

**LAW SOCIETY OF UPPER CANADA**  
**Continuing Professional Development**  
**3<sup>RD</sup> ANNUAL BUSINESS LAW SUMMIT**

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**TIPS ON OPINION NEGOTIATION AND LOGISTICS<sup>1</sup>**

- Use precedents with extreme caution. The opinion comes from the documents, not the last deal.
- Avoid sending out a first draft under pressure. Once the first draft is out there, every change has to be blacklined.
- Agree ahead of time what opinions will be needed and who will do what. If the lender's counsel is making all registrations and doing all searches, it may not make sense for borrower's counsel to give the registration opinion. In addition, depending on the circumstances, it may be practical for borrower's and lender's counsel to agree to retain only one set of local counsel, other than for Quebec.
- When the other side sends a form of opinion, don't toss it away and substitute your own favourite precedent. Explain your changes as you go along (e.g., why you think an opinion request is inappropriate). Don't just exchange non-responsive drafts until the night before closing.
- If your transaction involves many jurisdictions, think carefully about logistics. It's not fair to expect everyone in all jurisdictions to stay up all night, especially if they are rendering only the most basic corporate or registration opinions.
- Prepare a form for local counsel. Don't just ask them to do what they always do. Provide names of parties, documents, and opinions required. Leave assumptions and qualifications for local counsel to add.
- Don't assume there will be opinions on every transaction, with respect to every relevant jurisdiction and every possible type of collateral.
- Don't assume you always need a minute book review. What in the opinion depends on it?

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<sup>1</sup> Susan Zimmerman (Goodmans LLP).

- Don't refuse to give any opinion you haven't given before simply on the basis that "we never do that."
- Don't insist on receiving a particular opinion on the basis that the other law firm has given it before or that "we always get it."
- Avoid adding new qualifications unless (i) you're sure the issue is not already covered by one of the customary qualifications, (ii) the point might plausibly affect enforceability and not only interpretation, and (iii) the point is actually relevant to the documents at hand.
- Listen. If you are having a disagreement about an opinion, explore with the other lawyer what exactly he or she sees as the problem. If you are the opinion giver, what precisely does the other lawyer want or need from you? Can you negotiate language both of you can live with?
- Pick your fights. Don't argue about things that don't matter. This applies whether you are giving or receiving an opinion. Different firms have different practices. Look to the substance of the opinion rather than fussing about form or specific language.
- Don't argue about the opinions with the other side during the closing and/or in front of the clients.
- Keep in mind that *opinions can't solve legal problems*. Among other reasons: (i) competent lawyers will not rely on opinions they wouldn't give; (ii) enforceability generally becomes an issue only on insolvency (in respect of which all lawyers qualify their enforceability opinions); and (iii) no real business issue will go away because someone offers or refuses to opine on it.
- *Remember that, in opinion negotiation, the opining lawyer and the receiving lawyer are on the same side: the side of the transaction.* Both of you want to get the deal done on time and without annoying your clients.