

Report on the 2010 Survey of Law Firm Opinion Practices

By the Legal Opinions Committee of the ABA Section of Business Law*

INTRODUCTION

Most law firms have policies and procedures for preparing and giving closing opinions. Examples include using opinion committees, involving lawyers other than opinion preparers before opinion letters are delivered, providing model forms that can or must be used, and mandating or suggesting approaches to giving particular opinions.

In 2002, the Legal Opinions Committee of the American Bar Association Section of Business Law circulated a confidential survey of law firm practices in preparing and giving third-party closing opinions in business transactions (the “2002 survey”).¹ In 2010, the Committee conducted a new survey (the “2010 survey”), which included questions that were similar to those in the 2002 survey, as well as many others.² The Committee received 252 responses to the 2010 survey, compared to 50 responses to the 2002 survey.³ Although responses were anonymous, they included information on firm size and geographic location that enabled the Committee’s Survey Subcommittee to analyze the responses in various ways. The questions in the 2010 survey and a tabulation

* The Survey Subcommittee consisted of: John B. Power (Reporter), Donald W. Glazer (Editor-in-Chief), E. Carolan Berkley, Arthur A. Cohen, John Evangelakos, Richard N. Frasch, Douglas E. Haas, Steven K. Hazen, Timothy G. Hoxie, Christina M. Houston, Richard R. Howe, Jerome E. Hyman, Stanley Keller, Anna S. Mills, and J. W. Thompson Webb.

The Subcommittee was ably staffed by Robert Rupp, Group Director, Publishing Services of the American Bar Association, and Associate Director of the ABA Section of Business Law when the project began. Robert’s technical knowledge, energy, and infinite patience were critical to the success of the project.

1. See Comm. on Legal Opinions, ABA Section of Bus. Law, *Law Office Opinion Practices*, 60 BUS. LAW. 327 (2004) [hereinafter 2002 Survey Report].

2. The survey defined “opinion letters” to mean closing opinions delivered to third parties (i.e., non-clients) in domestic U.S. business transactions. It defined “opinion” to mean a specific conclusion expressed in an opinion letter. This report uses those definitions except where the context indicates otherwise. The survey did not cover practices in preparing and giving tax, intellectual property, real estate, cross-border, or other specialized opinions.

3. The 2002 survey was circulated to law firms and inside law departments. The 2010 survey was circulated only to law firms. See generally Comm. on Legal Opinions, ABA Section of Bus. Law, *Closing Opinions of Inside Counsel*, 58 BUS. LAW. 1127 (2003). In 2010, the Committee sought participation by law firms that had lawyers on the Committee and those that did not.

of responses are reproduced in Appendix 1 to this report, and tables derived from survey responses are found in Appendix 2.⁴

Respondents ranged from small to very large law firms⁵ and were geographically diverse.⁶ About one third⁷ of respondents that identified the state in which they had their headquarters indicated that they had their headquarters in California, the District of Columbia, Florida, New York, or Texas.⁸ The state in which the largest percentage of respondents that answered the question had their headquarters was New York (13%).⁹ While many respondents had only one office, some had many offices, including some with many non-U.S. offices.¹⁰

This report describes and discusses the responses to the 2010 survey and is intended to provide a general picture of the practices law firms of various sizes follow in preparing and giving closing opinions. Responses to the survey suggest that many firms of comparable size follow similar practices. Survey results, however, portray a broad range of practices, are not statistically significant, and should not be used as a basis for establishing standards, customary practice, or even best practices for opinion giving.¹¹ The responses make clear that one-size-fits-all does not come close to describing the opinion practices, either generally or with regard to specific matters, followed by law firms even of comparable size.

4. Textual responses are not included in the appendices but in many cases are summarized in the text or footnotes of this report.

5. Appendix 1, Question 36. Small firms represented a larger percentage of respondents to the 2010 survey than to the 2002 survey. About one third of the firms responding to the 2010 survey had 50 or fewer lawyers. *Id.* About one quarter of the firms or law departments responding to the 2002 survey had fewer than 100 lawyers. 2002 Survey Report, *supra* note 1, at 333 (Question A.1).

6. Appendix 1, Questions 39 & 40.

7. See Appendix 3 for the conventions this report uses—unless the context indicates otherwise—to describe quantitative amounts.

8. 44 percent of all responding firms had an office in one or more of these states. Percentages and proportions in this paragraph and the related footnotes could be higher (or lower) because 17% of responding firms did not identify their headquarters state or the states in which they had an office. Appendix 1, Questions 39 & 40.

9. Appendix 1, Question 39. In addition, about one third of responding firms that answered the question had an office in New York. Appendix 1, Question 40. About one quarter of responding firms that answered the question had offices in California or the District of Columbia. *Id.* At least one respondent had its headquarters in every state except Alaska, Maine, Mississippi, New Mexico, North Dakota, South Dakota, West Virginia, and Wyoming. Appendix 1, Question 39.

10. Appendix 1, Questions 37 & 38.

11. Moreover, opinion practice is continually evolving, and responses to the survey may not reflect a respondent's opinion practices at a later time. In addition, the nature of a survey is such that responses to specific questions may not convey subtleties. A firm, for example, may have indicated that it gave particular opinions without indicating that it did so only rarely. In addition, questions about firm mandates and prohibitions may not have elicited answers about a firm practice, preference, or suggestion that did not rise to the level of a mandate or prohibition. See *infra* note 56. For example, a firm that sometimes gave a particular opinion or confirmation may have limited its coverage or resisted giving it whenever possible. See *infra* No-Litigation Confirmations (survey responses suggest a trend toward limiting coverage of no-litigation confirmations).

I. OPINION PRACTICE MANAGEMENT

A. FIRM OPINION PRACTICES

Almost all responding firms had firm opinion policies and procedures and provided their lawyers resources for preparing and delivering opinions.

The 2010 survey asked respondents to indicate which of a list of activities their firm engaged in as part of its opinion practice.¹² As did the comparable question in the 2002 survey, each listed activity received a substantial number of affirmative responses.¹³ In general, the larger the firm, the more likely it was to engage in each of the listed activities.¹⁴

The activities receiving the most affirmative responses (more than three quarters of respondents) were (i) establishing procedures for issuing opinion letters and (ii) distributing and making available materials and resources prepared by others regarding opinion letters and opinion practice.¹⁵ The activities receiving the fewest affirmative responses (but still from about half of respondents) were (i) prohibiting unless waived the giving of specific opinions and (ii) mandating unless waived the wording of specific opinions.¹⁶

B. FIRM OPINION COMMITTEES

Most respondents, including almost all large firms, had at least one opinion committee. Often, opinion committees had broad responsibility for their firms' opinion practice, but what that responsibility entailed varied.

12. Appendix 1, Question 4. Question 4 asked respondents to indicate all activities that applied. Question 4 also asked whether respondents engaged in the indicated activities through opinion committees or in some other way. However, more respondents indicated that they engaged in particular activities through committees than indicated that they engaged in those activities as a firm, suggesting that the question was not clear and that at least some respondents misunderstood it. As a result, the responses to that part of the question are not meaningful and are not reported in Appendix 1, Question 4.

13. *Id.* All but 17 firms indicated that they engaged in at least one of the activities listed in Question 4 of the 2010 survey. Although that question and Question C.1 in the 2002 survey were worded differently (for example the 2002 question only asked about opinion committee functions and did not ask about mandates or prohibitions), responses in 2010 did not suggest that respondents' general approach to opinion practice had changed in any meaningful way. *Id.*; 2002 Survey Report, *supra* note 1, at 334 (Question C.1).

14. Appendix 2, Chart 1.

15. Appendix 1, Question 4.

16. *Id.* 56% of responding firms prohibited the giving of specific opinions and 44% mandated the wording of specific opinions, in each case unless waived. A larger percentage of responding firms with more than 50 lawyers engaged in these activities than those with 50 or fewer lawyers. Appendix 2, Chart 1. Although 110 firms indicated that they mandated unless waived the wording of specific opinions, only 28 firms indicated that the use of models for specific opinions was mandatory unless waived. See Appendix 1, Question 18; *infra* note 48 and accompanying text. Apparently, some firms did not equate mandating wording of specific opinions with mandating use of models for specific opinions. This may be because they read "wording" to refer to specific words or phrases within a specific opinion and "models" to refer to an opinion as a whole. See *infra* note 56 for a discussion of the significance of the use of terms like "mandatory" and "prohibited" in the survey and in this report. See Appendix 1, Question 4 and Appendix 2, Chart 1 for responses to other listed activities. See also text accompanying *infra* note 32 (about two thirds of responding firms that required involvement of a consulting lawyer in some but not all situations indicated that a consulting lawyer was required when a proposed opinion differed significantly from a standard opinion model).

About three quarters of responding firms had at least one opinion committee,¹⁷ with the larger the firm, the greater the likelihood of its having a committee.¹⁸ Almost all firms with more than 500 lawyers had at least one opinion committee, while only about one third of the firms with 50 or fewer lawyers had a committee.¹⁹ A small proportion of firms had more than one committee, with again the larger the firm, the greater the likelihood of its having more than one committee.²⁰

About three quarters of firms with committees said that their committees had responsibility for opinion letters delivered by all firm offices and practice areas,²¹ with the smaller the firm, the greater the likelihood that was true.²² Responsibilities of committees varied broadly. Firms indicated in textual comments, for example, that their committees (i) were available to consult or set opinion standards but partners had responsibility for opinions, (ii) prepared opinion guidelines for consideration by firm management, (iii) monitored opinion issues, (iv) reviewed opinions,²³ (v) reviewed “non-routine” or “problematic” opinions, (vi) approved opinion letters in transactions exceeding a specified amount, (vii) promulgated policies and responded to questions but did not review opinions, which in some cases were reviewed at the practice group level,²⁴ (viii) did not have responsibility for opinions in the areas of tax, patents, or intellectual property,²⁵ or (ix) were responsible only for opinions given in corporate finance transactions.

C. CONSULTING LAWYERS

Most firms required opinion preparers to consult at least sometimes with another lawyer or lawyers before delivering an opinion letter. Typically, firms required that consulting lawyers be partners and either be members of an opinion committee or have relevant expertise, or both. Firms usually permitted the opinion preparers to select consulting lawyers. The responsibilities of consulting lawyers that were noted most

17. Appendix 1, Question 1. This result is consistent with the 2002 survey, in which 77% of respondents answering the question said they had an opinion committee or committees. 2002 Survey Report, *supra* note 1, at 333 (Question B.1). However, the data suggest that a higher percentage of large firms had committees in 2010 than in 2002. See Appendix 2, Chart 2 (in 2010, 90% of responding firms with more than 50 lawyers had committees); *supra* note 5 (a larger proportion of respondents to the 2010 survey were small firms as compared to the 2002 survey).

The 2010 survey defined “opinion committee” to mean “a group of lawyers that has the responsibility to oversee some or all of a firm’s opinion letter practice.”

18. Appendix 2, Chart 2.

19. *Id.* A small number of the largest firms had no committee.

20. Appendix 1, Question 1; Appendix 2, Chart 2. Most firms with more than one committee allocated responsibilities among their committees by practice group or area of law, or both. Appendix 1, Question 2.

21. Appendix 1, Question 3.

22. Appendix 2, Chart 3.

23. See *infra* note 26 (last sentence); *infra* note 41 (last sentence); Appendix 1, Question 9A.

24. Several firms indicated that responsibility was split between an opinion committee and practice groups.

25. See *supra* note 2 (tax, intellectual property, and other specialized opinions not covered by the survey).

frequently were to inquire about issues on the face of the opinion and to determine whether the context of the transaction raised special concerns or required special procedures. Few firms expected consulting lawyers to concur in the opinions being given. Details of the consultation process varied broadly.

About three quarters of responding firms required opinion preparers to consult at least sometimes with a “consulting lawyer” before delivering an opinion letter.²⁶ About two thirds of these firms required opinion preparers to consult always.²⁷ While more than three quarters²⁸ of firms with more than 50 lawyers required consultation in some or all situations, only about half of smaller firms required consultation.²⁹

What Situations Require Consultation? The survey asked firms requiring consultation in some but not all situations to identify from a list those circumstances in which they required consultation.³⁰ The circumstances receiving the highest number of affirmative responses (about two thirds of the firms in this category) were when (i) the opinion letter presented issues that were not straightforward, (ii) an opinion posed unusual risks because of the type of transaction involved or the circumstances of the particular transaction, (iii) the opinion letter presented issues that were not easily resolved,³¹ and (iv) the opinion letter differed significantly from the firm’s standard model.³²

What Does the Consulting Lawyer Do and When? About half of the firms that required consultation either had no policy on when the consulting lawyer should become involved or merely required involvement any time prior to delivery of

26. Appendix 1, Question 7. The survey defined “opinion preparers” to mean those lawyers who are responsible for preparing an opinion letter and “consulting lawyer” to mean a lawyer or group not otherwise involved in the transaction with whom opinion preparers consult pursuant to a policy of the firm. A small number of firms stated in textual comments that they allowed lawyers working on a transaction to serve as consulting lawyers. An opinion committee as a whole could be a consulting lawyer, as could its individual members. See Appendix 1, Question 9A; see also *infra* note 41; text accompanying *supra* note 23.

27. Appendix 1, Question 7. In the 2002 survey, 33 of 45 respondents (about 75%) said that they required that an opinion preparer routinely consult before giving a third party opinion. 2002 Survey Report, *supra* note 1, at 335 (Question D.1(a)).

28. 81%. Appendix 2, Chart 4.

29. *Id.* Thirty-five responding firms with 50 or fewer lawyers (41% of those firms) did not have an opinion committee and also did not require consultation with other lawyers.

30. Appendix 1, Question 8. Responding firms were asked to identify all listed circumstances that applied. Question 8 did not distinguish between firms that had a firm policy that did not require consultation except in specified circumstances and firms that had a policy that required consultation always with specified exceptions.

31. *Id.* Circumstances (i), (ii), and (iii) received affirmative responses from 67% to 70% of these firms. *Id.*

32. *Id.* Circumstance (iv) received affirmative responses from 59% of these firms. *Id.* Other listed circumstances (i.e., opinions on securities laws, the Investment Company Act, and secured transactions) received fewer affirmative responses, ranging from about one quarter to about one third of firms requiring consultation in some but not all situations. *Id.* About one third of these firms identified “other,” and their textual comments varied, stating, for example, that the policy for review by a consulting lawyer varied by office or required review for (i) specific types of opinions, e.g., on banking law or substantive consolidation; (ii) all opinions that were not “repeat opinions”; or (iii) opinions in transactions in which only one partner was involved.

the opinion letter.³³ About one quarter required consultation before the draft opinion letter was delivered to the other party.³⁴ Textual comments suggested that firms encouraged early consultation.³⁵ Less than one quarter of the firms requiring consultation required a follow-up consultation before the opinion letter was signed or delivered.³⁶

The survey asked firms requiring consultation to identify from a list the responsibilities of their consulting lawyers.³⁷ The two responsibilities receiving the most affirmative responses (each of which was selected by about three quarters of firms requiring consultation) were (i) identifying matters on the surface of the opinion letter that raised questions or were unusual and (ii) determining whether the opinion letter required special procedures or raised special concerns due to the nature of the transaction or client, the relationship between the opinion preparers and the client, or some other reason.³⁸ The responsibility receiving the fewest affirmative responses (by about one quarter of firms requiring consultation) was concurring in the opinion letter as if the consulting lawyer had been one of the opinion preparers.³⁹ Each of the five other listed responsibilities received affirmative responses from about two thirds of firms requiring consultation.⁴⁰

Who Are the Consulting Lawyers? About two thirds of firms requiring consultation required that the consultation be with a lawyer or lawyers who belonged to an opinion committee and about half required that consultation be with a lawyer or lawyers who had expertise in the area addressed by the opinions being given.⁴¹ Textual comments suggested wide variations in practice.⁴² About three quarters of firms requiring consultation permitted opinion preparers to select the consulting lawyer, and about one quarter required an opinion committee or a

33. Appendix 1, Question 13.

34. *Id.*

35. Other textual comments identified other circumstances when involvement of a consulting lawyer was required. They included, for example, (i) when the opinion letter was in final form and (ii) prior to agreement as to the content or form of the opinion letter.

36. Appendix 1, Question 15.

37. Appendix 1, Question 14. Firms were asked to identify each responsibility that applied.

38. *Id.*

39. *Id.* About one quarter of those answering the analogous question in the 2002 survey indicated that the consulting lawyer had responsibility to concur in the opinion as if he or she had been the opinion preparer. 2002 Survey Report, *supra* note 1, at 336 (Question D.4(d)).

40. Appendix 1, Question 14.

41. 107 and 101 respondents, respectively. Appendix 1, Question 9A. Firms requiring consultation were asked to check all answers that applied from a list describing types of consultants. About one quarter of responding firms that checked either answer checked both. Only a small number checked "an entire opinion committee." *Id.*

42. They included, for example, (1) only opinion committee or a member was consulted; (2) only persons with appropriate expertise were consulted; (3) opinion committee was involved if the transaction involved more than a specified amount; (4) consultant was selected from a list prepared by the head of the relevant department; (5) both an opinion committee member and lawyer with expertise were consulted; (6) multiple lawyers might be consulted in some situations; (7) an opinion committee member with the appropriate expertise was consulted; (8) two independent lawyers were consulted with process varying with the circumstances; (9) two corporate partners were required to sign off on each opinion; (10) approval required by any other shareholder; (11) all opinions reviewed by one lawyer; (12) opinion reviewed by a partner in each of the areas involved; and (13) at least one partner on a department opinion committee was consulted.

member or members of an opinion committee to make the selection.⁴³ Almost all of the firms requiring consultation required that the consulting lawyer be a partner or other senior lawyer.⁴⁴

Is the Consultation Memorialized? Firms were about evenly split between those that required the consultation to be memorialized and those that did not.⁴⁵ When memorialization was required, the most common method was for the consulting lawyer to sign an office copy of the opinion letter.⁴⁶

D. MODEL OPINIONS AND DOCUMENTATION

Most responding firms had one or more model opinion letters or opinions, but few required their use, instead primarily utilizing them as a preferred starting point. Only about one third of responding firms required preparation of supporting documentation or had models for such documentation.

About three quarters of responding firms (including almost all firms with more than 500 lawyers) had at least one model opinion letter or model opinion; the larger the firm, the greater the likelihood of its having models.⁴⁷ About two thirds of firms with model opinion letters or with model opinions used the models as a preferred starting point, while less than one quarter required their use.⁴⁸ Less than one quarter reported that their use of models for opinion letters and opinions depended on the situation; textual comments gave a sense of the variety of approaches.⁴⁹

43. Appendix 1, Question 9B. Here again firms were asked to check all that applied from a list including “An opinion committee or members of an opinion committee” and “An opinion preparer or preparer.” A small number selected both answers or “someone else.” *Id.*

44. Appendix 1, Question 10. Three quarters required a partner. Less than one quarter required a partner except in limited circumstances. *Id.* Textual comments indicated that many in the latter group permitted a retired partner, senior counsel, or similarly qualified lawyer to be a consulting lawyer in appropriate circumstances.

45. Appendix 1, Question 16. *See infra* note 46.

46. *Id.* *Cf.* 2002 Survey Report, *supra* note 1, at 336–37 (Question D.5) (23 of 38 firms did not “formalize” the relationship between the consulting lawyer and the opinion preparer; most popular “formalization” method was a memo in the transaction file).

47. Appendix 1, Question 17; Appendix 2, Chart 5. More firms answered the part of Question 18 about model opinion letters than answered the part about model opinions, perhaps because they read “model opinions” as referring to forms of opinions used by their firms apart from those in their firm’s model opinion letters and had none to report. *See supra* note 2 (definitions of “opinion letters” and “opinions”).

48. Appendix 1, Question 18. Proportions and percentages in this paragraph and this footnote are of firms that answered the relevant questions. About one third of responding firms with more than 500 lawyers required use of model opinion letters and opinions. Appendix 2, Chart 6. *Cf. supra* note 16 (110 firms reported they required unless waived the wording of specific opinions); text accompanying *supra* note 32 (about two thirds of responding firms that required consultation sometimes required it when the opinion letter differed significantly from their standard model); 2002 Survey Report, *supra* note 1, at 337 (Question E.1(a)) (about half of respondents to the 2002 survey reported they required opinions in designated form).

49. Appendix 1, Question 18. Among the textual comments were the following: (i) specialized opinions not covered by forms; (ii) opinions often followed existing precedents; (iii) models used for some types of deals and not others; (iv) models used varied by partner; (v) forms supplied by recipient sometimes used as starting point; (vi) use of models decided by practice groups; (vii) models used by offices outside of the United States; and (viii) opinions more than a starting point but not mandatory except for certain opinions specified in a manual.

Model supporting documentation was less common than model opinion letters or opinions, although apparently more common than in 2002. Only about one third of responding firms had a policy calling for a supporting memo, checklist, or similar supporting documentation for each opinion letter.⁵⁰ About one third of responding firms, including about three quarters of firms that had a policy requiring documentation, had one or more models of supporting documentation.⁵¹ Less than one quarter of firms with model supporting documentation mandated their use; about half indicated that their models were preferred but not required.⁵² When supporting documentation was prepared,⁵³ about two thirds of responding firms included it in the transaction file, and less than one quarter included it in a firm file or archive for opinion letters; about one quarter required its review or permitted its review on a case-by-case basis by the consulting lawyer.⁵⁴

E. WAIVERS

Opinion committees or their members frequently had authority to waive opinion mandates, prohibitions, and procedures. Most firms did not require that waivers be memorialized.

Survey responses suggest that firm opinion policies are usually subject to formal or informal waivers in particular circumstances.⁵⁵ The survey asked firms to identify who from a list was authorized to waive compliance with mandates, prohibitions, or procedures⁵⁶ by checking all that applied.⁵⁷ About one half of the

50. Appendix 1, Question 19. The likelihood of a firm's having a policy did not depend on firm size. Appendix 2, Chart 7. The percentage of firms having a policy apparently increased since 2002: less than a quarter of the firms responding to the 2002 survey reported a requirement for a supporting memo. 2002 Survey Report, *supra* note 1, at 337 (Question E.1(b)). However, a comparison is difficult because the 2002 survey referred only to mandatory supporting memoranda while the 2010 survey referred to a policy requiring any kind of supporting documentation.

51. Appendix 1, Question 20. About one half of the firms with more than 500 lawyers had model documentation. Appendix 2, Chart 7. Some firms with a policy did not have models, and some firms with models did not have a policy. Appendix 2, Chart 8. About one half of responding firms indicated that they had neither a policy nor models. *Id.*

52. Appendix 1, Question 21. The balance of the firms with model supporting documentation reported that its use depended on the situation or had no policy. *Id.*

53. Opinion preparers often prepared supporting documentation even though their firm did not require it. See *supra* note 51. While only 84 firms indicated that they required supporting documentation, at least 150 firms responded to questions about how supporting documentation was handled when it was prepared. Appendix 1, Questions 19 & 22.

54. Appendix 1, Question 22. Firms were asked to check all that applied. Of the 246 firms responding to this question, about one third indicated that they had no policy. *Id.*

55. *But see* text accompanying *infra* note 60 (about half of responding firms indicated that consulting lawyer policy was not waivable). The Committee notes that a consulting lawyer might waive a requirement while reviewing an opinion letter without its being formally identified as a waiver.

56. Words like "mandates," "prohibitions," "requirements," and "waivers" suggest a degree of formality that does not exist in many firms. For example, because policies may take the form of strong suggestions rather than strict rules, responses to questions about whether the use of model opinions was mandated unless waived and about the waiver process may not have provided a clear picture of what firms actually do when pressed to give a "prohibited" opinion in a specific transaction. See *supra* note 11.

57. Appendix 1, Question 5.

firms that responded to the question identified a member or members of an opinion committee, and about one third identified an opinion committee as a whole.⁵⁸ Less than one quarter identified anyone else.⁵⁹

When firms that required consultation with a consulting lawyer were separately asked who was authorized to waive that requirement, about one half indicated that it was not waivable.⁶⁰ About half of the other half permitted a waiver by a member or members of an opinion committee, and about one quarter of that half permitted a waiver by an opinion committee as a whole.⁶¹

About two thirds of firms responding to the relevant questions did not require that a waiver be memorialized.⁶² About one quarter memorialized waivers by placing a writing in the transaction file along with other supporting materials.⁶³

F. ARCHIVES

Many firms maintained a file or archive of opinion letters they gave.

About one half of responding firms maintained an archive of opinion letters they gave.⁶⁴ Less than one quarter maintained a file or archive of opinion letters given by other firms.⁶⁵

II. LIMITATIONS ON OPINIONS AND CONFIRMATIONS

The survey asked a series of questions about how firms handled specific types of opinions and confirmations.

A. OPINIONS ON LAW OF ANOTHER STATE

Delaware

Most firms that did not have a Delaware office gave straightforward opinions on at least some Delaware entities without consulting Delaware counsel. Most did not give opinions on Delaware contract law.

58. *Id.* About one quarter of the firms that responded to the question selected both an opinion committee and a member or members of an opinion committee. See Appendix 1, Question 23 (similar results to those for Question 5 for those firms that required at least one model opinion letter, opinion, or supporting document); Appendix 1, Question 11 (similar results to those for Question 5 for waiving consulting lawyer review after subtracting those firms that indicated consulting lawyer review was not waivable).

59. See Appendix 1, Question 5 for those choices.

60. Appendix 1, Question 11. Question 5 (waivers of mandates, prohibitions, and procedures generally) did not ask whether the firm permitted waivers.

61. *Id.*

62. Appendix 1, Questions 6, 12 & 24.

63. *Id.*

64. Appendix 1, Question 34.

65. Appendix 1, Question 35.

Only a small percentage of responding firms had a Delaware office,⁶⁶ but about three quarters (including almost all firms with more than 50 lawyers⁶⁷) gave routine status, power, action, and stock (authorization, issuance, and payment) opinions on corporations organized under the Delaware General Corporation Law without consulting Delaware counsel.⁶⁸ About three quarters of respondents gave status, power, and action opinions on limited liability companies formed under the Delaware Limited Liability Company Act without consulting Delaware counsel, and fewer (but still about two thirds) gave similar opinions on limited partnerships formed under the Delaware Revised Uniform Limited Partnership Act without such consultation.⁶⁹ Only about one third of the responding firms gave opinions on the limited liability of LLC members or limited partners under Delaware law without consulting Delaware counsel,⁷⁰ and less than one quarter gave opinions on Delaware contract law without such consultation.⁷¹

In general, the larger the firm, the greater the likelihood of its giving opinions on Delaware entities without consulting Delaware counsel.⁷² Firms described limitations on giving these opinions in textual responses.⁷³

66. Appendix 1, Question 25. Questions about the practices of firms in giving opinions on the law of other states were directed to opinions on the law of states in which the firm did not have an office. The decision to give an opinion on the law of another state should turn on whether the lawyers involved regard themselves as competent to address the issues raised by the opinion and not on whether their firm has an office in that state or whether any of the lawyers preparing the opinion is licensed there. See, e.g., TriBar Opinion Comm., *Third-Party "Closing Opinions,"* 53 BUS. LAW. 591, 631 (1998); TriBar Opinion Comm., *Third-Party Closing Opinions: Limited Liability Companies,* 61 BUS. LAW. 679, 681 (2006) [hereinafter TriBar LLC Report].

67. Appendix 2, Chart 10. Most other percentages in this segment (Delaware) would be significantly higher if the responses of firms with 50 or fewer lawyers were excluded. *Id.* See text accompanying *infra* note 72.

68. Appendix 1, Question 26. Question 26 permitted firms to exclude from their responses opinions addressing novel or complex legal issues. Percentages reflected in this paragraph are based on the number of firms answering respective subparts of Questions 26 and 28. Firms with Delaware offices as well as those without Delaware offices answered some or all of these subparts. A small number of firms with Delaware offices stated that they did not give Delaware opinions described in one or more of the subparts, probably because the lawyers in their Delaware office practiced in other specialized areas or their non-Delaware lawyers did not routinely involve lawyers in their Delaware office in their transactions. Almost all firms responding to the 2002 survey (96%) said they gave opinions on the Delaware General Corporation Law even when they had no opinion preparer admitted there. 2002 Survey Report, *supra* note 1, at 338 (Question F.4(a)).

69. Appendix 1, Question 26. For a discussion of opinions on Delaware limited liability companies given by non-Delaware lawyers, see TriBar LLC Report, *supra* note 66, at 681–83.

70. Appendix 1, Question 26. For a discussion of limited liability opinions on Delaware limited liability companies, see TriBar Opinion Comm., *Supplemental TriBar LLC Opinion Report on Membership Interests,* 66 BUS. LAW. 1065, 1074 (2011).

71. Appendix 1, Question 28. About three quarters indicated that they did not give these opinions (apparently as a matter of policy), and another 10% indicated that they had no policy because the issue was not significant in their practice.

72. Appendix 2, Chart 10. See *supra* note 67.

73. Several comments emphasized the point that Question 26 permitted respondents to assume that matters addressed were not novel or complex (e.g., had to be straightforward or routine). See *supra* note 68. Other comments indicated further limitations, for example (i) only gave capitalization opinion when firm is general counsel; (ii) gave opinions on Delaware General Corporation Law but not on capitalization; (iii) expressly excluded Delaware contract law applicable to LLC or partnership

Other States

Relatively few firms gave opinions without consulting local counsel on Maryland or Nevada entities, or on New York contract law, when they did not have an office in the applicable state.

Less than one quarter of firms responding to the relevant questions that did not have an office in the respective states gave straightforward opinions⁷⁴ on the Maryland General Corporation Law or Business Trust Act, or on New York contract law, without consulting local counsel, and only a small number of respondents gave such opinions on the Nevada Corporations Code.⁷⁵ About two thirds of responding firms had policies against giving any of these opinions.⁷⁶ The balance had no policy because requests for these opinions were not significant in their practice.⁷⁷

Firms were asked to list laws of other states in which they did not have an office on which they gave straightforward opinions without consulting local counsel.⁷⁸ Comments suggested that practices varied broadly and depended on such factors as the specific law on which the opinion was requested, the nature of the firm's practice, the firm's geographic location, and the admission to practice in particular states or knowledge of those involved in the preparation of the opinion. In general, most firms appeared reluctant to give opinions on the law of states other than Delaware in which they did not have an office.

UCC Opinions

Many responding firms gave opinions that covered Article 9 of the Uniform Commercial Code of other states without consulting local counsel.

About two thirds of the responding firms gave opinions that covered Article 9 of the Uniform Commercial Code (as reported in a publicly available compilation) of states in which they did not have an office without consulting local

agreements; (iv) did not cover complex LLC or partnership agreements; (v) required confirmation by consulting lawyer of "expert" advice; and (vi) limited law covered to standard compilation of the statutes and cases or published statutes without interpretive cases. For a critique of the last practice, see TriBar LLC Report, *supra* note 66, at 681.

74. That is, opinions not involving novel or complex legal issues. Appendix 1, Question 28. See *supra* notes 68 & 73.

75. Appendix 1, Question 28. The Nevada corporation statute was selected because many non-Nevada businesses, primarily in western states, incorporate in Nevada to take advantage of its Corporations Code; the Maryland corporation and trust statutes were selected because many non-Maryland-based investment entities have been formed in Maryland. (The name of the Maryland Business Trust Act was changed to the Statutory Trust Act after the completion of the survey.) New York contract law was selected because many contracts in interstate transactions choose New York law as their governing law.

76. *Id.* About three quarters of respondents to the 2002 survey said they had a policy or custom that precluded or limited their giving opinions on the law of jurisdictions in which they did not have an office. 2002 Survey Report, *supra* note 1, at 337 (Question F.1). Textual comments in 2002 suggested that when giving these opinions most firms only gave them on the law of specific states or on specific statutes or both (most often Delaware General Corporation Law or the Uniform Commercial Code).

77. Appendix 1, Question 28.

78. Thirty-nine firms listed laws of a total of 23 states. *Id.*

counsel.⁷⁹ In general, the larger the firm, the more likely it was to give these opinions.⁸⁰ Some firms commented that they limited these opinions, for example by covering only Delaware law or perfection by filing under Article 9.⁸¹

About one half of the responding firms gave opinions that covered Article 8 of the Uniform Commercial Code of states in which they did not have an office without consulting local counsel.⁸² The survey did not ask whether firms that answered “No” did not give the opinions as a matter of policy or rather were not asked for them in light of the nature of their practice.

B. NO-LITIGATION CONFIRMATIONS

Most responding firms gave no-litigation confirmations at least sometimes. Responses suggested a trend toward limiting coverage, for example by addressing only litigation that could adversely affect the transaction or in which the firm was representing the client.

Although more than three quarters of responding firms gave no-litigation confirmations in at least some circumstances, many sought to limit those confirmations.⁸³

Historically “no-litigation confirmations” stated that the opinion giver knew of no undisclosed litigation that could materially adversely affect the client generally or the transaction. Recently, possibly in response to cases holding against law firms that gave no-litigation confirmations,⁸⁴ many law firms have sought to narrow these confirmations to litigation that could adversely affect the transaction and to matters in which the firm represents the client.⁸⁵ About half of the firms that gave no-litigation confirmations either prohibited (unless waived) or discouraged opinion preparers from providing confirmations regarding litigation

79. Appendix 1, Question 27. See generally TriBar Opinion Comm., *Special Report of the TriBar Opinion Committee: UCC Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449 (2003).

80. See Appendix 2, Chart 11.

81. Other examples of limitations included: (i) only straightforward opinions; (ii) only on specific Uniform Commercial Code sections; (iii) only on perfection; (iv) only with the approval of a firm lawyer expert in these matters; and (v) only based on the statute and not case law or legislative history. On the last point, see *supra* note 73 (last sentence).

82. Appendix 1, Question 27. See TriBar Opinion Comm., *Special Report of the TriBar Opinion Committee—Opinions on Secondary Sales of Securities*, 66 BUS. LAW. 625, 638–40 (2011) (currently no material differences in various state versions of Article 8; recommends that secondary sale opinions either address which state’s Uniform Commercial Code is applicable or expressly state that the opinion is given as if the Uniform Commercial Code of the state whose law is covered by the opinion letter applied).

83. Appendix 1, Question 29. About half of the responding firms said that they gave no-litigation confirmations, and about one third said they gave them sometimes. Many of those that gave the confirmations “sometimes” and provided comments expressed a strong reluctance to give these confirmations. A higher percentage of firms with more than 50 lawyers than of smaller firms gave no-litigation confirmations at least sometimes. Appendix 2, Chart 12.

84. See *Dean Foods Co. v. Pappathanasi*, No. 01-2596 BLS, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004); *Nat’l Bank of Can. v. Hale & Dorr, LLP*, 2000-00296, 2004 WL 1049072 (Mass. Super. Ct. Apr. 28, 2004).

85. See Boston Bar Ass’n, *Boston Bar Association Streamlined Form of Closing Opinions*, 61 BUS. LAW. 389, 396–97 (2005).

that could adversely affect the client generally,⁸⁶ and about one third limited confirmations to matters in which the firm represented the client.⁸⁷

About three quarters of firms that gave no-litigation confirmations limited them to matters known to specified lawyers within the firm.⁸⁸

C. UNDERWRITING AGREEMENTS

Law firms ordinarily are unwilling to address the enforceability of indemnification provisions in underwriting agreements because of concerns that these provisions are contrary to public policy.⁸⁹ Question 33 of the survey was intended to elicit information about how firms that gave opinions on underwriting agreements avoided coverage of indemnification provisions. Due to ambiguity in the phrasing of the question, the Committee believes that the responses to the question are not meaningful.⁹⁰

III. CONCLUSION

Like the 2002 survey, the 2010 survey revealed a broad range of approaches to opinion practice. Responses to the 2010 survey indicated some significant differences in practice between large and small firms. The Committee suggests that firms periodically review their opinion practices in view of changes both in opinion practice generally and in the nature of their practice, their size, their culture, and the location of their offices.⁹¹

86. Appendix 1, Question 30. *See also supra* note 83. The smaller the firm, the greater the likelihood of its giving discretion to the opinion preparers to use this approach. Appendix 2, Chart 13.

87. Appendix 1, Question 31.

88. *Id.* The fact that about one quarter of the firms that gave no-litigation confirmations did not indicate that they used a knowledge qualifier probably is attributable either to the fact that they included another limitation (e.g., a limitation to litigation in which the firm was representing the client) that rendered a knowledge qualifier unnecessary or that they did not appreciate that failing to identify use of the qualifier in Question 31 meant that they did not require it.

89. *See, e.g.*, Item 510 of Regulation S-K, 17 C.F.R. § 229.510 (2012); DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS § 9.14.2 (3d ed. 2008 & Supp. 2012).

90. The question did not address the possibility of an opinion's covering the enforceability of an underwriting agreement but excluding coverage of the indemnification provision.

91. *See* 2002 Survey Report, *supra* note 1, at 332.

Appendix I

Survey Responses¹

I. FIRM OPINION COMMITTEES

1. <i>Does your Firm have one or more Opinion Committees? (Please select one)</i>		
One Opinion Committee. ²	158	63%
More than one Opinion Committee.	22	9%
No Opinion Committee. ³	<u>72</u>	<u>29%</u>
Total	252	100%
2. <i>How is responsibility allocated among your Firm's various Opinion Committees? (Please check all that apply)</i>		
By practice group or area of law.	17	77% ⁴
By geography (e.g., by office location).	5	23%
Other. ⁵	4	18%
3. <i>Does your Firm's Opinion Committee (or do your Firm's Opinion Committees) have responsibility for Opinion Letters given by all of your Firm's offices and practice areas?</i>		
Yes	137	77%
No ⁶	<u>41</u>	<u>23%</u>
Total	178	100%

II. MANAGEMENT OF YOUR FIRM'S OPINION PRACTICE

4. <i>Please indicate whether your Firm engages in any of the following activities [and, if it does so and has one or more Opinion Committees, whether it does so through an Opinion Committee or Committees⁷]. (Please check all that apply)</i>		
	<u>Total Firms Responding⁸</u>	
Prepares, circulates or adopts model Opinion Letters or Opinions.	184	73% ⁹
Prohibits unless waived the giving of specific Opinions.	141	56%

1. Footnotes in this Appendix include information about prompts given to respondents in the survey and information about how percentages were calculated, as well as other matters.

2. Respondents were asked to skip to Question 3 if they selected this response.

3. Respondents were asked to skip to Question 4 if they selected this response.

4. Percentages in this column are based on the number of firms that answered this question (22).

5. Respondents were asked to describe the reason for this answer.

6. Respondents were asked to describe limitations on these responsibilities.

7. See REPORT ON THE 2010 SURVEY OF LAW FIRM OPINION PRACTICES, *supra*, § I.B n.12. (responses to the part of the question about committee involvement are not meaningful and are not reported).

8. Numbers in this column are the number of firms that selected the respective answers to the question.

9. Percentages in this column are of the number of firms that responded to this question (252).

Mandates unless waived the wording of specific Opinions.	110	44%
Establishes procedures for issuing Opinion Letters.	215	85%
Prepares memos or other materials (e.g., guidance on model Opinion Letters or Opinions) to assist in Opinion Letter preparation.	158	63%
Oversees or participates in the training of lawyers on Opinion issues.	187	74%
Distributes or makes available materials and resources prepared by others (e.g., bar association reports or relevant cases) regarding Opinion Letters and Opinion practice.	205	82%
5. <i>Who is authorized to waive compliance with mandates, prohibitions, or procedures?</i> (Please check all that apply)		
An Opinion Committee.	74	31% ¹⁰
A member or members of an Opinion Committee.	124	52%
A lawyer or lawyers designated or approved by (i) an Opinion Committee or (ii) a member or members of an Opinion Committee.	36	15%
The Consulting Lawyer (regardless of whether a member of an Opinion Committee).	40	17%
An Opinion Preparer.	31	13%
Your Firm's general counsel.	31	13%
A lawyer or lawyers with specified positions in management of your Firm or relationships with a client or clients of your Firm. ¹¹	41	17%
A lawyer or lawyers designated in some other way. ¹²	17	7%
It depends on the issue. ¹³	28	12%
6. <i>How is approval of a waiver memorialized?</i> (Please check all that apply)		
A writing is signed by the person approving the waiver.	40	17% ¹⁴
A writing is placed in the transaction file along with other supporting materials.	60	26%
A writing is placed in a Firm file or archive for Opinion Letters.	31	13%
The approval is not required to be memorialized.	145	63%

10. Percentages in this column are of the number of firms that responded to this question (238).

11. Respondents were asked to describe the designation.

12. Respondents were asked to describe the other way.

13. Respondents were asked to explain this answer.

14. Percentages in this column are of the number of firms that responded to this question (231).

III. CONSULTATION PRIOR TO GIVING OPINION LETTERS

7. <i>Does your Firm have a policy that unless waived requires consultation by the Opinion Preparers with a lawyer or group not otherwise involved in the transaction before an Opinion Letter is delivered?</i> (Please check one answer)		
Always. ¹⁵	108	43%
In some but not all situations.	73	29%
Not required. ¹⁶	<u>68</u>	<u>27%</u>
Total	249	100%
8. <i>When consultation with a Consulting Lawyer is required in some but not all situations, under what circumstances is consultation required?</i> (Please check all that apply)		
Opinion Letter is significantly different from your Firm's standard model.	43	59% ¹⁷
Giving an Opinion poses unusual risks because of the type of transaction involved or the circumstances of the particular transaction.	50	68%
The Opinion Letter presents issues that are not straightforward.	51	70%
The Opinion Letter presents issues that are not easily resolved.	49	67%
Opinion covers compliance with or exemption from securities laws.	22	30%
Opinion covers the Investment Company Act.	18	25%
Opinion covers a secured transaction.	17	23%
Other. ¹⁸	23	32%
9A. <i>When consultation by the Opinion Preparers with a Consulting Lawyer is required, which of the following need to be consulted?</i> (Please check all that apply)		
A member or members of an Opinion Committee.	107	59% ¹⁹
An entire Opinion Committee.	8	4%
Any lawyer or lawyers.	9	5%
A lawyer or lawyers who have expertise in the area addressed by Opinions.	101	56%
It depends on the situation. ²⁰	22	12%

15. Respondents were asked to skip to Question 9A if they selected this response.

16. Respondents were asked to skip to Question 17 if they selected this answer.

17. Percentages in this column are of the number of firms that selected "In some but not all situations" in Question 7 (73).

18. Respondents were asked to describe other situations in which consultation was required.

19. Percentages reported for Questions 9A, 9B, 11, 14, and 16 are of the number of firms that selected "Always" or "In some or all situations" in Question 7 (181).

20. Respondents were asked to explain this answer.

9B. <i>Who normally selects the Consulting Lawyer (other than an entire Opinion Committee)?</i> (Please check all that apply)		
An Opinion Committee or a member or members of an Opinion Committee.	46	26% ²¹
An Opinion Preparer or Preparers.	141	78%
Someone else. ²²	12	7%
10. <i>When consultation with a Consulting Lawyer is required, is the Consulting Lawyer required to be a partner in your Firm?</i> (Please check one)		
Yes, always.	133	75%
Yes, with limited exceptions. ²³	36	20%
No. ²⁴	<u>9</u>	<u>7%</u>
Total	178	100%
11. <i>When consultation with a Consulting Lawyer is required, who is authorized to waive the consultation?</i> (Please check all that apply)		
An Opinion Committee.	29	16% ²⁵
A member or members of an Opinion Committee.	57	32%
A lawyer or lawyers designated or approved by (i) an Opinion Committee or (ii) a member or members of an Opinion Committee.	12	7%
The Consulting Lawyer.	11	6%
Your Firm's general counsel.	10	6%
A lawyer or lawyers with specified positions in management of your Firm or relationships with a client or clients. ²⁶	16	9%
A lawyer or lawyers designated in some other way. ²⁷	3	2%
Not waivable.	81	45%
12. <i>How is approval of the waiver memorialized?</i> (Please check all that apply)		
A writing is signed by the person who approved the waiver.	20	17% ²⁸
A writing is placed in the transaction file along with other supporting materials.	34	29%
A writing is placed in a Firm file or archive for Opinion Letters.	17	14%
The waiver is not required to be memorialized.	74	63%

21. See *supra* note 19.

22. Respondents were asked to explain this answer.

23. Respondents were requested to describe the exceptions.

24. Respondents were asked to describe the categories of lawyers who could be Consulting Lawyers.

25. See *supra* note 19.

26. Respondents were asked to explain this answer.

27. Respondents were asked to describe how the lawyer or lawyers were designated.

28. Percentages in this column are of the number of firms that answered this question (118).

13. <i>When does your Firm's policy call for the Consulting Lawyer to become involved?</i> (Please check one answer)		
When the need for an Opinion Letter is first perceived.	11	6%
When an agreement calling for an Opinion Letter is first being negotiated.	13	7%
Prior to circulation of the draft Opinion Letter to the other side.	49	27%
Any time prior to the delivery of the Opinion Letter.	57	32%
At some other time. ²⁹	10	6%
Firm policy does not specify when consultation is expected to occur.	<u>40</u>	<u>22%</u>
Total	180	100%
14. <i>Which of the following are responsibilities of the Consulting Lawyer?</i> (Please check all that apply)		
Determine that the form (as distinguished from the substance) of the Opinion Letter satisfies your Firm's requirements.	112	62% ³⁰
Respond to questions of the Opinion Preparers and raise matters that the Consulting Lawyer identifies, without any overall responsibility for the form or substance of the Opinion Letter.	114	63%
Determine whether the Opinion Letter requires special procedures or raises special concerns due to the nature of the transaction or client, the relationship between the Opinion Preparers and the client, or for some other reason.	135	75%
Satisfy herself/himself as to the substance of particular matters addressed in the Opinion Letter that the Consulting Lawyer has determined require special attention.	116	64%
Identify matters on the surface of the Opinion Letter that raise questions or are unusual.	142	79%
"Concur" in the Opinion Letter as if the Consulting Lawyer had been one of the Opinion Preparers.	44	24%
Clear or approve delivery of the Opinion Letter.	108	60%
Consider such matters as the Opinion Preparers and the Consulting Lawyer determine.	115	64%
Other. ³¹	6	3%

29. Respondents were asked to explain this answer.

30. See *supra* note 19.

31. Respondents were asked to explain this answer.

15.	<i>Does your Firm's policy unless waived require a follow-up consultation with the Consulting Lawyer before the Opinion Letter is signed or delivered (for example, to confirm that no unanticipated problems have arisen)?</i>		
	Yes	36	20%
	No	<u>142</u>	<u>80%</u>
	Total	178	100%
16.	<i>Does your Firm's policy require that the consultation between the Consulting Lawyer and the Opinion Preparers be memorialized? (Please check all that apply)</i>		
	By the signature of the Consulting Lawyer on the office copy of the Opinion Letter.	36	20% ³²
	By a memo in a Firm file or archive for Opinion Letters.	19	11%
	By a memo in the transaction file.	22	12%
	In some other way. ³³	27	15%
	Firm policy does not require memorialization. ³⁴	92	51%

IV. FORMAT AND PROCEDURES FOR OPINION LETTERS

17.	<i>Does your Firm have one or more model Opinion Letters or model Opinions?</i>		
	Yes	202	80%
	No ³⁵	<u>49</u>	<u>20%</u>
	Total	251	100%
18.	<i>Which best describes your Firm's policy regarding the use of model Opinion Letters and model Opinions? (Please check all that apply)</i>		
	Use of Model Opinion Letters is mandatory unless waived.	37	19% ³⁶
	Use of Model Opinion Letters is preferred as a starting point but not required.	135	69%
	Use of Model Opinion Letters depends on the situation. ³⁷	24	12%
	Use of models for specific Opinions is mandatory unless waived.	28	20% ³⁸
	Use of models for specific Opinions is preferred as a starting point but not required.	98	68%
	Use of models for specific Opinions depends on the situation. ³⁹	17	12%

32. See *supra* note 19.

33. Respondents were asked to specify what the other way was.

34. Respondents were asked to explain this answer.

35. Respondents were asked to skip to Question 19 if they selected this answer.

36. The first three percentages in this column are of the number of firms that answered the questions about model Opinion Letters (196).

37. Respondents were asked to explain this answer.

38. The percentages in this and the following two entries in this column are of the number of firms that answered the questions about specific Opinions (133).

39. Respondents were asked to explain this answer.

19.	<i>Does your Firm have a policy that calls, at least as a general rule, for the preparation of a supporting memo, checklist or similar supporting documentation for each Opinion Letter?</i>		
	Yes	84	34%
	No	<u>166</u>	<u>66%</u>
	Total	250	100%
20.	<i>Does your Firm have one or more models for supporting documentation?</i>		
	Yes	85	34%
	No ⁴⁰	<u>162</u>	<u>66%</u>
	Total	247	100%
21.	<i>Which of the statements below best describes your Firm's policy regarding the use of model supporting documentation?</i>		
	Use of model documentation is mandatory unless waived.	12	13%
	Use of model documentation is preferred but not required.	48	53%
	Use depends on the situation. ⁴¹	11	12%
	No policy.	<u>20</u>	<u>22%</u>
	Total	91	100%
22.	<i>When supporting documentation is prepared, how is it then handled? (Please check all that apply)</i>		
	Reviewed as part of a Consulting Lawyer's review of the Opinion Letter.	54	22% ⁴²
	Reviewed by the Consulting Lawyer on a case-by-case basis.	66	27%
	Included in the transaction file with other supporting materials.	150	61%
	Included in a Firm file or archive for Opinion Letters.	26	11%
	Other. ⁴³	5	2%
	No policy.	73	30%
23.	<i>Where use of a model Opinion Letter, a model Opinion or model supporting documentation is required, who is authorized to waive its use? (Please check all that apply)</i>		
	An Opinion Committee.	38	16% ⁴⁴
	A member or members of an Opinion Committee.	74	31%
	A lawyer or lawyers designated or approved by (i) an Opinion Committee or (ii) a member or members of an Opinion Committee.	21	9%
	The Consulting Lawyer.	32	13%

40. Respondents were asked to skip to Question 22 if they selected this answer.

41. Respondents were asked to explain this answer.

42. Percentages in this column are of the number of firms that answered this question (246).

43. Respondents were requested to describe the other handling.

44. Percentages in this column are of the number of firms that answered this question (238).

Your Firm's general counsel.	9	4%	
A lawyer or lawyers designated in some other way. ⁴⁵	19	8%	
It depends on the situation. ⁴⁶	7	3%	
Please check here if your Firm does not require use of at least one of these models. ⁴⁷	111	47%	
24. <i>How is approval of the waiver memorialized? (Please check all that apply)</i>			
A writing is signed by the person who approved the waiver.	22	17% ⁴⁸	
A writing is placed in the transaction file along with other supporting materials.	32	25%	
A writing is placed in a Firm file or archive for Opinion Letters.	19	15%	
The waiver is not required to be memorialized.	81	63%	
V. LIMITS ON OPINION GIVING			
25. <i>Does your Firm have a Delaware office?</i>			
Yes	17	7%	
No	<u>233</u>	<u>93%</u>	
Total	250	100%	
26. <i>Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the following matters regarding Delaware entities without consulting Delaware counsel?⁴⁹</i>			
	<u>Yes</u>	<u>No</u>	<u>% Yes</u>
1 Status, stock (authorization, issuance and payment), power and requisite corporate actions under the Delaware General Corporation Law.	188	59	76% ⁵⁰
2 Status, power, and required limited liability company action under the Delaware Limited Liability Company Act.	176	71	71%
3 Limited liability of members under the Delaware Limited Liability Company Act.	90	147	38%
4 Status, power, and required limited partnership action under the Delaware Revised Uniform Limited Partnership Act.	140	96	59%
5 Limited liability of limited partners under the Delaware Revised Uniform Limited Partnership Act.	80	154	34%

45. Respondents were asked to describe the method of designation.

46. Respondents were asked to explain this answer.

47. Respondents were requested to skip to Question 29 if they selected this answer.

48. Percentages in this column are of the number of firms that answered this question (129).

49. Respondents selecting "yes" for any opinion were asked to describe any limitation on giving the opinion.

50. Percentages in this column are of the number of firms responding to the respective subparts of the question.

27. Does your Firm give Opinions on the following Articles of the Uniform Commercial Code (as reported in a publicly available compilation) of a state in which your Firm does not have an office without consulting local counsel?⁵¹

	<u>Yes</u>	<u>No</u>	<u>% Yes</u>
1. Article 9	149	100	60%
2. Article 8	107	136	44%

28. Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the following laws when your Firm does not have an office in the applicable state without consulting local counsel?⁵²

	<u>Yes</u>	<u>No Policy</u> ⁵³	<u>No</u>
Nevada Corporations Code	19 (8%) ⁵⁴	78	147 (60%)
Maryland General Corporation Law and/ or the Maryland Business Trust Act	28 (12%)	62	144 (62%)
New York contract law	32 (19%)	22	112 (68%)
Delaware contract law	28 (12%)	24	180 (78%)
Other state laws ⁵⁵	39 (21%)	19	127 (68%)

29. Does your Firm give “no-litigation” confirmations?

Yes	112	45%
Sometimes ⁵⁶	94	37%
No	<u>45</u>	<u>18%</u>
Total	251	100%

30. Please identify which of the following best describes your Firm’s policy about giving “no-litigation” confirmations regarding undisclosed litigation against your Firm’s client that could adversely affect:

	<u>Prohibits unless waived</u>	<u>Discourages</u>	<u>No policy</u> ⁵⁷
The transaction.	19 (9%) ⁵⁸	51 (25%)	131 (64%)
The client generally (with or without a materiality qualifier).	31 (15%)	73 (35%)	94 (46%)

51. Respondents checking “yes” were asked to describe any limitations on giving such opinions.

52. Respondents were asked not to select a state where the firm had an office.

53. Respondents were advised that this meant that transactions requiring opinions in this area were not significant in their practice.

54. Percentages for the responses to this question are of the number of firms responding to the respective subparts of the question.

55. Respondents that selected this answer were asked to list the other state laws.

56. Respondents checking this answer were asked to explain their answer.

57. Respondents were advised that this meant that these confirmations were given at the discretion of the opinion preparers.

58. Percentages in this chart are of the total number of firms that answered “Yes” or “Sometimes” to Question 29 (206).

31.	<i>If your Firm gives “no-litigation” confirmations, which (if any) of the following describe your Firm’s policy (unless waived)? (Please check all that apply)</i>		
	Requires limiting confirmation to legal proceedings in which your Firm is representing the client.	72	35% ⁵⁹
	Requires limiting confirmation by a knowledgeable qualifier.	154	75%
32.	<i>If your Firm gives “no-litigation” confirmations, does your Firm’s policy prohibit (unless waived) express coverage of any of the following? (Please check all that apply)</i>		
	Investigations	68	33% ⁶⁰
	Oral threats of litigation	96	47%
	Written threats of litigation	46	22%
33.	<i>Does your Firm limit Opinions on securities underwriting agreements to due authorization, execution and delivery?</i> ⁶¹		
	Yes	106	50%
	No	<u>106</u>	<u>50%</u>
	Total	212	100%

VI. OPINION LETTER ARCHIVES

34.	<i>Does your Firm maintain a file or archive of Opinion Letters it has given?</i>		
	Yes	127	51%
	No	<u>122</u>	<u>49%</u>
	Total	249	100%
35.	<i>Does your Firm maintain a file or archive of Opinion Letters given by other Firms?</i>		
	Yes	48	19%
	No	<u>201</u>	<u>81%</u>
	Total	249	100%

VII. INFORMATION ABOUT YOUR FIRM

36.	<i>Please indicate the number of lawyers in your Firm.</i>		
	1–50	85	34%
	51–200	66	26%
	201–500	39	15%
	More than 500	<u>62</u>	<u>25%</u>
	Total	252	100%

59. Percentages in this column are of the total number of firms that answered “Yes” or “Sometimes” to Question 29 (206).

60. Percentages in this column are of the total number of firms that answered “Yes” or “Sometimes” to Question 29 (206).

61. See REPORT OF THE 2010 SURVEY OF LAW FIRM OPINION PRACTICES, *supra*, § IIC (Underwriting) (responses to this question not meaningful due to ambiguity of the question).

37. *How many offices does your Firm have?*

1	80	32%
2-5	76	30%
6-10	43	17%
More than 10	<u>51</u>	<u>20%</u>
Total	250	100%

38. *How many of your Firm's offices are outside of the United States?*

None	178	71%
2-5	41	16%
6-10	19	8%
More than 10	<u>12</u>	<u>5%</u>
Total	250	100%

39. *Please indicate the US State or States in which your Firm is Headquartered.*

Alabama	1	0% ⁶²	Montana	1	0%
Alaska	0	0%	Nebraska	1	0%
Arizona	5	2%	Nevada	2	1%
Arkansas	1	0%	New Hampshire	2	1%
California	14	7%	New Jersey	5	2%
Colorado	7	3%	New Mexico	0	0%
Connecticut	1	0%	New York	27	13%
Delaware	3	1%	North Carolina	9	4%
District of Columbia	9	4%	North Dakota	0	0%
Florida	14	7%	Ohio	5	2%
Georgia	3	1%	Oklahoma	2	1%
Hawaii	3	1%	Oregon	3	1%
Idaho	2	1%	Pennsylvania	4	3%
Illinois	7	3%	Puerto Rico	0	0%
Indiana	2	1%	Rhode Island	2	1%
Iowa	2	1%	South Carolina	1	0%
Kansas	1	0%	South Dakota	0	0%
Kentucky	2	1%	Tennessee	6	3%
Louisiana	4	2%	Texas	12	6%
Maine	0	0%	Utah	1	0%
Maryland	7	3%	Vermont	1	0%
Massachusetts	10	5%	Virginia	7	3%

62. Except for the last entry in this column, percentages in this chart are of 209, which is the total number of respondents to the survey (252) less the number of respondents that declined to answer this question (43). 43 firms (17% of 252) declined to answer this question.

Michigan	7	3%	Washington	1	0%
Minnesota	4	2%	West Virginia	0	0%
Mississippi	0	0%	Wisconsin	2	1%
Missouri	4	2%	Wyoming	<u>0</u>	<u>0%</u>
I decline to answer this question	43	17% ⁶³	Total	254	

40. Please indicate each US State in which your Firm has an office.

Alabama	3	1% ⁶⁴	Montana	0	0%
Alaska	2	1%	Nebraska	1	1%
Arizona	8	4%	Nevada	5	2%
Arkansas	1	1%	New Hampshire	4	2%
California	54	26%	New Jersey	16	8%
Colorado	13	6%	New Mexico	0	0%
Connecticut	4	5%	New York	65	31%
Delaware	10	5%	North Carolina	16	8%
District of Columbia	53	25%	North Dakota	0	0%
Florida	31	15%	Ohio	6	3%
Georgia	13	6%	Oklahoma	2	1%
Hawaii	3	1%	Oregon	3	1%
Idaho	4	2%	Pennsylvania	15	7%
Illinois	16	8%	Puerto Rico	0	0%
Indiana	3	1%	Rhode Island	4	2%
Iowa	2	1%	South Carolina	3	1%
Kansas	2	1%	South Dakota	0	0%
Kentucky	2	1%	Tennessee	6	3%
Louisiana	5	2%	Texas	26	12%
Maine	0	0%	Utah	6	3%
Maryland	9	4%	Vermont	0	0%
Massachusetts	17	8%	Virginia	12	6%
Michigan	9	4%	Washington	7	3%
Minnesota	6	3%	West Virginia	0	0%
Mississippi	2	1%	Wisconsin	4	1%
Missouri	4	2%	Wyoming	<u>0</u>	<u>0%</u>
			Total	519	

63. Percentage is of 252.

64. Percentages in this chart are of 210, which is the total number of firms that responded to the survey (252) less the number of firms that declined to answer this question. 42 firms (17% of 252) declined to answer this question.

Appendix 2

Charts Derived from Survey Responses

CHART 1
QUESTION 4
OPINION ACTIVITIES BY FIRM SIZE

Please indicate whether your firm engages
in any of the following activities
(Please check all that apply)

	Number of Firm Lawyers ¹				Total ²
	1-50	51-200	201-500	> 500	
Prepares, circulates or adopts model Opinion Letters or Opinions	50 (59%)	47 (71%)	31 (79%)	56 (90%)	184 (73%)
Prohibits unless waived the giving of specific Opinions	30 (35%)	41 (62%)	24 (62%)	46 (74%)	141 (56%)
Mandates unless waived the wording of specific Opinions	31 (36%)	30 (45%)	15 (38%)	34 (55%)	110 (44%)
Establishes procedures for issuing Opinion Letters	58 (68%)	62 (94%)	37 (95%)	58 (94%)	215 (85%)
Prepares memos or other materials (e.g., guidance on model Opinion Letters or Opinions) to assist in Opinion Letter preparation	30 (35%)	48 (73%)	26 (67%)	54 (87%)	158 (63%)
Oversees or participates in the training of lawyers on Opinion issues	50 (59%)	45 (68%)	33 (85%)	59 (95%)	187 (74%)
Distributes or makes available materials and resources prepared by others (e.g., bar association reports or relevant cases) regarding Opinion Letters and Opinion practice	59 (69%)	55 (83%)	34 (87%)	57 (92%)	205 (82%)
Number of Firms in survey in this size category	85	66	39	62	252

1. Percentages in the first four columns of this chart are of the total number of firms responding in the respective size categories.

2. Percentages in this column are of the number of firms that responded to this question (252).

CHART 2
QUESTION 1
USE OF OPINION COMMITTEES BY FIRM SIZE

Does your Firm have one or more Opinion Committees?
(Please select one)

	Number of Firm Lawyers ³				Total ⁴
	1-50	51-200	201-500	> 500	
One Committee	30 (35%)	52 (79%)	30 (77%)	46 (74%)	158 (63%)
More than one	0 (0%)	6 (9%)	5 (13%)	11 (18%)	22 (9%)
None	55 (65%)	8 (12%)	4 (10%)	5 (8%)	72 (29%)
Total Firms	85 (100%)	66 (100%)	39 (100%)	62 (100%)	252 (100%)
Total Firms with Committees ⁵	30 (35%)	58 (88%)	35 (90%)	57 (92%)	180 (72%)

CHART 3
QUESTION 3

Responsibility of Committees by Firm Size

Does your Firm's Opinion Committee (or do your Firm's Opinion Committees) have responsibility for Opinion Letters given by all of your Firm's offices and practice areas?

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Yes	28 (97%)	51 (88%)	25 (71%)	33 (58%)	137 (77%)
No	1 (3%)	7 (12%)	10 (29%)	24 (42%)	42 (23%)
Total	29 (100%)	58 (100%)	35 (100%)	57 (100%)	179 (100%)

3. Percentages in the first four columns of this chart are of the total number of firms responding in the respective size categories.

4. Percentages are of the number of firms that answered this question (252).

5. The sum of (i) the number of firms with one committee and (ii) the number of firms with more than one committee. Percentages are of the total number of firms that answered the question in the respective firm size categories. 167 firms with more than 50 lawyers answered this question, 90% of which (150 firms) had one or more committees.

CHART 4
QUESTION 7

Consultation by Firm Size

Does your Firm have a policy that unless waived requires consultation by the Opinion Preparers with a lawyer or group not otherwise involved in the transaction before an Opinion Letter is delivered? (Please check one answer)

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Always	22 (26%)	33 (52%)	21 (54%)	32 (52%)	108 (43%)
In some but not all situations	25 (30%)	20 (31%)	6 (15%)	22 (36%)	73 (29%)
Not required	37 (44%)	11 (17%)	12 (31%)	8 (13%)	68 (27%)
Total Responding Firms	84 (100%)	64 (100%)	39 (100%)	62 (100%)	249 (100%)

CHART 5
QUESTION 17

Use of Form Opinion Letters or Opinions by Firm Size

Does your Firm have one or more model
Opinion Letters or model Opinions?

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Yes	60 (71%)	52 (80%)	33 (85%)	57 (92%)	202 (80%)
No	25 (29%)	13 (20%)	6 (15%)	5 (8%)	49 (20%)
Total	85 (100%)	65 (100%)	39 (100%)	62 (100%)	251 (100%)

CHART 6
QUESTION 18

Use of Model Opinion Letters and Model Opinions by Firm Size

Which best describes your Firm's policy regarding
the use of model Opinion Letters and model Opinions?
(Please check all that apply)⁶

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Opinion Letters					
Use of Model Opinion Letters is mandatory unless waived	9 (16%)	5 (9%)	4 (13%)	19 (34%)	37 (19%)
Use of Model Opinion Letters is preferred as a starting point but not required	41 (75%)	43 (80%)	23 (74%)	28 (50%)	135 (69%)
Use of Model Opinion Letters depends on the situation (Please explain)	5 (9%)	6 (11%)	4 (13%)	9 (16%)	24 (12%)
Total responding for Opinion Letters	55 (100%)	54 (100%)	31 (100%)	56 (100%)	196 (100%)
Specific Opinions					
Use of models for specific Opinions is mandatory unless waived	6 (14%)	4 (10%)	5 (23%)	13 (33%)	28 (20%)
Use of models for specific Opinions is preferred as a starting point but not required	31 (76%)	32 (80%)	15 (68%)	20 (50%)	98 (68%)
Use of models for specific Opinions depends on the situation (Please explain)	4 (10%)	4 (10%)	2 (9%)	7 (17%)	17 (12%)
Total responding for specific Opinions	41 (100%)	40 (100%)	22 (100%)	40 (100%)	143 (100%)

6. Firms in fact responded only once for Opinion Letters and only once for specific Opinions.

CHART 7
QUESTIONS 19 AND 20

Use of Model Supporting Documentation by Firm Size

Does your Firm have a policy that calls, at least as a general rule, for the preparation of a supporting memo, checklist or similar documentation for each Opinion?

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Yes	34 (40%)	17 (26%)	10 (26%)	23 (38%)	84 (34%)
No	50 (60%)	49 (74%)	29 (74%)	38 (62%)	166 (66%)
Total	84 (100%)	66 (100%)	39 (100%)	61 (100%)	250 (100%)

Does your Firm have one or more models for supporting documentation?

Yes	30 (36%)	17 (26%)	9 (23%)	29 (48%)	85 (34%)
No	53 (64%)	48 (74%)	30 (77%)	31 (52%)	162 (66%)
Total	83 (100%)	65 (100%)	39 (100%)	60 (100%)	247 (100%)

CHART 8
COMPARISONS OF FIRM ANSWERS TO QUESTIONS 19 AND 20

Form Documentation Policy and Use⁷

(Q19) Does your Firm have a policy that calls, at least as a general rule, for the preparation of a supporting memo, checklist, or similar supporting documentation for each Opinion Letter?

	Yes	No	Total	
(Q20) Does your Firm have one or more models for supporting documentation?	Yes	59	29	88
	No	25	137	162
	Total	84	166	250

7. To determine how many firms answered yes to both questions, identify the number that is both on the **yes** line and also in the **yes** column.

CHART 9
QUESTION 21

Use of Model Supporting Documentation by Firm Size

Which of the statements below best describes your Firm's policy regarding the use of model supporting documentation?

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Use of model documentation is mandatory unless waived	4 (13%)	2 (11%)	1 (9%)	5 (16%)	12 (13%)
Use of model documentation is preferred but not required	21 (68%)	8 (45%)	5 (46%)	14 (45%)	48 (53%)
Use depends on the situation (Please explain)	2 (6%)	2 (11%)	2 (18%)	5 (16%)	11 (12%)
No policy	4 (13%)	6 (33%)	3 (27%)	7 (23%)	20 (22%)
Total	31 (100%)	18 (100%)	11 (100%)	31 (100%)	91 (100%)

CHART 10
QUESTION 26Delaware Opinions by Firm Size⁸

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the status, stock (authorization, issuance and payment), power and requisite corporate actions under the Delaware General Corporation Law?	Yes 31 (38%)	59 (91%)	37 (97%)	61 (98%)	188 (76%)
Total Responding	82	65	38	62	247
Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the status, power, and required limited liability company action under the Delaware Limited Liability Company Act?	Yes 31 (38%)	53 (82%)	35 (92%)	57 (92%)	176 (71%)
Total Responding	82	65	38	62	247
Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the limited liability of members under the Delaware Limited Liability Company Act?	Yes 16 (20%)	24 (39%)	16 (44%)	34 (57%)	90 (38%)
Total Responding	80	61	36	60	237
Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the status, power, and required limited partnership action under the Delaware Revised Uniform Limited Partnership Act?	Yes 18 (24%)	42 (68%)	28 (76%)	52 (85%)	140 (59%)
Total Responding	76	62	37	61	236
Does your Firm give Opinions (at least those not addressing novel or complex legal issues) on the limited liability of limited partners under the Delaware Revised Uniform Limited Partnership Act?	Yes 9 (11%)	22 (37%)	16 (44%)	33 (55%)	80 (34%)
Total Responding	79	59	36	60	234

8. Percentages are of the total number of firms responding in each category.

CHART 11
QUESTION 27

UCC Opinions by Firm Size

Does your Firm give Opinions on the following Articles of the Uniform Commercial Code (as reported in a publicly available compilation) of a state in which your Firm does not have an office without consulting local counsel?

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
<i>Article 8 Opinions</i>					
Yes	16 (19%)	29 (48%)	27 (69%)	35 (58%)	107 (44%)
Total Responding	83	61	39	60	243 (100%)
<i>Article 9 Opinions</i>					
Yes	31 (36%)	40 (63%)	30 (77%)	48 (79%)	149 (60%)
Total Responding	85	64	39	61	249 (100%)

CHART 12
QUESTION 29

No-Litigation Confirmations by Firm Size

Does your Firm give no-litigation confirmations?

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Yes	38 (45%)	33 (50%)	17 (44%)	24 (39%)	112 (45%)
Sometimes	21 (25%)	29 (44%)	16 (41%)	28 (46%)	94 (37%)
No	26 (30%)	4 (6%)	6 (15%)	9 (15%)	45 (18%)
Total	85 (100%)	66 (100%)	39 (100%)	61 (100%)	251 (100%)

CHART 13
QUESTION 30 BY FIRM SIZE

**No-Litigation Confirmations: Litigation that Could Adversely
Affect the Client Generally by Firm Size**

Please identify which of the following best describes your Firm's policy about giving no-litigation confirmations regarding undisclosed litigation against your Firm's client that could adversely affect the client generally.

	Number of Firm Lawyers				Total
	1-50	51-200	201-500	> 500	
Prohibits unless waived	7 (12%)	9 (15%)	5 (15%)	10 (22%)	31 (16%)
Discourages	17 (29%)	22 (36%)	13 (39%)	21 (46%)	73 (37%)
Given at the discretion of the opinion preparers	34 (59%)	30 (49%)	15 (46%)	15 (33%)	94 (47%)
Total	58 (100%)	61 (100%)	33 (100%)	46 (100%)	198 (100%)

Appendix 3
Descriptions of Quantitative Terms

Percentages	Descriptive Term
1%–9%	Small
10%–20%	Less than one quarter
21%–29%	About one quarter
30%–41%	About one third
42%–58%	About one half
59%–70%	About two thirds
71%–80%	About three quarters
81%–90%	More than three quarters
91%–99%	Almost all

