Chapter 9
A Deal in Time

9.1 The Deal Life Cycle And The Role Of The Lawyer

A deal has a life cycle from inception through closing and post-closing. Eventually it becomes just history, for the participants and for the lawyers. From the perspective of the corporate lawyer, the deal that gets to closing smoothly and expeditiously, that delivers what was anticipated to the parties, and that is not a source of later trouble and contention is a success. However, when a deal goes bad, it engenders angst among the participants. Even if it is through no fault of the lawyers, every aspect of the failed transaction and its accompanying documentation will be scrutinized.

Good lawyering begins with the first phone call from the client. Lawyers typically have little or no involvement in the earliest discussion stages of a deal, but are brought in when it is time to move to documentation and execution. For lawyers in a law firm, the first step will be to make sure that the matter is cleared for acceptance through the firm’s intake function. Then you are set to go.

9.2 Understanding The Company And Its Financing Needs

As tempting as it may be to skip this step, it is important for the lawyers to understand the rationale and context of the deal. Senior lawyers on the team have to be well informed of the company’s financing needs, and then they, in turn, must inform the entire team. The failure of the team to understand and share information about what is going on can lead to inadvertent breaches of confidentiality and to less serious political missteps that make the lawyer and the team look unprofessional. It is worth pulling up research materials on the parties and on the deal, including SEC filings, financial statements, and analyst reports on the company.

9.3 Defining The Market And Instrument

Next you should have a clear understanding of what security or obligation the company proposes to issue and the market where it is going to be sold or placed, which will give you direction in finding the right forms and precedents. In addition, demonstrating an understanding of the market will help you gain the client’s confidence.

9.4 Locating And Using Forms And Precedents

A lawyer almost never creates an entirely new contract without reference to a form (a neutral, generic template, or a standard form provided by the bankers’) or precedent (a negotiated document from a prior deal). By using a good form or precedent, the lawyer will start with something nearer to the finished work product and produce a first draft that is along the lines of what the clients expect. Forms and precedents let you see what is customary and piggyback off the thought processes of others, and they provide a checklist of items to be considered. However, even if you have a good form or close precedent, preparing spreadsheets from comparable deals and checklisting against them is worthwhile because it educates you about what is standard, what is variable, and the scope of variation.

Some best practice caveats about using forms and precedents:

- Special care must be exercised when using a precedent instead of a form. The precedent document represents the negotiated outcome for a different deal and may include provisions that could be inappropriate to the new deal or unfavorable to your client.
- When using a precedent instead of a form, be extremely careful to excise all names and words that might identify the source. Serving up leftovers from an old deal can be pretty embarrassing and is a sure sign of haste or carelessness. The “leftovers” might show up in historical metadata attached to a document circulated in electronic form, so you should circulate electronic documents with historical metadata stripped off or in a flat and inert form such as a static pdf or other image type file.
- Word-processing can make it easier to check for and correct purely careless errors through global search, but global search and replace also generates errors. Each find-and-replace instance must be carefully checked.
- Computer-based document production, which today means effectively all document production, also creates an error-generating environment. More about this later.

9.5 Preliminary Agreements—Term Sheets And Commitment Letters

The first stage in a financing is the preparation of preliminary agreements between the company and the banks providing or arranging the financing. This is an extremely important step. Lawyers may or may not be heavily involved, although lawyers are typically involved in the leveraged market and for acquisition financings.

The preliminary agreements lay out the terms of the expected financing and how the financing works with any related transaction (such as an acquisition) and other related financings. Signing up these agreements provides a kind of protected space for working toward closing, and the terms included in the preliminary agreements provide the starting point for drafting definitive documentation.

The timing of a preliminary agreement is dependent on the project’s funding needs. For a project loan, where you are working with a single lender, the commitment letter with attached term sheet may precede closing and funding by weeks, and subordinate usually occurs prior to closing based on the agreed commitment letter. The underwriting agreement for a capital markets transaction is signed only at pricing, when the underwriters are convinced that the deal is on track (i.e., the accounts that will purchase the securities from the underwriters, but prior to that time the company will have signed an engagement letter, mostly for the benefit of the underwriters to protect them from losing the deal to a competitor.

In addition to laying out the terms of any funding commitments, including conditions and indicative terms, preliminary agreements contain obligations on the part of the company to pay various fees, expenses, and indemnities, and to refrain from working with other banks on a competing deal. There are likely to be provisions about confidentiality and disclosure.

According to their terms, preliminary agreements are binding, and some terms may survive, indeed are especially intended to survive, if no deal is completed—for example, fees required to be paid if a competing deal is done within the exclusivity period, and expense and
incentive provisions (expense provisions being of particular interest to lawyers). Because the parties can be taking on substantial financial and reputational risks, banks do not enter into preliminary agreements without internal approvals, and, likewise, these agreements would be the basis for seeking board approval for the financing at the company. In the acquisition context, these letters are attached to bid papers and may be carefully reviewed by sellers as an element of the bid.

Lawyers tend to focus on preliminary agreements mostly as a guide to drafting definitive documentation. But it is a mistake to lose sight of the client perspective. Bankers and the company are keenly interested in the compensation arrangements, whereas lawyers see the fee amounts as “plug figures” in rather simple clauses. Though there is nothing much that the lawyers have to do with the fee arrangements, other than make sure they are accurately documented, it’s good to keep in mind how important these are to the clients. Fee arrangements may be confidential even within the larger working group. Sometimes fee arrangements are set out in separate letters so that they do not have to be disclosed in SEC filings or to third parties who need to understand the level of funding commitment, the conditions to funding, and the terms of the financing. The amount of the lead agent’s compensation may not be known to all participants in a tiered bank syndication. Lawyers may not always be as sensitive as they might be to these dynamics, and have been known to give away too much information by inadvertently filing or distributing documents containing the confidential fee arrangements.

A second best practice point is that clients who are not familiar with the particular market may not always have a good grasp of what they are getting and what they are committing to under a preliminary agreement. Giving an underwriter exclusivity does not commit the underwriter to provide the financing. A “drop dead” date in a bank commitment letter does not require the bank to fund by that date, instead it permits the bank to walk if the deal has not closed.

9.6 Due Diligence, Detail, And The Preliminary Agreement

It is important to identify the right level of detail for the preliminary agreement and the right amount of due diligence that should be carried out up front. Ideally, a term sheet should contain sufficient detail so that the parties are confident not only that a deal can be done but that getting there will not involve too many unpleasant surprises. Every seasoned lawyer will tell you about instances where late identification of a “showstopper” or near-“showstopper” (major le-gal, structural, or third-party approval issue or impediment) caused great embarrassment. Less dramatically, if a term sheet is too vague in an area of known sensitivity, subsequent negotiations may be protracted and unpleasant.

Is the answer a long and detailed term sheet? In my experience, people who are inclined to negotiate the details of a lengthy term sheet are quite likely to negotiate hard over the details of the far lengthier definitive documentation.

A term sheet that refers in shorthand to standard, so-called boilerplate provisions but is quite precise about basic structural assumptions and specific deal terms, and anticipates and resolves potential areas of important disagreement, represents an intelligent level of detail. Likewise, a measured amount of legal detail to life surface any “showstoppers” is sensible. It will help to think about third-party consents as well as the opinions that will likely be required at closing, and to focus especially on those opinions that will require statutory or contractual analysis. Early and frequent consultations with tax and other specialist lawyers are important.

The preliminary agreement phase should not include pre-negotiation of minor or routine points that can be easily compromised when the definitive documents are discussed. On the other hand, “finessing” a known area of likely misunderstanding or conflict in order to sign up a deal can turn out to be very unwise. Lawyers need to understand the pressures that may make their clients want to push through issues or, occasionally, sweep them under the rug, but it is our job to help the overall process along by asserting our best judgment on this type of question and call a halt for investigation and discussion where it is warranted.

9.7 Drafting And Negotiation

9.7.1 The Drafting Process

Once a preliminary agreement has been reached, lawyers for one of the parties—almost always the bank or the underwriter, except in the private equity context—will begin to prepare documents. Unless time is very short, these documents will go to the client first, and then start circulating among the larger group for review and negotiation. Unless the lawyer has an exceptionally good understanding of the client’s needs and expectations based on prior experience, it is nearly always right to resist client pressure to distribute initial drafts of documents to the other side without client review. There will be no going back from what is out there.

The drafting lawyer keeps the master. Over the course of a series of meetings, conference calls, and exchanges of documents, the documents are revised and the points of disagreement narrowed until the parties finally declare themselves satisfied, at which point execution copies can be prepared and the deal set for closing.

The drafting party generally has an advantage. The first draft sets the baseline for discussion and thereafter agreed-upon changes can be (though should not be) tilted slightly in favor of the drafting party’s client. Time pressures and inertia mean that many provisions will be accepted rather than fought over.

9.7.2 Golden Rules Of Document Drafting

The drafting lawyer is responsible for:
- fairly and responsibly reflecting in the words the agreed-upon outcomes of negotiation; failure to do this reflects badly on the professionalism of the lawyer or, worse, calls into question the good faith of the lawyer or the lawyer’s client;
- circulating correct redlines and properly marking or noting open issues;
- proofreading, carefully checking cross-references and the like, and making appropriate conforming changes; and
- working to keep documents as short as possible. The commenting parties should:
  - allow the drafting lawyer sufficient time to draft and, after negotiations, to redraft;
  - provide small comments in writing (not in a meeting or over the phone);
  - not (distinguishingly) make important comments or request important changes in the guise of conveying “nits”; and
  - exercise restraint in commenting (for example, do not rewrite for style).

All parties should allow enough time for everyone to carefully read and analyze documents before meeting or conveying comments. This is particularly true if you are representing a company where officers and employees outside the finance department or general counsel’s office may need to review particular parts of the documents. A rush to give initial (and too superficial) comments may be followed up with a second round of heavy comments—better to hold up the first go-round and make sure it is comprehensive. Allowing proper time for review at each stage will save time in the end.

9.7.3 How To Read A Contract

Another technique or discipline that will also save you time in the long run is structured reading of contract documents. Whether you are drafting or commenting on documents, working with a contract as a lawyer requires rigor and analysis. I suggest the following steps:

1. Look at the table of contents and give the document a straight read-through once so that you have a general sense of what it contains and where various provisions are located. Sometimes provisions can turn up in surprising places, so do not rely on headers or assume logical or even customary organization.
2. Read the contract closely for the important business terms and the substance of the negotiated points to make sure they are accurately reflected, cross-checking against the term sheet and checking off term sheet items to make sure they are all covered.
3. Analyze each part of the contract, closely keeping in mind how the contract provisions work together. This read should be at a very technical level. If the representations must be repeated at future times, are they written in such a way that they in fact can be? Are related subjects such as litigation, judgment
defaults, and judgment liens treated consistently across the conditions precedent, representations, covenants, and events of default? Subject-matter or functional reading, not linear reading, is required to make sure the contract is coherent and consistent.

4. Before finalizing the contract, another straight read-through is advisable, preferably after the dust has settled on redrafting a day or two. The purpose of the last read is to catch the incorrect cross-references, unclosed loops, and other loose ends that are the inevitable product of multiple piecemeal drafts. It is best yet if a fresh pair of eyes can be enlisted to do a cold read.

This kind of aggressive, structured, and staged reading and analysis is an essential element of successful contract drafting and negotiation.

Occasionally, documents are prepared under enormous time pressure so that there is no time for a "fresh eyes" or even "rested eyes" read before signing. In that case, it is good practice to look at the closing documents very carefully as soon as possible after closing, when the closing sets are being prepared. Parties are likely to be quite amenable to technical corrections of obvious errors, provided they are caught within the first few days. Of course, you will not be able to fix substantive omissions or problems in this way! Even so, were you to discover a problem requiring a quick amendment as a cure, that is better to do than not.

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9.7.4 Negotiation And The Lawyer's Role

Good contract drafting is not only a product of but an aid to negotiation. At a simple level lawyers can help parties reach agreement by softening language, using such formulas as "best efforts", "reasonable", "promptly" or "as soon as practicable" rather than "immediately", "consents not to be unreasonably withheld", appointment of a third party to make determinations; and so forth. These are all part of a lawyer's toolkit.

Lawyers can also help by listening carefully and by asking probing questions. A discussion between the two sides over a disputed issue may suggest to the resourceful lawyer a more precise and detailed formulation of the provision at issue that would be acceptable to both parties. This sort of probing will also help the lawyer define precisely what each party is interested in and avoid "over-drafting."

Most obviously and significantly, good lawyers add value to negotiations because they can bring to the table solutions they have seen in other similar deals. They are also experienced in negotiation per se—managing meetings and discussions toward fruitful ends. Importantly, lawyers are professional advisors, not principals. As professional advisors they have duties to the client, but also to the integrity and quality of the process. Because lawyers are not principals and can (or should) maintain a disinterested perspective, they can, in the best of circumstances, provide wise counsel, not making business decisions but making sure their clients have considered the situation and alternatives in the most constructive light. Objectivity can help in avoiding some common errors in decision-making.

9.7.5 Common Errors In Decision-Making

There is established literature on the subject of systematic errors in decision-making. A few points are relevant in the negotiation context:

- Availability: The ease of recall of a fact or certain events will cause us to overestimate its importance or frequency. We tend to overweight what we know from recent experience and discount or ignore what isn't familiar to us.
- Representativeness: We tend to put too much emphasis on associations we have noted in the past in making conclusions about the facts before us.
- Anchoring and adjustment. We tend to grab onto any quantitative input and adjust from there, no matter how baseless the input.

In other words, we tend to put too much faith in our own recent experience, no matter how limited; we tend to reason from one example to other situations even though we shouldn't; and we tend to work off what we have in front of us, such as figures presented in the first draft of the document, whether or not it presents a reasonable starting point.

Other processes you will see at work in a typical negotiation:

- People will sometimes pursue a series of "what-if" scenarios to the point of utter remoteness, or to a level of complexity that cannot be resolved in advance.
- In other cases, people making difficult or painful decisions between x and not-x find themselves debating the pros and cons of these, when in fact not-x is clearly a non-starter. The thinking would be better put to use in making sure that the x/not-x dichotomy is right in the first place.
- Self-serving biases affect the reading of ambiguous language and sometimes make even spotting a potential ambiguity difficult.
- The perception of risk can be significantly influenced by how the risk is presented. Studies indicate that people tend to be risk-averse when looking at potential gain (a sure gain of $100 is better than a 50% chance of $200 gain) and risk-tolerant when they are looking at potential loss (a sure loss of $100 is worse than a 50% chance of $200 loss).
- People assign real, non-rational, value to getting a good deal. As a corollary: After the fact, people prefer to avoid confronting that they have overpaid or left money on the table.
- Perceptions of value may be skewed by context and timing. The example frequently cited is that while you might walk three blocks to save $10 on a $25 calculator, you would be less likely to walk the same three blocks to save $10 on a $200 television. You would typically demand more to part with something you already own than the price you would pay to buy it. We ascribe more value to money paid or received now than money to be paid or received in the future, over and above the time value of money.
- You can sometimes maximize perceived value by unbundling—servicing up the same consideration or negotiating concessions piecemeal over time or in the form of a generous-looking list. This is the reason that you will often find a negotiator's list of "points conceded" containing a number of easy gives, or maybe the same basic point conceded in a number of ways. Of course, one of the lawyer's jobs is to see through this sort of thing.
- People respect a norm of fairness and expect it to be observed in the short term and over time. People who push for the absolute last advantage when they have the upper hand can expect no mercy when the tables are turned. People in the financial world move around a lot, and no one can say exactly what the future will bring. This is why experienced business people often want to feel that they have left a little something on the table for the other side.
- Team dynamics tend to bind the members together and to make each team discard the abilities, even the motives, of the other team. This unrealistically negative view of the other side is generally not constructive and may well blind us, to an even dangerous degree, to our own relative weaknesses and vulnerabilities.
- A major motivator in decision-making is the avoidance of regret; the impulse to critical hindsight (second-guessing) is nearly irresistible. And people tend to regret results of actions they affirmatively take more than they regret the results of inaction or even neglect. So people often take one path because they could not bear the reproach (including self-reproach) associated with possible outcomes of taking the other.
- Negotiations, especially in the bidding context, frequently feature "non-rational escalation of commitment," where the decision maker has too much invested in the stop-reverse course. Another version of this is the "sunk costs" dynamic: You have spent $100 on ballet tickets, but when the night of the performance rolls around you would rather do something else. Do you have too much invested in the ballet to skip it? Or should you look at it this way instead: You've spent the money and it's gone. That decision is in the past. Now what is the best expenditure of your time and energy tonight? Time and again, people throw good money after bad, prop up previous investment decisions with additional questionable investments, and overlook in bidding contests. We do it to save face and to avoid recognizing our earlier wrong decision. (Bankers move bad loans from the customer relationship officer who made the loan to a special audit department expert in dealing with troubled credits in part to deal with this dynamic.)
- People frequently devote disproportionate time to negotiations to haggling over variables such as dollar amounts and time periods, and to pet subjects—topics that are inherently intriguing, current, or of particular interest to the negotiating parties though perhaps not that relevant to the deal. When this gets out of hand, lawyers should help the parties manage their time and attention more appropriately.

9.8 Closings
9.8.1 Good Closings

A closing represents the real-world satisfaction of the conditions precedent in a contract. At the closing, the transaction that is the subject of the contract is consummated, so the last event to occur will be the filing of the merger certificate in the case of a merger, or the exchange of funds against the issuance of securities in a securities offering, or the funding of the term loan under a credit agreement. A closing under a revolving credit agreement means that the conditions to effectiveness have been met; there may be a shorter list of conditions to be met at the time of each borrowing.

The closing may be as simple as obtaining relevant physical or electronic signatures and confirming that these have been received and are in good order, so that you are "closed." At the other end of the spectrum, a closing may involve so many parties, documents, and actions that it is scheduled well in advance and takes place in many rooms over a number of days or in stages.

Focusing on the nuts and bolts of a closing is important because a realistic appreciation of the relative difficulty of meeting various conditions will both sharpen your precision in defining these conditions early on and make you think about the logistics of reaching the clients' shared goal of consummation or effectiveness of the deal. More pragmatically, clients recognize that a smooth and professionally executed closing is a mark of competent, organized, and considerate lawyering. A botched, sloppy, or overly emoted closing, with the clients on pins and needles, is neither appreciated nor easily forgotten.

The key to a successful closing is preparation, teamwork, and more preparation. In any complex closing, it is inevitable that one or more unforeseen last-minute hitchhes will require all of your attention to untangle. If you have reduced everything that could possibly have been foreseen to the mechanics of a checklist then it is important to be ready to deal with the unexpected and to tend to clients. That unexpected phone call, delay, or overlooked detail will seem like a major crisis instead of an ordinary glitch if you are busy fooling around with routine matters that have been left to the last minute.

Advance preparation includes a closing memo or list. Early on, the drafting lawyer or, if the drafting lawyer cannot or will not do it, the commenting lawyer must put together and circulate a closing memorandum corresponding to the conditions precedent in the contract. The closing list must be detailed: it should have a column for status and a corresponding column identifying the person responsible for each item. The closing list should be the subject of early and frequent meetings or phone calls; it should be annotated, updated and recirculated often. Potential problems (for example, third-party consents, surveys, appraisals, or delinquency in circulating draft certificates for comment) should be identified and dealt with firmly.

A client relations tip: Do not assume that authorized signatories for the agreements (client officers) will make themselves available for signing at the lawyers' convenience. Clients do not like being tracked down at the airport or being paged on the beach to sign documents. Advance planning is required and it may be a good solution to hold pre-signed signature pages so long as you use them only as clearly instructed (the instruction memorialized in writing) by the client.

9.8.2 Typical Documentary Requirements

Beyond execution and delivery of the principal documents, the company (if a corporation) will be expected to deliver documentation evidencing corporate existence (through evidence of good standing from the secretary of state of the jurisdiction of incorporation), certified copies of the articles or certificate of incorporation (certified by the secretary of state or, providing a lesser level of comfort, the corporate secretary), copies of the bylaws certified by the corporate secretary, and copies of board resolutions approving the transaction and certified by the corporate secretary. The authorizing resolutions might be general (for example, approving borrowings not to exceed $50 million for working capital purposes), but significant transactions should have specific authorizing resolutions (likely referring to the preliminary agreement terms).

Documents to be certified by a secretary of state or other government official need to be ordered in advance. Certification by a corporate secretary involves nothing more than obtaining the corporate secretary's signature to a statement that "The attached is certified to be a true and correct copy of the [specific document of general relevance or date or dates—for example, including the date board resolutions were adopted through the date of closing], with possibly the corporate seal affixed by the secretary. Affixation of the corporate seal has become relatively unimportant in modern practice, but some bylaws still require it for some documents.

For legal entities that are not corporations, such as LLCs and partnerships, lawyers must understand the legal structure and authorization procedures (for example, by action of the general partner in the case of a limited partnership) and, as necessary, trace the chain of authorization up through as many entities as necessary to establish due authorization and execution, performing this analysis at each level. This requires looking at the state or other law under which the entity was organized, and the organizational documents. Particularly with respect to private equity, ownership may be through a series of limited partnerships, whose general partners are themselves limited partnerships, or other legal entities. Foreign entities are likely to have their own formalities and authorization arrangements, which should be respected so long as foreign lawyers advise they are sufficient.

It is also important to identify the person actually signing the relevant documents on behalf of the corporation or other legal entity in an incumency certificate, the corporate secretary attests that the person signing is the duly elected officer of the corporation and is duly authorized to execute the documents on behalf of the corporation, and further attests to a specimen signature of the person. Institutions such as banks keep books of signatures of persons authorized to sign on behalf of the institution. The relevant book may be inspected by counsel for the other side or the page may be photocopied and certified as a true and correct copy. Likewise, foreign companies may present evidence that the signing person is a managing director, which may be sufficient to authorize the person to bind the company.

In more formal closings, the secretary's signature would itself be certified through a so-called cross-incumency certificate (provided by another corporate officer), which states that the secretary is the duly elected secretary of the company and the specimen signature of the secretary (on the cross-incumency certificate) is true and correct. The value of a cross-incumency certificate is greatly reduced if the secretary certifies as to the signing officer, and then the signing officer certifies as to the secretary! The better practice is for a third officer to certify as to the secretary.

Banks and other financial institutions do not generally produce documents evidencing corporate authority, exceptions being where the bank is taking on obligations to investors (acting as corporate trustee, providing a liquidity facility to support bonds, or providing a letter of credit).

9.8.3 Potential Documentation Problems

Even relatively simple documentary requirements may yield up problems that can generate serious nail-biting and worry, if discovered on the eve of closing. It is far better to identify these problems and cure them in advance.

- Once in a while, though rarely, you will find that an issuer's charter limits the powers of the corporation in a way that affects your deal. This problem has become practically extinct, given the use of generic form charters and the broad powers language in state business corporation statutes. However, it is still an issue in the municipal finance, governmental agency, and non-profit sectors. Special purpose vehicles may have very limited powers, perhaps designed for just a specific deal, so recycling a special purpose vehicle for a new or expanded deal may turn out to be problematic.
- The review of bylaws occasionally turns up a problem. Some require the affixation of a corporate seal to certain types of legal documents. Some require two officers to sign certain types of agreements. Some do not specify any standing authority for officers, leaving their ability to bind the corporation absent board action open to question.
- If you are in charge of making sure that a resolution was duly adopted, you need to track the state law, charter, and bylaw provisions regarding board
action and make sure of compliance. In the case of subsidiaries, you may find that shareholders have not acted to elect directors in some time, that the board has not met to select officers, or that board members have resigned without replacements, etc. It may take time to get the corporate house in order for closing.

- Upon close inspection, many "standing" resolutions fall short. Poorly drafted resolutions or resolutions drafted far in advance may turn out to raise questions. A typical dilemma faced by outside lawyers is where the company's standing resolutions authorize "aggregate working capital borrowings not in excess of $50 million." Does this permit a particular credit agreement? Possibly. How can outside lawyers know in advance and opine that borrowings under that credit agreement and other working capital borrowings in total won't exceed $50 million? The answer is that they cannot, so some combination of officers' certifications, conditions to borrowing, covenants, and assumptions in the opinion will have to plug the gap. A resolution specifically authorizing borrowings under the relevant credit agreement, appropriately defined to include amendments and extensions, is preferable. But in-house counsel and financial officers are understandably reluctant to approach their boards for new resolutions, especially if it requires scheduling a special meeting. For this reason, early review (in time to cure problems at a regularly scheduled board meeting) is recommended.

- State statutes, corporate charters, and bylaws may impact directly on execution of a transaction. To leave review of these to closing (while preparing the legal opinion, for example) can be a potentially fatal error. Delaware General Corporation Law section 203 imposes limitations on certain transactions with interested shareholders; replacing a board or holding a board meeting may be difficult; preferred stock terms, which are contained in charter documents, may include covenant-like terms or mandatory redemption requirements triggered by your deal; or the number of shares of stock that can be issued is limited. These types of issues, if they affect your deal, really come under the heading of due diligence—discovering them at closing will be too late.

9.8.4 Requirements In The International Context

Signatures of non-U.S. persons can be attested by their consuls or by notaries in their countries, whose notarial certificates are then consularized. Embassy websites can provide information on these procedures.

In some countries, notaries have a role closer to that of an American lawyer and unlike that of an American notary public. Both their prestige and their remuneration (including notarial fees, which might be imposed on an ad valorem basis) are significant, and they may provide advice of a legal nature that must be heeded.

In some countries, stamp taxes (taxes imposed for the formalization of certain contracts) apply, and these can be significant as well.

9.8.5 Related Transactions And Simultaneous Closings

If a deal is tied to the consummation of a related transaction, such as a merger or acquisition, the availability of other financings, exit from bankruptcy or the pay-off of financings that are being retired, then the closings of these individual transactions will be linked and cross-dependent.

This is the "chicken and egg" problem. All the closings are conditions precedent to each other. But if a new financing is dependent on the release of collateral pledged under an old financing, which is to be repaid with the proceeds of the new financing, how do you ever get there? If somebody takes the first step on trust, what are the chances that things will get stuck in the middle? Although a theoretically difficult problem, here is how it works. Everybody relevant to the final sign-off on each piece of the deal stands by. They acknowledge they are about ready to go, and the first steps involving third parties—filings and payments—are initiated. People, or maybe just some of the people, hang around to make sure that all the other steps fall into place.

Keep a close eye on funding deadlines and the time of day. The reason that most financing transactions "preclose" a day early is to permit funding (wire transfers) to commence early in the day and complete well before day's end. In a complex matter, lawyers will need to take time out to help their clients map funding instructions or, if these are prepared by others, to make sure they are in order. If you don't meet the funding deadline, you may come up to the moment of closing and be stalled out. A closing that "hangs" overnight on payment delays can require parties to make adjustments among themselves to compensate for the overnight loss of funds, but, in the odd case, could raise difficult issues as to whether or when the deal has closed.

9.9 Opinions

9.9.1 Opinions Are Hard; Not Just A Word-Processing Exercise

It is customary in the United States for legal opinions to be given as part of the closing of corporate finance transactions. Legal opinions represent the opinion giver's conclusions as to legal issues and facts of a legal nature. When a law firm renders an opinion, it is stating that it has reached certain conclusions on the basis of a review of relevant facts and law, and is taking on the associated liability. It is fair to say that giving a legal opinion heightens the level of due diligence or scrutiny of the matters covered. In addition to opinions required from the principal lawyers running the deal and in-house counsel, a transaction might merit opinions from local, foreign, or special expert counsel.

Sometimes a difficult legal issue merits a supplemental opinion or memorandum of law, and the conclusions in the opinion or memorandum might be qualified or "reasoned," not "clean" or "flat." Other times, parties decide that it is in everyone's best interest to deal with the issue orally and informally, rather than creating a written record of the pros, cons, uncertainties, and vulnerabilities that a reasoned opinion or memorandum of law will lay out.

Though opinions are closing items, they require early attention. It is not just a question of producing a document to be signed. Opinions are not and should not be aspects of deal execution that engage the client's attention in the ordinary course. If there is a problem with an opinion at closing, then it is almost always a clear indication that the lawyers fell down on the job earlier on.

Lawyers have come to recognize that, while opinions serve the valid purpose of encouraging close scrutiny of legal issues, neither the profession nor business clients have been well-served by traditional opinion practice. Practices and standards on even the simplest issues can vary greatly. In particular, a schism developed between the so-called California style of opinion, check-full of exceptions and qualifiers, and the so-called New York style of opinion, kept short on the basis that the common exceptions and qualifiers are understood by the presumpatively well-informed and well-advised recipient. (This may be in accordance with the New York courts' strict construction of contracts and their general disinclination for inferring or creating protections for which the parties haven't bargained.) Now that firms operate in multiple jurisdictions, the style differences can arise within a single firm, with the offices in the various states rendering differing opinions on comparable issues in comparable situations.

Lawyers have also expressed concern regarding the extent to which knowledge might be imputed from one lawyer to another in a large firm with branch offices, or the extent to which general language in an opinion might be read to cover specialized legal issues beyond the competence of the general corporate or finance practitioner. Clashes between firms that are really about different opinion practice can become high-visibility showstoppers at closings, in front of the clients and to the credit of none of the lawyers involved. For these reasons, the profession has tried to progress standards of opinion practice, but these efforts have fallen short of establishing a uniform opinion practice.
The standard opinion for a corporate finance transaction is given by counsel to the company, but delivered to and relied upon by the banks, underwriters, or purchasers (the "buy side"). (Lawyers for the "buy side" often give a basic opinion as well.) The basic opinion usually covers:

- the existence and good standing of the company and its corporate power and authority to enter into the transaction;
- due authorization, execution, and delivery of the agreements; and
- the validity, binding effect, and enforceability of the agreements (this is the "enforceability opinion").

Due diligence for the first point consists of a review of recent evidence of good standing (a certificate from the relevant state authority for the jurisdiction of incorporation) and of the charter and bylaws; for the second, review of authorizing resolutions, incumbency certificates, and signatures on the executed documents; and, for the third, the review of the substance of the agreement for possible problems of enforceability under the stipulated governing law.

Corporate existence and power, as well as due authorization, are governed by the laws of the jurisdiction of incorporation. Execution and delivery is a question of both the laws of the jurisdiction of incorporation and the governing law, while the "enforceability opinion" is a matter of stipulated governing law.

Opinion practice would generally be that a lawyer admitted to practice in any state can review the good standing issue, since the opinion is given in reliance on the certificate of a government official. Many firms not admitted in those states give opinions on the corporate law of Delaware or, in the Western United States, Nevada. The enforceability opinion is more difficult to deal with if the opinion lawyer is not admitted in the state of the governing law. This can sometimes be finessed by giving the opinion as if the governing law were the law of the state in which the counsel is admitted, or with an assumption that the governing law is in all relevant respects identical to the law of the state in which the counsel is admitted; depending on the circumstances, this approach may not be acceptable and other lawyers,

qualified in the relevant jurisdiction, will have to be engaged to give the opinion.

9.9.3 Conclusions About Legal Facts

A second set of opinions might be characterized as conclusions about legal facts:

- that the borrower and its subsidiaries are qualified to do business in the relevant jurisdictions;
- that the current deal does not violate applicable law, judgments, or other contracts;
- that there is no material litigation affecting the borrower or the deal (which has not been disclosed); and
- that a related transaction (such as a merger) has been consummated.

The first and third of these opinions are most properly the province of the in-house counsel, or of outside counsel only if outside counsel provides ongoing legal representation of the borrower. Outside counsel could opine as to no violation of applicable law, limited to the law of the jurisdiction in which counsel is admitted. Outside counsel could also, given sufficient notice, cover non-contravention of specified contracts after a review of them, and could properly cover consummation of related transactions in which it is acting. Otherwise, these matters will likely fall to in-house counsel to cover.

9.9.4 Security Interest Opinions

Special legal opinions are usually required if there are mortgages or other security interests or pledges. Again, the governing law issues are tricky. It is customary for mortgages to be governed by the law of the jurisdiction in which the real property is located. Security agreements usually specify as governing law the law that governs the principal credit document. In any event, U.C.C. perfection is most commonly governed by the law where the borrower is incorporated (for a domestic corporation). Federal law impacts security interests in some types of collateral; foreign law is relevant to perfection of pledges

by foreign companies and to pledges of stock of foreign companies and other foreign assets. The point to take away from this is that there may be numerous difficult choice of law questions implicated in a simple opinion that "the security interests are perfected." Dealing with them properly and lining up outside counsel as necessary are long lead-time items.

9.9.5 True Sale And 10b-5 Opinions

Other opinions that may actually shape a deal or drive its execution are "true sale" opinions in the securitization context and, of course, "10b-5 opinions," which cover the adequacy and accuracy of disclosure (and opinions on compliance as to form in the securities offering context). Suffice it to say that a last-minute request for an opinion of this type would be considered out of bounds, professionally speaking.

9.9.6 Rules To Opine By

Rules of professional courtesy should dominate opinion practice. Opinion practice is hard, and many lawyers find it tedious as well. In truth, it is one of the more scientifically exercises that a corporate lawyer must perform and is a long way from the excitement of cutting a deal. For these reasons, opinion practice tends to get short shrift as a matter of overall attention and timing; and when lawyers finally turn to the opinions, at or just prior to closing, it is easy for tempers to flare. Everybody feels put-upon. Even worse, every so often the opinion exercise does in fact turn up a show-stopping or stomach-churning legal problem that did not, as the parience goes, get focused on up front.

- The first rule of opinion practice is: Get the opinion request or proposed draft on the table right away, and get it out of the way, that is, every jot and tittle of the wording agreed to, well in advance of the closing. This requires the cooperative effort of both sides of a deal. In the end, it does the deal no good if the opinion request goes out with the first draft of the document, but the first response back is the opinion that shows up on the closing table. The greatest sin, though, is the last-minute demand for an opinion that cannot be given without extensive research or due diligence, such as a 10b-5 opinion in a Rule 144a offering or private placement, or a non-contravention opinion.

- The second rule lawyers should observe is the "golden rule" of opinion practice. A firm should not ask for or require an opinion, within its general area of competence, of a sort that it itself, would not be able and willing to give.

- The third rule is the more substantive corollary to the "golden rule": You cannot fix a known legal problem by getting an opinion that there isn't one. If you know there is an uncertainty as to a legal issue, not only is it unfair to ask for a "flat" or "clean" opinion that ignores the uncertainty, but, more substantively, the opinion does not make the uncertainty go away. If you receive an opinion that is not supported by the facts and the law, you might, at best, be able to sue the opinion giver for malpractice, which is not really much of a fix for financial loss or legal liability, and further assumes that you, as recipient, were not aware of the issue and relied on the inaccurate legal opinion. Hence, it is inappropriate for a firm or a client to pressure a lawyer to give a flat legal opinion in order to paper over an underlying legal problem or uncertainty.

- It is appropriate to make an opinion lawyer do the necessary work to give an opinion that is in fact important for the deal. Opinion practice requires a cost-benefit analysis that should be addressed early on. The most common problem that arises is the resolution of the proper scope of the opinion and the determination of who will be responsible for the different parts of the opinion. If an opinion request legitimately covers perfection of security interests in collateral having material value, and if the borrower's counsel is not a U.C.C. expert in the relevant states, then supplemental opinions will have to be obtained. If there is U.C.C. collateral in fifty states and three foreign countries but 95% of the value of the
collateral is pledged by obligors "located" in two states, then it would be unreasonable, in most deals, to require U.S. local counsel opinions for more than those two states. On the other hand, if perfection is sought in foreign jurisdictions, advice, if not opinions, of foreign counsel will be required. The lawyers need to work this sort of thing out well in advance of closing and since incremental legal costs are involved, it is certainly a business issue as well as a lawyer's issue. (Note that, even though lawyers not qualified in Delaware may give basic Delaware corporate law opinions, they generally will not give Delaware U.C.C. opinions.)

- The other common scope problem is the coverage of the noncontravention opinion (and to a lesser extent, other corporate housekeeping opinions, such as qualification to do business in multiple jurisdictions). Giving a non-contravention opinion, to the effect that the instant deal does not violate the terms of other deals, requires documentary review and analysis of the type explained in this book. It is time-consuming and hard for outside lawyers and, thus, costly for clients, except in the case where those same outside lawyers have recently worked on the contract being reviewed for compliance. Scope questions like this usually get resolved by asking in-house counsel to cover this and other matters that they should be monitoring in the ordinary course.

- Opinions given must not be misleading. If an opinion is technically correct but, in the totality of the circumstances, fails to put the recipient on notice of a problem or anomaly, then the opinion giver has not acted properly. Likewise, it is not appropriate to disingenuously request an opinion that looks ordinary and simple on its face but, as a technical matter, covers or may be read to cover a point that is known by the requesting party to be problematic or questionable.

9.10 Post-Closing

9.10.1 Final Documents And Closing Sets

After the closing, the lawyers should scrutinize the final documentation, distribute it to the parties, and prepare the closing set for the firm's own record. Preparing correct reference versions of final documents is especially important. These are the versions that parties and lawyers will rely upon later to understand the parties' rights and obligations and, in the case of the lawyers, to give advice.

The exercise of creating a final record of the matter has become more challenging in the era of electronic documents and records. In particular, lawyers may rely upon electronic versions of documents that reside in their document management system without being properly locked down. These documents might be inadvertently altered after closing. Another problem is that hand-written changes made at closing might not be made in the electronic version of the document, once again making the electronic version unreliable. Unfortunately, it is not unheard of for lawyers to give incorrect advice on contract questions because they pulled up a document on their computer systems, instead of looking at a reliable copy (either paper or a locked-down and fully conformed electronic version) of the document as executed.

9.10.2 Post-Closing: Amendments, Waivers, And Questions Of Interpretation (When To Call A Lawyer)

After the closing, clients may call with questions about how to interpret the documents or with other questions about the deal. Sometimes they will have a question about whether something is permitted under the agreement, they may have news of an impending default, or they may say that they need to amend or refinance the deal. Requests for amendments, waivers, and proposed refinancings present rather straightforward tasks for corporate finance lawyers. Difficult questions of interpretation and issues that may lead to declaration of a default or taking remedies should be handled in consultation with other lawyers, including, as appropriate, litigators or bankruptcy/workout specialists. If there are indications that a company is entering into the troubled credit zone, an audit of any collateral security arrangements to assure perfection may be called for. In other cases, such as securitizations, it may be appropriate to review other aspects of compliance with documentation with collateral trustees and administrators. In all cases where interpretation of language is at issue, lawyers should consider whether, in hindsight, their own work and advice could be questioned, and consult with risk management colleagues where that might be the case.