requirement

Start with the basics: identify which Delaware entities are involved and define each entity's role in the transaction. Determine whether each entity is acting as a borrower, guarantor, pledgor, general partner, managing member, or another transaction party, and then identify exactly what opinion is required.

A credit agreement or closing checklist may simply require an “opinion of Delaware counsel,” but that description does not necessarily tell you what Delaware counsel is expected to cover. Obtain the proposed opinion form — or at least the requested opinion provisions — as early as possible. For transaction counsel, the practical question is not whether Delaware counsel can deliver the opinion, but whether the right materials reach the right people early enough.

Step 2: Build the Organizational Document Package

For each Delaware entity, assemble the complete organizational record.

Depending on the type of entity, the package will typically include:

- the certificate of formation or incorporation and any amendments
- the current LLC agreement, partnership agreement, bylaws, or other governing agreement
- relevant amendments, joinders, assignments, or other modifications

- certificates of good standing or similar certificates
- existing resolutions, consents, or other authorization documents relevant to the transaction

Do not assume that the certificate filed with the Delaware Secretary of State tells the entire story. For Delaware alternative entities in particular, the governing agreement matters. Delaware law provides significant contractual flexibility. An LLC agreement, for example, may establish approval requirements, manager authority, voting thresholds, restrictions, or other conditions that affect whether the entity can properly authorize a transaction.

This organizational package becomes the foundation for the later authorization analysis, so the governing documents should be reviewed before the authorization documents are finalized, not after.

Step 3: Provide the Transaction Documents

Next, identify the documents the Delaware entity will actually execute.

Depending on the transaction, these might include a credit agreement, guaranty, pledge agreement, security agreement, mortgage, purchase agreement, merger agreement, or other operative documents. These documents do not necessarily need to be in final execution form when opinion review begins. They should, however, be sufficiently developed to allow counsel to understand the transaction and determine what the Delaware entity is being asked to do.

This distinction matters: waiting for absolute final documents can unnecessarily delay the opinion process, while starting from documents that are changing materially every day can create a different problem.

The practical goal is to begin with documents that are substantially settled and then keep opinion counsel informed of material changes as the transaction moves toward closing.

Step 4: Determine Who Is Covering What

This is one of the most important steps.

Not every legal issue involving a Delaware entity is necessarily a Delaware opinion issue.

A transaction may involve Delaware entity law, New York contract law, the law of the jurisdiction where real property is located, Article 9 of the Uniform Commercial Code, federal law, or the laws of several other jurisdictions. Different counsel may therefore be responsible for different portions of the overall opinion package.

The parties should determine early which opinions are expected from Delaware counsel and which are being provided by primary transaction counsel, local counsel, UCC counsel, or other specialized counsel. Doing this early prevents a particularly frustrating closing-day discovery: everyone assumed someone else was covering the opinion.

Step 5: Review the Requested Opinions Before the Closing Crunch

Once the organizational documents and substantial final transaction documents are available, the requested opinion language can be analyzed. This is where assumptions, qualifications, limitations, and proposed revisions should be addressed.

An opinion request should not be treated as boilerplate simply because it came from a form used in another transaction.

The entity may be different, the governing documents may be different, the transaction structure may be different, and the governing law may be different. Most importantly, the opinion being requested may be different.

A power opinion is not an authorization opinion; an authorization opinion is not an enforceability opinion; and an enforceability opinion is not a perfection or priority opinion.

Precision matters. Resolving those distinctions before the closing date is considerably easier than negotiating them while everyone is waiting for funding.

Step 6: Match the Authorization to the Governing Documents

Once the transaction structure is sufficiently settled, the authorization documents should be checked against the entity's governing documents.

Who has authority to approve the transaction: members, managers, the board, or another person or entity with consent rights?

Does the governing agreement impose a particular voting threshold, and if the entity acts through another entity, has the authority chain been followed all the way through?

The goal is simple: the transaction documents, governing documents, authorization documents, and signature blocks should tell the same story. When they do not, that is when seemingly small issues can become closing problems.

Step 7: Keep Delaware Counsel Informed of Material Changes

Transactions change, and that is normal. Not every revised draft needs to restart the opinion analysis, but changes affecting the Delaware entity, its obligations, the parties, the transaction structure, or the documents being executed should be communicated promptly.

A seemingly small change to the deal terms may affect an opinion conclusion. The safest approach is not to guess whether a change matters, but to identify the change and allow counsel responsible for the opinion to determine whether it affects the analysis.

Step 8: Finish the Opinion Before Everyone Is Waiting for It

By the time the transaction reaches closing, the substantive opinion work should ideally be complete. The remaining items should primarily involve confirming final documents, completing appropriate bring-down diligence, such as confirming good standing and checking for final changes to governing or transaction documents, confirming execution and authorization, and issuing the opinion.

That is the objective: the closing table is not the place to discover an unusual provision in an LLC agreement, negotiate the scope of an opinion, or determine who had authority to approve the transaction.

Those issues should already have been resolved.

The Practical Takeaway

The Delaware opinion process does not need to be complicated. In most transactions, the formula is straightforward:

- Identify the entities
- Obtain the opinion form
- Assemble the organizational documents
- Provide the transaction documents
- Allocate opinion coverage
- Confirm authorization
- Resolve comments

- Communicate material changes
- Close

None of those steps are particularly remarkable; what matters is the order in which they happen.

A Delaware legal opinion is a relatively small closing deliverable, but it sits at the intersection of the entity's governing documents, Delaware law, the transaction documents, and the closing requirements. That is what makes preparation important.

The best opinion process is the one nobody remembers after closing, because the issues were identified early, the documents matched, and the opinion was ready when needed.