BULLETIN

OF THE BUSINESS LAW SECTION

Vol. 29 | Special Issue (June - September 1992) | Nos. 2 & 3

STATE BAR OF TEXAS

BUSINESS LAW SECTION

REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS

June 1, 1992

STATE BAR OF TEXAS
BUSINESS LAW SECTION
LEGAL OPINIONS COMMITTEE

Darrel A. Rice, Chairperson
Dallas, Texas

COMMITTEE AND SUBCOMMITTEE MEMBERS
1989-1991

Subcommittee on Definition, Purpose, and Scope of Legal Opinions

Beverly Goulet, Chairperson	Dallas, Texas
Darrel A. Rice	Dallas, Texas

Subcommittee on Remedies Opinion

Campbell Griffin, Chairperson	Houston, Texas
Richard C. Johnson	Dallas, Texas
Patricia H. Holmes	Houston, Texas
Dudley W. Murrey	Dallas, Texas
Ken Miller	Houston, Texas

Subcommittee on Ethical Responsibilities and Potential Liabilities

Geoffrey Walker, Chairperson	Houston, Texas
Richard A. Tulli	Dallas, Texas
David G. Elkins	Houston, Texas
Dexter P. Peacock	Houston, Texas
John T. Kipp	Dallas, Texas

Subcommittee on Commonly Used Opinion Clauses and Recommended Procedures

Scott Cohen, Chairperson	Dallas, Texas
David Meyercord	Dallas, Texas
Sally A. Schreiber	Dallas, Texas
Sam Rosen	Fort Worth, Texas

Subcommittee on Opinions Regarding Personal Property Security Interests

Ira Einsohn, Chairperson	Dallas, Texas
Rick Goyne	Dallas, Texas
James McKellar	Dallas, Texas

Subcommittee on Negotiation, Preparation, Quality Control, and Factual Basis for Opinions

Steve Cochran, Co-Chairperson	Dallas, Texas
George Coleman, Co-Chairperson	Dallas, Texas
Scott Wallace	Dallas, Texas

Subcommittee on Legal Opinions Regarding Usury and Conflicts of Law

Dennis Anderson, Chairperson	Houston, Texas
Jim Wallenstein	Dallas, Texas
John Gangstead	Austin, Teas
Kenneth A. Rogers	Dallas, Texas

Subcommittee on Forms of Opinions

Michael Shearn, Co-Chairperson	San Antonio, Texas
Tad R. Smith, Co-Chairperson	El Paso, Texas

1992 Members

Max Addison	Houston, Texas
R. Dennis Anderson	Houston, Texas
Richard M. Byrd	San Antonio, Texas
Vincent Carson	El Paso, Texas
Steve Cochran	Dallas, Texas
R. Scott Cohen	Dallas, Texas
George W. Coleman	Dallas, Texas
Ira D. Einsohn	Dallas, Texas
David G. Elkins	Houston, Texas
Beverly K. Goulet	Dallas, Texas
Roderick A. Goyne	Dallas, Texas
Campbell A. Griffin, Jr.	Houston, Texas
Patricia H. Holmes	Houston, Texas
Richard C. Johnson	Dallas, Texas
John T. Kipp	Dallas, Texas
James W. McKellar	Dallas, Texas
David Meyercord	Dallas, Texas
Ralph K. Miller, Jr.	Houston, Texas
Dudley W. Murrey	Dallas, Texas
P. Dexter Peacock	Houston, Texas
Darrel A. Rice	Dallas, Texas
R. Barrett Richards	Amarillo, Texas
Kenneth A. Rogers	Dallas, Texas
W. Christopher Schaeper	Houston, Texas
Sally A. Schreiber	Dallas, Texas
Tad R. Smith	El Paso, Texas
Richard A. Tulli	Dallas, Texas
Geoffrey K. Walker	Houston, Texas
Scott Wallace	Dallas, Texas
James H. Wallenstein	Dallas, Texas
Richard G. Williams	Fort Worth, Texas

Ex-Officio Members

Evelyn Biery	San Antonio, Texas
Byron Egan	Dallas, Texas
Charles C. Szalkowski	Houston, Texas

STATE BAR OF TEXAS
BUSINESS LAW SECTION

REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

EXHIBITS

Illustrative Opinions

Accord Opinion

Non-Accord Opinion

Illustrative Qualifications

Illustrative Form of Officer's Certificate

Selected Bibliography

STATE BAR OF TEXAS
BUSINESS LAW SECTION

REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS

June 1, 1992

I. INTRODUCTION TO THE TEXAS REPORT AND ITS INTENDED USE

A. Background of the Opinion Committee Project.

1. Formation and Goals of the Committee. The Legal Opinions Committee of the Business Law Section of the State Bar of Texas was organized and began its work as an ad hoc committee in June 1989. The Committee was originally comprised of twenty-seven members, all of whom were experienced business lawyers from law firms located in various cities in the State of Texas. The Committee became a standing committee of the Business Law Section of the State Bar of Texas in 1990, and continued its work with the intent of publishing the report of the Committee prior to June 30, 1992.

The goals of the Committee were primarily to encourage and express a consensus of Texas business lawyers with regard to (i) the philosophy and purposes of legal opinions rendered to third parties in business transactions; (ii) uniform approaches to format and coverage of such opinions; (iii) the meaning of certain words and phrases commonly used in legal opinions; (iv) guidelines for negotiation of and factual investigation to back up legal opinions; and (v) guidelines for Texas lawyers with respect to professional ethics and maintaining professionalism and quality control in connection with legal opinions. To achieve these goals, the Committee agreed to prepare a comprehensive report covering these topics, to be published as an educational tool and a guide to Texas lawyers in negotiating and drafting legal opinions.

2. Review of Reports by Other Bar Groups. The Committee reviewed and discussed the special reports on legal opinions by various bar groups,[1] including the Preliminary Draft of the Statement of

---

[1] The first state bar opinion project was a joint effort of the City, County and State of New York bar associations, beginning with Tri-Bar Opinion Committee, Legal Opinions to Third Parties: An Easier Path, 34 Bus. Law. 1891 (1979) [hereinafter Tri-Bar Report]; followed by Tri-Bar Opinion Committee, An Addendum--Legal Opinions to Third Parties: An Easier Path, 36 Bus. Law. 429 (1981) [hereinafter Tri-Bar First Addendum]; and Tri-Bar Opinion Committee, Second Addendum to Legal Opinions to Third Parties: An Easier Path, 44 Bus. Law. 563 (1989) [hereinafter Tri-Bar Second Addendum] [collectively hereinafter New York Report]. Several business practice sections of the California Bar have published a series of reports, including the Committee on Corporations of the Business Law Section of the State Bar of California, Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions, 14 Pac. L.J. 1001 (1983) [hereinafter California 1983 Corporate Report]; Committee on Corporations of the Business Law Section of the State Bar of California, 1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions, 45 Bus. Law. 2169 (1990) [hereinafter California 1989 Corporate Report]; Uniform Commercial Code Committee of the Business Law Section of the State Bar of California, Legal Opinions in Personal Property Secured Transactions, 44 Bus. Law. 791 (1989) [hereinafter California UCC Report]; and Joint Committee of the Real Property Section of the State Bar

(continued...)

Policy Regarding Lawyers' Opinions in Mortgage Loan Transactions by the State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, 1985.[2] The Committee is deeply indebted to these groups, and has borrowed heavily from and utilized their reports in the preparation of this report. Other sources are listed in the Selected Bibliography attached hereto as Exhibit "H".

3. **Drafting by Subcommittees and Presentation of First Discussion Draft**. This report was initially drafted by several subcommittees of the Committee. Each subcommittee considered and drafted a part of the report, which was then submitted to the entire Committee for review and comment, and discussed at one or more of the regular meetings of the Committee. This first discussion draft of the entire report was furnished to the Committee in December 1990, and was presented as a discussion draft at the Advanced Business Law Course sponsored by the State Bar of Texas in San Antonio, Texas on January 25, 1991, and at the 13th Annual Conference on Securities Regulation and Business Law Problems sponsored by the University of Texas School of Law in Austin, Texas on March 7, 1991.

4. **Adoption of the ABA Report and Legal Opinion Accord**. The most significant recent development in legal opinion practice is the adoption and publication of the ABA's Third Party Legal Opinion Report and Legal Opinion Accord.[3] The ABA Report was designed to establish "a national consensus as to the purpose, format, and coverage of a third-party legal opinion, the precise meaning of its language, and the recognition of certain guidelines for its negotiation."[4] The ABA Report is limited to use in private (versus public) finance, excluding opinions in tax shelters, or in a regulatory context. The ABA Report generally does not cover the technical aspects of legal opinions dealing with security interests in personal property, or other secured financings.

The ABA Report has three parts. The first part is the Legal Opinion Accord (hereinafter the "Accord" or the "ABA Accord"), which consists of twenty-two "black letter" rules with accompanying commentary. The Accord is designed to be adopted by reference in legal opinions. The ABA Accord is intended to govern those opinions that expressly adopt it. Following the ABA Accord is an "Illustrative Opinion Letter," which demonstrates the use of the Accord in an opinion letter. The ABA Report concludes with "Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions."

---

[1](...continued)
of California and the Real Property Section of the Los Angeles County Bar Association, Legal Opinions in California Real Estate Transactions, 42 Bus. Law. 1139 (1987) [hereinafter California Real Estate Report] [collectively hereinafter "California Reports]. Two recent state bar projects have been Special Joint Committee of the Maryland State Bar Association, Inc., and the Bar Association of Baltimore City, Report of the Special Joint Committee on Lawyers' Opinions in Commercial Transactions, 45 Bus. Law. 705 (1990) [hereinafter Maryland Report]; and Report of the State Bar of Arizona Corporate, Banking, and Business Law Section Subcommittee on Rendering Legal Opinions in Business Transactions, (Feb. 1, 1989) [hereinafter Arizona Report].

[2] Much useful information regarding the practices of Texas lawyers practicing in the mortgage lending area is provided by State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, Opinion Letters in Mortgage Loan Transactions: Preliminary Draft of the Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions, St. B. Newsl. Real Est. Prob. & Tr. L., Jan. 1985 at 20 [hereinafter Texas Real Estate Report].

[3] Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association, 47 Bus. Law 167 (1991) [hereinafter ABA Report]. The ABA Report is available in pamphlet form as reprinted from the November 1991 (Volume 47, Number 1) issue of The Business Lawyer.

[4] Id., Foreword, at 169.

5. **Adoption of the ABA Report and Legal Opinion Accord by the Texas Committee**. The Committee agreed that it would not finalize the Texas Report until after the ABA Report was published in final form, in order to avoid conflicts between the Texas Report and the ABA Report. The approach of the ABA Report and the Accord included therein are included in this Report, and the ABA Report is adopted by the Committee as part of this Report. However, the Texas Report is more comprehensive than the ABA Report, and covers matters such as professional responsibilities and potential liabilities in connection with opinions, common corporate opinions, the technical aspects of legal opinions regarding security interests in personal property. The final discussion draft of this Report was presented on March 12, 1992 at the 14th Annual Conference on Securities Regulation and Business Law Problems sponsored by the University of Texas School of Law in Austin, Texas.

B. Scope of This Report.

The scope of the this report is confined to (i) legal opinions in business transactions given to clients or to third parties in private transactions, including without limitation such transactions as commercial loans, private placements, underwritings, mergers, acquisitions and other business combinations, and (ii) opinions relating to loans secured by personal property. This report does not cover technical securities law aspects of business transactions, nor does it cover legal opinions in tax shelters. Further, the opinions discussed in this report are limited to opinions relating to corporate transactions and do not discuss transactions involving limited or general partnerships.

Most legal opinions are probably delivered in connection with a "closing" of a business transaction. For example, the "closing" under a loan agreement involves a transfer of funds to the borrower in exchange for a promissory note or other evidence of debt, accompanied by appropriate signed collateral documents such as deeds of trust and security agreements. As part of this closing process, the opinion giver will often render and deliver an opinion letter at the closing. Typically, all parties receive signed counterparts of the closing documents. It is customary to deliver manually signed copies of the closing documents, including all requested legal opinions, rather than photocopies, so that each party gets "original" documents at the "closing".[5] Much of the discussion in this report centers on business transactions, and opinions which are delivered at a "closing". However, the discussion as to the preparation of legal opinions, the standards for legal opinions, the ethical considerations involved, and potential liabilities for legal opinions relate generally to all legal opinions, regardless of the circumstances in which they are given.

This report is intended to present an overall consensus of the Committee members, and hopefully will serve as an educational tool and a guide to lawyers in Texas who prepare and issue legal opinions. This report reflects the views of the Committee as of the date of its publication, and is based on current Texas law and opinion practice as of such date. This report does not necessarily reflect the views of any particular Committee member or law firm, nor does it necessarily represent the views of the State Bar of Texas. This report has not been approved by the State Bar of Texas. The sections of this report dealing with ethical considerations and liabilities are intended to provide Texas lawyers with a brief summary of the principal Texas authorities addressing these subjects. This report does not define or establish ethical or liability standards, and is not intended to be given effect in any disciplinary or liability proceedings.

C. Commentary on Use of the ABA Report.

1. **Creation of a National Opinion Language**. Because the form and meaning of legal opinions have evolved primarily through custom and usage over the past several decades, there have been varying interpretations and practices concerning legal opinions, both in the State of Texas and across the nation. Many state and local bar organizations have prepared useful reports regarding the preparation, drafting, and meaning of legal opinions. These reports are generally non-binding, and for the most part have not been drafted in a form intended to be incorporated by reference. The usefulness of various individual state reports on legal

---

[5] A. Field & R. Ryan, Legal Opinions in Corporate Transactions 1-2 (Matthew Bender Business Law Monographs No. 26, 1988).

opinions is somewhat limited when a transaction involves clients and lawyers from different states in multi-state transactions.

Contrary to most state bar opinion reports, the Accord is designed (i) to be utilized in all states in the United States and (ii) to be adopted (i.e., incorporated by reference) in Opinion Letters, on an individual ad hoc basis. If an Opinion Letter adopts the Accord, then the Accord will govern that Opinion Letter, and have a binding effect on it. It the opinion giver and opinion recipient agree that the Accord is adopted in an Opinion Letter, then the rules of the Accord are automatically determinative of any issues covered by the Accord, without any express recitation of the rules or other material in the Accord. In the event of conflict between non-binding state or local bar association reports and the Accord, the Accord provisions will govern, and will override any conflicting provisions of such reports, as well as conflicting opinion custom or practice.

The Accord is a significant step toward creating a national opinion language. By setting out the "black letter" rules of opinions in the Accord, the ABA has provided lawyers with a readily available set of agreed principles and understandings which would be applicable in many business financing, sale, or acquisition transactions.

2. **Flexibility to Change the ABA Accord--Modification and Private Ordering**. The Accord is a vehicle for creating consensus and bringing precision to legal opinions by the use of agreed principles and specific understandings and assumptions. The parties may change the Accord to suit any particular situation, and this provides flexibility in the use of the Accord. To the extent that the Accord is useful for a particular opinion letter, it may be adopted; if parts of the Accord are not suited to an opinion letter, then the language of the opinion letter may modify the Accord as much or as little as may be necessary in a particular Transaction.

3. **Continued Usage of Traditional Non-Accord Practice in Certain Instances**. The Accord is designed to be incorporated by reference in opinion letters. The full text of the Accord is incorporated, unless the parties otherwise agree. In most cases, the Accord will provide a convenient starting point for drafting opinion letters. In some cases, the Accord may be modified to suit a particular transaction. In other cases, the opinion giver and opinion recipient may determine that it is more appropriate to utilize traditional non-Accord practice for giving the opinion. The voluntary nature of the Accord allows for both (a) ABA Accord opinion practice (including modification through private ordering), and (b) a non-Accord traditional opinion practice, which relies on existing pre-Accord opinion practice. Hopefully, as familiarity with the Accord increases, the usage of the Accord will increase. Further, it seems likely that the traditional practice will change over time to harmonize the traditional practice with the Accord practice, particularly as to insubstantial differences.

D. Commentary on Use of the Texas Report.

1. **The Texas Report Not Designed for Incorporation by Reference of the Entire Report**. Unlike the Accord, the Texas Report does not contain "black letter" rules regarding opinions. The Texas Report is educational and advisory in nature, and it is designed to build consensus in opinion giving. The Texas Report is not designed for incorporation by reference in its entirety. The Texas Report contains discussion, recommendations, and views of the Committee concerning the form, content, and meaning of commonly used opinions in business transactions. It also contains suggested due diligence procedures for particular opinions. Professional ethical responsibilities and potential liabilities are also discussed. Except for (i) the Other Common Texas Qualifications and (ii) the Assumptions and Qualifications Concerning Security Interests in Personal Property, none of these matters were discussed or presented in this Report in a manner which is intended for incorporation by reference.

2. **Limited Incorporation by Reference**. The Other Common Texas Qualifications, which are discussed in Part VII, Subpart B of this Report, are attached as Exhibit "C". The Assumptions and Qualifications Concerning Security Interests in Personal Property, which are discussed in Part IX, Subpart E of this Report, are attached as Exhibits "D" and "E". These assumptions and qualifications may be incorporated by reference in an opinion letter, and are in addition to the standard assumptions and qualifications included in an opinion letter which adopts the Accord. Additionally, Exhibits "C", "D", and "E" may be used when dealing

with counsel to an opinion recipient who is not familiar with the Texas Report. These exhibits provide a convenient means of communicating the desired assumptions and qualifications by furnishing a copy of them to opposing counsel rather than using incorporation by reference. This usage may be particularly helpful when negotiating an opinion letter with a non-Texas lawyer.

3. **Traditional Non-Accord Practice**. Because the ABA Accord will probably not be adopted for opinions in all situations, the Committee has presented this Report with a view to discussing both the Accord and the traditional non-Accord practice for many common opinions. If the Accord is adopted in an opinion letter, then it will govern the remedies opinion, the no breach or default opinion, the no violation of law opinion, and the confirmation of legal proceedings. Other common opinions, such as due incorporation, valid issuance of securities, and proper corporate authorization of the transaction documents, are not covered by the Accord and will continue to be governed by traditional non-Accord practice. Further, if the Accord is not adopted, then this Report's discussion of traditional non-Accord opinion practice concerning the remedies opinion, no breach or default opinion, no violation of law opinion, and legal proceedings opinion should prove useful.

E. Illustrative Form of Opinions.

1. **Use of Forms Generally**. There is no prescribed form for legal opinions. The meaning and language of legal opinions have evolved over a period of decades by custom and usage in United States business law practice. Many law firms have developed certain "standard" opinion forms which can be utilized as a basis for negotiating legal opinions in a particular type of transaction. Most firms maintain extensive files of opinions previously rendered by the firm. The use of forms of opinions or opinions given previously in similar transactions is helpful both from the standpoint of providing instruction and guidance to lawyers within the firm, as well as avoiding the necessity of "reinventing the wheel," by providing a convenient source of accumulated know-how for rendering opinions. However, with the advent of the Texas Report and the ABA Report, it may well be time for many of these forms to be re-examined, and to be either revised or discarded in order to conform to the approach taken by the ABA Report and the Texas Report. In any event, discretion should be exercised in the use of opinion forms or opinions given in prior Transactions, because no form of opinion can be drafted which is appropriate for all Transactions. Every lawyer who negotiates, drafts, or signs a legal opinion should give a fair, reasonable, and dispassionate review and consideration to requests for legal opinions, and should be ever mindful of his or her professional responsibilities in giving legal opinions.

2. **Illustrative Form, Including Adoption by Declaration of the ABA Accord**. The Texas Report is designed to be used both as an educational tool and as the basis of agreement between an opinion giver and counsel for the opinion recipient as to the meaning and scope of commonly used legal opinions. The illustrative form of legal opinion attached as Exhibit "A" to this Report omits many of the assumptions, exceptions, and qualifications commonly found in most opinions. This is because the assumptions, exceptions, and qualifications contained in the ABA Accord are adopted by declaration in the opinion letter, and it is therefore not necessary to recite them in the text of the opinion. This Report also generally describes the actions and "due diligence" steps to be performed by the opinion giver. The form of opinion attached as Exhibit "A" does not recite these actions and steps in full, but these actions and steps are a consensus of the Committee as to the appropriate "due diligence" for the specific opinions discussed in this Report.

3. **Illustrative Form of Non-Accord Opinion Letter**. Because the adoption of the Accord is voluntary, and because the Accord may not be suitable in all situations, the Committee has prepared and attached as Exhibit "B" an illustrative form of non-Accord opinion in a secured loan transaction. This illustrative form is based on current traditional non-Accord opinion practice.

F. Glossary of Certain Terms.

As used in this Report, the following terms shall have the meanings indicated below:

ABA Report: the Third-Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association (1991), 47 Bus. Law 167 (1991).

Accord: the Legal Opinion Accord included in the ABA Report, including the boldface text consisting of §§ 1-22, the introductory paragraph preceding the Glossary, and the Glossary; the Commentary and Technical Note accompanying each Section are not part of the Accord but provide guidance as to its interpretation and organization.

Actual Knowledge: the conscious awareness of information about either fact or law (depending on the context) by any Primary Lawyer, without the Opinion Giver undertaking any other investigation within the Opinion Giver's organization (i.e., without any canvass of all lawyers in the Opinion Giver's organization or a search of the Opinion Giver's files).

Assumptions Regarding Security Interests in Personal Property: see Part IX., Subpart E.5.a. of this Report.

Bankruptcy and Insolvency Exception: see § 12 of the Accord (see also Part VII, Subpart B.1 of this Report).

Client: the party or parties to the Transaction (including predecessor entities where relevant) for which the Opinion Giver is providing legal representation.

Closing or closing: for purposes of this Report, the term "closing" means the actions taken in connection with the consummation and effectuation of a Transaction, including exchanging signed originals of the Transaction Documents, payment of the purchase price or the advance of funds, providing all documents and instruments, and taking other actions, including obtaining any necessary regulatory approvals, as may be necessary in order to effectuate the Transaction.

Common Unified Qualifications: collectively, the Other Common Qualifications and the Other Common Texas Qualifications.

Constituent Documents: the articles or certificate of incorporation, by-laws, partnership documentation or similar organization documents of the Client.

Court Orders: court and administrative orders, writs, judgments and decrees that name the Client and are specifically directed to it or its property.

Equitable Principles Limitation: see § 13 of the Accord (see also Part VII, Subpart B.2 of this Report).

General Qualifications: the Bankruptcy and Insolvency Exception, the Equitable Principles Limitation, and any Other Common Qualifications that apply to the particular opinion in question. If the General Qualifications are to apply to an opinion in addition to the Remedies Opinion, the Opinion Letter must specifically state that they apply to that opinion.

Generic Exception or generic exception. see Part VII, Subpart C of this Report.

Law: the statutes, the judicial and administrative decisions, and the rules and regulations of the governmental agencies of the Opining Jurisdiction, including its Local Law (but see § 19 of the Accord).

Local Law: the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities and special political subdivisions (whether created or enabled through legislative action at the Federal, state or regional level -- e.g., water agencies, joint power districts, the Maine Turnpike Authority, The Southern California Rapid Transit District, the Port Authority of New York and New Jersey), and judicial decisions to the extent that they deal with any of the foregoing.

No Breach or Default Opinion: an opinion that "execution and delivery by the Client of, and performance of its agreements in, [a specified Transaction Document] do not (i) violate the Constituent Documents, (ii) breach, or result in a default under, any existing obligation of the Client under an Other

Agreement, or (iii) breach or otherwise violate any existing obligation of the Client under a Court Order" or an opinion that uses equivalent wording.

No Violation of Law Opinion: an opinion that "execution and delivery by the Client of, and performance by the Client of its agreements in, [a specified Transaction Document] do not violate applicable provisions of statutory law or regulation" or an opinion that uses equivalent wording.

Obligated Party: a person or entity who is a party to and obligated by any of the Transaction Documents.

Opining Jurisdiction: a jurisdiction the applicable law of which is addressed by the Opinion Giver in the Opinion (see § 1 of the Accord); if there is more than one such jurisdiction (e.g., the United States and a particular state), the term refers collectively to all.

Opinion or opinion: see Part II, Subpart B of this Report.

Opinion Giver: the lawyer or legal organization rendering the Opinion.

Opinion Letter: the document setting forth the Opinion that is delivered to and accepted by the Opinion Recipient.

Opinion Recipient: the addressee or addressees of the Opinion Letter.

Other Agreements: contracts, other than the Transaction Documents, to which the Client is a party or by which it or its property is bound.

Other Common Qualifications: see § 14 of the Accord (and see Part VII, Subpart B.3 of this Report).

Other Common Texas Qualifications: see Part VII, Subpart B.4 of this Report.

Other Counsel: a lawyer or legal organization (other than the Opinion Giver) providing a legal opinion pertaining to particular matters concerning the Client, the Transaction Documents, or the Transaction (i) directly to the Opinion Recipient, or (ii) to the Opinion Giver in support of the Opinion.

Other Jurisdiction: the jurisdiction whose law a Transaction Document provides will govern that contract, if not the Opining Jurisdiction.

Primary Lawyer: see § 6-B of the Accord (and see Part VI, Subpart C.5(a) of this Report).

Primary Lawyer Group: see § 6-B of the Accord (and see Part VI, Subpart C.5(a) of this Report).

Public Authority Documents: certificates issued by the Secretary of State or any other government official, office or agency concerning a person's property or status, such as certificates of corporate or partnership good standing, certificates concerning tax status, certificates concerning Uniform Commercial Code filings or certificates concerning title registration or ownership.

Qualifications Regarding Security Interests in Personal Property: see Part IX, Subpart E.6 of this Report.

Remedies Opinion: an opinion that a specified Transaction Document "is enforceable against the Client" or an opinion that uses equivalent wording (e.g., one or more of the words "legal," "valid" and "binding" in addition to or in lieu of the word "enforceable"); the familiar following phrase "in accordance with its terms" is implied and need not be stated in the Opinion Letter.

Transaction: the business exchange (e.g., loan, sale of securities, merger or acquisition) by the Client and the other parties.

Transaction Documents: the contract setting forth the principal terms of the Transaction addressed by the Opinion and other contracts ancillary thereto that are explicitly addressed by the Opinion.

II. DEFINITION, PURPOSE, AND SCOPE OF LEGAL OPINIONS

A. The Importance of Legal Opinions to Lawyers.

Business lawyers are frequently called upon to give a written Opinion Letter to a Client or to a third party as a condition to closing a Transaction. Such opinions are important to the lawyers involved because the delivery of such opinions helps the Clients achieve their business objectives, and thereby creates a valuable professional legal service.

Lawyers issuing legal opinions must also comply with their professional responsibilities and ethical requirements. As a member of the legal profession, each lawyer has a fundamental professional responsibility to give competent professional advice and counsel to the Client. The lawyer also has certain professional responsibilities to non-Clients who are Opinion Recipients, as discussed in Part III of this Report. In addition to being a condition to the achievement of the legitimate business objectives of the Client, a legal opinion may be a possible basis for liability of the Opinion Giver.

Further, an Opinion Giver's legal opinion is in essence a reflection of the professionalism and expertise of the Opinion Giver. The professional reputation of any lawyer or law firm is a valuable asset which must be protected by constant attention to the quality of the work product. Because of the importance of legal opinions to lawyers, as well as to their Clients, each attorney who prepares or reviews a legal opinion should exercise good professional judgment and give careful and thoughtful attention to the language and meaning of the opinion, as well as to any factual investigation and legal research necessary to support the opinion.

B. Definition of a Legal Opinion.

1. General Definition. Unfortunately, exactly what is encompassed by the term "opinion" is not always clear. Obviously, the formality of oral and written advice can vary widely, since lawyers on a routine day-to-day basis express legal conclusions or advice in the performance of their professional obligations. With respect to professional opinions in the legal context, Black's Law Dictionary 985 (5th Ed. 1979) refers to "[a] document prepared by an attorney for his client, embodying his understanding of the law as applicable to a state of facts submitted to him for that purpose. . . ." Many legal opinions today fall within this general definition, except that they are given to a third party, and not to the Client. Within this general definition, the form and substance of legal opinions vary widely, depending on the facts and circumstances in which the opinion is rendered, as well as the professional approach and policies of the Opinion Giver.

2. Definition For Purposes of This Report. For purposes of this report, an "opinion" is (i) any formal written communication in which conclusions or opinions of law are expressly stated, in letter form or otherwise, delivered at a closing of a Transaction to a Client or a third party dealing with a Client, and (ii) any formal written communication addressing specific requests for legal advice which are responsive to contractual or governmental requirements requested by the Client or by a third party with the Client's full and informed consent, or which are otherwise given, with the Client's consent, as conditions precedent to the consummation of the Client's business objective in a Transaction. Opinions to third parties in business transactions are usually set forth in an Opinion Letter.

C. Role and Purposes of Legal Opinions.

The primary role of the Opinion is to provide some formal confirmation through a written statement of professional judgment by a lawyer as to the availability of the essential elements of the transaction for which the parties have bargained. Another significant part of this role involves more of a "due diligence" function. Most legal opinions contain language which gives some degree of confirmation as to matters which are similar to

certain representations and warranties contained in the Transaction Documents.[6] An opinion delivered at the closing of a Transaction frequently discloses new information or contains new qualifications because lawyers usually require more precision in stating their opinions and are less tolerant of risk-assumption in their own opinions than are the Clients in giving their representations and warranties.[7]

Opinions are required by Opinion Recipients in order to provide some degree of assurance as to the effectiveness of agreements in a dispute-oriented legal system.[8] Although the business community seeks assurance as to the desired legal characteristics and the rights and remedies of the parties' agreements in a business transaction, there is no judicial or administrative procedure available to provide such an assurance prior to an actual dispute. Consequently, the parties have customarily requested lawyers to provide certain assurances as to the Transaction by means of an Opinion Letter delivered at or prior to the Closing.[9] The Opinion Letter is frequently addressed to a third party in the transaction (i.e., to a party other than the counsel's own Client), and when accepted after review by the Opinion Recipient's counsel, may be interpreted as a consensus among the respective legal counsel to the parties to the Transaction that the Transaction Documents are generally in proper form, and, if a Remedies Opinion is given, that the Transaction Documents are enforceable.[10] In this regard, each attorney requesting an opinion should remember that the opinion is not an "insurance policy" intended to create a liability on the part of the opposing counsel, but rather an attempt to further the interests of the parties involved by providing the informed judgment of a competent professional.

Legal opinions in business transactions are most commonly prepared in order to satisfy a condition to the closing of the Transaction. A legal opinion is generally given for the purpose of either (a) providing assurance that an intended course of action is lawful, or that certain desired legal consequences will result from a proposed action, or (b) confirming the existence or creation of certain legal relationships. In some instances, attorneys may be asked to assist in providing confirmation as to the accuracy of certain representations and warranties concerning litigation, compliance with applicable laws, and other matters made by parties to a transaction. Legal opinions may also be given to governmental agencies or regulatory authorities in order to satisfy regulatory requirements, such as opinions of counsel required as part of registration statements filed with the Securities and Exchange Commission.[11]

---

[6] American Bar Association, Committee on Developments in Business Financing of the Section of Corporation, Banking and Business Law, Term Loan Handbook 116-117 (J. McCann, Ed. (1983).

[7] Id. at 117.

[8] A. Field & R. Ryan, supra note 5, at 1-1.

[9] Id.

[10] See Part VII hereof for a discussion of the Remedies Opinion.

[11] Legal Opinions Given in Corporate Transactions, 33 Bus. Law. 2389, 2390-91 (1978). One commentator has stated the purposes of legal opinions as follows:

> Purpose. To describe legal status or relationships arising out of defined fact situations in order to achieve one or more of the following objectives, among others:
>
> A. To resolve disputes or uncertainties (e.g. as to the meaning of particular language in a contract).
>
> B. To provide assurance (e.g. as in a title opinion).

(continued...)

D. **Role of the Opinion Giver**.

1. **Role Varies Depending on Whether Opinion Recipient is a Client or a Third Party**. In connection with the Opinions given in business transactions, lawyers' responsibilities differ significantly depending upon the identity of the Opinion Recipient. As discussed in Part III of this Report, infra, if the Opinion Recipient is the Client, the Opinion Giver has a paramount duty, based on the professional responsibility of the attorney to the Client.[12] On the other hand, lawyers are often requested by their Clients to render an opinion to a third party as a condition to the consummation of a Transaction. In this context, lawyers perform a different type of function and accept a different type of responsibility than they perform or accept while rendering legal advice to their own Clients.[13]

---

[11](...continued)

C. To justify going forward by describing (i.e. predicting) legal consequences (or, conversely, by providing a basis for assuming absence of adverse legal consequences) of prior or proposed transactions (e.g. tax opinion).

D. To satisfy contractual requirement (e.g. opinion of issuer's counsel pursuant to underwriting agreement).

E. To satisfy regulatory requirements (e.g. opinion given in connection with Securities Act Registration).

F. To provide a basis upon which a regulatory body may rely in its own interpretation of fact situation (e.g. opinion relied on by staff of Securities and Exchange Commission in giving "no-action letter").

G. To resolve questions raised by other professionals and to provide authoritative basis for statements in reports and opinions with respect to matters to which other professionals are not competent to make (or are unwilling to assume responsibility for) judgments (e.g. to provide sources of professional judgment and "audit evident" [sic] for accountants, or to provide opinions on local law for general counsel).

Friedman, The Formal Opinion Letter, in Legal Opinions and Accountant Certifications (PLI Corporate Law and Practice Course Handbook Series No. 166, Vol. 1) at 19-20. See also California 1989 Corporate Report, supra note 1, at 2173-74.

[12] In this connection, it has been observed that:

> [O]ne of the most important functions that the lawyer performs, and the one where his talents may be particularly useful, is to analyze for his client exactly what legal opinions the client should receive, from whom the client should obtain those opinions, including whether they should come from himself, from some other lawyer, or from both himself and another lawyer, whether the client should rely on the opinions he receives from other lawyers, and, in general, whether or not the legal opinions which the client receives are sufficient [and] that it is reasonable for the client to proceed with the transaction. Legal Opinions Given in Corporate Transactions, 33 Bus. Law. 2389 (1978), at 2403 (remarks of W. Loeber Landau).

[13] See discussion in Part III of this Report. In this regard, the following observations concerning legal opinions in a loan transaction are instructive:

> The lender has sought specific opinions from the borrower, and the borrower has asked his lawyer to provide them. If the borrower's lawyer believes he has a reasonable basis for

(continued...)

As is discussed more fully in Part III of this Report, the lawyer asked to deliver a legal opinion to someone other than the lawyer's own Client is performing the function of an "evaluator", and is subject to an ethical duty of truthfulness in all statements to the third person,[14] and an ethical prohibition against making a "false or misleading communication about the qualifications or the services" of the Opinion Giver.[15] In rendering an opinion for the benefit of a third person, the Opinion Giver apparently must also satisfy requirements of competence and diligence, similar to the requirements that apply in the Client-lawyer relationship.[16]

However, a lawyer giving an opinion to a third party non-Client does not owe the third party the same ethical duties that are owed to a Client. For example, the Opinion Giver does not have an obligation to address legal issues outside the expressly negotiated scope of the opinion, even if the Opinion Giver believes that the legal issue could be important to the Opinion Recipient.[17] Further, the lawyer assumes no obligation to the third party to maintain the confidentiality of information furnished by the non-Client, as is required in the case of Client information. As is discussed in Part III of this Report, the Client-lawyer relationship plays the central and dominant role in rendering legal opinions. From a professional responsibility standpoint, the Opinion Giver's fundamental duty is to his or her own Client: a lawyer can give a legal opinion to a third person, but only with the consent of the Client, and only if the interest of the third person and the lawyer's self-interest can be harmonized with the primary duty owed by the Opinion Giver to the Client.

2. **Role of Professionalism and Independence**. One of the chief benefits of legal opinions is frequently that the lawyer's professionalism and independence allow the Opinion Giver to provide serious and thoughtful consideration of the matters covered in the opinion, perhaps with greater care and attention than

---

[13](...continued)

> giving the requested opinions and does not suspect that any of the facts that he is assuming or relying on for that purpose are incorrect, he owes no obligation to the lender or the lender's lawyer to point out, for example, that the requested opinion does not cover a patent question that the borrower's lawyer would have sought had he represented the lender. Nor does he have an obligation to advise the lender that although he is perfectly satisfied that he has a reasonable basis for giving the requested opinion, he would, if he were advising his own client, advise him to engage other experts to investigate particular factual matters further. He might advise his own client to do so, even though he does not believe there is anything wrong, simply because he believes that it would be more prudent for the client to do so. Legal Opinions Given in Corporate Transactions, supra note 12, at 2403-04 (remarks of W. Loeber Landau).

[14] Supreme Court of Texas, State Bar Rules art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) Rule 4.01 (1989) [hereinafter Texas Rules].

[15] Texas Rule 7.01.

[16] Texas Rule 1.01.

[17] "Simply stated, when rendering advice to one's own client, the client is otherwise unrepresented; advice delivered to third parties is typically responsive to specific requests made by the recipient with the benefit of independent counsel after careful deliberation. In the former instance, the responsibilities of a lawyer are broad and encompassing; in the latter, in the absence of transactional fraud, the opinion process is characterized by the principle of caveat emptor." Goyne & Johnson, Lawyers and Legal Opinions in Banking and Other Commercial Transactions 14-15, in Course Materials, Southern Methodist University Annual Symposium on Banking Law, Dallas, Texas (June 13, 1989).

would be given to such matters by Clients.[18] Accordingly, independence of the professional judgment of the Opinion Giver is important to the integrity of the opinion-giving process. To avoid the appearance of impropriety and to maintain the independence of the Opinion Giver, the Committee recommends that an opinion should not be prepared or signed by an attorney who has a proprietary interest in the Transaction or the Client's business, unless such proprietary interest is appropriately disclosed to the Opinion Recipient.[19]

E. Who Should Be The Opinion Giver.

The determination of which lawyer or law firm should give a legal opinion in a particular Transaction depends on the facts and circumstances, and is a question of judgment. The lawyer who is best qualified to give a particular opinion may frequently be the lawyer who knows the most about the factual background for the requested opinion. Rather than relying on any hard and fast rules about who should give opinions in any particular kind of Transaction, counsel to the parties in Transactions are encouraged to take a pragmatic approach to the analysis of who should give a particular opinion. Such an analysis should take into consideration the cost of the investigation that will be required if a particular counsel is to give an opinion, the familiarity of that counsel with the affairs of the respective parties, the relationship of the counsel to the parties and to the Transaction, and the expertise which the particular counsel may bring to bear.

F. Reliance by Opinion Recipient.

When the Opinion Recipient is a third party other than the Opinion Giver's own Client, the only reliance on the Opinion is as to those specific matters specifically and affirmatively addressed in the Opinion. The Accord addresses reliance by the Opinion Recipient as follows:

> § 7 Reliance by Opinion Recipient. The Opinion Recipient may rely upon the Opinion, without taking steps to verify the conclusions reached, with respect to the specific legal issues that the Opinion Letter affirmatively addresses. The Opinion Recipient may not rely on the Opinion or the Opinion Giver for any legal or other analysis beyond that set forth in the Opinion Letter, such as the broader guidance and counsel that the Opinion Giver might provide to the Client.[20]

The Commentary to Section 7 of the Accord states the following regarding reliance by the Opinion Recipient:

> ¶ 7.1 General. The Accord confirms the operating principle that the Transaction negotiations will establish those legal issues that the Opinion will address (see §§ 18 and 19). That negotiated opinion coverage is normally reflected in a Transaction Document. In all cases, upon the Opinion Letter's delivery and acceptance, its content will determine the Opinion's coverage of legal issues. In its consideration of legal issue coverage (as well as other Opinion issues), the Opinion Recipient will normally be assisted by its own legal counsel. Whether or not represented by legal counsel, the Opinion Recipient is not the Opinion Giver's client. Section 7 underscores the fact that the Opinion Giver's role in assisting the Opinion Recipient in its business diligence respecting the Transaction is confined to the matters with which the Opinion Letter, as delivered to the Opinion Recipient, in fact deals. Any broader role for the Opinion Giver would raise a fundamental issue for the Opinion Giver under the applicable rules of professional conduct, in terms of the duty of loyalty owed to a client and prohibitions against conflict of

---

[18] Term Loan Handbook, supra note 6, at 117.

[19] See Texas Real Estate Report, supra note 2, at 25. The receipt of legal fees, contingent or otherwise, in connection with the Transaction, would not ordinarily be viewed as creating a proprietary interest requiring such disclosure.

[20] ABA Report, supra note 3, § 7.

interest. The Opinion Giver's responsibility is therefore limited to rendering an Opinion that responds appropriately to the specific legal issues that the Opinion Giver has undertaken to address.[21]

See Part III and Part IV, respectively, of this Report for discussions of the ethical obligations and limitations on liability that restrict reliance by a non-Client upon an opinion from another party's lawyer under the Texas Rules and Texas case law.

G. Qualifications as to Factual Examination.

The Opinion Giver should consider taking (and ordinarily will take) the steps and make the factual and legal investigations described in this Report, as applicable to a specific opinion. There may be sound reasons to limit the Opinion Giver's factual investigation, by (i) allowing the Opinion Giver to rely an officer's certificates, certificates of public officials, or representations and warranties in the Transaction Documents, (ii) allowing the Opinion Giver to limit an Opinion "to the best of our knowledge", or (iii) otherwise limiting the scope of the factual investigation by the Opinion Giver. Qualifications to an Opinion which limit the scope of the Opinion Giver's factual investigation may be appropriate in many situations. See Part VI, Subpart C of this Report for a discussion of factual examinations, and qualifications limiting factual examinations by Opinion Givers.

H. Factual Assumptions.

Under § 4 of the Accord it is not necessary, in an Opinion Letter which adopts the Accord, to expressly state factual matters in Opinions. Generally, factual assumptions such as the genuineness and authenticity of documents examined by the Opinion Giver, and the genuineness of signatures on documents are automatically assumed in an Opinion Letter which adopts the Accord. See Part VI, Subpart D of this Report for a further discussion of factual assumptions in Opinions.

I. "Explained Opinions"; Qualified and "Reasoned" Opinions Concerning Issues of Legal Uncertainty.

There are legal issues with respect to which it may be appropriate to request an opinion, but which are subject to a generally recognized material uncertainty, due to lack of legal precedent or conflicting or unclear legal precedent. Where that is the case, the significance and necessity of an opinion on a matter should be considered in light of the difficulty of the Opinion Giver coming to a conclusion without qualification and the cost of negotiation and preparation of a lengthy qualified or "explained opinion." These "explained" opinions are discussed in Part VI, Subpart F of this Report.

III. PROFESSIONAL RESPONSIBILITIES AND ETHICAL CONSIDERATIONS

A. Background and Scope.

The sections of this report dealing with ethical considerations (Part III) and liabilities (Part IV) are intended to provide Texas lawyers with a brief summary of the principal Texas authorities addressing these subjects at this time. It must be stressed that the report itself does not in any sense define or establish ethical or liability standards. To the extent that any editorial interpretation contained in the report may diverge from or extend beyond the existing Texas authorities, such deviations are inadvertent, do not represent the views of the State Bar of Texas or any committee thereof and should not be given effect in any disciplinary or liability proceedings.

Effective January 1, 1990, the Texas Supreme Court adopted the Texas Disciplinary Rules of Professional Conduct previously approved by a referendum of the State Bar of Texas (the "Texas Rules"). The Texas Rules follow the format, as well as much of the substance and language, of the Model Rules of

---

[21] Id., Commentary, ¶ 7.1.

Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983 (as amended by the House of Delegates in 1987 and 1989, the "ABA Rules"). The Texas Rules are preceded by a "Preamble" of 16 numbered paragraphs (cited here as "Preamble ¶ ___") and a "Terminology" section defining certain terms. The substantive body of the Texas Rules is structured as a code of numbered "Rules" (cited as "Texas Rule _____") together with numbered paragraphs of "Comments" accompanying each Texas Rule (cited as "Comment ¶ __ to Texas Rule ___").

As stated in Preamble ¶ 10, the Texas Rules "define proper conduct for purposes of professional discipline. They are imperatives, cast in terms of 'shall' or 'shall not.'" The Texas Rules codify and establish bases for disciplinary proceedings against lawyers licensed to practice in Texas or specially admitted by a Texas court for a particular proceeding. Such lawyers are answerable under the Texas Rules (i) for their conduct occurring in Texas and (ii) if the action is professional misconduct under Texas Rule 8.04 (discussed below), for their conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction.[22]

In contrast to the Texas Rules, the accompanying Comments "are cast often in terms of 'may' or 'should' and are permissive, defining areas in which the lawyer has professional discretion. When a lawyer exercises such discretion, whether by acting or not acting, no disciplinary action may be taken. . . . The Comments do not . . . add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments."[23]

It should be emphasized that the Texas Rules do not define standards of civil liability for professional misconduct. Violation of the Texas Rules "does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached."[24] Rather, the Texas Rules "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."[25] The Texas authorities establishing civil liability are accordingly addressed separately, in Part IV below.

At the same time, it must be recognized that the listings of imperatives in the Texas Rules, even taking into account the precatory amplification afforded by the Comments, are no more than a minimal formulation for disciplinary and guidance purposes. The full requirements of ethical conduct must, inevitably, be a matter of personal conscience for each lawyer. This point is concisely made in Preamble ¶ 9:

> Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

B. <u>Legal Opinions Under the Texas Rules</u>.

The Texas Rules analyze the ethical requirements for professionally responsible conduct by considering the lawyer primarily as a representative of the Client and secondarily as "an officer of the legal system and a

---

[22] Texas Rule 8.05.

[23] Preamble ¶ 10.

[24] Preamble ¶ 15.

[25] Preamble ¶ 11.

public citizen having special responsibility for the quality of justice."[26] From the standpoint of a Texas lawyer asked to deliver a legal opinion to someone other than the lawyer's own Client, the Texas Rules characterize the lawyer's function as that of "evaluator" and consider the ethical aspects of fulfilling the evaluator's function in terms of two components -- "examining a client's affairs and reporting about them to the client or to others."[27]

This express recognition of the lawyer's function as evaluator is derived without modification from the second paragraph of the preamble to the ABA Rules. The practice of delivering a report on the evaluation -- that is, a legal opinion -- to someone other than the lawyer's Client is addressed directly in Texas Rule 2.02, "Evaluation for Use by Third Persons," which was derived from ABA Rule 2.3. The prior Texas ethical and disciplinary authority, the Code of Professional Responsibility, like the ABA Model Code on which it was based, had no analogous provision.

The Texas Rules impose a number of ethical duties upon a lawyer rendering an opinion to a third person who is not the lawyer's Client. First, the Opinion Giver owes a duty of truthfulness in all statements to the third person and may not knowingly make a false statement of material fact or law, or knowingly fail to disclose a material fact "when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."[28] Second, a lawyer who gives a legal opinion to a third person as part of representing the lawyer's Client is subject to an ethical duty to "exercise independent professional judgment and render candid advice."[29] Third, the Opinion Giver may not make a "false or misleading communication about the qualifications or the services" of the Opinion Giver or his or her law firm.[30] In rendering an opinion for the benefit of the third person, the Opinion Giver apparently must also satisfy requirements of competence and diligence that are similar to the requirements that apply in the Client-lawyer relationship.[31]

However, a lawyer does not owe a non-Client recipient of a legal opinion all of the ethical duties that are owed to a Client. For example, the Opinion Giver has no obligation to address a legal issue that is outside the express negotiated scope of the opinion, even when the lawyer believes that the legal issue may be important to the non-Client.[32] Similarly, the lawyer assumes no obligation to the third party to maintain the confidentiality of information furnished by the non-Client, as is required in the case of Client information.[33]

The relationship between the ethical duties owed by the Opinion Giver to the Client and the ethical duties owed to the non-Client Opinion Recipient has controlling importance under the Texas Rules. The Texas Rules consider the delivery of legal opinions to third parties to be a subcomponent of the lawyer's predominant

---

[26] Preamble ¶ 1.

[27] Preamble ¶ 2.

[28] Texas Rule 4.01.

[29] Texas Rule 2.01. In view of the specific terms and language of Texas Rule 4.01, the Committee understands the term "render candid advice" to require only compliance with Texas Rule 4.01 in communicating with the non-client Opinion Recipient.

[30] Texas Rule 7.01.

[31] Texas Rule 1.01.

[32] Comment ¶ 3 to Texas Rule 4.01. The ABA Report explicitly adopts this approach in § 7.

[33] Texas Rule 1.05.

function as a representative of his or her own Client. The Client-lawyer relationship has the central and dominant role. From a professional ethics standpoint, the Opinion Giver's fundamental duty is to his or her own Client: under the Texas Rules, the Opinion Giver may give a legal opinion to a third person Opinion Recipient, but only with the consent of the Client and only if the interest of the Opinion Recipient and the Opinion Giver's self-interest can, in the Opinion Giver's judgment, be squared with the primary duty owed by the Opinion Giver to the Client.

In view of the paramount position of the lawyer's duty to his or her own Client under the Texas Rules, the format of this section of the Report is to begin with a review of the pertinent portions of Part I of the Texas Rules (which governs the Client-lawyer relationship). Having laid that predicate, the discussion turns to Part II of the Texas Rules (which most directly addresses legal opinions), Part IV of the Texas Rules (which defines the lawyer's duty of honesty in communications with non-Clients), and other selected sections of the Texas Rules that may bear upon the ethical responsibilities of the Opinion Giver.

1. The Client-Lawyer Relationship: Part I of the Texas Rules. As more fully described below, the lawyer's central and defining duties to the Client may be analyzed in terms of four ethical imperatives. First, the lawyer must assure competence in the provision of legal services to the Client. Second, the lawyer must perform with diligence in pursuing and effecting the goals of the representation. Third, the lawyer must maintain the confidentiality of Client information, particularly privileged information. Fourth, the lawyer must avoid conflicts of interest with other Clients or with the lawyer's own self-interest that could impermissibly impair the lawyer's loyalty to the Client.

a. Competent and Diligent Representation: Rule 1.01. Texas Rule 1.01 establishes the threshold ethical standard for the delivery of legal opinions to third parties:

> A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
>
> (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter . . .

Under Texas Rule 1.01, a lawyer may not ethically undertake to deliver a legal opinion unless the lawyer is competent to undertake the examination and reporting components of the tasks. "Competence" is defined in the Terminology section of the Preamble as denoting "possession [of] or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client." Except in the case of "an emergency," which should presumably arise only rarely in the context of preparing third person legal opinions, Texas Rule 1.01 requires that either (i) the Opinion Giver must possess or timely acquire all legal knowledge, skill and training reasonably necessary for each part of the task or (ii) the Opinion Giver must associate another lawyer who is competent to handle whatever portion of the task is beyond the Opinion Giver's competence. Any such association must be made with the prior informed consent of the Client. The term "reasonably necessary" in this context does not mean "sufficient to assure perfection." Instead, the term shall be understood to mean necessary under the circumstances to satisfy the appropriate prevailing standards of performance in light of the Client's fiscal and time requirements.

From a practical standpoint, the ethical requirement of competence thus compels the Opinion Giver to determine at the outset what different kinds of legal issues will be addressed in the opinion. Only then can the lawyer assess his or her own competence with respect to the issues presented. As noted in Comment ¶ 3 to Texas Rule 1.01:

> Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

Ethical as well as other sound considerations therefore normally make it advisable to establish the precise scope of the third party legal opinion as early in the transaction as possible so that the Opinion Giver can assess his or her own competency and, where necessary, take timely steps to associate other counsel with the prior informed consent of the Client.

Two continuing trends -- increasing legal specialization and larger numbers of multistate transactions -- account for many instances in which the Opinion Giver must associate other competent counsel. A requested opinion may involve such divergent and specialized matters as evaluation of UCC security interests, assessment of pending litigation, review of corporate organization and authorization, compliance with securities laws, analysis of patent rights and determination of the requirements of ERISA. The rendering of such an opinion may require competence beyond what can be provided by a single individual but that may well be supplied by several cooperating lawyers within a single law firm.[34] In such cases, the ethical result should be the same, regardless of whether for ethical purposes the law firm is considered to be the Opinion Giver or an individual lawyer in the firm is considered to be the Opinion Giver and to have "associated" other lawyers in the firm (the prior informed consent of the Client being presumed from and evidenced by the Client's retention of the law firm for the transaction): in each case the competence requirement is satisfied within the law firm by bringing to bear the expertise of the particular lawyers possessing the requisite specialized competence.

In situations where the Opinion Giver or firm must associate an outside lawyer or firm in order to obtain the requisite competence for the delivery of a particular legal opinion, the prior informed consent of the Client is necessary and should be expressly obtained. Ordinarily, the scope of the legal opinion, both as to the range of substantive law topics covered and as to the multiplicity of the jurisdictions whose laws are implicated for opinion purposes, will in practice be negotiated between the Opinion Giver and the lawyer for the third person Opinion Recipient. This is appropriate under Texas Rule 4.02, discussed below. Nevertheless, Texas Rule 1.01 mandates that it is the Opinion Giver's Client, not just opposing counsel, who must be informed of and consent to any association of additional counsel that may be necessary for the opinion that is agreed upon. This requirement underscores the principle, which should always be borne in mind by counsel on both sides of the opinion negotiation, that important decisions as to the scope of the opinion required in a transaction should ultimately be made by the Client and that the Client should be appropriately informed and advised in the matter by counsel.

Texas Rule 1.01 also codifies the fundamental duty of diligent representation. Comment ¶ 6 to Rule 1.01 indicates that this ethical consideration would require a lawyer to decline to undertake responsibility to deliver an opinion when, because of the lawyer's work load or for other reasons, the lawyer cannot handle the matter with diligence as well as competence. Procrastination by the Opinion Giver, whether in negotiating the scope of the opinion, in conducting the requisite factual examinations and legal research, or in preparing and tendering for review the full text of the written opinion for the use of the third party, is inconsistent with the ethical duty of diligence if the Client's interests are adversely affected.

b. Scope and Objectives of Representation: Rule 1.02. Texas Rule 1.02 gives the Client, not the lawyer, ultimate authority to determine the objectives to be served by the legal representation, albeit "within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation."[35] The Opinion Giver thus may limit the scope of the opinion delivery representation only if and to the extent that the lawyer's own Client consents after consultation.[36] The Texas Rules as well as the ABA Report contemplate that the scope of the opinion will be established by negotiation and agreement between the parties -- that is, between the Opinion Giver's Client and the Opinion Recipient. In that process, and in the

---

[34] Under the Terminology section of the Texas Rules, the term "law firm" includes the lawyers in a private firm, a legal department of a corporation, a legal services organization or other organization, or a unit of government.

[35] Comment ¶ 1 to Texas Rule 1.02.

[36] Texas Rule 1.02(b).

communication that the opinion itself encompasses, the Opinion Recipient is not the Opinion Giver's Client, even if the Opinion Recipient is not represented by other counsel in the matter.[37]

At the same time, the Opinion Giver must limit the scope of the representation as necessary to comply with legal and ethical requirements.[38] Hence, under a standard that is consistent with the overall scheme of the Texas Rules, the scope of the lawyer's engagement may not encompass "conduct that the lawyer knows is criminal or fraudulent."[39] The ethical parameters of this standard and its impact on legal opinions are explored further below. "Fraud" or "fraudulent," under the definitions contained in the Terminology section of the Preamble to the Texas Rules, are used in the Texas Rules to denote "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."

c. Communication: Rule 1.03. Beyond the ethical obligation of the lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information",[40] the Opinion Giver has an ethical duty to communicate, as appropriate under the circumstances, with the Client as to each important aspect of the representation -- determining the scope of the opinion, conducting the factual examination and legal research, and drafting the written Opinion Letter by which the Opinion Giver's evaluation is to be reported to the third party Opinion Recipient. This communication should include explanation by the lawyer to the Client "to the extent reasonably necessary to make informed decisions regarding the representation."[41]

For example, when the scope of an opinion requires the Opinion Giver to associate an outside lawyer, the Opinion Giver is ethically obliged to explain to the Client the reasons for and consequences of the decision and to ensure that the Client has "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."[42] Similarly, and as more fully considered below, the Opinion Giver has an ethical obligation to maintain the confidentiality of Client information under Texas Rule 1.05 and may be forbidden to disclose such information without the Client's consent after consultation even though such disclosure would be required in order to deliver an opinion to a third party. In such situations, conflicts may arise between the Client's interest, the self-interest of the Opinion Giver and the interest of the Opinion Recipient. The resolution of such conflicts of interest may in some cases necessitate relatively detailed communication between the Opinion Giver and the Client in order to permit the Client to make informed decisions.

d. Confidentiality of Information: Rule 1.05. One of the central ethical tensions that may be encountered by an Opinion Giver is the conflict between the lawyer's ethical obligation, on the one

---

[37] Commentary ¶ 7.1 to ABA Report § 7 states: "Whether or not represented by legal counsel, the Opinion Recipient is not the Opinion Giver's client. Section 7 underscores the fact that the Opinion Giver's role in assisting the Opinion Recipient in its business diligence respecting the Transaction is confined to the matters with which the Opinion Letter, as delivered to the Opinion Recipient, in fact deals. Any broader role for the Opinion Giver would raise a fundamental issue for the Opinion Giver under the applicable rules of professional conduct, in terms of the duty of loyalty owed to a client and prohibitions against conflict of interest."

[38] Texas Rule 1.02 (c)-(g).

[39] Texas Rule 1.02(c).

[40] Texas Rule 1.03(a).

[41] Texas Rule 1.03(b).

[42] Comment ¶ 1 to Texas Rule 1.03.

hand, to preserve the confidentiality of information that the Opinion Giver has quite properly developed through diligent investigation and candid communication with the Client, and the Opinion Giver's ethical obligation, on the other hand, to disclose that same information in the opinion that is delivered to the third person Opinion Recipient so as to communicate honestly in the opinion. In some situations this tension may pose ethical dilemmas for the Opinion Giver.

Procedurally, such dilemmas are to be resolved under the Texas Rules through a two-part process. First, the lawyer discusses the matter with the Client in sufficient detail to enable the Client to make an informed decision whether or not to authorize disclosure of the confidential information in the Opinion Letter. Second, if the Client does not authorize the required disclosure and the requested Opinion Letter cannot be modified to remove the problem, the Opinion Giver may be obliged to withdraw from the representation and, in rare circumstances, may be obliged or authorized to reveal the confidential information despite the Client's objection.

Texas Rule 1.05(a) begins by defining "confidential information" to include two subcategories. The first, "privileged information," is defined as information protected by Rule 503 of the Texas Rules of Evidence or Rule 503 of the Texas Rules of Criminal Evidence or by the principles governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. The second class of confidential information, "unprivileged information," encompasses "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." This is obviously, and intentionally, a very broad and inclusive definition.

Paragraph (b) of Texas Rule 1.05 greatly restricts the lawyer's ethical authority to reveal or use any confidential information, and imposes especially strict limitations on the use of privileged information:

> (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and [(f)], a lawyer shall not knowingly:
>
> (1) Reveal confidential information of a client or a former client to:
>
> (i) a person that the client has instructed is not to receive the information; or
>
> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
>
> (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
>
> (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
>
> (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

As a starting point, then, and except as permitted under prescribed circumstances, it is unethical for an Opinion Giver to reveal confidential Client information in a legal opinion to a third person Opinion Recipient. Yet a legal opinion, by its very nature, almost invariably reveals and uses information "relating to a client or furnished by the client, . . . acquired by the lawyer during the course of or by reason of the representation of the client," and therefore must reveal and use confidential Client information.

The circumstances that create exceptions to the primary rule of confidentiality, and that authorize or require a lawyer to reveal confidential Client information to a third party, are codified in paragraphs (c) through (f) of Texas Rule 1.05. For purposes of the present discussion, the most pertinent exceptions to the confidentiality requirement are as follows (emphasis added):

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representation, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Rule of Professional Conduct, or other law.

. . .

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

. . .

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by . . . Rule 4.01(b) [discussed below].

The Opinion Giver must analyze the Client information to be used or disclosed in rendering an opinion to a third person. If the Client information is "privileged," it cannot be used or revealed in the opinion without the Client's express authorization or consent after consultation (except in situations involving fraudulent or criminal acts). Client information that is "unprivileged" may be revealed under paragraph (d) without specific express authorization if the disclosure is impliedly authorized by the Client or is believed necessary by the lawyer as part of representing the Client and delivering the opinion (the scope of the opinion and implications of the disclosure having been previously approved by the Client after sufficient communication under Texas Rules 1.02 and 1.03, as discussed above).

e. Conflicts of Interest between Clients: Rules 1.06, 1.07 and 1.09. In addition to the duties of competence, diligence, and confidentiality, the lawyer owes an ethical duty of loyalty to the Client. The Texas Rules, like the ABA Rules, approach the duty of loyalty to the Client both affirmatively (by requiring competence, diligence and communication with the Client, as described above) and negatively (by prohibiting the lawyer from becoming subject to conflicting interests). These prohibitions focus on the two primary sources of potential conflict: (i) the conflict that may arise when a lawyer accepts representation of a second Client whose interests may be adverse to the first Client (the subject of Texas Rules 1.06, 1.07 and 1.09); and (ii) the

conflict that may arise when a lawyer engages in certain conduct or transactions implicating the self-interest of the lawyer in a manner that may unacceptably impair the lawyer's loyalty to the Client (the subject of Texas Rules 1.08, 1.11, 1.13 and 1.14).

Loyalty to the Client "prohibits undertaking representation directly adverse to the representation of [a] client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests."[43] In the context of legal opinions, Texas Rule 1.06 provides that the Opinion Giver may not, in delivering the legal opinion, establish a Client relationship with the recipient of the legal opinion -- that is, the lawyer may not accept the Opinion Recipient as a second Client for purposes of delivering the legal opinion -- unless two conditions are met:

> (1) [T]he lawyer reasonably believes that the representation of each client will not be materially affected; and
>
> (2) [E]ach affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications and possible adverse consequences of the common representation and the advantages involved, if any.[44]

These restrictions on the creation of a Client-lawyer relationship with the third-party Opinion Recipient apply even though the Opinion Recipient will presumably be relying to some degree and in some manner upon the opinion and even though the Opinion Recipient may not have any cause of action against the lawyer for damages resulting from a negligently erroneous opinion in the absence of such a lawyer-Client relationship.[45]

One consequence of representing multiple parties in a matter is that the lawyer "shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute."[46] The consequences of accepting as a Client the recipient of the proposed legal opinion would therefore expressly include the inability to represent the lawyer's primary Client in a subsequent dispute with the recipient of the legal opinion arising out of the matter absent prior consent from both. However, the relationship to the non-Client Opinion Recipient is not one of attorney-Client, but rather one of a third party for whom the attorney is performing an evaluation at the request of his Client.[47] Furthermore, to the extent that the Opinion Recipient were to be deemed a "quasi-client", it would appear that such consent could be deemed to be a condition to the creation of the second lawyer-Client relationship, at least to the extent that future disputes could be foreseen, adequately described to the Clients and consented to.

As expressed in Comment ¶ 8 to Texas Rule 1.06: "Disclosure and consent are not formalities. . . . While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed." Again, the apparent procedure to be followed by the lawyer is to disclose fully the consequences of dual representation to the Client and then to abide by the Client's decision as to whether or not to permit the lawyer to assume the

---

[43] Comment ¶ 2 to Texas Rule 1.06 (emphasis added).

[44] Texas Rule 1.06(c).

[45] See Part IV, infra.

[46] Texas Rule 1.06(d).

[47] See ABA Report, supra note 3, at Commentary ¶ 7.1.

responsibilities of a lawyer-Client relationship with the third party. "It is for the client to decide whether the client wishes to accommodate the other interest involved."[48]

Even assuming that the primary Client consents, after appropriate disclosure, to the lawyer taking on the Opinion Recipient as a second Client, the lawyer may still not undertake the conflicting representation unless the lawyer also "reasonably believes that the representation of each client will not be materially affected."[49] In situations involving litigation, the representation of opposing parties to the same litigation is expressly prohibited by Texas Rule 1.06(a). In contexts other than litigation, the lawyer must determine whether representation of multiple Clients is ethically feasible. Comment ¶ 14 to Texas Rule 1.06 states that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them." Thus, for example, multiple borrowers or co-obligors might properly be represented by the same lawyer. By contrast, the "fundamentally antagonistic" interests of the parties typically makes it ethically inappropriate for counsel for the borrower or obligor also to represent the lender or obligee, even for the limited purpose of delivering an opinion to the lender or obligee. Comment ¶ 14 to Texas Rule 1.06 is quoted verbatim from the comment to ABA Rule 1.7.

Texas Rule 1.07 governs the lawyer in acting as an intermediary between Clients. The status of "intermediary" under the Texas Rules is far more expansively defined than the ordinary meaning of the word might suggest. Under paragraph (d) of this Rule, "a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests."

Paragraph (a) of Texas Rule 1.07 prohibits the lawyer from representing two or more such parties unless: "(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved . . . and obtains each client's written consent to the common representation; (2) the lawyer reasonably believes that the matter can be resolved without the necessity of . . . litigation, on terms compatible with the clients' best interests, [in a manner permitting adequately informed decision making by each client and without significant risk of material prejudice to the interests of any client]; and (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients." This is, clearly, a tall order.

A lawyer seeking to represent both the primary Client and the Opinion Recipient as an additional Client would apparently be an "intermediary" for purposes of Texas Rule 1.07 and therefore would be required, as a precondition to undertaking such a role, to obtain the informed written consent of both parties and to resolve all the other issues in favor of allowing the joint representation. Thereafter, during the ensuing course of the joint representation, Texas Rule 1.07(b) would require the lawyer to "consult with each client concerning the decision[s] to be made and the considerations relevant in making them, so that each client can make adequately informed decisions."

Comment ¶ 6 to Texas Rule 1.07 notes that a "particularly important factor in determining the appropriateness of intermediation is the effect on Client-lawyer confidentiality and the attorney-Client privilege. In a common representation, the lawyer is still required both to keep each Client adequately informed and to maintain confidentiality of information relating to the representation, except as to such Clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper."

Texas Rule 1.09 provides ethical guidance concerning the lawyer's responsibility with respect to former Clients. The rule generally prohibits, without prior consent, a lawyer who personally has formerly represented a Client in a matter from accepting representation of a second Client in a matter adverse to the former Client if, among other things, the second Client "questions the validity of the lawyer's services or work product for the

---

[48] Comment ¶ 4 to Texas Rule 1.06.

[49] Texas Rule 1.06(c)(1).

former client."[50] Texas Rule 1.09 also prohibits a lawyer from representing a second Client in a matter adverse to the former Client if the matter is the same or substantially related to the matter in which the former Client was represented or if the representation "in reasonable probability" will involve disclosure of confidential Client information in violation of Texas Rule 1.05.

To illustrate one apparent consequence of Texas Rule 1.09, a borrower's counsel who also represented the lender as an additional Client for purposes of delivering a legal opinion to the lender might not be ethically permitted at a later date to represent the borrower in challenging the rights of the lender, for example, to enforce documents as to which the lawyer had given an enforceability opinion. This consequence would be among those required to be explained to the borrower at the outset in connection with obtaining the borrower's consent to the initial joint representation.

Under these rules, entering into a Client-lawyer relationship with the third party Opinion Recipient of the legal opinion, in addition to the pre-existing Client-lawyer relationship with the primary Client, may pose overwhelming ethical difficulties in many situations. As a result, such dual representation is only very rarely undertaken. Instead, it is nearly universal practice to recognize that "the Opinion Recipient is not the Opinion Giver's Client."[51] This custom prevails despite the fact that the absence of such a Client-lawyer relationship with the Opinion Recipient may insulate the Opinion Giver from civil liability to the Opinion Recipient under the doctrine of "strict privity" discussed in Part IV, infra.

f. Conflicts of Interest between the Client and the Lawyer: Rules 1.08, 1.11, 1.13 and 1.14. The Texas Rules contain a number of provisions intended to cope with conflicts that may arise between the best interest of the Client and the lawyer's own self-interest. Such conflicts of interest may create particularly troublesome problems in the context of legal opinions to third persons. The Client's frequently encountered desire is that the lawyer's opinion be as broad in scope and as free from qualification as possible in order to satisfy the requirements of the third person with whom the Client seeks to consummate a business transaction. The Opinion Giver, on the other hand, may desire to limit the scope of the opinion or to subject the opinion to limitations, qualifications and exceptions. The Opinion Giver, in short, may wish to narrow the opinion and minimize the chance of error, while the Client may seek to expand the legal opinion and remove it as an obstacle to the consummation of the business transaction.

Nor is it unheard of for a Client to urge a lawyer to give a requested opinion despite the lawyer's uncertainty as to its accuracy or reliability. Experience indicates that the relative bargaining power of the parties to a business transaction not infrequently influences the pressures brought to bear upon the Opinion Giver by the Opinion Recipient's lawyer and by the Opinion Giver's own Client. Regrettably, the Texas Rules provide no specific guidance to lawyers wrestling with such conflicts. Texas Rules 1.08, 1.11, 1.13 and 1.14, each of which addresses one or more aspects of conflict of interest between the lawyer and Client, are aimed at different sorts of conflicts than those arising in the delivery of legal opinions.

The Texas Rules, considered as a whole, do however provide fairly clear parameters and guidance for the Opinion Giver in resolving conflicts with the lawyer's self-interest. As a cardinal principle, the lawyer may not ethically put self-interest above the interest of the Client. The Texas Rules express this principle through requirements of competence, diligence, confidentiality and loyalty. This central and defining agency relationship in which the lawyer must serve the Client is subject, of course, to the lawyer's ethical responsibility to avoid being used as a tool in a Client's fraudulent or criminal conduct.

In addition to these ethical aspects of the lawyer-Client relationship, the Texas Rules go on to define an Opinion Giver's ethical responsibilities from two further analytical points of view. Those additional rules, discussed immediately below, examine the ethical responsibilities of the lawyer both as a "counselor" who gives

---

[50] Texas Rule 1.09(a)(2).

[51] ABA Report, supra note 3, at Commentary ¶ 7.1.

advice to the Client and may render an evaluation for use by a third person[52] and as a professional who must in all events be truthful in statements made to third persons in the course of representing a Client.[53]

2. The Lawyer as Counselor: Part II of the Texas Rules. As a counselor, whether the lawyer is advising the Client or undertaking other actions in representing the Client -- such as delivering a legal opinion to a third party at the request of the Client -- the lawyer has an ever-present duty to exercise independent professional judgment and to render candid advice. Yet the lawyer continues to represent the Client and remains subject to the duties inherent in the Client-lawyer relationship outlined above. As a result, the lawyer cannot assume the role of counselor to a non-Client Opinion Recipient unless the Client has consented after consultation and unless the lawyer's assumption of that role will not adversely affect the primary Client-lawyer relationship.

a. The Lawyer as Advisor: Rule 2.01. Texas Rule 2.01 reads, in its entirety:

> In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

This fundamental rule underlies the content of any legal advice, including legal opinions, delivered by a lawyer. The requirements of independent judgment and candor apply not only in the context of advising the Client but also in the context of "otherwise representing a client." When a lawyer represents a Client and, as part of that representation, delivers a legal opinion to a third person, the lawyer is ethically obliged to "exercise independent professional judgment and render candid advice" in the opinion.[54]

The comments to Texas Rule 2.01, which do not focus on communications to persons other than the Client, are derived essentially verbatim from the comments to ABA Rule 2.1 and focus on four essential aspects of the advisory process. First, the requirement of candor overrides the lawyer's understandable desire to provide the answer desired by the Client. Although the advice may be put "in as acceptable a form as honesty permits," the lawyer "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[55]

Second, the lawyer's advice to the Client must be calculated to be useful and should not be couched "in narrow legal terms" without regard to other important practical considerations "such as costs or effects on other people."[56] However, when a request is expressly or impliedly made for purely technical advice, and is made by a Client experienced in legal matters, the lawyer may accept the request "at face value."[57] In the ordinary situation in which the third person Opinion Recipient is represented by counsel, the negotiation of the scope and language of the legal opinion may similarly be accepted "at face value" by the lawyer. The lawyer should not

---

[52] Texas Rules 2.01 and 2.02.

[53] Texas Rule 4.01.

[54] The Committee understands the term "render candid advice" to mean, in this context, only that the Opinion Giver must satisfy the requirements of Texas Rule 4.01, which are specifically concerned with communications to non-clients.

[55] Comment ¶ 1 to Texas Rule 2.01.

[56] Comment ¶ 2 to Texas Rule 2.01.

[57] Comment ¶ 3 to Texas Rule 2.01.

have any ethical obligation to address matters in the legal opinion beyond those expressly covered by the opinion as negotiated.[58]

Third, the Comments to Rule 2.01 make clear the general notion that "a lawyer is not expected to give advice until asked by the client."[59] However, when the lawyer "knows that the Client proposes a course of action that is likely to result in substantial adverse legal consequences to the Client, duty to the Client may require that the lawyer act if the Client's course of action is related to the representation."[60] There is no similar requirement with regard to the offering of unasked-for advice to a third person, as distinguished from the lawyer's Client, and there should be no such implied duty to protect such a third person.[61] Indeed, such a duty to a third person would many times be inconsistent with the lawyer's paramount duty to the lawyer's own Client.

Fourth, the lawyer as counselor to his or her Client is not properly limited to a narrow, legal-issues-only point of reference. On the contrary, the full experience and judgment of the lawyer may properly be brought to bear:

> It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[62]

The second sentence of ABA Rule 2.1 (which was omitted from Texas Rule 2.01, perhaps because it is not phrased as an imperative) is even more expansively phrased:

> In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Preamble ¶ 11 to the Texas Rules expressly recognizes that the Texas Rules and Comments "do not . . . exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules." Recognizing this limitation, Texas Rule 1.15(b)(4) permits a lawyer to withdraw from representing a Client even if the Client's acts or demands upon the lawyer do not entail fraud or criminal activity whenever "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement."

b. Evaluation for Use by Third Persons: Rule 2.02. In view of the specific applicability of Texas Rule 2.02 to the delivery of legal opinions to third persons, the rule is reproduced below in its entirety along with the full text of the accompanying Comment paragraphs (excluding only Comment ¶¶ 2, 3 and 7 that do not pertain to opinions in business transactions).

> Rule 2.02: Evaluation for Use by Third Persons
>
> A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless:

---

[58] See Texas Rule 4.01 and ABA Report, supra note 3, at Commentary ¶ 7.1.

[59] Comment ¶ 5 to Texas Rule 2.01.

[60] Id. (emphasis added).

[61] See Texas Rule 4.01 and ABA Report, supra note 3, at Commentary ¶ 7.1.

[62] Comment ¶ 2 to Texas Rule 2.01.

(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(b) the client consents after consultation.

Comment:

Definition

1. An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

. . .

4. In addition to serving as advisors or as evaluators, lawyers may be called upon to serve as investigators. When serving as investigator, the identity of the client is critical, because only the client has a confidential relationship with the lawyer. See Rule 1.05. Thus, a lawyer who makes an investigative contact with a non-client in circumstances which might cause the non-client to believe that the lawyer is representing him in the matter should make that non-client aware that rules concerning client loyalty and confidentiality are not applicable. See Rule 1.05. See also Rule 1.12(e).

Third Persons

5. When the evaluation is intended for the information or use of a third person, the evaluation involves a departure from the normal client-lawyer relationship. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

6. The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. See Rule 1.02. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refused to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Compliance with the Opinion Giver's ethical responsibilities in rendering a legal opinion to a third person will require the Opinion Giver to assess the applicability and consequences of all of the foregoing authority. The following points may merit specific comment or emphasis in the present discussion.

First, and perhaps most importantly, an undertaking to deliver a legal opinion to a third person "involves a departure from the normal client-lawyer relationship."[63] This is true in at least two important ways. The relationship between the Opinion Recipient and the Opinion Giver is not a lawyer-Client relationship. The Opinion Giver does not have the same duties to the Opinion Recipient as to a Client -- for example, the Opinion Giver has no ethical obligation to advise the Opinion Recipient regarding legal matters or consequences not expressly covered by the scope of the Opinion Letter,[64] as might be the case if the advice were being given to the Client under Texas Rule 2.01.[65] Separately, and equally importantly, undertaking to render an opinion for use by a third person does not excuse the lawyer from the ethical duties owed to the lawyer's Client. For example, even if the legal opinion might call for the lawyer to disclose privileged information regarding the Client, that information must nevertheless be kept confidential by the lawyer unless expressly agreed to by the Client and except to the extent it can or must be revealed under Texas Rule 1.05 or other legal or ethical authority.

Second, despite the fact that the third party Opinion Recipient is not a Client, the ethical propriety of the engagement is not presumed. On the contrary, a lawyer can undertake to give such an opinion only after completing an analytical process analogous to the procedure mandated for assessing conflicts of interest between an existing Client and a potential second Client. The lawyer may not undertake the task of providing the legal opinion unless "the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."[66] Assuming that the lawyer believes the engagement will be "compatible" with the primary Client-lawyer relationship, the lawyer may undertake to deliver an opinion to a third person provided "the client consents after consultation." In many transactions the lawyer's opinion is a closing requirement specifically listed in a Transaction Document signed by the Client, which clearly manifests the Client's consent. In many other situations, and particularly where the Client is sophisticated in business matters and familiar with the role and process of delivering legal opinions, the Client's consent may be given implicitly or without elaborate prior discussion. When, however, the Client is unsophisticated or the lawyer knows that the opinion engagement will likely impinge upon the lawyer's compliance with requirements of confidentiality or other aspects of the primary Client-lawyer relationship, the lawyer should consult with the Client about accepting the Opinion Giver's engagement. Such consultation might, depending upon the circumstances, cover such matters as "the existence, nature, implications, and possible adverse consequences" of the engagement to render the opinion "and the advantages involved, if any."[67]

The third point to be noted -- and one that should be understood by the lawyer's Client at the time the engagement to deliver the opinion is first undertaken -- is that the Opinion Giver does assume some ethical obligations to the Opinion Recipient, and particularly assumes an obligation to abide by strict standards of truthfulness in communicating with the Opinion Recipient under Texas Rule 4.01, discussed below. In addition, an Opinion Giver has a separate obligation to disclose the results of an evaluation to the Opinion Recipient under Texas Rule 1.05(e) when the Opinion Giver's information "clearly establish[es] that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person." Similarly, an Opinion Giver may reveal confidential client information to the Opinion Recipient under the provisions of Texas Rule 1.05(c)(7) "in order to prevent the client from committing a criminal or fraudulent act."

---

[63] Comment ¶ 5 to Texas Rule 2.02.

[64] See Texas Rule 4.01 and ABA Report, supra note 3, at Commentary ¶ 7.1.

[65] See Comment ¶ 5 to Texas Rule 2.01.

[66] Texas Rule 2.02(a).

[67] Texas Rule 1.06(c)(2).

Comment ¶ 5 to Texas Rule 2.02 refers to a "duty to disseminate the findings" of an evaluation undertaken for the use of someone other than the Client. The source and extent of such a duty to disseminate findings is not explicitly set forth in the Texas Rules or the accompanying Comments. (This is equally true with regard to the comment to ABA Rule 2.3, from which the Texas Comment is derived verbatim.) It is clear that the lawyer's duty to maintain the confidentiality of Client information is not waived or superseded by the lawyer's undertaking to deliver an opinion to a third person, except to whatever extent the Client may agree. Accordingly it does not seem to the Committee that Comment ¶ 5 is intended to create any duty to disseminate findings that is independent of, or that extends beyond, such disclosure as is (i) contemplated by the lawyer's undertaking to render the opinion and consented to by the Client after consultation or (ii) otherwise permitted or required by the Texas Rules.

A fourth ethical consideration in the delivery of legal opinions to third persons under Texas Rule 2.02 pertains to the scope of the investigation underlying the opinion and to the scope of the opinion itself. Recognizing that the "quality" of the opinion will depend upon the "freedom and extent of the investigation upon which it is based," Comment ¶ 6 to Rule 2.02 remarks that the lawyer's latitude of investigation should be that which is viewed as necessary as a matter of professional judgment by the Opinion Giver. Absent prohibiting ethical constraints, the scope of a legal opinion may be limited. Under Comment ¶ 6 to Texas Rule 2.02, "any such limitations which are material to the evaluation should be described in the report." The ABA Report states that the Opinion Letter will conclusively evidence the agreed opinion coverage upon its delivery and acceptance.[68] Comment ¶ 6, in recognizing that "the terms of the evaluation may be limited" under appropriate circumstances, cross-references Texas Rule 1.02. Texas Rule 1.02 places the ultimate authority to determine the scope of the lawyer's representation in the hands of the Client after appropriate consultation. Thus, the lawyer has an ethical obligation to assure that the scope of the investigation is adequate in the lawyer's professional judgment and an additional ethical obligation to abide by limitations on that scope set by the Client. If these two duties cannot be reconciled, the lawyer may not be able ethically to undertake to deliver the opinion.

The Client's authority to determine the scope of the lawyer's engagement is, in all events, subject to fundamental ethical limitations. These limitations include those set forth in: (i) Texas Rule 1.02(c), which requires that a lawyer "shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent;" (ii) Texas Rules 1.02(d) and (e), which require the lawyer to "make reasonable efforts under the circumstances" to persuade the Client to refrain from committing, or to take corrective action with respect to, a crime or fraud; and (iii) Texas Rule 1.02(f), which requires the lawyer to explain to the Client the lawyer's inability to accept representation that is not permitted by the rules of professional conduct or other law.

Another ethical problem that might arise with respect to the scope and content of an opinion prepared for a third party is the Client's subsequent refusal to comply with the initial terms upon which it was understood that the opinion was to be rendered. If the Client changes its mind after the lawyer has commenced the process of preparing the opinion, "the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances."[69] Given the deference to the primary attorney-Client relationship that pervades the entire ethical framework of the Texas Rules, it appears that the Client would necessarily retain the right to such a subsequent change of mind. If the Client should choose to retract or revise its consent to the rendering of the opinion, the lawyer would be bound by the Client's decision from that point forward. The lawyer could not, however, participate in a Client's changed decision in violation of rules requiring the lawyer to make disclosures under the circumstances -- such as where fraud or criminal activity likely to result in death or substantial bodily harm appeared imminent.

---

[68] ABA Report, supra note 3, at Commentary ¶ 7.1.

[69] Comment ¶ 6 to Texas Rule 2.02.

3. Non-Client Relationships: Part IV of the Texas Rules. As a negotiator, a lawyer "seeks a result advantageous to the client but consistent with requirements of honest dealing with others."[70] The requirement that a lawyer deal honestly with non-Clients applies to the Opinion Giver delivering an Opinion Letter to a third person Opinion Recipient.

a. Truthfulness in Statements to Others: Rule 4.01. In addition to Texas Rule 2.02, Texas Rule 4.01 also bears directly upon the ethical responsibility of an Opinion Giver delivering an Opinion Letter to a third person Opinion Recipient. Texas Rule 4.01 provides as follows:

> In the course of representing a Client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a Client.

The structure of Texas Rule 4.01 is similar to ABA Rule 4.1: affirmative statements are distinguished from nondisclosures, and facts are distinguished from legal conclusions. With regard to affirmative statements, an Opinion Giver may not knowingly make a false statement -- whether of material fact or of law -- to a third person Opinion Recipient.[71] With regard to nondisclosures, the lawyer may not knowingly fail to disclose a material fact under specified circumstances involving criminal or fraudulent acts. No similar obligation is imposed regarding a failure to make a statement of law. The apparent purpose of the distinction is to make clear that an Opinion Giver does not have an obligation to advise a non-Client as to legal matters, but that the Opinion Giver may not knowingly make a false statement of a legal matter to an Opinion Recipient. An Opinion Giver may likewise, in general, knowingly omit to disclose facts to an Opinion Recipient if those facts are not "material" or if disclosure is not necessary "to avoid making the lawyer a party to a criminal act" or in order for the lawyer to avoid "knowingly assisting a fraudulent act perpetrated by a client."[72]

With regard to materiality, Comment ¶ 1 to Texas Rule 4.01 recognizes that the materiality of a fact can depend upon the circumstances. In the circumstance of rendering an Opinion Letter to a third person Opinion Recipient, facts would appear to be material only if they would affect the legal conclusion expressed in the Opinion Letter.

Of particular applicability to the delivery of legal opinions is the observation in Comment ¶ 2 to Texas Rule 4.01 that a lawyer violates the rule "either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person." Clearly, an Opinion Giver cannot avoid the ethical requirement of truthfulness in statements to the Opinion Recipient by the device of knowingly incorporating or assuming in the Opinion Letter inaccurate statements of fact made by the Client. For example, an Opinion Giver could not ethically assume the accuracy of a representation made by the Client in a Transaction Document for purposes of rendering an opinion when the Opinion Giver knew the assumption to be false and also "material" in the sense of affecting the legal conclusion expressed. The incorporation of such statements violates the rule if "the lawyer knows they are false and intends thereby to mislead."[73]

As explained in Comment ¶ 3 to Texas Rule 4.01:

---

[70] Preamble ¶ 2.

[71] Texas Rule 4.01(a).

[72] Texas Rule 4.01(b).

[73] Comment ¶ 2 to Texas Rule 4.01.

> Generally, in the course of representing a client a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure, such as formal discovery. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client.

In a circumstance where the Client is known by the Opinion Giver to be engaging in fraudulent or criminal action, the Opinion Giver should counsel with the Client and urge appropriate remedial action.[74] If the Client refuses to comply with the Opinion Giver's urging, the responsibilities of the Opinion Giver depend on whether or not disclosure is necessary to avoid making the Opinion Giver "a party to a criminal act" or to avoid the Opinion Giver's "knowingly assisting a fraudulent act perpetrated by a client."[75]

Texas Rule 4.01 does not elaborate upon the meaning of the phrase "knowingly assisting a fraudulent act perpetrated by a client." However, the phrase must be intended to denote more than the mere nondisclosure by the Client of the same fact that the Opinion Giver has not disclosed. Otherwise, the inclusion in Texas Rule 4.01(b) of the quoted phrase would be pointless and the rule would simply prohibit the lawyer from knowingly failing to disclose any material fact that the Client has not disclosed. The context of the phrase, which is placed as a prohibitory accompaniment to the requirement that the lawyer avoid nondisclosure "making the lawyer a party to a criminal act," indicates that the phrase should be read as contemplating situations in which the Opinion Giver's silence amounts to knowing assistance in the perpetration of an independent and intentional fraud by the Client. Thus, an Opinion Giver should not be considered to violate Texas Rule 4.01 merely because the Opinion Giver and the Client both fail to disclose a particular fact to the Opinion Recipient, even though the nondisclosed fact might be material to the Opinion Recipient, unless the Opinion Giver knows that the Client is engaged in perpetrating a fraudulent act upon the Opinion Recipient (beyond the nondisclosure of the particular fact) and that the Opinion Giver's disclosure is necessary to avoid the Opinion Giver's "knowingly assisting" the fraudulent act of the Client.

Put another way, not every nondisclosure of a material fact rises to the level of "knowingly assisting a fraudulent act" under the Texas Rules. In the context of the purchase or sale of a security, the nondisclosure of a material fact may be "fraudulent" for purposes of Rule 10b-5 under the Securities Exchange Act of 1934, but only if (i) disclosure of the omitted fact is necessary to make the statements that are made, in light of the circumstances, not misleading and (ii) the nondisclosing party acts with an intent to deceive or recklessness sufficient to satisfy the "scienter" requirement. It is not completely clear whether an Opinion Giver liable as an aider or abettor of a violation of Rule 10b-5 would also necessarily be subject to discipline under Texas Rule 4.01(b). It may well be that the phrase "knowingly assist a fraudulent act perpetrated by a client" requires more.

When disclosure of a material fact would be necessary for the Opinion Giver to avoid knowingly assisting a Client's fraudulent act, the Opinion Giver may not knowingly fail to disclose a material fact to a third person such as the Opinion Recipient. Where the Opinion Giver's nondisclosure would permit the Client to proceed with a fraud but would not make the lawyer a knowing assistant in the fraud perpetrated by the Client, the lawyer may be ethically entitled (though not ethically required) to resign[76] as well as to make disclosure[77]. Disclosure is not only permitted but required, even though the Opinion Giver would not be implicated as a party to a crime or as an assistant to a fraudulent act by the Client, when the Opinion Giver "has confidential

---

[74] Comment ¶ 4 to Texas Rule 4.01. See also Texas Rule 1.02(e).

[75] Texas Rule 4.01(b).

[76] Texas Rule 1.15(b)(2) and (3).

[77] Texas Rule 1.05(c)(7).

information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person."[78]

b. Communication with One Represented by Counsel: Rule 4.02. Texas Rule 4.02(a) forbids an Opinion Giver from communicating directly with the nonlawyer Opinion Recipient if the Opinion Recipient is represented by another lawyer with regard to the subject, unless the Opinion Giver has the consent of the other lawyer or is otherwise authorized by law to do so. Ordinarily, it is ethically appropriate that negotiations regarding the scope and language of the opinion should be carried on with legal counsel for the Opinion Recipient. The communication contained in the Opinion Letter itself, however, is customarily intended and ethically authorized to be delivered directly to the nonlawyer Opinion Recipient.

4. Law Firms and Associations: Part V of the Texas Rules. As discussed in Part XI of this Report, it may be prudent for a law firm or law department to implement specific review procedures intended to minimize the risks of error in opinion-giving. Beyond the salutary effects such procedures may have in avoiding errors, review procedures may also be appropriate from an ethical standpoint. Each lawyer involved in the opinion process has a shared ethical responsibility for the investigation conducted and the work product produced.

a. Responsibilities of a Partner or Supervisory Lawyer: Rule 5.01. It is important again to emphasize the distinction between the bases upon which one lawyer may be held liable for acts or omissions of another lawyer and the circumstances that may give rise to disciplinary action. The Texas Rules address only the latter issue and expressly state that they are not intended to create any independent basis for civil liability.[79]

Texas Rule 5.01 subjects a partner or other supervisory lawyer to discipline for violations of the rules of professional conduct by a supervised lawyer if (i) the partner or supervising lawyer "orders, encourages, or knowingly permits the conduct involved" or (ii) the partner or other lawyer with direct supervisory authority over the supervised lawyer "with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation."

In addition to this standard for disciplinary purposes, Comment ¶ 6 to Texas Rule 5.01 recognizes the separate "moral obligation" that is borne by lawyers in positions of authority in a firm. Such lawyers, according to Comment ¶ 6, "should feel a moral compunction to make reasonable efforts to ensure that the . . . firm . . . has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules." From the point of view of delivering legal opinions to third persons, the supervisory function and the necessity for appropriate procedural measures are thus as important from an ethical standpoint as from the standpoint of avoiding error in the legal conclusions expressed. The nature and formality of the appropriate measures to be undertaken to this end will depend upon the nature of the opinion and the size and structure of the firm giving the opinion.[80]

b. Responsibilities of a Supervised Lawyer: Rule 5.02. Each lawyer in a firm shares a measure of responsibility for the discharge of the firm's ethical responsibilities. A lawyer subject to the supervision of another lawyer is not excused from compliance with the rules, although "a supervised lawyer does not violate [the] rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct."[81]

---

[78] Texas Rule 1.05(e).

[79] Preamble ¶ 15.

[80] See Comment ¶ 7 to Texas Rule 5.01.

[81] Texas Rule 5.02.

c. **Professional Independence of a Lawyer: Rule 5.04**. The fact that a lawyer has been engaged by the Client to render an opinion to a third person cannot, ethically, influence the lawyer so as to compromise the lawyer's professional independence and candor or the lawyer's primary professional duty to the Client. Texas Rule 5.04(c) provides that "a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Neither the Opinion Recipient nor the Client may be permitted to influence the Opinion Giver's exercise of independent professional judgment or the truthfulness of the Opinion Giver's communication in the Opinion Letter.[82] Comment ¶ 4 to Texas Rule 5.04 indicates that the principal purpose of this rule is to assure that the lawyer's primary loyalty to the Client is not compromised:

> Rule 5.04(c) provides that a lawyer shall not permit improper interference with the exercise of the lawyer's professional judgment solely on behalf of the client. The lawyer's professional judgment should be exercised only for the benefit of the client free of compromising influences and loyalties. . . . Similarly, neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

At the same time, however, the language of Texas Rule 5.04(c) clearly applies to forbid the Opinion Giver's professional judgment from being influenced by the Client in a context where the Client has employed and paid the Opinion Giver to render an Opinion Letter to a third person Opinion Recipient. As previously discussed, the Opinion Giver has a duty to "exercise independent professional judgment and render candid advice"[83] and a duty to communicate truthfully.[84] These duties exist notwithstanding the duties owed to the Opinion Giver's Client and despite the Opinion Giver's engagement by that Client to render the legal opinion to the third person Opinion Recipient.

5. **Information About Legal Services: Part VII of the Texas Rules**. The lawyer has a special obligation to avoid misleading communications about the lawyer's qualifications to perform legal services or about the services the lawyer is to render. This ethical obligation does not appear to be limited to communications with Clients or potential Clients and should therefore be considered in rendering legal opinions. Where the Opinion Recipient is represented by its own counsel, however, the Opinion Giver's duty to assure that the Opinion Recipient is not misled as to such matters of qualifications or legal services should be subject to the presumption that the Opinion Recipient is being properly advised by the Opinion Recipient's own counsel as to matters the Opinion Giver may reasonably expect to be known to the Opinion Recipient's counsel.

a. **Communications Concerning a Lawyer's Services: Rule 7.01**. Texas Rule 7.01(a) forbids a lawyer from making "a false or misleading communication about the qualifications or the services of any lawyer or law firm." This prohibition would apparently apply to some communications made in, or with respect to, legal opinions delivered to third persons. For purposes of this Rule, a statement is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[85] This formulation, though similar to the formulation regarding truthfulness in statements to third persons under Texas Rule 4.01, discussed above, may have a broader meaning. Again, a distinction is made between affirmative misrepresentations (which may not be made as to either material facts or matters of law) and omissions (which may not be made as to material facts but may be made as to matters of law). However, Texas Rule 7.01(a)(1) provides that any statement (perhaps including a statement of law as well as a statement of fact) is misleading if the statement "omits a fact necessary to make the statement considered as a whole not materially misleading."

---

[82] See Texas Rules 2.01, 2.02 and 4.01.

[83] Texas Rule 2.01.

[84] Texas Rule 4.01.

[85] Texas Rule 7.01(a)(1).

As to statements covered by its terms, Texas Rule 7.01 would appear to require from an ethical standpoint that no fact be omitted from a legal opinion if the consequence of the omission is to render any of such statements of fact or law "materially misleading".[86] However, Texas Rule 7.01 applies only to a special category of statements made by lawyers -- namely statements "about the qualifications or the services of any lawyer or law firm." The typical opinion contains only a limited number of statements regarding services and qualifications, such as statements to the effect that the Opinion Giver or firm represents a named Client or that lawyers in the firm are licensed to practice law only in Texas. As a result, the practical implications of the different formulation in Texas Rule 7.01 should ordinarily be of only narrow application in the context of legal opinions.

Within that narrow realm, however, caution may be warranted. For example, where a Texas lawyer gives an opinion regarding the Delaware General Corporation Law (as is often quite properly done), it may be appropriate in some circumstances to state that the opinion is expressed only as to the laws of Texas, federal law and the Delaware General Corporation Law. Similarly, where limitations have been placed on the investigation undertaken as a factual predicate for a legal opinion, such limitations should be expressly disclosed so that the recipient is not misled as to the nature of the "service" rendered by the Opinion Giver.[87]

6. Maintaining the Integrity of the Profession: Part VIII of the Texas Rules. The lawyer has an ultimate ethical duty, in all actions taken in furtherance of the representation of a Client, to assure that the lawyer's conduct is conducive to maintaining the integrity of the legal profession.

a. Misconduct: Rule 8.04. As a final "backstop" to the legal framework discussed above, Texas Rule 8.04(a) expressly forbids a lawyer from violating any of the Texas Rules, regardless of whether the violation occurs in the course of a Client-lawyer relationship, and requires that a lawyer never "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[88] The clear purpose of the Texas Rules is to impose upon lawyers a high standard of honesty in their professional dealings and communications. In undertaking to render a legal opinion to a third person Opinion Recipient under the Texas Rules, the Opinion Giver must resolve sometimes difficult questions in a manner that protects and preserves the primary Client-lawyer relationship (including particularly the confidences of the Client) and at the same time assures that the Opinion Giver exercises independent professional judgment and communicates truthfully with third persons.

IV. STANDARDS OF CARE AND LIABILITIES IN CONNECTION WITH LEGAL OPINIONS

A. Introduction.

An improperly rendered opinion can have adverse consequences to the Opinion Giver, including disciplinary sanctions, civil liability under private causes of action, and civil and criminal liability to state and federal authorities.[89] The Opinion Giver who wishes to avoid such consequences must satisfy applicable minimum standards of care that have been established by and set forth in ethical rules, court decisions, state and federal statutes, and pronouncements of professional organizations and governmental authorities.

This Part of the Report describes the minimum standards of care applicable to Opinion Givers under Texas law and the liability and certain other consequences under Texas law of failing to satisfy such standards.

---

[86] Id.

[87] Comment ¶ 6 to Texas Rule 2.02.

[88] Texas Rule 8.04(a)(3).

[89] See Freeman, Legal Opinion Liability, in Drafting Legal Opinion Letters, 400-02 (M. Sterba, ed. 1988) for a description of various possible adverse consequences.

B. Standards of Care.

Texas courts have not applied a strict-liability standard in cases involving a lawyer's exercise of professional judgment.[90] Accordingly, an Opinion Giver may avoid liability or culpability under Texas law by satisfying minimum standards of care in connection with rendering an opinion.

1. Ethical Standards. Though the Texas Rules do not set forth ethical standards applicable specifically to the rendering of legal opinions, it is clear that the standards applicable generally to the professional conduct of Texas lawyers apply to an Opinion Giver. Part III of this Report discusses such ethical standards and related topics.

2. Common-Law Standards. Texas courts have not expressed a standard of care applicable particularly to the rendering of legal opinions, but have applied a standard applicable generally to the professional conduct of Texas lawyers. This common-law standard has not, however, been fully or finally explicated by the courts.

The Texas Supreme Court has recently stated that "[a] lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney."[91] Previous expressions of the standard, which appear to have continued vitality, are more descriptive. A lawyer is "not bound to possess and exercise the highest degree of skill, . . . but is required to possess such legal knowledge and to exercise such skill and diligence as men of the legal profession commonly employ."[92] In a decision regarding the judgment exercised by a lawyer in prosecuting a lawsuit, a Texas court stated that a lawyer impliedly represents to the Client that:

> (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.[93]

There are also indications that, at least in certain circumstances, the standard of care may depend on the lawyer's locality, although the pertinent "locality" has not been determined.[94]

The specialization of legal practice may also have an impact on the standard of care under Texas law. Specialization is formally acknowledged by the Texas Supreme Court and the State Bar of Texas, and one Texas

---

[90] See, e.g., Cosgrove v. Grimes, 774 S.W.2d 662, 664-65 (Tex. 1989); Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.--San Antonio 1966, no writ); Great American Indem. Co. v. Dabney, 128 S.W.2d 496, 501 (Tex. Civ. App.--Amarillo 1939, writ dism'd judgmt cor.). Cf., Archibald v. Act III Arabians, 755 S.W.2d 84, 87-89 (Tex. 1988) (Gonzalez, J., dissenting) (arguing that implied warranties should not apply to the rendition of professional services).

[91] Cosgrove, 774 S.W.2d at 664.

[92] Great American Indem. Co., 128 S.W.2d at 501.

[93] Cook, 409 S.W.2d at 477 (quoting Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954)). See also Patterson & Wallace v. Frazer, 79 S.W. 1077, 1079-81 (Tex. Civ. App.--El Paso 1904, no writ).

[94] Compare Cook, 409 S.W.2d at 478 (lawyer practicing in a different community not qualified to testify as an expert regarding the judgment of a lawyer in El Paso County as to trial tactics in a county court) with Liles v. Phillips, 677 S.W.2d 802, 805-06 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.) (lawyer failed to "exercise the care, diligence, and judgment of a good and competent attorney in North Texas").

court has suggested that it is an element of the standard of care,[95] but no Texas court has yet applied a different standard of care because of legal specialization.[96]

Because the expressions of the applicable standard of care by Texas courts have seldom been accompanied by an explanation of the standard or any of its elements, the decisions of those courts afford little guidance as to compliance with the expressed standard.

Generally, it is clear in Texas that the good faith of a lawyer is not sufficient to meet the standard of care: "The standard is an objective exercise of professional judgment, not the subjective belief that [the lawyer's] acts are in good faith."[97] Further, decisions of courts in other jurisdictions indicate that the standard includes two duties that clearly are fundamental to a lawyer rendering an opinion: An Opinion Giver has a duty "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."[98] An Opinion Giver also has a duty to conduct a reasonable investigation of the relevant facts necessary to support the opinion.[99]

3. Statutory Standards: The Texas Deceptive Trade Practices Act. Texas lawyers may be liable to their Clients for violations of the Texas Deceptive Trade Practices Act (the "DTPA"),[100] but the standard of care imposed on lawyers by the DTPA has not been established by the Texas Supreme Court.

In DeBakey v. Staggs,[101] the Court of Civil Appeals affirmed a decision holding a lawyer who failed to file a proper name-change petition liable to his former Client under the DTPA. Such liability was predicated on the conclusions that the lawyer's services were "services" as defined in § 17.45(2) of the DTPA, that the lawyer's Clients were "consumers" as defined in § 17.45(4) of the DTPA, and that the lawyer's conduct was an "unconscionable action or course of action" as defined in § 17.45(5) of the DTPA.[102]

---

[95] See Patterson & Wallace, 79 S.W. at 1080.

[96] But cf. Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714, 720 (Cal. Ct. App. 1979) (lawyer who prepared a trust held to the higher level of knowledge of tax law ordinarily possessed by tax law specialists); King v. Flamm, 442 S.W.2d 679, 681 (Tex. 1969) (medical specialist held to a higher degree of skill than that of a general practitioner). See Comment, Specialization: The Resulting Standard of Care and Duty to Consult, 30 Baylor L. Rev. 729 (1978). See also Restatement (Second) of Agency § 379 (1958).

[97] Cosgrove, 774 S.W.2d at 665 (disapproving suggestions of other Texas courts that there is "an exception to attorney negligence based on the subjective good faith of the attorney").

[98] Smith v. Lewis, 13 Cal. 3d 349, 358, 118 Cal. Rptr. 621, 627, 530 P.2d 589, 595 (1975).

[99] See, e.g., Greyhound Leasing & Fin. Corp. v. Norwest Bank of Jamestown, N.W, 854 F.2d 1122 (8th Cir. 1988); Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962).

[100] Tex. Bus. & Com. Code Ann. §§ 17.41-.826 (West 1987 & Supp. 1992).

[101] 605 S.W.2d 631 (Tex. Civ. App.--Houston [1st Dist.] 1980), writ ref'd n.r.e. per curiam, 612 S.W.2d 924 (Tex. 1981).

[102] DeBakey, 605 S.W.2d at 633.

In finding no reversible error in response to the application for writ of error, the Texas Supreme Court stated its agreement with the lower courts' conclusion that the lawyer's Clients were "consumers" under the DTPA, but reserved for future determination "the standard of care by which a legal malpractice claim is to be determined."[103]

Since the decisions in the DeBakey case, Texas courts have applied only the standard of "unconscionable action" to cases involving the alleged liability of a lawyer under the DTPA.[104] Nevertheless, the recent decision of the Texas Supreme Court in Archibald v. Act III Arabians[105] may be read broadly, as holding that there is an implied warranty of good and workmanlike performance applicable to the rendering not only of horse-training services (which were involved in the case), but also of any professional services involving the modification of existing tangible goods.[106] If so read, the standard to be met by a lawyer, in order to avoid liability under the DTPA, would be that of rendering service in a "good and workmanlike" manner.[107] Though there may be no discernible difference between such standard and the common-law standard of care applied to lawyers,[108] the application of the good-and-workmanlike performance warranty to lawyers in a DTPA case could result in increased liability exposure to lawyers.[109]

4. Statutory Standards: Securities and Tax Laws. A lawyer rendering an opinion in an area of law primarily governed by statute, such as securities law or tax law, is subject to the standards established by the statutes, and rules promulgated thereunder, governing that area of law. In the areas of securities law and tax law, the application of statutory standards to an Opinion Giver is justified because of the integral role legal opinions play in the transactions or reports to which such statutes are addressed. One court has expressed this justification as follows:

> The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the

---

[103] DeBakey v. Staggs, 612 S.W.2d 924, 925 (Tex. 1981).

[104] See Lucas v. Nesbitt, 653 S.W.2d 883 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.). See also Baron, The Expansion of Legal Malpractice Liability in Texas, 29 S. Tex. L. Rev. 355, 366-68 (1987).

[105] 755 S.W.2d 84 (Tex. 1988).

[106] Id. at 87-89 (Gonzalez, J., dissenting).

[107] Id. See Willis v. Maverick, 760 S.W.2d 642, 648 (Tex. 1988) (Mauzy, J., concurring and dissenting). In Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987), the Texas Supreme Court defined "good and workmanlike" as "that quality of work performed by one who has the knowledge, training, or experience necessary to the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."

[108] See Coulson v. Lake L.B.J. Mun. Utility Dist., 734 S.W.2d 649, 651 (Tex. 1987), remanded, 771 S.W.2d 145 (Tex. Civ. App.--Austin 1988), rev'd, 781 S.W.2d 594 (Tex. 1989, writ denied).

[109] See Subpart C.3 of this Part infra. See also Note, Professional Service Immunity Under the DTPA Comes Up Lame: Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988), 20 Tex. Tech L. Rev. 913 (1989) ("Note, Professional Service Immunity").

public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters.[110]

Accordingly, though this Report does not address or purport to provide guidance with respect to federal or state securities or tax laws,[111] a lawyer rendering or proposing to render an opinion in connection with a transaction involving securities should be familiar particularly with the various liability-related provisions of the Securities Act of 1933, as amended, Sections 11, 12, 15, and 17;[112] the Securities Exchange Act of 1934, as amended, Sections 10(b), 14(a), 14(e), and 20(a)[113] and Rules 10b-5, 14a-9, and 14e-1 promulgated thereunder;[114] the Racketeer Influenced and Corrupt Organizations Act;[115] and the Securities Act of Texas, as amended, Section 33,[116] and other applicable state securities laws.[117] Similarly, a lawyer rendering or proposing to render an opinion with respect to tax laws should be familiar particularly with the liability provisions of the Internal Revenue Code of 1986, as amended, Sections 6700 and 6701, and Treasury Circular 230 (31 CFR Part 10, Section 10.33) and American Bar Association Opinion 346.

5. **Professional and Governmental Agency Standards**. Certain of the pronouncements of the American Bar Association (the "ABA") have been expressions of standards of practice with respect to rendering a few particular types of legal opinions. Though the expressed standards are not intended to constitute the standards of care applied by courts to determine a lawyer's malpractice liability, at least one court has found the satisfaction of such standards persuasive in denying a lawyer's alleged liability.[118] With respect to the relationship between the guidance provided by this Report and the applicable standards of care, see Part III of this Report.

---

[110] SEC v. Spectrum Ltd., 489 F.2d 535, 541-42 (2d Cir. 1973).

[111] See Part I of this Report.

[112] 15 U.S.C. §§ 77k, 77l, 77o & 77q (1988).

[113] 15 U.S.C. §§ 78j(b), 78n(a), 78n(e) & 78t(a) (1988).

[114] 17 C.F.R. §§ 240.10b-5, .14a-9 & .14e-1 (1991).

[115] 18 U.S.C. §§ 1961-65 (1988).

[116] Tex. Rev. Civ. Stat. Ann. art. 581-33 (Vernon Supp. 1992).

[117] See, e.g., A. Jacobs, 8 Opinion Letters in Securities Matters: Text--Clauses--Law, Intro.-42.1 (1987); Freeman, supra note 89, at 440-80; Wander, Goldstein & Zaslavsky, Liabilities for Issuing Opinion Letters § 6.1.2, in Conference Materials, ABA Business Law Section Conference on Legal Opinions (March 31, 1989).

[118] See Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 655 F. Supp. 1573 (S.D. Fla. 1987), aff'd, 846 F.2d 753 (11th Cir. 1988), cert. denied, 488 U.S. 854 (1988).

The widely accepted American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information[119] establishes professional standards for lawyers concerning disclosure to a Client's auditors of information about litigation and other potential liabilities of such Client.[120]

In addition, the ABA's Committee on Ethics and Professional Responsibility has issued two formal opinions setting forth standards of practice in rendering legal opinions. Opinion No. 335[121] establishes guidelines to be followed when rendering a legal opinion, based on assumed facts, in connection with the sale of unregistered securities. Such guidelines indicate the extent to which a lawyer is obligated to investigate and verify factual matters that serve as the basis for his opinion. Opinion No. 346[122] establishes standards applicable to lawyers rendering opinions, included or referred to in materials prepared for the benefit of offerees, which analyze the tax effects of a tax-shelter investment. Such standards address the relationship of the lawyer with the Client, the extent of the lawyer's required factual and legal inquiries, and certain matters to be included or considered for inclusion in the opinion.

Two agencies of the federal government have also promulgated standards with respect to certain tax-related opinions. The Securities and Exchange Commission has promulgated SEC Guide 5,[123] paragraph 12 of which concerns tax opinions rendered in connection with registration of securities of real estate limited partnerships. The U.S. Treasury Department has promulgated Circular No. 230,[124] which sets forth guidelines regarding tax-shelter opinions; such guidelines are somewhat different than those set forth in Opinion No. 346.[125]

C. Types and Scope of Liability.

The sources of liability imposed on a Texas lawyer who erroneously renders an opinion correspond to the sources of the applicable standards of care described or referred to in Subpart B of this Part. It is settled that an Opinion Giver is not "an insurer of the results of his work"[126] or to be held liable merely for an error in judgment.[127] Nonetheless, both the efficacy of certain theories of lawyer liability and the scope of such liability, which have been the subject of considerable recent discussion by the courts and commentators, are unsettled.

1. Violations of Ethical Standards. A Texas lawyer who violates one or more ethical standards in rendering an opinion may be subject to disciplinary proceedings brought by the State Bar of Texas,

---

[119] 31 Bus. Law. 1709 (1976).

[120] See Erbstoesser & Matson, Lawyers' Letters to Auditors, in Drafting Legal Opinion Letters, 297-320 (M. Sterba ed. 1988).

[121] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 335 (1975).

[122] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346 (revised 1982).

[123] Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships, 1 Fed. Sec. L. Rep. (CCH) ¶ 3829.

[124] Treas. Dept. Circular No. 230, 31 C.F.R. § 10.33 (1990).

[125] See Blackburn, Tax Opinions, in Drafting Legal Opinion Letters, 201-96 (M. Sterba ed. 1988).

[126] Great American Indemnity Co., 128 S.W.2d at 501.

[127] Cook, 409 S.W.2d at 477.

leading to the imposition of appropriate professional sanctions, including reprimand, suspension, or disbarment.[128]

"[T]he violation by an attorney of the disciplinary rules adopted by the Texas Supreme Court does not of itself create a private cause of action."[129] Such a holding is consistent with Preamble ¶ 15 to the Texas Rules:

> These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.

Nevertheless, a lawyer's exposure to disciplinary proceedings and professional sanctions because of a violation of the Texas Rules will not necessarily serve as a shield from civil liability, if his or her conduct is otherwise actionable.[130] Further, courts in certain jurisdictions other than Texas have considered ethical standards relevant to a determination of a lawyer's violation of the applicable standard of care.[131]

2. Malpractice Liability. Though Texas courts and commentators have indicated that allegations of legal malpractice may be made on the basis of contract or tort,[132] the Texas Supreme Court has recently held that "[a] cause of action for legal malpractice is in the nature of a tort,"[133] and that "[a]n attorney malpractice action in Texas is based on negligence."[134]

---

[128] See, e.g., State v. Baker, 539 S.W.2d 367, 375 (Tex. Civ. App.--Austin, 1976, writ ref'd n.r.e.). See also the discussion in Part III of this Report.

[129] Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e.). See Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474,479 (Tex. App.--1989, writ denied).

[130] See Hennigan v. Harris County, 593 S.W.2d 380, 383 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.) (the existence of a public remedy pursuant to professional disciplinary procedures held not to preclude a private remedy pursuant to a cause of action for fraud).

[131] See, e.g., Gomez v. Hawkins Concrete Constr. Co., 623 F. Supp. 194, 199 (N.D. Fla. 1985); Albright v. Burns, 206 N.J. Super. 625, 629, 503 A.2d 386, 390 (1986). Proof of elements in addition to any failure to comply with ethical standards, however, is required before the imposition of liability for legal malpractice. See, e.g., Millhouse v. Wiesenthal, 775 S.W.2d 626 (Tex. 1989).

[132] See, e.g., Hideca Petroleum Corp. v. Tampimex Oil Int'l, Ltd., 740 S.W.2d 838, 847 (Tex. App.--Houston [1st Dist.] 1987, no writ).

[133] Willis, 760 S.W.2d at 644.

[134] Cosgrove, 774 S.W.2d at 664.

Under Texas law, liability based on negligence generally requires the proof of four elements:

> The plaintiff must prove that there is a duty owed to him by the defendant, a breach of that duty, that the breach proximately caused the plaintiff injury and that damages occurred.[135]

Because a legal malpractice action in Texas is a tort action, it is governed by the two-year statute of limitations set forth in Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986).[136] Further, the statute of limitations for such action "does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action."[137]

Accordingly, an opining Texas lawyer may be liable to a (former) Client if such Client can prove, in an action brought before the running of the applicable statute of limitations, that the opinion was negligently rendered.[138] The significant issue that remains in this area of Texas law, and one particularly important to Texas lawyers rendering opinions to third parties, is whether a Texas lawyer may be liable for malpractice or negligence to any person other than his or her Client.

The present law in Texas with respect to this issue has recently been expressed as follows:

> Except for matters involving fraud or dangerous conduct constituting a breach of duty owed to the general public, Texas courts have generally recognized that a nonclient has no cause of action against an attorney for negligent performance of legal work. This is based upon a lack of privity between them.[139]

Texas courts have consistently held that a Texas lawyer has no duty to a third party in the absence of privity of contract, despite precedents in other jurisdictions rejecting the privity requirement.[140] Adoption of the ABA Accord to govern an Opinion Letter does not create "privity" (or an attorney-Client relationship) for liability purposes, even though the ABA Accord, when adopted, is contractual in nature.

The leading decisions which adopted the privity requirement in cases involving professional negligence are National Savings Bank v. Ward,[141] in which the Supreme Court held that a lawyer who negligently prepared

---

[135] Id. at 665 (citing McKinley v. Stripling, 763 S.W.2d 407 (Tex. 1989)).

[136] Willis, 760 S.W.2d at 644.

[137] Id. at 643.

[138] See, e.g., Cosgrove, 774 S.W.2d at 666; First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 414 (Tex. App.--Dallas 1983, writ ref'd n.r.e.) (no liability, however, if no reliance on the opinion).

[139] Parker v. Carnahan, 772 S.W.2d 151, 156-57 (Tex. App.--Texarkana 1989, writ denied) (citing First Mun. Leasing, 648 S.W.2d 410; Bell v. Manning, 613 S.W.2d 335 (Tex. Civ. App.--Tyler 1981, writ ref'd n.r.e.); Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App.--Fort Worth 1968, no writ)). See Wavell v. Roberts, 818 S.W.2d 462, 465 (Tex. App.--Corpus Christi 1991, writ denied) ("An attorney owes no duty of care to nonclients.").

[140] See, e.g., Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. App.--San Antonio 1986, writ dism'd by agr. 729 S.W.2d 690 (Tex. 1987)).

[141] 100 U.S. 195 (1880).

a title opinion was not liable to third parties absent fraud or collusion, and Ultramares Corp. v. Touche,[142] in which the court held that accountants who negligently prepared financial statements were not liable to a third party that subsequently received such statements from the accountants' Client. In the latter case, the court acknowledged that the application of privity was necessary to avoid imposing liability on the accountants that would otherwise be unlimited.[143]

As Texas courts have recognized, the courts of a number, though not a majority, of other jurisdictions have in recent years criticized the decisions in National Savings Bank and Ultramares and have rejected the privity requirement in legal malpractice actions, including those concerning opinions rendered to non-Clients.[144] The courts rejecting the privity requirement have adopted varying theories for extending a lawyer's liability to third parties, while avoiding or attempting to avoid the extension of liability to an unlimited class of persons.[145] Even in declining to follow such decisions of courts in other jurisdictions, Texas courts have acknowledged the rejection of the privity requirement as a "trend."[146]

In addition, Texas courts have rejected the privity defense in recent cases involving the alleged negligence liability to third parties of various professionals other than lawyers.[147] In such cases, the courts have relied in great part on Section 552 of the Restatement (Second) of Torts (1977) ("Section 552"), the first subsection of which reads as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

---

[142] 255 N.Y. 170, 174 N.E. 441 (1931).

[143] Id. at 179, 174 N.E. at 444.

[144] See, e.g., Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), cert. denied, 368 U.S. 987 (1962); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987) cert. denied, 484 U.S. 1043 (1988); Vereins-Und Westbank, AG v. Carter, 691 F. Supp. 704 (S.D.N.Y. 1988); Crossland Sav. FSB v. Rockwood Ins. Co., 700 F. Supp. 1274 (S.D.N.Y. 1988). See also Annot., Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties, 61 A.L.R. 4th 615 (1988). But see United States of Kuwait PLC v. Eventure Energy, Enhanced Oil Recovery Associates---Charco Redondo Butane, No. 86 Civ. 4214 (JMC) (S.D.N.Y. Sept. 21, 1989).

[145] For discussions of such theories, see Wander, Goldstein & Zaslavsky, supra note 117, at § 6.2.2; R. Mallen & J. Smith, Legal Malpractice §§ 7.11-.13 (3d ed 1989); Treu, Legal Opinion Letters: Liability of Attorneys to Non-Clients in Texas, 28 Bulletin of the Business Law Section of the State Bar of Texas, No. 1, at 11-19 (1991) ("Treu, Legal Opinion Letters"); Comment, Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint, 14 St. Mary's L.J. 405, 410-17 (1983).

[146] See, e.g., Berry, 717 S.W.2d at 718. See also R. Mallen & J. Smith, supra note 145, § 7.10.

[147] See Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408 (Tex. App.--Dallas 1986, writ ref'd n.r.e.) (accountants); Cook Consultants, Inc. v. Larson, 700 S.W.2d 231 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (surveyors); Shatterproof Glass Corp. v. James, 466 S.W.2d 873 (Tex. Civ. App.--Fort Worth 1971, writ ref'd n.r.e.) (accountants).

The adoption by Texas courts of Section 552 (which does not impose any privity requirement) in the case of professionals other than lawyers, together with a statement by another Texas court to the effect that lawyers are subject to the same general rules of law as other professioals,[148] has suggested to certain courts and commentators that Section 552 will be ought to be applied to cases of lawyers' negligence liability.[149] In addition, while Texas Courts of Appeals have acknowledged and invariably followed the rule requiring privity in legal malpractice actions, certain of those courts seem to have expressed an interest in dispensing with privity if that were permitted by Texas precedents.[150]

Other courts and commentators believe that the special nature of the attorney-client relationship and the attendant public policy considerations require that only the Client in privity with the lawyer be allowed to assert a malpractice claim against a lawyers.[151] Hence, present Texas law requires privity in legal malpractice actions, "even under circumstances where the attorney renders an opinion to his Client on which he knows a third party will rely,"[152] but various matters clearly forewarn of the possible elimination of the privity requirement in cases where attorney liability is in question.

3. **Statutory Liability Under the DTPA**. A dissenting Justice of the Texas Supreme Court and certain commentators have indicated that the implied warranty of performance in a good and workmanlike manner under the DTPA might be or should be applied to legal services.[153] Notwithstanding the similarity, and perhaps the identity, of the standard of good-and-workmanlike performance to the common-law standard of care in negligence cases,[154] recovery under the DTPA (because of the violation of the implied warranty) would require proof only that the conduct was a "producing cause" of the alleged damages.[155] The proof of producing cause does not include the element of foreseeability that the proof of proximate cause in negligence cases does.[156] Hence, a "consumer" under the DTPA[157] would have a lesser burden of proof, and a Texas lawyer would have a correspondingly greater risk of liability, if the DTPA's implied warranty were applied to the rendering of legal services.[158]

---

[148] Cook, 409 S.W.2d at 477.

[149] See Blue Bell, Inc., 715 S.W.2d at 413; Texas Real Estate Report, supra note 2, at 21-22; Comment, supra note 145, at 416-17.

[150] See, e.g., Blue Bell, Inc., 715 S.W.2d at 412-13; Berry, 717 S.W.2d at 718-19.

[151] See Continental Savings Ass'n v. Sneed, Vine, Wilkerson, Selman & Perry and Kay L. Taylor, Civ. No. A-88-CA-844 (W.D. Tex. 1989) (attached as Addendum "A" to Treu, Legal Opinion Letters, supra note 145); Note, Cosgrove v. Grimes: Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions, 42 Baylor L. Rev. 601, 615-17 (1990).

[152] Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384, 1394-95 (N.D. Tex. 1988).

[153] See Archibald, 755 S.W.2d at 87-88 (Gonzalez, J., dissenting); Kincaid, Recognizing an Implied Warranty That "Professional" Services Will Be Performed in a Good and Workmanlike Manner, 21 St. Mary's L. J. 685 (1990).

[154] See Coulson, 734 S.W.2d at 651.

[155] See Tex. Bus. & Com. Code Ann. § 17.50(a)(2) (Vernon 1987). Archibald, 755 S.W.2d at 88 (Gonzalez, J., dissenting).

[156] Id.

[157] Only clients of a lawyer have been held to be "consumers" under the DTPA. See DeBakey, 612 S.W.2d at 925; Johnson v. Delay, 809 S.W.2d 552, 554 (Tex. App.--Corpus Christi 1991, writ denied); First Mun. Leasing Corp., 648 S.W.2d at 417. But see Marshall, 704 F.Supp. at 1393-94; Dennis v. Allison, 698 S.W.2d 94, 95 (Tex. 1985), 698 S.W.2d at 95; Flenniken v. Longivew Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983).

[158] Archibald, 775 S.W.2d at 88 (Gonzalez, J., dissenting); Note, Professional Service Immunity, supra note 109, at 930-35.

Nevertheless, though the possibility must be taken seriously,[159] the implied warranty under the DTPA has not been applied to lawyers' conduct. In Dennis v. Allison,[160] the Texas Supreme Court refused to impose the implied warranty in connection with a medical doctor's treatment of his patient. More recently, the Court has avoided and disclaimed any decision as to "whether an implied warranty applied to services in which the essence of the transaction is the exercise of professional judgment,"[161] such as is involved in the rendering of a legal opinion; and the Court has expressly denied that it has determined to apply the implied warranty to legal services.[162] A result has been that Texas Courts of Appeals have held that the implied warranty does not apply to professional services.[163]

V. NEGOTIATING OPINIONS

A. Cost-Benefit Analysis - Whether an Opinion Should Be Requested.

In many Transactions it may not be appropriate to request a formal Opinion Letter. Before a legal opinion is requested covering a matter, the lawyers should consider carefully the nature and scope of legal issues that may be significant to the Transaction and advise the Client as to the costs associated with the Opinion Letter when compared to the benefit received by the Opinion Recipient. The costs of an Opinion Letter are probably easier to quantify than the benefits, and this analysis is in large part a matter of experience, judgment, and subjective analysis, rather than objectively, empirically based. However if, in the judgment of the Opinion Giver and counsel to the Opinion Recipient, the opinion is not cost-effective based on a cost-benefit analysis, then it should not be requested.

The cost of rendering a legal opinion may be significant, even in a relatively simple transaction. The opinion cost should be weighed against the benefits to be gained from such opinion. If the added cost of opining on an issue is significant when compared with the significance of the legal issue, the opinion is not cost-effective. In such cases, the requesting lawyer should be satisfied by his or her own review and should not request an opinion from the lawyer for the other party to the transaction.

An example of a "high-cost low-benefit" opinions is an opinion that the Client is not in "material violation of any federal, state or local law, regulation or administrative order or ruling." This type of broad legal opinion conclusion places a nearly impossible burden on the Opinion Giver and may involve factual and legal investigation into numerous diverse legal areas such as environmental regulations, health and safety laws, employee benefit laws, and zoning laws. The possibilities for violation of laws, regulations and administrative rulings are vast, and the investigation that would be necessary to render such an opinion is usually well beyond the reasonable cost to the Client.

---

[159] See Willis, 760 S.W.2d at 648 (Mauzy, J., concurring and dissenting) ("[T]his court has not expressly rejected the notion that an implied warranty of good and workmanlike performance may apply to the provision of legal services.")

[160] 698 S.W.2d 94 (Tex. 1985).

[161] Melody Home Mfg. Co., 741 S.W.2d at 354 (referring to its decision in Dennis).

[162] Willis, 760 S.W.2d at 648 (The "determination of whether a lawyer's professional conduct is actionable under the DTPA must await another day.").

[163] Kubinsky v. Van Zandt Realtors, 811 S.W.2d 711, 715-16 (Tex. App.--Fort Worth 1991, writ denied) (real estate brokerage services); Eoff v. Hal and Charlie Peterson Found., 811 S.W.2d 187, 196 (Tex. App.--San Antonio 1991, no writ) (hospital services); Forestpark Enters., Inc. v. Culpepper, 754 S.W.2d 775, 779 (Tex. App.--Fort Worth 1988, writ denied) (shopping center management services).

B. Agreement Among Counsel Limiting Scope of Opinion Requested.

Although an opinion is not an "agreement" in the sense of a contract, it generally represents a consensus of legal counsel to the parties to a Transaction as to certain important legal issues in the Transaction that should be addressed. These issues are generally related to the broad concepts that (a) the Transaction Documents are generally in proper form, and (b) the Transaction Documents are enforceable agreements.

The "benefit of the bargain" depends more on factual matters such as the value of assets, the economic viability of a business, and the quality and integrity of management, than it does on strictly "legal" matters. Broad opinions encompassing primarily factual matters are more appropriately dealt with by representations and warranties by the Opinion Giver's Client, rather than by a legal opinion. The threshold question, that must be answered by agreement among the Opinion Giver and the counsel for the Opinion Recipient, is the scope of the opinion. The guiding principles for negotiation of legal opinions are (1) lawyers should not be asked to give "factual opinions," since statements of fact are not legal opinions, (2) lawyers should not be asked for an opinion that the counsel for the Opinion Recipient would not be willing to give under similar circumstances, and (3) the costs of the requested opinion must be justifiable when compared to the benefit to the Opinion Recipient.

C. The Time to Negotiate the Opinion.

Legal opinions in business transactions are normally rendered pursuant to the terms of the Transaction Documents. This agreement typically sets forth the specific textual requirements of the opinions to be required.

The opinion should be negotiated at the outset, so that the final form and substance of the opinion to be delivered at the closing can be included in the Transaction Documents. This practice will be beneficial to the parties because: (i) additional time will be available to correct possible legal problems connected with rendering the requested opinion; (ii) before the Transaction Documents are executed, there will generally be less pressure brought to bear upon the Opinion Giver to render the opinion, and more reasonable opinion requests may result; and (iii) the parties to the Transaction, as well as the attorneys for parties on both sides of the transaction, cannot use failure to agree on the form of an opinion as an excuse to avoid or delay consummating the Transaction. It should be understood that counsel to a Client is not contractually bound to render an opinion in the form called for by the Transaction Documents, even though the Transaction Documents are signed by the Client, but failure to do so could result in embarrassment to the Client and failure of the Transaction to be consummated.

The attorney in any Transaction should arrange with counsel for the other party to negotiate, as soon as possible, any broad issues to be covered by the opinion. The attorney should avoid allowing the Client to enter into the Transaction Documents that call for the delivery of legal opinions that have not been reviewed and preliminarily approved by the Opinion Giver. Each attorney should strive to agree on and attach to the Transaction Documents the exact opinion that is to be required.

D. Guidelines for Opinion Negotiation and Preparation.

1. General Principles of Opinion Negotiation. The negotiation of an opinion should be conducted on a highly professional basis. Opinion Givers should deliver a draft of their proposed opinion early in the Transaction, and should make available someone from the law firm authorized or empowered by the firm to negotiate the opinion. A lawyer should not be requested to deliver an opinion that the requesting lawyer

would not be prepared to furnish if the roles were reversed.[164] Stated otherwise, a lawyer should not ask for an opinion that he or she would not give under similar circumstances.[165]

2. **ABA Guidelines for Opinion Negotiation and Preparation--Inappropriate and Questionable Opinion Requests**. The ABA Report contains the ABA Accord, followed by an Illustrative Opinion Letter. The ABA Report concludes with certain guidelines for opinion negotiation and opinion letter preparation.[166] The ABA Opinion Negotiation Guidelines state that an Opinion Recipient, or the counsel to the Opinion Recipient, should not make inappropriate opinion requests. The ABA Opinion Negotiation Guidelines list several subjects which are inappropriate for requests for legal opinions, including non-reciprocal opinions, overly broad coverage, issues of known uncertainty, comprehensive foreign qualification, comprehensive legal compliance, negative assurance, and quitclaims.[167]

The ABA Opinion Negotiation Guidelines also classify certain other types of requests for opinions as "questionable" opinion requests, and state that "[a]bsent special and compelling circumstances, the Opinion Recipient (or its counsel) should not request opinion coverage concerning the following:[168] fraudulent transfer, specific foreign qualification and good standing, concurrence with other counsel's opinion, and litigation evaluation. The Committee concurs with the ABA Opinion Negotiation Guidelines, which are incorporated herein by reference.

E. Preparation of the Initial Draft of the Opinion.

When not specified in the underlying Transaction Documents, the initial draft of the form of legal opinion is often prepared by counsel to the Opinion Recipient. The Opinion Giver then reviews the proposed draft of the opinion. However, in preparing the initial draft of an opinion, "gamesmanship" should be avoided. The exchange of numerous conflicting drafts is counterproductive and expensive. If the Opinion Giver's firm has its own policies or guidelines concerning a particular type of opinion, or preferred opinion language that it customarily uses, it may be wise to begin with a draft prepared by the Opinion Giver, after discussion between the requesting lawyer and the Opinion Giver of the major points to be covered by the opinion. By adopting this pragmatic approach, the costs of negotiating the opinion can be minimized.

F. Applicable Law Coverage.

1. **Legal Scope**. The Opinion Giver should expressly limit the opinion to the law of designated jurisdictions. If the Law of a specific jurisdiction is stated as being covered by the Opinion Letter, then under the Accord there is no implication that it may be deemed to address the law of all jurisdictions, including statutes, judicial and administrative decisions and the rules and regulations of their governmental agencies bearing upon the matters covered by the opinion.[169]

---

[164] Tri-Bar Report. One commentator has expressed this view as follows: "An opinion is not the same as a lease, which may be drafted either from the landlord's point of view or from the tenant's point of view. While the business provisions of a lease may vary widely, a professional opinion should not depend upon which side one represents."

[165] ABA Report, supra note 3, at 224-232 [hereinafter, the "ABA Opinion Negotiation Guidelines"].

[166] Id.

[167] Id. at 226-228.

[168] Id. at 228, 229.

[169] See Part VII, Subpart E.1 of this Report.

2. **Local Laws and Regulations**. Under § 19(g) of the Accord, unless otherwise agreed (and described in the Opinion) the applicable law for which responsibility is assumed by the Opinion Giver does not include any Local Law.[170] There are certain Transactions, such as project financings and real estate financings, where Local Laws may be of particular importance and must be considered. In those cases, the language and substantive content of the opinion concerning the coverage of Local Laws should be specifically requested by the Opinion Recipient, and the opinion should specifically state the scope and application of Local Laws that it covers.[171]

G. Scope of Inquiry Made.

An opinion may specifically limit the scope of factual inquiry to particular documents, matters or procedures, upon agreement by the Opinion Recipient and the Opinion Giver as to such matters. An important part of negotiating the opinion in a complex Transaction is frequently the negotiation of an agreement between the counsel as to the scope of the factual inquiry to be made with respect to certain matters upon which the opinion is based.

Under § 2 of the Accord, "[t]he Opinion Recipient may assume that the Opinion Giver has reviewed such documents and given consideration to such matters of law and fact . . . as the Opinion Giver has deemed appropriate, in its professional judgment, to render the opinion."[172]

VI. DRAFTING OPINIONS - THE FORM AND ELEMENTS OF LEGAL OPINIONS

There is no prescribed form for legal opinions. However, the repeated and continued use of legal opinions in similar types of business transactions has led to a certain uniformity in approach. Legal opinions generally cover (i) introductory matters, such as the date, the identity of the recipient of the opinion, the role of the lawyer giving the opinion, a general description of the transaction in which the opinion is being rendered and the purpose for which the opinion is given; (ii) a general or specific recitation of the factual and legal matters reviewed by the Opinion Giver, frequently including a listing of material Transaction Documents reviewed, as well as other corporate documents such as articles of incorporation and bylaws which have been reviewed; (iii) a statement of certain factual assumptions, such as the genuineness of all signatures on all documents other than that of the Client, the authenticity of all documents submitted to the attorney as originals, the conformity to the originals of all documents submitted as copies, and the correctness and accuracy of all facts set forth in all certificates and reports identified in the opinion; (iv) the legal conclusions covered by the opinion, and any qualifications to these legal conclusions which are appropriate under the circumstances; (v) special matters peculiar to the opinion, such as reliance on opinions of local counsel with respect to the law of other jurisdictions, or any special limitations upon the use of the opinion; and (vi) the signature to the opinion. Each of these elements of the typical legal opinion is briefly discussed below.

A. Introductory Matters.

1. **Date of Opinion; Delivery**. Legal opinions are usually, but are not required to be, delivered at the completion of the business transaction, and bear the date of the closing. Opinions generally will be considered to be rendered as of the date shown on the opinion, and there is typically no need to specify the effective date of the opinion separately from the date shown on the opinion. The Committee believes that it is not necessary to disclaim an obligation to update an opinion after it is rendered and agrees with the ABA Report, which states that "[t]he Opinion Giver has no obligation to advise the Opinion Recipient (or any third party) of changes of law or fact that occur after the date of the Opinion Letter -- even though the change may

---

[170] See ABA Report, supra note 3, at § 19 and Commentary.

[171] Id.

[172] Id. at § 2.

affect the legal analysis, a legal conclusion or an informational confirmation in the Opinion Letter."[173] However, some lawyers may include a disclaimer similar to the following, which the Committee believes should be implied in every opinion, whether expressly stated or not:

> **This opinion is rendered as of the date hereof, and we undertake no, and hereby disclaim any, obligation to advise you of any changes in or new developments which might affect any matters or opinions set forth herein.**

The only exception in which there could logically be an obligation to update an opinion would be a situation in which a conclusion expressed in the opinion is as of some date prior to the date of the delivery, as for example, an opinion made in reliance upon records of the Texas Secretary of State which cannot be verified on a current basis (for example, opinions with respect to filings of financing statements under the Texas Business and Commerce Code).

Because of the diverse geographical location of the parties in many business transactions, attorneys are frequently called on to deliver opinions "in escrow" to another party, or such other party's attorney, or an intermediary in a transaction. Under this arrangement, the opinion will be post-dated, and will be delivered only upon instructions to the holder that the opinion is to be delivered on its effective date, which is generally the "closing date" of the transaction. An opinion delivered under these circumstances should be deliverable to the Opinion Recipient only upon authorization given by the Opinion Giver by telephone, telecopy, telegraph, or other means of effective communication. If given verbally, such authorization should be promptly confirmed in writing.

In a situation in which the opinion is delivered in advance of a closing, the rendering lawyer must be mindful of his or her professional responsibility to confirm the accuracy of the factual matters, to the extent applicable in accordance with the scope of due diligence, as well as the legal matters covered in the opinion, as of the date that the opinion is actually given or "delivered" to the recipient. Matters such as the continuing good standing of a corporation, updating factual certificates of officers, and other factual or legal matters which could change over the period of time between the date the opinion is delivered in escrow and the date that it is delivered at the closing should be confirmed or reconfirmed as of the closing date.

2. **Addressee**. The addressee of an opinion is normally a party to the transaction, or a party as a representative of a group of persons involved in the transaction, or an identified class of persons. In all cases the Opinion Recipient should be specifically identified by name and address. The Committee agrees with the approach taken in the ABA Report, which states that "**[o]**nly the Opinion Recipient is entitled to rely upon or to assert any legal rights based upon the Opinion Letter, and the Opinion Recipient may rely on the Opinion only for the purpose contemplated by the Transaction Documents."[174]

If the Accord is not adopted in an Opinion Letter, the Committee recommends that each legal opinion following traditional non-Accord practice include a sentence at the conclusion of the opinion to the following effect:

> **This opinion letter (i) has been furnished to you at your request, and we consider it to be a confidential communication which may not be furnished, reproduced, distributed, disclosed to anyone, or quoted from or referred to without our prior written consent, except to your auditors, counsel, and appropriate regulatory and governmental authorities, and (ii) is rendered solely for your information and assistance in connection with the closing of the above transaction, and may not be relied upon by any other person or for any other purpose without our prior written consent.**

---

[173] Id. at § 9.

[174] Id. at § 20.

An alternative formulation of the language limiting reliance upon the Opinion Letter is as follows:

> **This Opinion Letter is limited to the matters stated herein and no opinion is implied or may be inferred beyond the matters expressly stated. This Opinion Letter is provided at your request and is to be limited in its use to reliance by you in consummating the transactions described herein and no other person or entity may rely or claim reliance upon this Opinion Letter.**

If the Opinion Recipient and the Opinion Giver agree that someone other than the Opinion Recipient may rely upon the opinion, the opinion letter should specify those entitled to rely, under what circumstances, and to what extent.[175]

B. Description of the Transaction, the Lawyer's Role, Reasons for the Opinion, and Definitions.

The introduction of the opinion should state for whom the lawyer is acting as counsel and a description of the transaction. Generally, this may be accomplished by language such as:

> **We have acted as counsel to _____, a _____ corporation (the "Company"), in connection with [insert description of transaction]. This Opinion Letter (herein so called) is furnished to you as required by Section _____ of the [name of agreement] (the "Agreement"). Capitalized terms used in this Opinion Letter not defined herein are defined as set forth in the Agreement.**

In stating the role of counsel, an attorney or firm may wish to designate his, her or its role as "special" counsel, if the attorney or firm wishes to emphasize this limited role. If the attorney or firm is not involved generally in representing the Client in a particular transaction, and has been requested to give an opinion on a specific limited matter, it may be advisable to describe specifically the scope of such limited involvement, rather than implying a limited participation by the reference to "special" counsel. Furthermore, the term "special" counsel is frequently used as a reference to a lawyer who has been asked to render an opinion as a specialist in the field of law discussed in the opinion. The word "general" should seldom be used, since it probably indicates a continuing knowledge of all corporate affairs of a Client that is, in most cases, beyond the scope of representation of the Client and thus beyond the scope of the opinion.

Lawyers may also be asked to state that they have participated in the preparation of an agreement in question. The better view is to discourage this statement, because it may raise some implication that the attorney or the firm is assuming some responsibility for factual matters set forth in the underlying agreement, including the exhibits. The assumption of this responsibility is generally far beyond the role of the lawyer in the Transaction, and therefore, the inclusion of this type of statement is not recommended.

C. Factual Examination and Qualification.

1. Opinion Giver's Responsibility to Verify Certain Facts. In connection with the issuance of an Opinion, the Opinion Giver must be satisfied that he or she has reviewed sufficient facts to support each of the legal conclusions expressed. Under the Accord, the Opinion Giver, by agreeing to be governed by the Accord, is presumed to have "reviewed such documents and given consideration to such matters of law and fact . . . as the Opinion Giver has deemed appropriate, in its professional judgment, to render the Opinion. Unless the Opinion Letter expressly states that the Opinion Giver has limited the scope of inquiry to particular documents, matters or procedures, the Opinion Giver does not, by including in the Opinion Letter a recital of specific documents reviewed, matters considered, or other procedures followed, alter this assumption."[176] In most situations, the legal conclusions expressed in an opinion can be supported by reviewing either original

---

[175] Id.

[176] ABA Report, supra note 3, at § 2.

copies, or copies identified to the reasonable satisfaction of the Opinion Giver, of specified documents, Public Authority Documents, certificates of public officials, or certificates of officers of the Client expressing representations and warranties as to factual matters.

In other situations, a discussion in an opinion regarding factual examination should generally set forth a detailed list of documents and certificates examined. The use of an approach that does not list specifically the documents and instruments examined may be appropriate in certain circumstances, but such situations should be carefully reviewed and should generally be confined to situations in which the opinions given are straightforward and not largely based upon complex factual determinations or assumptions.

2. Reliance by Opinion Giver on Information Provided by Others. The ABA Report states that reliance by an Opinion Giver is justified if the Opinion Giver is relying on information provided by Public Authority Documents, by officers of Clients, and others, if the provider of such information "is reasonably believed by the Opinion Giver to be an appropriate source for the information."[177] In cases of such justifiable reliance, the Opinion Giver is not required (i) to perform any investigations; (ii) to include a statement in the Opinion regarding such reliance; or (iii) to analyze "any underlying data supporting information contained in a certificate (e.g., confirmation of compliance with a financial covenant)."[178]

---

[177] ABA Report, supra note 3, at § 3, which states as follows:

The Opinion Giver:

(a) may rely upon information in Public Authority Documents and upon information provided by Client officials and others, if in each case the provider is the Opinion Recipient or is reasonably believed by the Opinion Giver to be an appropriate source for the information, without:

(i) investigation;

(ii) statement of the reliance in the Opinion Letter; or

(iii) analysis of any underlying data supporting information contained in a certificate (e.g., confirmation of compliance with a financial covenant);

but

(b) may not rely on information so provided if:

(i) the information constitutes a statement, directly, or in practical effect, of any legal conclusion at issue, unless the information is (A) provided in a legal opinion of Other Counsel and the reliance is stated in the Opinion Letter, or (B) set forth in a Public Authority Document; or

(ii) the information is provided to the Opinion Giver by the Opinion Recipient or provided solely through a representation in a Transaction Document, unless the reliance is stated in the Opinion Letter.

[178] Id.

If the information relied upon is provided to the Opinion Giver by the Opinion Recipient or provided solely through a representation in a Transaction Document, then the Accord requires that such reliance be stated in the Opinion Letter.[179]

An Opinion Recipient may not rely on information provided by others if it "constitutes a statement, directly or in practical effect, of any legal conclusion at issue, unless the information is (A) provided in a legal opinion of Other Counsel and the reliance is stated in the Opinion Letter, or (B) set forth in a Public Authority Document."[180]

3. Reliance on Client Officer's Certificates. The purpose of a legal opinion is to present an informed judgment and analysis regarding matters of law. The purpose is not to make or confirm factual statements. That task is appropriately the subject matter of the representations and warranties of the parties to a Transaction.

Generally, requests for opinions as to primarily factual matters should not be made. However, if a statement as to factual matters is of significant and necessary benefit to the Transaction, and is cost-effective, such statement should be made in a section separate and apart from the legal opinions section and should be based only upon the knowledge or awareness of the Opinion Giver. Such statements should generally be made only in reliance upon a written certificate of responsible officers of the Client. In appropriate circumstances, oral representations of responsible officers may be sufficient. The parties may also agree as to the identity of the officers to be relied upon, even though they may not be the most knowledgeable about the subject matter. If an officer's certificate is relied upon, the Committee recommends, although it is not required, that the opinion specifically refer to it, and that a copy be furnished to the attorney for the Opinion Recipient or attached as an exhibit to the opinion.[181]

a. Suggested Opinion Language. If an opinion is given in part in reliance on officers' certificates, the following language may be set forth in the Opinion:

---

[179] Id. "If the reliance is stated in the Opinion Letter, the Opinion Giver may rely on facts stated by the Client or the Opinion Recipient in a Transaction Document. (The disclosure of that reliance is appropriate in view of the occasional use by the parties of representations and warranties as a risk allocation device.) In such a case, it is not objectionable for the Opinion Recipient to request that the Opinion Giver also specify the particular facts it has relied upon." Id., Commentary, ¶ 3.2.

[180] ABA Report, supra note 3, at § 3.

[181] The Commentary to Section 3 of the ABA Report states as follows:

> ¶ 3.1 Certificates. In many cases, the Opinion Giver will establish information through reliance upon certificates of others. Subject to the qualifications as to unwarranted reliance (see § 5), the Opinion Giver's reliance on a certificate, without investigation, is appropriate if the certificate addresses the facts in question and, absent special circumstances (see ¶ 3.3), the Opinion Giver reasonably believes the provider of the information is an appropriate source. Certificates may state facts that are simple assertions (e.g., a listing of incumbent officers) or may involve conclusory assertions) (e.g., compliance with financial covenants). When the certificate contains such conclusory assertions, the provider may choose to include supporting information that justifies the assertions. Ordinarily, the Opinion Giver is not required to analyze the underlying information. If it desires that analysis, the Opinion Recipient should specifically request it and the Opinion Giver should describe it in the Opinion Letter.
>
> Id., Commentary ¶ 3.1.

We have been furnished with and examined originals or copies, certified or otherwise identified to our satisfaction, of all such records of the Company, agreements and other instruments, certificates of officers and representatives of the Company, certificates of public officials, and other documents, [and we have had such discussions with appropriate officers of the Company] as we have deemed necessary or desirable as a basis for the opinions hereinafter expressed. As to questions of fact material to such opinions, we have, where relevant facts were not independently verified or established, relied upon certificates of [and discussions with] officers of the Company.

This limitation can also be expressed in the body of the Opinion by reference to facts and documents disclosed in an officer's certificate with respect to specific paragraphs of the Opinion. An example of this approach would be as follows:

In giving the opinion expressed in paragraph __ above, we have relied solely upon a Certificate of _____ as to [listing of factual matters contained in the certificate or other writing].

b. Furnishing Copies of Officer's Certificates. If officer's certificates are relied on for factual matters underlying an Opinion, copies of any such officers' certificates are generally not required to be furnished to the Opinion Recipient. However, it may be appropriate for such officer's certificates to be either attached to the opinion, or furnished to the counsel for the Opinion Recipient. Opinions that do not expressly refer to officers' certificates, or that are expressly limited in scope to the review and investigation of documents or certificates described in the opinion do not require delivery of supporting officers' certificates to the Opinion Recipient or its counsel.

4. Suggested Opinion Language for Agreed Disclaimer of Independent Factual Examination. If the Opinion Giver and counsel for the Opinion Recipient agree that the Opinion Giver may limit the scope of inquiry to particular documents, matters or procedures, the following statement should be include:

In rendering the opinions hereinafter expressed, we have, with your consent, relied only upon our examination of the foregoing documents and certificates, and we have made no independent verification of the factual matters set forth in such documents or certificates.

5. "Knowledge" Qualification.

a. ABA Approach--"Unwarranted Reliance" if Opinion Giver Has "Actual Knowledge" of Contrary Facts. The ABA Accord adopts an approach that appears generally to be consistent with the traditional practice for most Texas lawyers concerning use of the "knowledge" qualification, although the focus of the Accord is primarily on the concepts of reliance by an Opinion Giver on information provided by others (§ 3 of the Accord) versus "unwarranted reliance" (§ 5 of the Accord). Section 5 of the ABA Report sets forth a test for "whether the Opinion Giver may rely on particular information or a particular assumption."[182] This test regarding "unwarranted reliance" is stated as follows:

> § 5 Unwarranted Reliance. As a general and overarching principle, the Opinion Giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if the Opinion Giver has Actual Knowledge that the information or assumptions are false or the Opinion Giver has Actual Knowledge of facts that under the circumstances would make the reliance unreasonable.[183]

---

[182] ABA Report, supra note 3, at § 5.

[183] Id.

The "Actual Knowledge" definition of the ABA Report is contained in Sections 6-A and 6-B, and the related Commentary. Sections 6-A and 6-B read as follows[184]:

> § 6-A Opinion Giver's Actual Knowledge. "Opinion Giver's Actual Knowledge," or a phrase having equivalent wording (e.g., "the Opinion Giver has Actual Knowledge"), means the conscious awareness of facts or other information by the Primary Lawyer or the Primary Lawyer Group.
>
> § 6-B Primary Lawyer or Primary Lawyer Group. "Primary Lawyer" means:
>
> (a) the lawyer in the Opinion Giver's organization who signs the Opinion Letter;
>
> (b) any lawyer in the Opinion Giver's organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents or preparing the Opinion Letter; and
>
> (c) solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (e.g., pending or threatened legal proceedings), any lawyer in the Opinion Giver's organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation.
>
> "Primary Lawyer Group" refers to all of the Primary Lawyers when there are more than one.

The Commentary to these Sections emphasizes that "[b]y defining 'Actual Knowledge' and identifying the lawyers in the Opinion Giver's organization whose 'Actual Knowledge' is relevant (i.e., can be imputed to the Opinion Giver), these provisions negate any theoretical duty to have such information or assumption examined for reliability by all lawyers in the Opinion Giver's organization."[185]

The Commentary further states that the "'conscious awareness' concept recognizes that what is 'known' at one time may not be in the mind or may be forgotten altogether at another time."[186] The Commentary also states that "[l]awyers are not required to analyze secondary materials supporting factual conclusions in an attempt to understand them or assess their correctness. For example, if calculations supporting a certificate of compliance with financial covenants form a part of the certificate of compliance, a Primary Lawyer need not analyze the calculations. The same rule applies to non-financial materials."[187]

b. Comparison With Non-ABA Accord Practice. The framework of the ABA Accord is intended to limit the use of the "knowledge" qualification. The Commentary, at ¶ 6.4, provides a comparison of the ABA Report approach with non-ABA Accord practice, as follows:

> "Under the Accord, the Opinion Giver will generally not use knowledge references (e.g., "to our knowledge" or "known to us") in the Opinion Letter. The confirmation of factual matters for the most part will involve direct reliance on certificates and Public Authority Documents or assumptions (see §§ 3 and 4). This reliance is subject to the qualification as to unwarranted reliance (see § 5). In practical effect, the Accord provides the Opinion Recipient a confirmation keyed to the Primary Lawyer or Primary Lawyer Group and tested by the unwarranted reliance

---

[184] Id., §§ 6-A, 6-B.

[185] Id., Commentary, ¶ 6.1.

[186] Id., Commentary, ¶ 6.2(iv).

[187] Id., Commentary, ¶6.2(v).

principle -- a result not substantially different from that obtained, as a practical matter, under opinion practice that predated (or does not follow) the Accord."[188]

The ABA Report concludes that "it is expected that the use of knowledge references (e.g., "to my knowledge" or "known to me") will generally be discontinued under the Accord."[189]

c. Continued Use of Knowledge References. The ABA Report acknowledges that, in some circumstances, the continued use of "knowledge" references in Opinions may be appropriate. The ABA Report gives the following example:

> "For example, when the Opinion Giver has sole supervisory responsibility for the Client's litigation matters, (e.g., the Client's single inside counsel or outside counsel functioning as the Client's general counsel), the Opinion Giver may consider reliance upon a certificate from another in the Client's organization to be unnecessary or inappropriate. In such an instance, the Opinion Giver may wish to refer to Actual Knowledge."[190]

d. Use of "Actual Knowledge" as a Qualification. When reliance upon information from others is not feasible, the ABA Report suggests that the Opinion Giver may wish to use "Actual Knowledge" as a qualification to an Opinion. In this regard, a technical note states as follows[191]:

> Referring to ¶ 6.5, when the Opinion Giver concludes that reliance upon others' information is not feasible, it may wish to refer to the Opinion Giver's Actual Knowledge (e.g., "to the Opinion Giver's Actual Knowledge, [the Client] has no pending or threatened legal proceedings other than . . ."). Use of the full § 6-A phrase will assure that the reference is limited to the Primary Lawyer or Primary Lawyer Group.

e. Meaning and Use of "Knowledge" Qualification - Traditional Non-Accord Approach. Under traditional non-Accord opinion practice, if an opinion must include a statement as to factual matters, it may be qualified by the use of the words "to our knowledge," "known to us," "to the best of our knowledge," "to our current actual knowledge" or the like. These phrases are typically intended to imply that the lawyer has not engaged in any comprehensive factual or legal investigation. If a statement is qualified by the words "to our knowledge", "to the best of our knowledge" or "known to us," the opinion letter should clearly state the scope of inquiry or due diligence upon which the legal conclusions are based. Further, any fact assumed should not be questionable on its face, and cannot be inconsistent with a fact known by the Opinion Giver.[192]

---

[188] Id., Commentary, ¶ 6.4.

[189] Id., Commentary, ¶6.5.

[190] Id., Commentary, ¶ 6.5.

[191] Id., Technical Note to Commentary, ¶ 6.5.

[192] See Texas Real Estate Report, supra note 2, at 23; see also ABA Report, supra note 3, § 5.

f. **Proposed Opinion Language--"Knowledge" Qualification Under Traditional Non-Accord Approach**. If the qualification "to our knowledge" or similar qualification is used, then the Committee recommends that the opinion include a statement similar to the following, under traditional non--Accord opinion practice:

> **The qualification of any opinion or statement herein by the use of the words "to our knowledge" or "known to us" means that during the course of representation as described in this opinion, no information has come to the attention of the attorneys in this firm involved in the transactions described which would give such attorneys current actual knowledge of the existence of the facts so qualified. Except as set forth herein, we have not undertaken any investigation to determine the existence of such facts, and no inference as to our knowledge thereof shall be drawn from the fact of our representation of any party or otherwise.**

6. **Factual Opinions That May Be Appropriate Under Certain Circumstances**. Certain matters may, in specified circumstances, be appropriate subjects for factual statements in legal opinions. Statements by attorneys regarding such matters as pending or threatened litigation and in specialized areas such as securities underwritings, securities issuances and corporate reorganizations, particularly involving publicly--held companies, are frequently requested. Accordingly, it is not unusual for attorneys to make statements in opinion letters with respect to the existence of litigation, the valid authorization and issuance of securities, and the effectiveness of registration statements under the Securities Act of 1933. Each of these instances involves the expression of a legal opinion which also involves representations regarding underlying facts.

7. **Reliance on Certificates of Public Officials**. Almost all Transaction opinions include opinions concerning the organizational status of the entities involved in the transaction. An attorney representing business organizations in Transactions is almost always required to include an opinion with respect to the organization and existence of a Client corporation or other entity, and its ability to transact business in its state of organization. Opinions are also frequently requested concerning the good standing and ability of an entity to transact business in other jurisdictions through qualification under applicable state statutes. The principal sources of verification of these matters are Public Authority Documents, at least with respect to corporations and limited partnerships. For Texas corporations and limited partnerships, the Secretary of State of the State of Texas and the Comptroller of Public Accounts of the State of Texas are the principal sources of information concerning the existence and good standing of such Texas entities. The principal certificates for corporations are as follows:

a. **Certified Copy of the Articles of Incorporation Together With Amendments**. A copy of the Articles of Incorporation or Certificate of Incorporation and all amendments thereto certified by the Secretary of State of the state of incorporation is a basic requirement for the typical corporate opinion. This certification represents evidence of the formation and existence of the corporation. These documents can normally be obtained in one or two days through various independent document services.

b. **Bringdown Certificates Regarding Incorporation and Amendment of the Articles**. On occasion, a certificate or telegram from the Secretary of State of the state of incorporation setting forth the date of incorporation and listing all amendments may be required in order to update the certified documents previously received from the Secretary of State.

c. **Certificate of Existence**. A certificate of existence from the Secretary of State of the State of Texas should be obtained for Texas corporations. This certificate may be relied on as prima facie evidence of the existence of the corporation on the date specified. It is advisable for the attorney to verify by telephone with the office of the Secretary of State of Texas that the corporation is in existence on the date the opinion is being delivered.

d. **Good Standing Certificate**. A certificate of good standing from the Comptroller of Public Accounts of the State of Texas, which certifies the good standing and the filing and payment by the corporation of franchise and similar reports and taxes is necessary in order to give a "good standing" opinion as

to a Texas corporation. Under Texas law, the failure to pay franchise taxes and file franchise tax reports will result in the forfeiture of the taxpayer's corporate powers.[193]

Under Delaware law, the "valid existence" and tax status of a corporation are covered by a single certificate. Public officials in other states will generally furnish similar certificates relating to the good standing or qualification to do business of corporations in such states, and these can normally be updated by telegram to the date of delivery of the opinion.

8. Reliance on UCC Searches. Uniform Commercial Code ("UCC") searches may be made and relied on with respect to the existence of liens or encumbrances on personal property. The Secretary of State of the State of Texas will provide a certificate listing financing statements, but delivery of this certificate tends to be somewhat slow, and attorneys will frequently rely on private document firms in Austin to provide these reports. Information on Uniform Commercial Code financing statement filings is obtainable only as of a date some time prior to the closing (usually several days), and cannot be updated by telegram. Accordingly, this limitation on availability makes it advisable for the Opinion Giver to qualify any reference to UCC searches by including language similar to the following:

Proposed Opinion Language

> **Insofar as this opinion relates to security interests, liens or encumbrances, we have relied upon, and assumed the completeness and accuracy of the report of [Name of search company] dated [specify date], relating to financing statement filings showing [name of debtor] as debtor, with the Office of the Secretary of State of the State of Texas, current through [specify date], at [_.m.--specify time] Information regarding such filings does not include any filings filed or terminated in the State of Texas after the effective date indicated in the report, and accordingly, we express no opinion relating to any security interests that may be effected or filings filed or recorded after such effective date.**

9. Drafting Officer's Certificates. There are two general types of officer's certificates in common use: (i) certificates verifying the authenticity of certain specifically identified documents, such as bylaws of the corporation or resolutions of its board of directors; and (ii) certificates relating to factual matters that are not readily verifiable or that are to be assumed by the Opinion Giver. Each of these types of officer's certificate is briefly discussed below. A specimen form of Officer's Certificate is attached hereto as Exhibit "B."

a. Officer's Certificate as to Authenticity of Documents. Perhaps the most common example of the first type of certificate is the certificate of the secretary of the corporation that a true and correct copy of the bylaws and resolutions of the board of directors pertaining to the transaction is attached to the certificate. The officer's certificate is often supported by an incumbency certificate containing the signatures and corporate capacities of various corporate officers who have signed or who will sign Transaction Documents. The certification as to articles, bylaws, and resolutions, as well as incumbency, is frequently combined in a single officer's certificate. The incumbency certificate customarily closes with an officer other than the secretary attesting to the secretary's signature.

Officer's certificates of this type are often delivered to the other party to the Transaction at the Closing to provide assurance in addition to the opinion of counsel that the required corporate action has been properly taken, and that the signatures of the individuals signing the documents are genuine. These certificates will normally be obtained by the Opinion Giver and in such case should be retained in the attorney's files, whether or not they are delivered to the other parties to the transaction. Ordinarily, certificates of this type should be

---

[193] Tex. Tax Code Ann. § 171 (Vernon 1982 & Supp. 1991). See Hicks v. Continental Carbon Paper Mfg. Co., 380 S.W.2d 737 (Tex. Civ. App.--Waco 1964, writ ref'd n.r.e., 382 S.W.2d 910 (Tex. 1964)) (forfeiture of right of corporation to do business after due notice of failure of corporation to pay franchise tax).

obtained in addition to any review by the Opinion Giver of the bylaws, minute books, and stock records of the corporation, or the partnership agreement of any partnership.

b. Officer's Certificate as to Factual Matters. The second type of officer's certificate concerns factual matters which are not readily verifiable by or are to be assumed or relied upon by the Opinion Giver. This type of certificate should not state legal conclusions, in the general language set forth in the opinion. It should only recite those factual matters which are actually being relied upon in connection with the opinion. A certificate as to "factual matters" by an officer of a corporation states legal conclusions is inappropriate.

c. Source, Form and Scope of Officer's Certificates. The officer providing the certificate should be an appropriate source of the information contained in the certificate, based upon that person's relationship with the facts in question,[194] and the certificate should, in the professional judgment of the Opinion Giver, be appropriate as to its form and scope.

D. Factual Assumptions.

Prior to the publication of the ABA Report, it has been common to include certain factual assumptions in an opinion. Practice has probably varied as to whether or not to set forth many of the assumptions which are normally made by the Opinion Giver. For example, some Opinion Givers have included an assumption that there is an absence of fraud in the Transaction. The Accord recognizes that over time a number of factual assumptions, including without limitation the absence of fraud in the transaction, have become generally accepted as being appropriate as a basis for giving Opinions. These assumptions have been either implied or expressly stated. These common factual assumptions are set forth in § 4 of the Accord, and an Opinion Letter which adopts the Accord does not need to recite these assumptions in the Opinion Letter.

1. Reliance by Opinion Giver on Assumptions - ABA Report. The ABA Report, § 4, lists a number of assumptions upon which an Opinion Giver may rely, without investigation. These assumptions under § 4 of the Accord are as follows[195]:

> § 4 Reliance by Opinion Giver on Assumptions. The Opinion Giver may rely, without investigation, upon the assumptions set forth below unless in a given case the particular assumption states, directly or in practical effect, a legal conclusion expressed in the Opinion.
>
> (a) A Client who is a natural person, and natural persons who are involved on behalf of the Client, have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it.
>
> (b) The Client holds the requisite title and rights to any property involved in the Transaction.
>
> (c) Each party to the Transaction (other than the Client) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it.
>
> (d) Each party to the Transaction (other than the Client) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Client.

---

[194] ABA Report, supra note 3, at § 3.

[195] Id., at § 4 and Commentary.

(e) Each document submitted to the Opinion Giver for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine.

(f) Each Public Authority Document is accurate, complete and authentic and all official public records (including their proper indexing and filing) are accurate and complete.

(g) There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence.

(h) The conduct of the parties to the Transaction has complied with any requirement of good faith, fair dealing and conscionability.

(i) The Opinion Recipient and any agent acting for it in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction.

(j) There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Transaction Documents.

(k) All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the Law of the Opining Jurisdiction, are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the Opining Jurisdiction, and are in a format that makes legal research reasonably feasible.

(l) The constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the Opining Jurisdiction has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.

(m) Other Agreements and Court Orders would be enforced as written.

(n) The Client will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of law or constitute a breach or default under any Other Agreement or Court Order.

(o) The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.

(p) All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.

These assumptions need not be stated in the Opinion Letter. The Opinion Giver may also rely, without investigation, upon other assumptions expressly stated in the Opinion Letter and acceptable to the Opinion Recipient and its counsel.

2. **Non-Accord Opinion Practice--Choice of Law Assumption That Other Law is the Same as the Opining Jurisdiction**. When a borrower with its principal offices in one state borrows money from a lender with its principal offices in another state, the lender frequently requires that the debt instrument contain contractual choice of law provisions which state that the laws of the state in which the lender is located will govern the Transaction. In some circumstances, the parties may also agree that the Transaction Documents will be governed by the local law of a state other than the state of domicile of the borrower or the lender. This

may occur when a lending transaction or other Transaction involves lenders, investors, etc. having their principal offices in several states.

The Accord deals specifically with choice of law opinions in multi-state transactions. Accordingly, a choice of law assumption is generally not necessary, because the rules of § 10 of the Accord will apply, and the Opinion will be given as if the Law of the Opining Jurisdiction governs, regardless of the fact that the Transaction Document provides that the Law of another jurisdiction governs.

However, if the Accord is not adopted in an Opinion Letter, and if the Opinion Giver and the counsel to the Opinion Recipient agree that the cost of investigating the law of the Other Jurisdiction or retaining counsel in the Other Jurisdiction are not cost-effective, when compared to any benefit that may be derived from the opinion, then the Opinion Giver may be allowed to assume that the substantive law of the Other Jurisdiction is the same as that of the Opining Jurisdiction. In many cases, this will be a practical solution that will allow a cost-effective legal opinion by the Opinion Giver, as an alternative to either (a) deleting the opinion requirement, or (b) requiring an expensive opinion that involves the retaining of local counsel for purposes of the law of the Other Jurisdiction.

In this type of opinion, the Opinion Giver assumes that the laws of the chosen state are identical to the laws of the Opining Jurisdiction, and then states that under the laws of the Opining Jurisdiction, the Transaction Documents are enforceable against the Client of the Opinion Giver. Although this assumption provides a fictional choice of law rule, and also gives an opinion that the Transaction Documents are enforceable under a fictional local law that is assumed to be identical to the local law of the Opining Jurisdiction, this form of hypothetical or constructed opinion may frequently offer a practical solution to an otherwise prohibitively expensive process. Without this type of assumption, the cost of involving local counsel for purposes of giving an opinion regarding the laws of the Other Jurisdiction will frequently outweigh any real or perceived benefits to the Opinion Recipient. A suggested form of this assumption is set forth below.

Proposed Form of Choice of Law Assumption

> The Agreement provides that it will be governed by the laws of the State of **[specify state]** (the "Other Jurisdiction"). For purposes of this Opinion Letter, we have assumed that the laws of the Other Jurisdiction are identical to the laws of the State of **[specify state]** (the "Opining Jurisdiction"). Accordingly, the Opinion expressed in paragraph [specify paragraph] below [the Remedies Opinion] is given as if the law of the Opining Jurisdiction governs the Agreement without regard to the fact that the Agreement provides that the law of the Other Jurisdiction shall govern the Agreement.

The rationale for this approach may be seen in a typical multi-state lending transaction, in which the principal office of the lender is located in a state different than the location of the principal office of the borrower. The lender's lawyer customarily drafts the loan documents, and is licensed in the Other Jurisdiction or is using the lender's "standard" forms tailored to the laws of the Other Jurisdiction. The Opinion regarding the laws of the Opining Jurisdiction is sometimes useful as a "safety net" in case the choice of law provisions in the loan documents are not enforceable, and the laws of the Opining Jurisdiction are held to be the governing law.

E. Expression of the Legal Opinion.

1. Introduction. The Committee recommends that the substantive portion of the opinion begin with an introductory statement as follows:

> **Based on the foregoing and subject to the qualifications and limitations stated in this Opinion Letter, we are of the opinion that:**

The expression of the opinion (that is, "we are of the opinion that") may vary according to the practice of the particular attorney. Other acceptable phrases for the introductory sentence of the opinion include "it is our opinion that"; "we express the following opinions"; or "our opinion is as follows." Other phrases which

imply something more or less than a normal opinion (i.e., "we advise you that" or "we are of the view that" or "it appears that" or "we believe that" or "we are of the conclusion that") may be appropriate when giving advice to one's own Client, but are not appropriate for use in an opinion to third parties. Because of the possibility of a different interpretation being ascribed to an opinion if other language or words such as "advise" or "believe" are used, the language for the introductory statement format immediately above should be utilized except in highly unusual circumstances.

2. **The Operative Language**. The repeated use of opinions in various business transaction contexts over several generations of lawyers has reduced the body of most transaction opinions to a list of "standard" opinions which generally appear from one transaction to the next. Unfortunately, while these forms of opinions may be thought of by many lawyers as "standard" opinions, the meanings of the words in these opinions are surprisingly unsettled. "The standard phraseology, replete with fuzzy nouns and slippery adverbs, is susceptible to a broad range of interpretation. Commentators disagree over even the most basic points, and seeking interpretations from lawyers who regularly render opinions can be a little like consulting Humpty Dumpty."[196] The operative language of legal opinions frequently given in business transactions will be discussed later in this report.

F. **Qualifications to the Legal Opinion**.

1. **Customary Qualifications As to the Effect of Certain Laws**. If there is a legal uncertainty which relates to a portion of the matter covered, it is customary to issue a "qualified" opinion which includes a statement that the particular opinion does not cover the effect of a certain law or laws. In that situation the requesting lawyer should be satisfied as to the matter and accept the opinion, subject to appropriate exceptions to the legal conclusions set forth. This type of qualification should be acceptable to the requesting lawyer, if the uncertainty is of a type that is generally recognized by the legal profession.

2. **"Explained" or "Reasoned" Opinions**. If the legal uncertainty regarding a requested opinion goes to the principal subject of an opinion, it may be inappropriate to ask for a legal opinion. A lawyer should never ask for a legal opinion that he or she would not be prepared to render under similar circumstances. A lawyer should likewise not render an unqualified opinion when there is substantial legal uncertainty with respect to an issue. A disagreement among counsel to the parties in a business transaction regarding the existence or degree of legal uncertainty sometimes results in an "explained" or "reasoned" opinion. In an "explained" or "reasoned" opinion, the lawyer presents a discussion of statutory and judicial authority, indicating that the matter is uncertain or perhaps "not free from doubt," and gives a prediction of the likely resolution of the matter if the issue is appropriately presented to a court of competent jurisdiction. If investigation and research lead to the conclusion that the law is unclear, the attorney should so inform the Client and note the uncertainty in the opinion.

Factors that frequently influence the strength of the conviction in the predictability of the outcome include: (i) whether there is relevant authority which supports the conclusion; (ii) whether there are important "public policy" issues involved; (iii) whether compelling logical arguments support the conclusion in a significant and obvious manner; and (iv) whether the facts in a particular transaction are consistent with the facts in other cases cited as authority.[197]

The ABA Opinion Negotiation Guidelines discuss explained opinions. The Committee concurs with such discussion, which is incorporated herein by reference.

3. **"Comfort" Opinions**. The narrative discussions found in "explained" legal opinions may be appropriate in circumstances in which one of the parties to a proposed business transaction wants some

---

[196] FitzGibbon & Glazer, Legal Opinions on Incorporation, Good Standing, and Qualification To Do Business, 41 Bus. Law. 461, 462 (1986).

[197] California Real Estate Report, supra note 1, at 1152.

"comfort" in an area of legal uncertainty. However, this type of "reasoned" opinion is to be discouraged. Such matters are more appropriately resolved by the Opinion Recipient obtaining the views and advice of his or its own lawyer, rather than relying on a narrative discussion in the opinion of the counsel to the other party to the transaction. In areas in which the uncertainty of the law may create some business or legal risk, the party seeking the opinion may also be able to benefit from the use of its own counsel, by retaining advice as to uncertainties in the law, or other less than favorable advice, within the protection of the attorney-Client privilege. Just as it is inappropriate to ask for "negative assurance" when facts are not known or there is substantial factual uncertainty, it is generally inappropriate to ask for an Opinion when it is known that there exists substantial legal uncertainty.

4. **Materiality Qualification**. Attorneys rendering legal opinions on complex matters sometimes use a concept of materiality to qualify opinions on certain matters, in order to allow a cost-effective solution to giving the opinion. Although the ABA Report discourages the use of a materiality standard as being too subjective and uncertain,[198] the qualification of materiality may be helpful in rendering opinions which might otherwise be very difficult, impractical, or unreasonably costly in terms of legal fees. For example, a materiality qualification is frequently used in connection with a disclosure of litigation.

5. **Exclusion of Certain Legal Issues**. Another commonly used qualification for limiting the scope of legal opinions is to specifically exclude certain legal issues from an opinion. For example, blue sky laws, federal antitrust law, environmental laws, or other legal matters may be excluded under certain circumstances. If an Opinion Letter adopts the ABA Accord, then § 19 of the ABA Accord excludes a number of specific legal issues, without the necessity of reciting such exceptions, "unless the Opinion Giver has explicitly addressed the specific legal issue in the Opinion Letter. . . ."[199] See § 19 of the ABA Accord for a listing of these legal issues which are automatically excluded from an Opinion Letter which adopts the Accord.

6. **Qualification as to Scope of Engagement or Participation in the Transaction**. In certain circumstances, legal counsel may be employed to render only limited opinions, opinions on certain specified laws, or to express an opinion based on limited participation in the Transaction, as agreed upon by the parties and their counsel. In these circumstances, it may be appropriate to specify the limited nature of the engagement or the participation of the Opinion Giver in the Transaction with respect to which the opinion is delivered. The Opinion Giver and the counsel for the Opinion Recipient may also agree to reasonable limitations on the scope of factual investigation by the Opinion Giver, and any such limitation should be described as a qualification to the legal opinion.

G. Foreign Law and Reliance on Local Counsel.

1. **Limitation of Law Addressed by an Opinion**. The Opinion Giver should expressly limit the opinion to the Law of designated jurisdictions and, where appropriate, to discrete laws within a particular jurisdiction, in each case to be specified in the Opinion. Unless otherwise stated, the Opinion should not be deemed to cover local laws or regulations (such as county, municipal and special political subdivisions, whether state level, regional or otherwise). Limitation of the opinion to the law of a specified jurisdiction (e.g., the State of Texas and federal law) have sometimes in the past been expressed by a statement in the Opinion of the jurisdictions in which the Opinion Giver is admitted to practice. However, this may not be appropriate in many cases, due to the proliferation of multiple offices and the spread of jurisdictions in which lawyers within the Opinion Giver organization are in fact admitted to practice. The Opinion Giver (including the single or solo practitioner) should recite in the Opinion the jurisdiction(s) for whose law responsibility is assumed, and should further limit the Opinion, "where appropriate, to specific statute or other discrete laws of a particular

---

[198] ABA Report, supra note 3, at 225.

[199] ABA Report, supra note 3, § 19, at 215, 216.

jurisdiction."[200] A disclaimer of opinion coverage for any other law may be included, but should be implied in the Opinion and therefore unnecessary.[201] Federal Law is not included if only state Law is designated, and Federal Law coverage, if desired, should be specifically mentioned in the Opinion Letter. In this regard, the following language is suggested by the Committee:

Proposed Opinion Language

Our opinions are limited in all respects to the substantive law of the State of Texas [and the General Corporation Law of the State of Delaware], and the federal law of the United States, and we assume no responsibility as to the applicability thereto, or the effect thereon, of the laws of any other jurisdiction.

2. **Reliance on Local Counsel in Multi-State Transactions**. The Opinion Giver in a multi-state transaction is often requested to furnish an opinion on matters governed by the laws of a jurisdiction other than the Opining Jurisdiction. Because of the professional responsibility of attorneys to be competent in the law with respect to which they are rendering an opinion, attorneys licensed in Texas generally should not render opinions on the laws of other states. However, lawyers licensed in Texas may properly and ethically render opinions on the law of Other Jurisdictions in special circumstances, such as when the requested opinion relates to corporate transactions governed by the corporate law of the State of Delaware, provided that the lawyers are well versed in and professionally competent with respect to such law. Since the Opinion Giver may be held to the same standard as lawyers licensed in an Other Jurisdiction if he or she gives an opinion with respect to the law of that Other Jurisdiction, attorneys generally seek the advice and opinion of local counsel with respect to the Other Jurisdiction, except in special situations in which the Opining Counsel is competent.

One approach to opinions of local counsel is to "isolate" the opinion of the Opinion Giver from the opinion of local counsel. Under this approach, the Opining Counsel excludes from the scope of the Opinion matters covered by the opinion of the Other Counsel, and no reference to the Other Counsel's opinion is made in the Opinion Giver's Opinion.

To further clarify the relationship between Other Counsel and the Opinion Giver, the opinion of Other Counsel may be addressed to the Opinion Recipient. If the opinion is not "isolated" as discussed above, then the Opinion should generally state that the Opinion Giver is justified in relying on the opinion of the Other Counsel in rendering the Opinion Giver's Opinion. The relationship with Other Counsel is covered by § 8 of the ABA Accord, which is incorporated herein by reference.[202]

---

[200] See ABA Report, supra note 3, at § 1 and Commentary.

[201] Id. Under the ABA Report, if specified jurisdictions are stated in the Opinion Letter, an express disclaimer of coverage under any other jurisdictions is not necessary. Section 1 of the ABA Report reads as follows:

> § 1 Law Addressed by Opinion. The Opinion Giver may, by express designation in the Opinion Letter, limit the Opinion's coverage to the Law of one or more specified jurisdictions and, where appropriate, to specific statutes or other discrete laws of a particular jurisdiction. That designation disclaims an opinion concerning the laws of any other jurisdiction, the other statutes or laws of the particular jurisdiction or the effect thereof, except as provided in § 10(c). Such disclaimer need not be stated in the Opinion Letter. The designation of the law of a particular state does not include the Federal law of the United States. If coverage of Federal law is intended, the Opinion Giver must designate coverage of that law in the Opinion Letter.

[202] ABA Report, supra note 3, at § 8.

3. **Rendering Opinions on the Law of Jurisdictions Other Than Those in Which Opinion Giver Is Licensed**. There is no impropriety in rendering opinions on the law of jurisdictions other than the ones in which the Opinion Giver is licensed, provided that the Opinion Giver complies with Texas Rules 1.01 and 5.05 and other relevant portions of the Texas Disciplinary Rules of Professional Conduct. Texas Rule 1.01 requires that the Opinion Giver either is, or becomes, competent to render the opinion requested.[203] Particularly in complex multi-state transactions, it may be appropriate for attorneys to give opinions on laws of jurisdictions other than the ones in which they are admitted to practice.[204] This would seem particularly true in situations involving statutes patterned on uniform laws, such as the Uniform Commercial Code.[205] Texas Rule 5.05 requires that a Texas lawyer shall not "practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."[206] Accordingly, the licensure requirements of the other jurisdiction may be an appropriate matter for inquiry when determining to opine as to the law of the Other Jurisdiction.

The view of the Committee is that there may be instances in which attorneys not only may, but should, render opinions on the laws of jurisdictions in which they are not admitted to practice, without requiring the association of local counsel on simple matters.

4. **Proposed Qualification for Reliance on Local Counsel**. The following language defining or limiting the responsibility of the principal counsel with respect to reliance on an opinion of local counsel may be used, unless the local counsel opinion is "isolated" from the primary opinion:

---

[203] See Part III, Section B(1)(a), of this Report.

[204] See Legal Opinions Given in Corporate Transactions, supra note 12, at 2406 (remarks of Dey Watts).

[205] As one commentator has stated:

> Admission to the Bar of a particular state is not determinative of competence in the law of that state. Many firms have lawyers practicing in specialty areas that, by reason of the nature of their practice, hold greater competence about particular laws of states where they are not licensed to practice than a vast majority of the members of the Bar who are licensed in that state, and it could well be impossible to find local counsel with competence equivalent to in-house talent in that field. Municipal finance is certainly one such field, consumer and commercial finance are probably others. Whether or not the laws of a foreign jurisdiction are involved, the relevant issue is always the question of competence. It has been said that all lawyers are expected to be able to render opinions on questions of Federal law, but how many of us would really feel comfortable in some area, such as Admiralty, unless we had access to a specialist.
>
> I think we have to be realistic about the fact that, in opining on questions involving the laws of other states, we will be held to the same standards to which lawyers of that state would be subjected and in areas where you hold yourself out as having special expertise, the somewhat higher standards of a specialist may be applied.
>
> Id. at 2407.

[206] Texas Rule 5.05.

Proposed Opinion Language

In rendering the opinion expressed in paragraph [specify paragraph] above, we have relied solely on the opinion of [name of counsel in Other Jurisdiction], dated [specify date], a copy of which is being concurrently delivered to you, to the extent those opinions concern the law of [specify Other Jurisdiction]. We have made no independent examination of the laws of the Other Jurisdiction.

In certain appropriate circumstances, the following alternative language may be added in lieu of the last sentence of the foregoing statement:

Although we have not reviewed the foregoing matters for purposes of rendering any opinions with respect thereto, we have reviewed and are satisfied with the form and scope of such opinion and believe that you are justified in relying thereon.

The foregoing statements require principal counsel to act reasonably in relying on the opinion of foreign counsel, but do not require an independent legal investigation by the principal counsel. The counsel to the Opinion Recipient may request that the primary counsel add language, as indicated in the second clause above, that its reliance is "justified" or that the Other Counsel "is satisfied with form and scope" without expanding the obligation of the primary counsel. Any statement by attorneys as primary counsel that "we concur" in a foreign counsel's opinion, or that it is "satisfactory in form and substance" should generally be avoided, since the ABA Accord requires the Opinion Giver to assume responsibility to verify the substance of an Opinion of Other Counsel, if the Opinion Giver states concurrence with the Other Counsel's legal opinion.

To paraphrase the Accord, if the Opinion Giver were to:

(a) only identify the opinion of the other counsel or remain silent with respect thereto, the Opinion Giver would assume no responsibility respecting either the other counsel or its legal opinion;

(b) state that the Opinion Recipient is justified in relying upon the other counsel's legal opinion, that statement would mean only that the Opinion Giver believes the other counsel is competent to render its opinion, on the basis of its professional reputation;

(c) state that the form or scope, or both, of the other counsel's opinion is satisfactory, without more, that statement would mean only that such opinion, on its face, appears to provide coverage with respect to the specific legal issues other counsel was requested to address;

(d) state reliance on the other counsel's legal opinion in rendering its opinion, the Opinion Recipient would be entitled to assume the Opinion Giver believes that (i) the other counsel is competent to render the opinion so provided on the basis of its professional reputation, and (ii) such opinion, on its face, appears to cover the legal issues upon which reliance is placed by the Opinion Giver;

(e) not state concurrence in the other counsel's legal opinion, the Opinion Giver would not assume responsibility to verify the substance of that opinion; or

(f) state concurrence in the other counsel's legal opinion, the Opinion Giver would assume responsibility to verify the substance of that opinion.[207]

Insofar as the principal lawyer's responsibility in situations involving reliance upon opinions of local counsel is not clearly established and the primary lawyer may have some responsibility, under certain circumstances, for both the selection of competent local counsel and for the substantive matters included in the

[207] ABA Report, supra note 3, at § 8.

opinion, the Committee adopts the approach set forth in the Accord as it relates to these issues of reliance on opinions of other counsel.

H. Signature.

Many law firms manually sign the opinion with the name of the law firm. Other firms follow different practices, such as "[Name of Firm], by [Name of Individual Attorney], a partner; or, for professional corporations, "[Name of Firm], By: [Name of Individual Attorney], [Office]." Although the only requirement is that an authorized person sign a legal opinion on behalf of a law firm, many firms have a policy that legal opinions must be signed by a partner or shareholder of the firm. In any event, the final responsibility for the issuance of an opinion should be placed on an attorney with sufficient experience to appreciate the significance of issuing the opinion, including the potential impact on the professional reputation of the Opinion Giver, the ethical duties of the Opinion Giver, and the professional liability risks to the Opinion Giver.

VII. THE REMEDIES OPINION

A. Purpose.

From the perspective of the Opinion Recipient, perhaps the most significant element of the Opinion is the enforceability or remedies opinion.[208] Its purpose is two-fold. First, it is intended to give comfort to the Opinion Recipient that a valid contract has been formed under the laws of the applicable jurisdiction. Second, and as a corollary, it expresses the opinion of the Opinion Giver that in the event the Client defaults in the performance of its obligations under the Transaction Documents as to which the opinion is given, the Opinion Recipient will be entitled to a remedy for the breach, subject to certain exceptions which might be made by a court applying such remedies. The degree of comfort as to the enforceability of specific remedies to which the Opinion Recipient is entitled under the terms of the Transaction Documents is a subject of considerable controversy.

For this reason, the Remedies Opinion is frequently the most highly negotiated part of a legal opinion. While a central purpose of this Report is to serve as an educational resource for Texas lawyers, Transactions involving parties from other states are becoming increasingly more common, and out-of-town lenders and their counsel focus on the Remedies Opinion. Thus, it would be shortsighted not to take into consideration practices recommended, and interpretations adopted, by other recent state bar committee reports and by opinion projects on the national level.[209] The New York and California bar associations have been quite active in attempting to set standards and agreements on practices concerning, and interpretations of, the meaning of legal opinions but have taken divergent views regarding the Remedies Opinion. Texas lawyers have been influenced by the New York Reports and the California Reports and many have accepted one view or the other. In an attempt to reconcile differing approaches and form a national consensus, the Business Law Section of the American Bar Association has recently published the ABA Report, including the Accord,[210] which is an attempt to arrive at a nationally accepted form of legal opinion and commentaries which an Opinion Giver may adopt by declaration in an Opinion Letter.

---

[208] The opinion covers the interdependent issues of enforceability and remedies. Texas lawyers refer to it interchangeably as the "enforceability opinion" or the "remedies opinion." The term "Remedies Opinion" has the same meaning in this Report as in the Accord. For simplicity, the term "Remedies Opinion" will be used in this Report.

[209] For a list of recent reports, see note 1, supra.

[210] ABA Report, supra note 3.

Prior to the ABA Report a typical Remedies Opinion would read as follows: "The [Transaction Documents] constitute the legal, valid and binding obligations of the [Client] and are enforceable against it in accordance with their terms."

Prior to the ABA Report numerous commentators had discussed the independent meaning of the words "legal", "valid", "binding" and "enforceable" and the need to include any one or more of those in the opinion.[211] While it has been customary to use all or a combination of these words, "binding" or "enforceable" in themselves were considered by most as sufficient to mean that (i) all the acts necessary to form a contract had occurred and a contract had come into existence under the law of contracts, (ii) the Transaction Documents did not violate any law or other public policy as to formation of contracts that would prevent a Court from enforcing the Transaction Documents as a whole, and (iii) all approvals necessary to permit the Client to enter into a contract had been obtained.[212] Thus, the typical Remedies Opinion prior to the ABA Report was generally considered to state in effect that, should there be a default in the performance of an obligation under the Transaction Documents, if (1) a failure to pay or other damage could be shown, and (2) the defaulting Client be brought into a Court that would apply the governing law, then subject to the defenses and exceptions set forth in the Opinion, the Court would provide a remedy.[213]

The ABA Report's position, with which the Committee concurs, is that the use of the words "legal," "valid" and "binding" are not essential and it is not necessary to use the phrase "in accordance with its terms."[214] If the parties to the transaction agree to adopt the ABA Accord with respect to the Opinions to be delivered in the Transaction, then the Remedies Opinion should read as follows:

The Transaction Documents are enforceable against the Client.

According to § 10 of the Accord, with which the Committee concurs, "[a] Remedies Opinion covering a Transaction Document:

(a) means:

(i) a contract has been formed;

(ii) a remedy will be available with respect to each agreement of the Client in the contract or such agreement will otherwise be given effect; and

(iii) any remedy expressly provided for in the contract will be given effect as stated;

(b) is given as if the Law of the Opining Jurisdiction governs the Transaction Document, without regard to whether the Transaction Document so provides;

(c) is given in respect of . . . [the formation of a contract], when the Client's jurisdiction of organization is other than the Opining Jurisdiction, on the basis that it addresses the law of

---

[211] See, e.g., Fuld, Legal Opinions in Business Transactions--An Attempt to Bring Some Order Out of Some Chaos, 28 Bus. Law. 915, 928-932 (1973); FitzGibbon & Glazer, Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments, 12 J. Corp. Law 657, 667 (1987); Tri-Bar Report, supra note 1, at 1915-1916.

[212] Of course, the Opinion Giver should do the research and due diligence necessary to be satisfied that these prerequisites have in fact been met.

[213] Tri-Bar Report, supra note 1, at 1914.

[214] ABA Report, supra note 3, at Commentary ¶ 10.1.

the Client's jurisdiction of organization as part of the Law of the Opining Jurisdiction to the extent the law of the jurisdiction of organization governs the Client's organizational status, good standing and authorization of the Transaction Document and any other corporate, partnership or similar requirements with respect to its execution, except to the extent the Opinion Letter expressly states assumptions or reliance upon Other Counsel in respect of one or more of these matters; and

(d) is given, insofar as the law governing the contract is concerned, on the basis that it:

(i) includes an opinion that a governing law provision choosing the Law of the Opining Jurisdiction will be given effect under the choice-of-law rules of the Opining Jurisdiction if the Transaction Document contains such a governing law provision; or

(ii) does not include an opinion as to what law governs if the Transaction Document contains a governing law provision choosing the law of an Other Jurisdiction or does not contain a governing law provision.

The Remedies Opinion deals only with the law of contracts of the Opining Jurisdiction and other laws of the Opining Jurisdiction that a lawyer in the Opining Jurisdiction exercising customary professional diligence would reasonably recognize to be directly applicable to the Client, the Transaction, or both. The Remedies Opinion does not deal with the laws and legal issues deemed excluded from the Opinion's coverage by §§ 18 [Opinion is limited to the specific legal issues which it addresses; i.e., no implied Opinions] and 19 [list of excluded legal issues, including federal and state securities laws, Federal Reserve Board margin regulations, ERISA, etc.] [of the ABA Report] and, while it includes an opinion that any agreement contained in the Transaction Document to arbitrate disputes will be given effect, does not deal with how any dispute under the contract would be resolved in the arbitral process. The Remedies Opinion is subject to the General Qualifications [Bankruptcy and Insolvency Exception, the Equitable Principles Limitation, and any other applicable Common Qualifications] and to any additional exceptions, qualifications or limitations specified in the Opinion Letter.[215]

If the Accord is adopted in an Opinion Letter, it is clear that a valid contract has been formed under the Law of the Opining Jurisdiction. The Opinion Recipient should also be better able to understand the extent to which a Court would enforce against the Client each particular agreement, right, benefit or remedy contained in the Transaction Documents.[216] It should be pointed out, however, that if the Transaction Documents contain a choice-of-law provision stipulating the law of an Other Jurisdiction, the Remedies Opinion will provide very limited coverage as to enforceability. From a strictly logical standpoint, it would deal only with the effectiveness of the choice-of-law provision under the Law of the Opining Jurisdiction. However, as the Commentary to § 10 of the ABA Accord points out, this "narrow view" is probably not what the Opinion Recipient intends, and accordingly a Remedies Opinion concerning a contract with a choice of law provision choosing an Other Jurisdiction should mean that the contract is enforceable under the law of the Opining Jurisdiction, "without passing on what law a court would actually apply."[217] Under the approach of the ABA Accord, a "choice of law opinion", or a "governing law clause opinion" may be specifically requested by the

---

[215] Id., at § 10.

[216] Id. at Commentary ¶ 10.3.

[217] ABA Report, supra note 3, at § 10, Commentary ¶ 10.5, p. 201.

Opinion Recipient. "The Opinion Giver may give a governing law clause opinion in lieu of or in addition to the Remedies Opinion, as may be agreed."[218]

The Remedies Opinion looks forward and attempts to predict on the basis of the law in effect at the time the Opinion is delivered whether a Court would enforce the Transaction Documents. Although the Opinion Giver does not have an obligation to offer information not requested by the Opinion Recipient[219], if the Opinion Giver knows that a Transaction Document may be void as a whole at its inception or voidable because of facts in existence at the time the agreement is entered into, such as vagueness, fraud,[220] duress, incapacity, public policy, or illegality of subject matter, further investigation should be done and the Transaction or documentation restructured prior to rendering the Remedies Opinion in order to eliminate the problem.[221] Facts within the Opinion Giver's knowledge at the time the Opinion is given which could limit the enforceability of certain provisions of a Transaction Document should be brought to the Opinion Recipient's attention in the opinion.

A Remedies Opinion expresses the Opinion Giver's opinion that each obligation imposed in the Transaction Documents on the Client, each agreement made therein and each right and remedy conferred by the Client therein would be given effect as set forth in the Transaction Document insofar as governed by the applicable laws, subject to the General Qualifications,[222] and any additional exceptions set forth in the Opinion. Consequently, the Opinion Giver must examine each separate provision contained in the Transaction Documents which could affect the obligations of the Client or their interpretation or enforcement. This "broad view" of the scope of the Remedies Opinion is the position taken by the ABA Report as well as the New York Report.[223]

Some lawyers have criticized such a broad interpretation of the scope of the Remedies Opinion as unrealistic and unfair in some situations because (i) a small transaction may not warrant, or the Client may not be willing to pay for, the time and expense involved in the Opinion Giver analyzing and researching each provision of the Transaction Documents, (ii) the provisions in question are usually drafted by counsel to the Opinion Recipient, or (iii) the utility of an exhaustive analysis is doubtful considering the inability to know all the facts that will be found to be operative in the event that a specific provision is challenged. These attorneys interpret the Remedies Opinion to be the Opinion Giver's opinion that in the event of a breach of performance by the Client of its obligations under the Transaction Documents, the Transaction Documents will be enforced and some remedy will be available to the performing party. They believe that if the Opinion Recipient is concerned about the enforceability of a particular provision, it is the Opinion Recipient's obligation to request a

---

[218] Id.

[219] Id. at Commentary ¶ 7.

[220] This does not mean the Opinion Giver is impliedly giving an opinion that no fraud exists. Fraud is a fact issue and not a matter for a legal opinion.

[221] For a thorough discussion of issues which would prevent the Opinion Giver from delivering an opinion that the Transaction Documents are legal, valid and binding, see FitzGibbon & Glazer, supra note 211, at 670-685.

[222] ABA Report, supra note 3, at § 11.

[223] Id. at § 10. Thus, to the extent Texas lawyers adopt the position of the ABA Report, the "broad view" of the scope of the Remedies Opinion will become the practice in Texas. See also Texas Real Estate Report, supra note 2, at 23; Johnson, Legal Opinions to Third Parties in Business Transactions C-33 (State Bar of Texas Advanced Corporate and Business Law Course, April 26, 1984); and the Tri-Bar Report, supra note 1, at 1914-15.

specific opinion as to that provision. This "narrow view" of the scope of the Remedies Opinion appears to have been adopted most vocally by the California bar.[224]

Finally, some lawyers have attempted to limit the scope of the Remedies Opinion by not including the words "in accordance with its terms" as a modifier to the word "enforceable". They hoped to indicate that they were not giving any opinion as to the availability of specific performance or certain other equitable remedies or that the scope of their opinion was limited to the narrow view described above. The Committee takes the view that the phrase "in accordance with its terms" merely emphasizes but does not expand the meaning of the words "legal, valid and binding" and thus negotiations on this point, beyond inclusion of some of the exceptions discussed below, are probably not productive.[225] The ABA Report, if followed, hopefully will end this debate by stating simply that the agreement "is enforceable against" the Client.[226]

B. General Qualifications to the Remedies Opinion.

It is generally accepted that there will always be certain fact patterns which could occur or positions taken by the Courts which would prevent or delay the obtaining by the Opinion Recipient of the particular remedies provided in the Transaction Documents upon a breach of the Client's obligations. For that reason, the Opinion Giver will need to make exclusions from the scope of the Remedies Opinion. These exclusions are discussed below.

The two areas in which the Courts have been most active in frustrating enforcement of the specific agreement of the parties have been (i) in bankruptcy and insolvency situations, and (ii) where equitable principles are applied by the Courts. Unless the particular Transaction is of a nature that bankruptcy or insolvency is considered likely, or has been structured so as to minimize the likelihood of a bankruptcy or insolvency of the Client, Opinion Recipients almost always allow the Remedies Opinion to be qualified by exceptions for bankruptcy, insolvency and application of equitable principles. These exceptions and limitations have become so accepted, the Accord takes the position that they are implied and need not be specifically stated with respect to the Remedies Opinion, if the Accord is adopted in the Opinion.[227] The Committee concurs with this position. In addition, certain qualifications to enforceability related to due process and general rules of contract law are often made. The Accord sets out other common qualifications which are of a type that generally cannot be "drafted around" and need not be stated if the Accord is adopted in the Opinion.[228] Likewise, the Common Unified Qualifications need not be stated if the Common Unified Exceptions from this Report are incorporated in the Opinion.

---

[224] This "narrow view" has been described in the California 1989 Corporate Report, supra note 1, at 2209, as follows:

> Some remedy is available if a party to the contract does not materially comply with its terms. this does not imply that any particular type of remedy is available, or that every provision in the agreement, such as the right to accelerate indebtedness in the event of a default, will be upheld or enforced by a court under all circumstances.

[225] See Goyne & Johnson, supra note 17, at 46-47; Texas Real Estate Report, supra note 2, at 23. Also see Tri-Bar Report, supra note 1, at 1916; Maryland Report, supra note 1, at 736.

[226] ABA Report, supra note 3, at Commentary, ¶ 10.1.

[227] Id. at § 11.

[228] Id. at § 14.

If an Opinion Letter adopts the ABA Accord, then the General Qualifications (which include the Bankruptcy and Insolvency Exception, the Equitable Principles Limitation, and the Other Common Exceptions) are automatically included as to any Remedies Opinion, and need not be specifically recited in the Opinion Letter. If the General Qualifications are to apply to any Opinion other than the Remedies Opinion, the Opinion Letter should so state.[229]

1. **The Bankruptcy and Insolvency Exception**. Historically, the bankruptcy and insolvency exception generally has been stated in the same sentence as the Remedies Opinion as a qualifying phrase or set forth separately in the body of the opinion. The Bankruptcy and Insolvency Exception under the ABA Accord is set forth in § 12.[230] If the ABA Accord is adopted in an Opinion Letter, then the Bankruptcy and Insolvency Exception is automatically included as an exception to the Remedies Opinion, and it is not necessary to recite it in the Opinion Letter. If the ABA Accord is not adopted in an Opinion Letter, then the Bankruptcy and Insolvency Exception should be specifically stated as a limitation to the "enforceability" or "remedies" opinion in a traditional non-Accord Opinion Letter. The recommended form of Bankruptcy and Insolvency Exception (herein so called) is as follows:

> **The [enforceability of the Transaction Documents] [and--specify other opinion, if any, to which this exception applies] is subject to the effect of bankruptcy, insolvency, reorganization, receivership, moratorium, or other similar laws affecting the rights and remedies of creditors generally.**

The Committee believes that the bankruptcy and insolvency exception should properly be interpreted broadly to pertain to all other Bankruptcy Code provisions. The ABA Report adopts this view, and if the ABA Report is adopted in an Opinion Letter, the Bankruptcy and Insolvency Exception includes:

(a) the Federal Bankruptcy Code and thus comprehends, among others, matters of turn-over, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non--recourse obligation into a recourse claim, limitations on ipso facto and anti-assignment clauses and the coverage of pre-petition security agreements applicable to property acquired after a petition is filed;

(b) all other Federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditor laws that affect the rights and remedies of creditors generally (not just creditors of specific types of debtors);

(c) all other Federal bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors laws that have reference to or affect generally only creditors of specific types of debtors and state laws of like character affecting generally only creditors of financial institutions and insurance companies;

(d) state fraudulent transfer and conveyance laws; and

(e) judicially developed doctrines relevant to any of the foregoing laws, such as substantive consolidation of entities.[231]

Fraudulent transfer opinions themselves are as much factual as legal in nature and they should not ordinarily be requested or given. If a fraudulent transfer opinion or preference opinion is required, as is

---

[229] Id. at § 11.

[230] Id. at § 12.

[231] ABA Report, supra note 3, at § 12.

sometimes the case when rating agencies are involved in the transaction, the Opinion Giver should carefully qualify the factual nature of the opinion or base conclusions on certificated assumptions by solvency experts and those with actual knowledge of the facts.[232]

There has been an increase in the number of insolvency situations during the 1980's with the result that state insolvency laws are being applied more frequently to protect debtors. As a result, the better view today is the broad view that all federal and state insolvency, moratorium, reorganization, conservatorship, assignments for the benefit of creditors and receivership laws are included in the insolvency exception. The view of the Committee is that the phrase "other similar laws affecting the rights of creditors generally" includes such laws, but does not include (i) laws which have reference to or affect only creditors of specific types of debtors (e.g., creditors of agricultural debtors) or (ii) laws affecting creditors generally but which are not of a character similar to those listed above. For example, many provisions of the Uniform Commercial Code ("UCC"), and laws as to usury and consumer credit affect creditors' rights generally, but these laws are not, in the Committee's view, included within the bankruptcy and insolvency exception.[233]

2. **The Equitable Principles Limitation**. The second general limitation to the Remedies Opinion which is almost always made is the "equitable principles limitation." This limitation is designed to except from the Remedies Opinion those situations in which a Court could apply equitable principles either (i) in granting an equitable remedy provided for in the Transaction Documents, such as specific performance or injunctive relief or (ii) in allowing the Client equitable defenses (e.g. waiver, laches or estoppel) against enforcement of a remedy. The exception may be made either as a clause qualifying the Remedies Opinion or in a separate sentence. The Equitable Principles Limitation under the ABA Accord is set forth in § 13.[234] If the ABA Accord is adopted in the Opinion Letter, then the Equitable Principles Limitation is automatically included as an exception to the Remedies Opinion, and it is not necessary to recite it in the Opinion Letter. If the ABA Accord is not adopted in an Opinion Letter, then the Equitable Principles Limitation should be specifically stated as a limitation to the "enforceability" or "remedies" opinion in a traditional non-Accord Opinion Letter. The recommended form of Equitable Principles Limitation (herein so called) is as follows:

> **The [enforceability of the Transactional Documents] is subject to the effect of general principles of equity, whether applied by a court of law or equity.**[235]

The Equitable Principles Limitation relates only to possible future events, and not those present at the time of the Closing. If the Opinion Giver has Actual Knowledge on the date of delivery of the Opinion of any unenforceability due to "equitable principles", then the Opinion Giver should either disclose such unenforceability to the Opinion Recipient in the Opinion Letter, or, if appropriate, decline to give the Opinion.[236] This exception acknowledges the fact that Courts exercising equitable powers have broad discretion to grant, withhold or modify a remedy, often based on the facts and actions of the parties at or prior to the time the remedy is sought. The exception is almost always taken when there is concern that the phrase "enforceable" or

---

[232] See Special Report by the Tri-Bar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions, 46 Bus. Law. 717 (1991).

[233] This view is consistent with the ABA Report, which takes this approach. See ABA Report, supra note 3, at Commentary ¶ 12.1.

[234] Id. at § 13, p. 204.

[235] Although many lawyers and the ABA Accord add the phrase "whether applied by a court of law or equity," Texas has a unified court system and the above phrase should be sufficient even without the phrase "whether applied by a court of law or equity."

[236] ABA Report, supra note 3, Commentary at ¶ 13.1, p. 205.

"enforceable in accordance with its terms" implies that specific performance and injunctive relief would be granted in any future situation in which the performing party believes it is entitled to these remedies. As Courts have expanded the use of equitable principles in the 1980's, however, lawyers have seen the need to broaden the scope of the standard equitable principles exception. As with the bankruptcy and insolvency exception, the view of the Committee is that the equitable principles limitation should be flexibly construed to include principles of a clearly similar nature developed or applied by the Courts from time to time without the need to mention these specifically. Within the scope of the equitable principles limitation are such concepts as (i) the availability of specific performance and injunctive relief, which are applied in the discretion of the Court; (ii) principles affording traditional equitable defenses (e.g., waiver, laches and estoppel) to a party seeking enforcement; (iii) a requirement for good faith and fair dealing on the part of the party seeking enforcement; (iv) the materiality of the breach; and (v) unconscionability, as applied to the enforcing party's conduct.[237]

The Committee adopts the approach of the Accord concerning the equitable principles limitation. If the Accord is adopted by the parties to the Transaction, then the Remedies Opinion and any other opinion to which the qualifications of the Accord are made specifically applicable are subject to the effect of general principles of equity, whether applied by a court of law or equity, which include principles:

(a) governing the availability of specific performance, injunctive relief or other traditional equitable remedies, which generally place the award of such remedies, subject to certain guidelines, in the discretion of the court to which application for such relief is made;

(b) affording equitable defenses (e.g., waiver, laches and estoppel) against a party seeking enforcement;

(c) requiring good faith and fair dealing in the performance and enforcement of a contract by the party seeking its enforcement;

(d) requiring reasonableness in the performance and enforcement of an agreement by the party seeking enforcement of the contract;

(e) requiring consideration of the materiality of (i) the Client's breach and (ii) the consequences of the breach to the party seeking enforcement;

(f) requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement; and

(g) affording defenses based upon the unconscionability of the enforcing party's conduct after the parties have entered into the contract.[238]

3. Other Common Qualifications. Opinion Givers sometimes seek to further qualify their opinion beyond the bankruptcy and insolvency exception and equitable principles limitation. This is due to the fact that most judicial intervention into the agreement of the parties has been motivated by concern for protecting Clients from overbearing boiler-plate provisions inserted in Transaction Documents by lenders or other parties with leverage. In addition, there is growing concern about increased liability for incorrect opinions.[239] As a result, some lawyers include long lists (commonly referred to as "laundry lists") of specific exceptions to the Remedies Opinion, which often become boiler-plate themselves. Other lawyers state they are giving no opinion as to the same list of items.

---

[237] See Tri-Bar Second Addendum, supra note 1, at 564; ABA Report, supra note 3, at § 13.

[238] ABA Report, supra note 3, at § 13.

[239] See Part IV of this Report.

If the Accord is adopted in an Opinion Letter, then the Remedies Opinion and any other Opinion to which the qualifications in the Accord are made specifically applicable are subject to the following generally applicable rules of Law (collectively, the "Other Common Qualifications") contained in § 14 of the Accord:

> § 14 Other Common Qualifications. To the extent the Law of the Opining Jurisdiction applies any of the following rules to one or more of the provisions of a contract covered by an Opinion to which this Section applies, that opinion is subject to the effect of generally applicable rules of Law that:
>
> (a) limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence and reasonableness;
>
> (b) provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected;
>
> (c) limit the availability of a remedy under certain circumstances where another remedy has been elected;
>
> (d) limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;
>
> (e) relate to the sale or disposition of collateral or the requirements of a commercially reasonable sale;
>
> (f) limit the enforceability of provisions releasing, exculpating or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves gross negligence, recklessness, willful misconduct or unlawful conduct;
>
> (g) may, where less than all of a contract may be unenforceable, limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;
>
> (h) govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;
>
> (i) may, in the absence of a waiver or consent, discharge a guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, or (ii) guaranteed debt is materially modified; and
>
> (j) may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract.[240]

The Committee adopts the approach of the ABA Report. Any opinion which adopts the Accord is automatically deemed to include the Other Common Qualifications as implicit qualifications to any Remedies Opinion contained in such Opinion. As the Commentary to the Accord points out, "as a general proposition, revising or rewording the offending portion of a contract will not avoid them."[241]

---

[240] ABA Report, supra note 3, at § 14.

[241] Id., at Commentary, ¶ 14.1, p. 206.

4. **Other Common Texas Qualifications**. Other provisions often excepted from the Remedies Opinion by Texas lawyers and not found in Other Common Qualifications listed above, include the following which should not be controversial in Opinions given by Texas lawyers (herein referred to as the "Other Common Texas Qualifications"):

(a) provisions restricting access to courts or to legal or equitable remedies or purporting to affect the jurisdiction or venue of courts;

(b) provisions purporting to establish evidentiary standards for suits or proceedings to enforce the Transaction Documents;

(c) provisions purporting to waive rights to notice, legal defenses, statutes of limitations, or other benefits that cannot be waived under applicable law;

(d) provisions granting powers of attorney or authority to execute documents or to act by power of attorney on behalf of the Client;

(e) self-help remedies provided for in the Transaction Documents (other than those remedies available pursuant to an exercise in accordance with the provisions of Section 51.002 of the Property Code or Chapter 9 of the Texas Business and Commerce Code);

(f) provisions providing that remedies are cumulative;

(g) provisions that decisions by a party are conclusive;

(h) provisions purporting to provide remedies inconsistent with the UCC, to the extent the UCC is applicable thereto;

(i) provisions purporting to grant to or limit rights of third parties; and

(j) provisions purporting to create a trust or constructive trust without compliance with applicable trust law.

5. **Incorporation of Other Common Texas Qualifications by Reference**. Most of the Other Common Texas Qualifications described above are common to most Transaction Documents as well as to the laws of most states.[242] The Committee believes that it would be appropriate for Texas attorneys to incorporate the Other Common Texas Qualifications contained in this Report by reference. If the ABA Accord is expressly adopted in an Opinion, then the Bankruptcy and Insolvency Exception, the Equitable Principles Limitation, and the Other Common Qualifications of the ABA Accord are automatically deemed to be included in the Opinion without the necessity of reciting them in the Opinion Letter. If the incorporation by reference of the Other Common Texas Qualifications is desired, then the following reference should be included in the Opinion Letter:

> **This Opinion incorporates by reference the Other Common Texas Qualifications contained in the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions (the "Texas Report") of the Business Law Section of the State Bar of Texas (1992), and this opinion should be read in conjunction with the Texas Report.**

If the Other Common Qualifications (from the Accord) and the Other Common Texas Qualifications are desired to be incorporated without adopting the Accord by declaration, then the following language may be used in the opinion:

---

[242] The Maryland Report, supra note 1, at 794-96, also contains a list of assumed exceptions which can be incorporated by reference.

This Opinion incorporates by reference the Common Unified Exceptions, as defined in the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions (the "Texas Report") of the Business Law Section of the State Bar of Texas (1992), and this opinion should be read in conjunction with the Texas Report.

C. Generic Exceptions.

1. General Usage; Criticism of "Practical Realization" Approach. In addition to the Other Common Qualifications and Other Common Texas Qualifications approach, some lawyers particularly in secured transactions or in complex unsecured transactions make a generic exception (herein so called) for laws which could affect the enforcement of certain remedies, but state a conclusion that the Opinion Recipient would nonetheless eventually obtain adequate and customary remedies.[243] A commonly used generic exception in the past has been expressed in terms of "practical realization" of "principal benefits intended by the parties."[244] This generic approach has been criticized on several counts. First, some criticize it as being vague and not providing much comfort or guidance to the Opinion Recipient as to the actual or potential weaknesses in the Transaction Documents. In addition, there is no established consensus as to what "practical realization" means. Third, the use of the word "intended" places an unfair burden on the Opinion Giver, who realistically cannot be expected to know what the Opinion Recipient actually intended at the time the documents were entered into.

Nevertheless, it is the position of the Committee that, in appropriate circumstances, the use of a generic exception followed by a more specific conclusion should be a compromise with which both Opinion Recipient and Opinion Giver can feel comfortable, particularly in light of the broader scope of the Bankruptcy and Insolvency Exception, the Equitable Principles Limitation and the Other Common Qualifications. In secured Transactions, for example, the generic exception gives some assurance to the secured lender that the remedial provisions of the security documents are customarily acceptable to secured parties in similar transactions.

Because of the lack of clarity as to the definition of "practical" when used in the old "practical realization" generic exception, the view of the Committee is that "realization" should not be preceded by "practical." Further, it is recommended that "benefits" should be qualified with "principal legal" to indicate that not all benefits apparently provided by the Transaction Documents will be enforceable. In addition, it is recommended that the generic exception include a statement to the effect that any such unenforceability "will not render the Transaction Documents invalid as a whole." This clause provides assurance that there is no fundamental defect in the documents which would vitiate the entire contract. Rather than using only the phrase "may impair the enforceability," the Committee recommends the use of the additional words "may not be enforceable" or "may . . . render unenforceable" to convey the concept that certain provisions may be unenforceable (versus "impaired" enforceability).

The Committee believes that the subject of the generic exception should include all provisions of the Transaction Documents, not just "remedies and waivers," to avoid any arguments as to whether a particular term or provision is a "remedy" or a "waiver," or something else, and therefore not subject to the generic qualification.

---

[243] See Texas Real Estate Report, supra note 2, at 23-24.

[244] A typical expression of this form of generic exception is as follows:

> The opinions expressed herein as to the validity, binding nature and enforceability of any of the terms of the Transaction Documents may be limited or otherwise affected by certain laws which may impair the enforceability of certain of the remedial, waiver and other provisions of the Transaction Documents; however, such laws will not, in our judgment, substantially interfere with the practical realization of the principal benefits intended by the parties, except to the extent of any procedural delay which may result therefrom.

2. **Proposed Opinion Language for Generic Exception.**

a. **Proposed Language for "Realization of Principal Benefits" Form.** The following language is recommended by the Committee as a form of "generic exception" to the Remedies Opinion utilizing the "realization of principal benefits" approach, combined with an opinion that any unenforceable provisions will not render the Transaction Documents invalid as a whole:

> **The opinion expressed herein that the Transaction Documents are enforceable against [the client] is also subject to the qualification that certain of the remedial, waiver and other provisions of the Transaction Documents may not be enforceable; but such unenforceability will not, in our judgment, render the Transaction Documents invalid as a whole, or substantially interfere with the realization of the principal legal benefits provided by the Transaction Documents, except to the extent of any procedural delay which may result therefrom.**

b. **Proposed Language for "Exercise of Normal Remedies After Material Breach" Form.** The following generic exception is recommended by the Committee as an alternative form of generic exception. This language avoids subjective questions of intent and replaces them with somewhat more objective concepts of materiality and "normal remedies." This materiality-based approach in the savings clause does not preclude the broad view that the remedies opinion itself applies to each provision of the Transaction Documents.[245] The specific form below is stated for a secured lending transaction, and can be modified appropriately to fit other types of transactions:

> **The opinion expressed herein that the Transaction Documents are enforceable against [name of the client] is also subject to the qualification that certain of the remedial, waiver and other provisions of the Transaction Documents may not be enforceable; but such unenforceability will not, in our judgment, render the Transaction Documents invalid as a whole and, in the event of a material breach of a material covenant in the Transaction Documents, the [lender] may exercise remedies that would normally be available to [a secured lender].**

3. **Meaning and Proper Use of Generic Exceptions and Other Common Qualifications.** The generic exception is intended to be a substitute for the laundry list approach. If a Generic Exception is used, then the use of the Common Unified Exceptions is unnecessary, since the generic exceptions should be understood to include, without limitation, the Other Common Qualifications and the Other Common Texas Qualifications (i.e., the Common Unified Exceptions). The "generic exceptions" should be interpreted to be subordinate to the bankruptcy and insolvency exception and the equitable principles limitation. Stated otherwise, the qualifications relating to bankruptcy, insolvency, and equitable principles are not diminished by the generic exception. The generic exception approach is comprehensive, thereby avoiding perhaps lengthy arguments concerning the precise number and wording of the exceptions included in the "laundry list." The specific laundry list approach may in appropriate circumstances consist simply of the use of the Other Common Qualifications and the Other Common Texas Qualifications. However, the "laundry list" may, in appropriate circumstances, include other specific legal issues, including without limitation those listed under "Specific Legal Issues" below, if applicable to a particular Transaction. Likewise, the use of one of the generic qualifications recommended above should be supplemented in appropriate situations with such specific exceptions, to the extent applicable.

---

[245] For a discussion of this type of approach, see Weise & Duncan, Uniform Commercial Code--Secured Loan Transactions Outline and Sample Form of Borrower's Counsel Opinion in Personal and Real Property Secured Transactions with Lender Preferred and Borrower Preferred Alternates, in ABA National Institute, Silverado Conference: The Standardization of Legal Opinions--Order Out of Chaos (Nov. 1989).

D. Specific Legal Issues For Which an Opinion May Be Requested.

There are certain legal issues which may be raised in the documentation of a Transaction and which may require analysis and a specific exception as to enforceability, other than those addressed by the Other Common Qualifications and Other Common Texas Exceptions to the Remedies Opinion discussed above. Certain types of Transactions by their nature may involve enforceability issues which need to be addressed specifically. Even if a generic exception is used, it should be supplemented with specific exceptions, if applicable.

1. ABA Specific Issues Not Otherwise Addressed. The ABA Report identifies a number of specific legal issues not generally addressed by a Remedies Opinion which, if an opinion regarding such issues is desired, should be specifically requested by counsel to the Opinion Recipient. Section 19 of the ABA Report reads as follows:[246]

> § 19 Specific Legal Issues. It is a basic principle of this Accord that the Opinion will deal in a direct way with any specific legal issue to be addressed. In this connection, an Opinion does not address any of the following legal issues unless the Opinion Giver has explicitly addressed the specific legal issue in the Opinion Letter:
>
> (a) Federal securities laws and regulations administered by the Securities and Exchange Commission (other than the Public Utility Holding Company Act of 1935), state "Blue Sky" laws and regulations, and laws and regulations relating to commodity (and other) futures and indices and other similar instruments;
>
> (b) Federal Reserve Board margin regulations;
>
> (c) pension and employee benefit laws and regulations (e.g., ERISA);
>
> (d) Federal and state antitrust and unfair competition laws and regulations;
>
> (e) Federal and state laws and regulations concerning filing and notice requirements (e.g., Hart-Scott-Rodino and Exon-Florio), other than requirements applicable to charter-related documents such as a certificate of merger;
>
> (f) compliance with fiduciary duty requirements;
>
> (g) Local Law;
>
> (h) the characterization of a Transaction as one involving the creation of a lien on real property or a security interest in personal property, the characterization of a contract as one in a form sufficient to create a lien or a security interest, and the creation, attachment, perfection, priority or enforcement of a lien on real property or a security interest in personal property;
>
> (i) fraudulent transfer and fraudulent conveyance laws;[247]
>
> (j) Federal and state environmental laws and regulations;
>
> (k) Federal and state land use and subdivision laws and regulations;
>
> (l) Federal and state tax laws and regulations;

---

[246] ABA Report, supra note 3, at § 19.

[247] See supra note 232 and accompanying text.

(m) Federal patent, copyright and trademark, state trademark, and other Federal and state intellectual property laws and regulations;

(n) Federal and state racketeering laws and regulations (e.g., RICO);

(o) Federal and state health and safety laws and regulations (e.g., OSHA);

(p) Federal and state labor laws and regulations;

(q) Federal and state laws, regulations and policies concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture laws; and

(r) other Federal and state statutes of general application to the extent they provide for criminal prosecution (e.g., mail fraud and wire fraud statutes).

The ABA Report provides, and the Committee concurs, that none of the legal issues described above will be deemed to be covered by the Opinion unless coverage has been specifically requested by the Opinion Recipient and the Opinion Giver has responded by addressing the particular legal issue in the Opinion Letter.

2. **Texas Specific Issues Not Otherwise Addressed**. Some of the more common legal issues under Texas Law which are appropriate for specifically requested opinions include the following:

a. **Usury**. The potential for usury is an issue which exists in almost any corporate financing or loan transaction in Texas.[248] While there is a difference of opinion among Texas lawyers as to whether an opinion that a Transaction Document is enforceable implicitly means that the loan is not usurious, in light of the fact there is Texas case law holding that a usurious contract is at least in part unenforceable the Opinion Giver should assume that a Remedies Opinion implicitly contains an opinion that the loan is not usurious.[249] It is recommended that counsel both for the Opinion Recipient and the Opinion Giver address the issue specifically. If the Opinion Recipient wants a high level of comfort that the loan is not usurious, he or she should ask for an opinion to that effect. If the Opinion Giver does not intend to deliver an opinion that the documents are not usurious, a specific disclaimer should be made. The following form of usury opinion is recommended:

The loan, as evidenced by the Transaction Documents, is not usurious.

Many lawyers qualify their usury opinions with numerous assumptions. Some of these are not necessary since the Opinion does not extend beyond the face of the Transaction Documents to future actions taken by the parties, and thus the issue being addressed by the Opinion Giver is whether the lender is contracting for, as opposed to charging or collecting, usurious interest. In the view of the Committee, it is reasonable for an Opinion as to usury to include assumptions (i) as to what charges a Court would characterize as interest, as to charges with respect to which characterization under current law as "interest" is uncertain, and (ii) that the lender complies with the provisions of the Transaction Documents, including without limitation any applicable "usury savings" clauses. In a traditional non-Accord Opinion, it may also be reasonable to include an

---

[248] See Hiller & Scruggs, Legal Opinion Letters and Texas Usury Laws, 10 St. Mary's L.J. 719 (1979). The various state and national committee projects are divided on the issue of whether usury is included in a remedies opinion which is silent on the subject.

[249] ¶ 18.1 in the Commentary to § 18 of the Accord takes this position. It states that "if violation of the usury law renders a loan agreement (or its interest provisions) void or voidable by the Client, an express opinion that the loan agreement is enforceable would include, on the basis of an analysis of what is essential and reasonable, an implied opinion that the loan does not violate the usury law." ABA Report, supra note 3, at Commentary, ¶18.1.

assumption that there are no fees or charges other than as specifically set forth in the Transaction Documents. Note, however, that this assumption would be unnecessary in an Opinion Letter governed by the Accord, since under § 4(j) of the Accord, there is an automatic assumption that there are no other written or oral agreements or understandings, or usage of trade or prior course of dealing which would amend, supplement, or qualify the Transaction Documents.

b. Non-Accord Practice--Title. In real estate transactions in large metropolitan areas in Texas it is customary to obtain title insurance and to rely on such for assurances as to title and first lien priority. The Accord states in § 4(b) that any Opinion Letter which adopts the Accord includes an automatic assumption that the Client has title to any property involved in the Transaction. However, if the Accord is not adopted in an Opinion Letter, it may be prudent, to expressly limit any opinion to make it clear that the opinion does not cover lien priorities or the enforceability of title. Title opinions are not uncommon in Texas, but a discussion of these specialized opinions is beyond the scope of this Report.

c. Indemnification and Contribution Provisions. Enforceability issues also arise in transactions involving Transaction Documents containing indemnification and contribution provisions, including securities transactions. As a result of the Second Circuit's decision in Globus v. Law Research Serv., Inc.[250] that indemnification agreements in securities transactions are contrary to public policy, most lawyers add an indemnification exception in Remedies Opinions regarding Transaction Documents containing indemnification and contribution provisions relating to actions which come within the scope of the securities laws. Other indemnification or release provisions may not be enforceable since Texas became an express negligence state or because of laws relating to certain subjects such as drilling service contracts.

E. Other Provisions Which May Require Qualifications to a Remedies Opinion Under Texas Law.

Some other commonly used provisions which may be unenforceable and should require particular analysis and a specific exception to a Remedies Opinion in some cases include the following:

(1) covenants regarding assignment,

(2) voting agreements and covenants to vote in a particular manner,

(3) arbitration clauses,

(4) provisions which may violate public policy,

(5) non-competition agreements,

(6) financing leases,

(7) establishing standards for service of process in suits or proceedings to enforce the Transaction Documents,

(8) set-off,

(9) provisions relating to the appointment of a receiver without regard to statutory requirements,

(10) provisions relating to mitigation of damages, and

(11) provisions peculiar to real or personal property foreclosures.

---

[250] 418 F.2d 1276 (1969), cert. denied, 397 U.S. 913 (1970).

F. Opinions by Implication.

The presumption is that an Opinion Recipient is not entitled to assume that an express opinion dealing with a particular legal issue impliedly addresses other issues unless the implication is essential to the express opinion and reasonable in the circumstances. If the ABA Accord is not adopted, an Opinion Giver, under traditional non-Accord opinion practice, may wish to include language which negates opinions by implication. Many Opinion Givers include a provision to this effect such as the following:

> **This opinion is limited to the matters stated herein and no opinions may be implied or inferred beyond the matters expressly stated herein.**

The Committee adopts the position of the ABA Report, which deals with opinions by implication as follows:

> An Opinion deals only with the specific legal issues it explicitly addresses. Accordingly, an express opinion concerning a particular legal issue does not address any other matters. An express opinion includes an implied opinion only if it is both essential to the legal conclusion reached by the express opinion and, based upon prevailing norms and expectations among experienced lawyers in the Opining Jurisdiction, reasonable in the circumstances. Even if this presumption against opinion by implication is overcome, a legal issue specified in § 19 [of the ABA Report] is covered by the Opinion only if and to the extent it is explicitly addressed in the Opinion Letter.[251]

The Commentary to Section 18 of the ABA Report is helpful in understanding the limitation on opinions by implication. The Commentary to Section 18 is set forth below.[252]

> ¶ 18.1 Basic Rule. Subject to the exclusion of the legal issues specified in § 19, the presumption that the Opinion does not deal in an indirect way with any legal issue not specifically addressed by it is rebuttable. For example, if violation of the usury law renders a loan agreement (or its interest provisions) void or voidable by the Client, an express opinion that the loan agreement is enforceable would include, on the basis of an analyses of what is essential and reasonable, an implied opinion that the loan does not violate the usury law. However -- disregarding § 19(d) for purposes of illustration -- it would not be reasonable to consider that express opinion concerning enforceability to include an implied opinion covering the antitrust implications of a tying arrangement in the loan agreement requiring the Client to use the services of the lender's affiliates.
>
> ¶ 18.2 Guidance. The use of the word "experienced" in § 18 to qualify the reference to "lawyers in the Opining Jurisdiction," as contrasted with the unqualified references to "a lawyer in the Opining Jurisdiction" in §§ 10 and 16, is intended to point up the difference between the standard by which the scope of opinions concerning particular legal issues is to be measured under § 18 and the standard of care required of Opinion Givers under §§ 10 and 16. Under § 18 one can look to prevailing perspectives in the legal community for guidance in determining what is "reasonable in the circumstances." The characteristics of the legal issue to be implied may also be relevant to the analysis. The implication of an opinion regarding legal issues that are fact intensive, involve explained opinions, or involve generally recognized special expertise (e.g., patent or immigration and naturalization law) would normally not be reasonable. Moreover, the nature of the Transaction and the Client's business activities can bear upon what is essential and reasonable. For example, involvement of the Client in specially regulated activities, such as those

---

[251] ABA Report, supra note 3, at § 18.

[252] Id., Commentary, ¶¶ 18.1, 18.2.

of a bank or public utility, would presumptively provide the basis for implication of the statutes and regulatory restrictions of the Opining Jurisdiction that apply to the Client in respect of the Transaction because of those activities.

Technical Note. Section 18 applies to each opinion set forth in the Opinion Letter, including opinion coverage addressing the legal opinion issues dealt with in § 10 (remedies), § 15 (no breach or default) and § 16 (no violation of law). It is limited by § 1 (applicable law), § 2 (scope of inquiry) and § 19 special legal issues).

In any lending transaction, it should be implied that the Opinion Giver is not giving any opinion as to (i) whether the borrower will be able to satisfy the indebtedness, (ii) the value of the collateral pledged as security, (iii) unless otherwise expressly stated, the state of title to any property or other collateral, or (iv) unless otherwise expressly stated, the creation, attachment, priority or perfection of liens or security interest created or to be created by the Transaction Documents or any other document executed in connection therewith.[253] It is not uncommon under traditional non-Accord opinion practice, however, for lawyers to expressly state that they are giving no opinion on those subjects.

G. Adoption of the ABA Accord as a Means for Agreement Between Opinion Giver and Counsel to Opinion Recipient.

Historically, there has been a clear divergence of opinion among lawyers as to the scope of a Remedies Opinion and to what extent it should or should not be qualified. This Report adopts the view of the ABA Report concerning the broad scope of the Remedies Opinion, as well as the broad interpretations of the Bankruptcy and Insolvency Exception and the Equitable Principles Limitation. It also adopts the incorporation by reference of (i) the Other Common Qualifications of the ABA Report and (ii) the Other Common Texas Qualifications (collectively referred to as the "Common Unified Qualifications").

This Report also suggests that, when appropriate, the Opinion Letter may include one of two alternative forms of Generic Exceptions. These Generic Exceptions include the Common Unified Qualifications.

It is necessary to be aware that opposing counsel in negotiating a Transaction may have a different interpretation of certain Opinions. Agreement on the scope and meaning of Opinions, particularly any Opinions not covered by the ABA Accord, at an early stage may save time, expense and embarrassment later. Adoption of the Accord is a convenient means for achieving agreement between the Opinion Giver and counsel to the Opinion Recipient as to the scope and meaning of certain Opinions, including the Remedies Opinion. Without such an agreement, a Court may later place a different interpretation on the scope of the Remedies Opinion than that which was intended.

VIII. CERTAIN OTHER COMMONLY USED OPINION CLAUSES AND RECOMMENDED PROCEDURES

A. Introduction.

A number of opinions concerning basic legal aspects of business transactions are commonly requested. Several of the commonly requested opinion clauses are discussed below. Each proposed opinion form is followed by an analysis of the scope of such opinion and recommended "due diligence" procedures relating to such opinion.

B. The Corporate Status Opinion.

An opinion as to corporate status is found in virtually all legal opinions rendered in connection with business transactions involving a corporation. The opinion is requested because of a need to know that the

---

[253] See Part IX of this Report.

corporation in fact exists and is legally able to act. The corporate status opinion is actually composed of a number of separate elements, which are discussed below.

Proposed Opinion Form

The Company is [a corporation] or [incorporated,] or [duly incorporated,] or [duly organized], [validly] existing[,] and in good standing under the laws of the State of [Texas].

Analysis and Commentary

1. **Is a Corporation; Is Incorporated**. This portion of the corporate status opinion means either that the corporation has, at some point in time, been incorporated and continues to be incorporated and exist at the time in question or that it is a de facto corporation in existence at the time in question. The "is a corporation" or "is incorporated" opinion does not mean that all necessary requirements for incorporation have been met, but rather that there has been, at a minimum, material compliance sufficient for the entity to qualify under applicable case law as a de facto corporation.

Texas corporations benefit from the provision of the Texas Business Corporation Act ("TBCA"), which provides that:

> Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against the State in a proceeding for involuntary dissolution.[254]

It is the belief of the Committee that the statute relieves the Opinion Giver of the need to determine whether the requirements for incorporation were met at the time the entity was incorporated so long as the Opinion Giver verifies the issuance of the certificate of incorporation. The Committee is of this view even though the comfort to be gained through reliance on the statute is subject to the limitations set forth therein concerning the ability of the State to use procedural defects in a suit for involuntary dissolution. The basis for this view is found in the limiting language of the statute itself. By providing that the State can remedy an improper incorporation by involuntary dissolution proceedings, the statute implies that the entity is in fact a corporation. Furthermore, it is likely that even if the State were successful in challenging the incorporation of a particular entity formed on or after the effective date of TBCA art. 3.04, that entity may nevertheless be able to claim de facto corporation status, in which case the "is a corporation" opinion would still be correct.[255]

It is important to note that the "is a corporation" or "is incorporated" opinion also focuses on the continued existence of the corporation (which is frequently the specific subject of a separate portion of the corporate status opinion, as discussed below). Accordingly, the corporation must exist at the time in question in order to give this opinion.

Review Procedure: The Opinion Giver should obtain from the Secretary of State and review a certified copy of the articles and certificate of incorporation for the corporation and all amendments thereto and all other documents which are filed with the Secretary of State. Any relevant parts of the articles of incorporation, such as agreements of merger, articles of merger, statements of rights and privileges of preferred stock, statements of reduction of capital, and articles of dissolution (all of the foregoing being hereinafter collectively referred to as the "Charter Documents"), should also be reviewed. The Opinion Giver should confirm that no involuntary dissolution proceedings have been commenced against the corporation by the State. The Opinion Giver should also obtain from the Secretary of State a certificate, dated shortly before the opinion, with respect to the

---

[254] Tex. Bus. Corp. Act art. 3.04 (Vernon 1980 & Supp. 1991) [hereinafter TBCA].

[255] See Comment of Bar Committee--1955 to TBCA art. 3.04.

existence of the corporation (a "Certificate of Existence"). In certain circumstances, it may be appropriate to order "bringdown" telegrams with respect to existence of a corporation, particularly if the Certificate of Existence is more than a couple of weeks old.

If a Certificate of Existence (or bringdown telegram) states that a corporation no longer exists or that the Secretary of State has no record of the corporation, if a certificate of dissolution has been issued, or if the term of the corporation has expired, the opinion cannot be given because the corporation does not exist at the date of the opinion. In this regard, it is important to note that a corporation formed before September 6, 1955, will, by virtue of TBCA art. 2.02.A(1), be deemed to have perpetual existence despite the lapse of the limited period of duration specified in the articles of incorporation "if all fees and franchise taxes have been paid as provided by law." If the State has commenced involuntary dissolution proceedings, the "is a corporation" or "is incorporated" opinion should not be given because the existence of the corporation is subject to imminent termination.

Once it is determined that the entity has not ceased to exist through voluntary or involuntary dissolution or expiration of its term and is not threatened with the cessation of existence in an involuntary dissolution proceeding brought by the State, the attorney must focus on whether the corporation was properly incorporated. To do so, the attorney must either (a) examine a copy of the original certificate of incorporation issued by the Secretary of State or (b) compare a copy the original articles and certificate of incorporation of the corporation against the relevant corporate statutes in effect as of the date of the filing of the original articles of incorporation. Given that it may be costly and time consuming to locate the relevant corporate statutes in effect at the date of incorporation, particularly with respect to corporations incorporated more than a few years prior to the date of the opinion, alternative (a) is more appropriate for most opinions. The practitioner should be required to meet the more stringent standard of (b) only in those specific situations in which the legal consequences to the recipient of the opinion is significantly different if the corporation is subject to involuntary dissolution following the date of the opinion because of a defect in the incorporation process.

2. Is Duly Incorporated. An opinion that the corporation has been "duly incorporated" generally means that the necessary steps for the creation of the corporation for its specified purposes were properly taken under the law in effect at the date of its incorporation.[256] Under Texas law, this means that articles of incorporation are signed by the appropriate number of qualified (e.g. age or residency) persons acting with proper legal capacity, that the articles of incorporation are filed with the Secretary of State, that the Secretary of State issued a certificate of incorporation, that the articles of incorporation contained all information required to effect the formation of the corporation at the time in question, and such that articles of incorporation did not contain any provisions prohibited under the TBCA or other applicable corporate law as then in effect. Unlike the "is a corporation" opinion, the "is duly incorporated" opinion requires absolute compliance with all statutory requirements for incorporation at the time of incorporation and does not allow for immaterial defects.

As discussed above, Texas corporations get some comfort concerning their incorporation from the provisions of Article 3.04 of the TBCA, although the Committee believes that the addition of the word "duly" requires that the attorney follow the more exhaustive of the two procedures discussed above with respect to the "is a corporation" or "is incorporated" opinion in order to give the "is duly incorporated" opinion.

3. Is Duly Organized. An opinion that a corporation has been "duly incorporated" does not mean that it has been "duly organized."[257] A corporation which is "duly organized" must have been "duly incorporated" and the other steps necessary to organize must have been properly taken. To be duly organized, a Texas corporation must have complied with the organizational requirements of the relevant corporate statute at the time of organization. Under the TBCA as currently drafted, these requirements include the calling and holding of an organizational meeting of directors in the manner, and for the purposes, specified in TBCA art. 3.06. Frequently, the requirements of the organizational meeting are met by a unanimous consent of directors in

---

[256] See Tri-Bar Report, supra note 1, at 1905.

[257] California 1989 Corporate Report, supra note 1, at 2202.

lieu of an organizational meeting, in accordance with TBCA art. 9.10. Although it is not free from doubt, many practitioners believe that the corporation must actually have received the minimum capital ($1,000.00) required by TBCA art. 3.05 to transact business in order for the corporation to be duly organized. It may be difficult to ascertain whether these requirements were met at the time of organization, especially if the corporation is more than a few years old at the time the opinion is being given. Accordingly, unless there is a specific need for this opinion in a particular transaction (i.e., a different result will obtain if the corporation was not duly organized), it is not generally reasonable to insist on this opinion.

Review Procedure: Counsel should examine the relevant corporate statutes in effect at the time of organization and should also obtain copies (certified by an appropriate officer of the corporation) of all minutes of all meetings of the board of directors and shareholders relating to the organization of the corporation, including minutes of the organizational meeting of directors (or, if permitted at the time of organization, a unanimous consent of directors in lieu of organizational meeting). The organizational minutes or consent of directors in lieu of organizational meeting should show that appropriate action was taken to form the corporation, as required by the relevant corporate statute in effect at the time of organization. Any other actions required for organization at the time in question should be confirmed, including the issuance of shares for the amount and type of consideration fixed by the board of directors in the organizational minutes. Note that TBCA art. 2.15 addresses the amount of consideration payable on issuance of shares and Tex. Const. art. 12, § 6 and TBCA art. 2.16.A specify the types of consideration for which shares may be issued. Tex. Const. art. 12, § 6 presently restricts consideration for which shares may be issued to money paid, labor done, or property actually received.

4. Validly Existing. To be existing, the corporation cannot have dissolved or ceased to exist by reason of a merger or the operation of a limitation on the duration of its existence in its articles of incorporation. This language is unnecessary if the "is a corporation" or "is incorporated" opinion has already been given because both opinions inherently include an opinion that the corporation is in existence. However, given the long history of the particular phrasing of the corporate status opinion, it is unlikely that practitioners will easily permit the omission of this language.

Some commentators believe that the word "validly" in front of "existing" means that the corporation is a validly formed de jure corporation and not merely a de facto corporation. Accordingly, if the corporate status opinion is to be given solely on the basis of the entity being a de facto corporation, it is appropriate to omit the word "validly."

Review Procedure: The procedure outlined above under the Review Procedure for the "is a corporation" and "is incorporated" opinions is applicable here as well.

5. Good Standing. While the phrase "duly organized" relates to legal issues involved at the time of the organization of the corporation, the phrase "in good standing" involves the status of the corporation under the applicable corporate laws at the time the opinion is issued. An opinion with respect to the "good standing" of a corporation means that the entity is in existence and is not delinquent in its filings of franchise tax returns to the extent that the State is entitled to revoke its corporate status. The "good standing" opinion is important in order get comfort that the entity does not have any material liability for franchise taxes, that the entity is not subject to involuntary dissolution proceedings for failure to pay taxes, and that the corporation is able to avail itself of all rights and remedies afforded to corporations, some of which may not be available to corporations that are not in good standing.

A "good standing" opinion does not imply that the corporation has the necessary licenses or other governmental approvals required for specific types of businesses prior to commencement of business.[258]

---

[258] See Babb, Barnes, Gordon & Kjellenberg, Legal Opinions to Third Parties in Corporate Transactions, 32 Bus. Law. 553, 558 (1977). This view is adopted in the Tri-Bar Report, supra note 1, at 1908, as follows:

(continued...)

The "good standing" opinion is usually rendered based solely on recently dated certificates of public officials. It is not necessary to state in the opinion that the attorney has relied solely on those certificates in rendering the "good standing" opinion since that is the customary practice and the recipient of the opinion is entitled to no further investigation on this point.

Review Procedure: To render an opinion that a Texas corporation is in good standing in the State of Texas, an attorney should take the action necessary to determine that the corporation is in existence (see discussion above) and also obtain from the Comptroller of Public Accounts a certificate, dated shortly before the opinion, as to "good standing" and payment of franchise taxes (a "Certificate of Good Standing"). Certificates of Good Standing generally indicate a date through which they are valid and, accordingly, it is not necessary to obtain a "bring down" telegram with respect to the good standing of a corporation from the Comptroller of Public Accounts if the opinion is given before such date has occurred.

C. Non-Accord Practice--Qualification to Do Business in Other Jurisdictions.

If the Accord is adopted, then the negative view of the ABA Report towards giving "qualification to do business" opinions will hopefully discourage their continued use. However, under traditional non-Accord practice, lawyers have been frequently asked to render an opinion that a corporation is "duly qualified to do business and in good standing as a foreign corporation" in jurisdictions other than the state of the incorporation of the corporation. This opinion is usually requested in order to determine a number of things: that the corporation is legally permitted to be transacting the business that it conducts in states other than the state of its incorporation, that the corporation has not incurred a material liability to a state other than the state of its incorporation for failing to qualify to transact business within that state, that the corporation does not suffer any legal impediment to enforcing its contract rights, and other matters.

Non-Accord Opinion--Proposed Opinion Form

> **The Company is duly qualified to do business and is in good standing as a foreign corporation in the states of _____ and _____. [To our knowledge, those states are the only states within the United States in which the Company owns or leases any material property or conducts any material business in which the failure to be qualified would have a materially adverse effect on the Company's business or financial condition.]**

Analysis and Commentary

Determination that a corporation is qualified to transact business in a particular jurisdiction usually is given solely in reliance on a "good standing" certificate issued by the appropriate public official(s) for such jurisdiction. The more difficult opinion is one that states where a corporation is required to be qualified, which may be particularly difficult with respect to a corporation conducting a business of any size or complexity in a number of jurisdictions.

Opinions that the corporation is qualified to do business "wherever such qualification is necessary" or "wherever the failure to so qualify would have a material adverse effect on the corporation or its business, financial condition, or operations" should be avoided whenever possible. In the event that such types of opinions are ultimately required through negotiations with opposing counsel, the Opinion Giver should give close attention to developing the necessary factual background by obtaining supporting officer's certificates, as discussed above.

---

[258](...continued)

Opinions relating to incorporation, organization and standing do not cover licenses, registrations or other governmental or third-party approvals which might be required prior to commencement of a specific type of business but which were not a condition to incorporation. It is generally understood that if such matters are to be covered in an opinion, they should be covered by a separate opinion on the applicability of and compliance with these licensing requirements.

Review Procedure: Counsel should obtain and rely on certificates from appropriate governmental authorities in each jurisdiction in which the corporation is qualified to do business. To determine whether a non-Texas corporation is qualified to transact business and in good standing in the State of Texas, an attorney would obtain a certificate of qualification from the Secretary of State of the State of Texas and a Certificate of Good Standing from the Comptroller of Public Accounts of the State of Texas.

To the extent possible, lawyers should attempt to limit the opinion to named jurisdictions in which the bulk of the corporation's properties or assets are located. As an alternative, such an opinion should be limited to those jurisdictions in which the need for qualification as a foreign corporation can be readily "determined by objective facts, such as those jurisdictions in which the company owns or leases real property, maintains offices or inventories, or has employees."[259] If an opinion is given only as to qualification to do business in named jurisdictions, the Opinion Giver should use his or her best efforts to agree with counsel for the other party on those jurisdictions which are material to the corporation. Otherwise, the Opinion Giver may be required to undertake a substantial factual and legal investigation, which is frequently neither cost-effective nor necessary to the consummation of the proposed business transaction.

If an opinion is given as to the qualification of a corporation "wherever such qualification is necessary," the Opinion Giver should obtain an officer's certificate to provide the factual support for his or her opinion. Such officer's certificate should succinctly state those facts upon which counsel is relying in giving his or her opinion, such as those states in which the company maintains offices, owns property, or has other contacts sufficient to rise to the level of transacting business. The opinion should state that it is based upon such officer's certificate.

If the officer's certificate indicates that there are no activities or assets in any state other than those from which qualification and good standing certificates have been obtained, the due diligence work is complete. However, if the certificate contains information concerning activities in a state in which the company is not qualified, counsel must determine whether those activities are in fact sufficient to require qualification. The statutes of many states list activities that are specifically exempted from the requirement to qualify to transact business. If the attorney concludes that the company is required to qualify, he or she can either have the company qualify in that state or conduct additional research to determine whether, even if qualification should have been obtained and was not, the penalties are fairly minor and easily cured. The usual penalties, aside from monetary penalties, include the inability of a corporation that has not qualified when required to do so to bring suit in that state's courts. Some state statutes also prevent such a corporation from defending suits in that state's courts.[260] While most states permit the failure to qualify to be cured in a way that will not have a material adverse effect on the delinquent corporation (assuming the dollar amount of past taxes and penalties is not in itself material), that is not a universal concept. For instance, certain states require the cure to be completed before the corporation commences litigation. In addition, certain states do not accord the same treatment to a corporation that is delinquent in its qualification as is accorded to a corporation that timely qualifies. If an attorney is required to render an opinion in this situation, the opinion should include language indicating that the determination that the failure to be qualified in a particular state will not be material is based solely on a review by the attorney of the latest unofficial compilation of the corporate statutes of that state and the company's assessment of materiality.

There is an apparent conflict in an opinion letter that contains an opinion concerning the qualification of a corporation to do business in other jurisdictions if the opinion letter also contains a "practice limitation" or language limiting the opinion to the law of a particular state. In the view of the Committee this conflict need not be specifically addressed. As a matter of accepted practice, a foreign qualification opinion is limited to a review of certificates of the appropriate governmental authorities and, in appropriate cases, review of the most recent available unofficial compilation of the corporate statutes of the relevant jurisdictions.

---

[259] California 1989 Corporate Report, supra note 1, at 2205.

[260] See, e.g., the statutes of Nevada and Wisconsin.

D. Corporate Power and Corporate Action.

A party proposing to enter into a significant business transaction with a corporation, including a transaction such as a loan, stock purchase, merger or acquisition of assets, is vitally interested in (i) the power and authority of the corporation to enter into and perform the agreement, (ii) the authorization of the transaction and (iii) the authorization of persons who are to effect the transaction on behalf of the corporation to do so. Therefore, typically the lender or buyer will want assurances in the form of a legal opinion that the corporation has the power and authority to enter into the agreement, that the corporation has authorized the transaction, and that the corporation has authorized the persons who are acting on its behalf in the transaction to so act.

Proposed Opinion Form

The Company has the corporate power and authority to execute, deliver and perform its obligations under the Transaction Documents. The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Company and have been duly executed and delivered by the Company.

Analysis and Commentary

1. Corporate Power and Authority. To the extent the opinion covers "corporate power and authority", it confirms that certain specified action of the corporation is not ultra vires. This opinion generally means that the corporation has legal capacity and power under the applicable corporation statutes and its articles of incorporation and bylaws to cause its agents to execute and deliver the agreement and perform its obligations thereunder.

Although lawyers may differ on the subject, it is generally thought prudent to assume that the phrases "power and authority" or "full power and authority" might be given broader application by courts than the phrase "corporate power and authority." For example, an opinion as to "full power and authority" could arguably be interpreted to mean that the corporation has all requisite governmental licenses and permits. While it may be appropriate for these matters to be addressed under the circumstances of the transaction, such opinions are better dealt with directly elsewhere in the opinion. Accordingly, the modifier "corporate" before "power and authority" should be used to alleviate this concern. The Committee, however, is of the view that the word "corporate" in the phrase "corporate power and authority" modifies both "power" and "authority."[261]

Review Procedure: To render a "corporate power and authority" opinion, the attorney rendering the opinion must review the relevant business corporation laws (i.e., the TBCA, Texas Miscellaneous Corporation Laws Act and any relevant special corporation statutes for a Texas corporation), the Charter Documents, and the bylaws of the corporation, as well as applicable common law authorities. In Texas and in many other jurisdictions, the doctrine of ultra vires as a defense against the enforcement of corporate obligations has been severely restricted.[262] However, questions of "corporate power and authority" may nonetheless arise under the TBCA.

2. Duly Authorized, Executed and Delivered. "Due authorization" refers to actions taken by the board of directors and, if necessary, the shareholders of the corporation to authorize the transaction. The phrase "duly authorized by all necessary corporate action on the part of the Company" is preferable to "duly authorized" alone, since the phrase "duly authorized" might be deemed to imply authorization by a governmental or regulatory body, or by another third person whose consent may be required. "Duly executed" refers to the authorization of the officers who have signed the documents on behalf of the corporation, the incumbency of the officers executing the documents, and the validity of their signatures (frequently assumed in the body of the

---

[261] However, some counsel apparently prefer to either insert the word "corporate" before "authority" or delete the words "and authority" entirely. California 1989 Corporate Report, supra note 1, at 2206.

[262] See TBCA art. 2.04.

opinion). "Duly delivered" means that the Company has delivered the agreement to the other party or parties to the transaction in order to create a binding contract.

It could be argued that the Opinion Giver should make factual inquiry into such matters as whether all the directors voting on the resolutions were duly elected and qualified, that a quorum was present at any necessary meeting, that all persons purportedly at such a meeting were present, and arguable even into such matters as whether proper notice was given or appropriate waivers obtained. The problem with this approach is that when verification (other than by officer's certificates) is undertaken, there is no clean cut-off for where the inquiry may stop. The better view is that in the absence of unusual facts which indicate improprieties, the Opinion Giver may prepare and rely on appropriate certificates verifying the adoption of director or shareholder resolutions relating to the specific transactions. With regard to the questions of due execution and delivery, both the execution and delivery are generally observed by the Opinion Giver. When, however, the Opinion Giver has not observed execution and delivery, he or she should be entitled to rely on officer's certificates that identify the officers and attest to the genuineness of their signatures and that confirm the execution and delivery of the agreement.

Review Procedure: An opinion regarding due authorization by a corporation should be given only after a review of the Charter Documents, bylaws and certified shareholder, director or committee resolutions, or alternatively, the minute books of the corporation. The legally sufficient adoption of appropriate director or shareholder resolutions relating to the specific transactions, certification as to the current articles and bylaws, the incumbency of officers who are signing the operative documents, and specimen signatures of the officers signing the operative documents, should be obtained in a certificate similar to the officer's certificate attached hereto as Exhibit "B."

E. Capitalization and Capital Shares.

In a transaction involving the issuance, transfer, or pledge of shares, an opinion may be requested about the capitalization of the corporation. An opinion concerning the capitalization of a corporation generally identifies the number and type of shares of the corporation authorized and outstanding, respectively, and addresses the due authorization, validity of issuance and assessability of such shares. Alternatively, the purchaser or pledgee may merely require assurances regarding the particular shares to be purchased or pledged. Since the corporate laws of some states permit a corporation to issue shares which are not fully paid, the question of assessability is generally addressed to provide a complete picture of the capitalization of the corporation or of the shares being transferred or pledged. However, with respect to Texas corporations, TBCA art. 2.16 provides that shares may not be issued until the full amount of the consideration therefor has been paid.

The proposed opinion assumes that the Opinion Giver is addressing the entire capitalization of the corporation. In some instances, the Opinion Giver will be requested to address only the number of shares authorized and outstanding and that the shares being issued or pledged in the transaction covered by the opinion are "duly authorized, validly issued, fully paid and non-assessable." In the case of shares to be issued in a Transaction, it may be advisable to qualify the opinion to the effect that, when issued against payment therefor in accordance with the Transaction Documents, such shares will be validly issued, fully paid and non-assessable. Such a qualification may be necessary if the opinion is rendered in advance of the issuance or the Opinion Giver is not in a position to confirm payment.

Proposed Opinion Form

The Company's authorized capitalization consists of _____ common shares, of which _____ shares are issued and outstanding. The outstanding shares have been duly authorized and validly issued and are fully paid and non-assessable.

Analysis and Commentary

1. Authorized/Outstanding Shares. Authorized shares consist of the number and type of shares that are stated in the articles of incorporation of the corporation as authorized for issuance.[263] Shares are duly authorized for issuance if the corporation (i) has power to issue the shares of the type in question under applicable law and its articles of incorporation and bylaws at the time the shares were issued and (ii) has taken all corporate action necessary to authorize the issuance of the shares. Necessary corporate action may take place prior to issuance or afterward by ratification. The power to issue the shares involves two concepts: first, the power to issue the number of shares in question; and second, the power to issue shares of the par value, class, and series and with the rights, preferences, limitations and other attributes of the issued shares.

Shares "outstanding" means the number of shares issued less the number of shares held in the corporation's treasury. Shares are issued when the required consideration is received.[264] Shares remain issued even though the corporation thereafter purchases or otherwise acquires such shares, unless the shares are retired or otherwise cancelled. The fact that shares are considered to be issued may presuppose that they are validly issued.

An opinion that shares are duly authorized should not be considered to include an opinion that a proxy or other solicitation used in connection with a change in the authorized capital of the corporation was not false or misleading in some material respect. Therefore, the Opinion Giver need not qualify the opinion about due authorization on account of potential defects in proxy materials unless the Opinion Giver is aware of litigation or other specific circumstances that cast doubt on the validity of the change in the authorized capital shares of the corporation.

Review Procedure: The Opinion Giver should secure and review a certified copy of the corporation's Charter Documents from the Secretary of State. A copy of the corporation's bylaws and all amendments thereto certified as complete by the secretary or other authorized officer of the corporation should also be obtained and reviewed.

The Opinion Giver should also obtain and review the corporate minute book or other corporate records containing all minutes of meetings or consents of the board of directors, board committees and shareholders of the corporation. (See "Validly Issued" below.) The review of the corporate records should include establishing that appropriate director and shareholder resolutions were adopted to authorize and adopt all amendments to the Articles of Incorporation and bylaws of the corporation.

The authorized number of shares and the respective par value, class, series and other attributes of the shares, including rights, preferences, and limitations is determined by a review of the Articles of Incorporation, as amended. The number of issued shares can be verified by a review of the stock record book of the corporation or by reliance upon information provided by a certificate of the corporation's transfer agent in the case of a publicly-held corporation. The Opinion Giver should also determine the number of shares that have been reserved for issuance for options, convertible securities or otherwise. The issuance of authorized shares that have been reserved for some other purposes would not be invalid but may conflict with or violate some other agreement of the corporation.

The Opinion Giver should determine whether there has been an over-issue of shares, because shares that are part of an over-issue are not duly authorized. Lost share certificates also can create a problem with respect to an opinion concerning the number of outstanding shares. The issuance of a new share certificate in substitution for a lost certificate creates the possibility that a bona fide purchaser in fact acquired the allegedly lost certificate and that the corporation has a greater number of shares outstanding than is reflected in its records. In such instances, an exception as to such matter may be noted in the opinion, or alternatively, the

---

[263] See TBCA art. 2.16.

[264] See TBCA art. 2.12.

Opinion Giver may issue the opinion without exception in reliance on a lost stock affidavit. If previously issued shares have been cancelled, the Opinion Giver must determine whether, under the Articles of Incorporation, the cancellation resulted in a reduction in the number of authorized shares.

2. **Validly Issued**. Shares are "validly issued" if the shares were duly authorized, issued for proper and sufficient consideration, and evidenced by appropriate certificates that have been properly executed and delivered. For a public company, inspection of stock records is usually difficult or at least not cost--effective, so the Opining Counsel generally will rely on representations of the Client's chief financial officer or certificates of the Client's stock transfer agent as a basis for the portion of the Opinion dealing with the actual physical issuance, execution, and delivery of stock certificates. (Also, see "Uncertificated Securities" below.) Shares are not validly issued if they were purportedly issued without proper board or shareholder (as in a merger) approval, or in excess of the number of shares authorized, or in violation of any shareholders' preemptive rights. TBCA art. 2.22-1 provides that shareholders have preemptive rights, subject to certain limitations, except to the extent such preemptive rights are limited or denied in the articles of incorporation.

An opinion relating to the validity of the issuance of shares addresses the validity of the issuance under applicable corporate laws. The opinion does not, and should not be viewed, as addressing compliance with other laws, such as federal and state securities laws, in connection with such issuance. Further, as noted in connection with due authorization, an opinion that shares are validly issued should not be considered to include an opinion that a proxy or other solicitation used in connection with a change in the authorized capital of the corporation was not false or misleading in some material respect.

Review Procedure: The Opinion Giver should review the same materials reviewed for the "duly authorized" opinion and also review the share certificates being issued or pledged in the transaction covered by the opinion. The records of the proceedings (and consents) of the board of directors or shareholders must contain resolutions authorizing each issuance of shares. If the articles of incorporation do not sufficiently limit or deny preemptive rights with respect to the issuance, if TBCA art. 2.22-1 does not exclude the issuance from the shareholders' preemptive rights, or if there are contractual preemptive rights, the corporate records should evidence compliance with or waivers of such preemptive rights by existing shareholders.

The Opinion Giver must also determine whether the corporation actually received consideration of a permissible type at the relevant time, which is in part a factual question. Under Tex. Const. art. 12, § 6, shares may only be issued for actually received consideration of money paid, labor done, or property received. Certificates of an appropriate officer of the corporation or its stock transfer agent should be permitted for the purposes of establishing the receipt of the consideration. In the case of property received as consideration, the Opinion Giver may wish to obtain and review the documents by which the property was conveyed to the corporation.

The same facts may prevent an Opinion Giver who is unable to give a "fully paid" opinion from giving a "validly issued" opinion. TBCA art. 2.16 provides that shares may not be issued until the full amount of the consideration therefor has been paid.

The Opinion Giver should obtain and rely on either an officer's certificate or other appropriate representations from the chief financial officer or other appropriate officer of a publicly-held corporation, or a certificate of the corporation's stock transfer agent, in order to establish evidence to substantiate the actual physical preparation, signing, and delivery of the stock certificates. The Opinion Giver should generally review the stock records of a privately-held corporation and trace each outstanding share certificate on which he or she is giving an opinion back to its origin, accounting for all certificates which have been issued and cancelled, in order to verify the number of outstanding shares and that the original issuance of the shares involved in the transaction was authorized and valid.

The Opinion Giver should determine whether the issuance of shares is in violation of any existing agreement restricting the issuance of shares. If there is a violation of an agreement, the Opinion Giver must consider whether the violation merely gives a right to damages or other relief against the corporation or whether the effect of the agreement (due to knowledge thereof by the purchaser or otherwise) is to make the issuance of

the shares void or voidable. In any event, the Opinion Giver must address such matter if giving a "no conflicts" opinion.

The Opinion Giver should also determine whether or not the business of the corporation is subject to any special federal, state, local or foreign law which may impose regulatory approval or other requirements on the valid issuance of shares.

A question may arise as to whether there is any substantive difference between an opinion that shares are "validly issued" or "legally issued." The question arises in the context of an attorney's opinion included as part of a registration statement under the Securities Act of 1933. Schedule A (Part 29) of Section 26 of of the Securities Act of 1933 and Item 601(b)(5)(i) of Regulation S-K[265] under the Securities Act of 1933 require an opinion of counsel as to the legality of the securities to be issued. Item 601(b)(5)(i) of Regulation S-K states that the opinion must indicate whether the securities "will, when sold, be legally issued, fully paid and non-assessable . . . ." The names and addresses of counsel who have passed on the legality of the securities must be disclosed in the registration statement pursuant to Schedule A (Part 23) of Section 26 of the Securities Act of 1933. The Committee has noted that, notwithstanding the express requirements under the Securities Act of 1933, many such opinions state that the securities are "validly issued," in lieu of stating that such securities are "legally issued." The interchangeability of the word "validly" for "legally" indicates either that the two terms have similar meanings or that lawyers are more comfortable with the meaning of the word "validly." The Committee recognizes that there may be confusion or disagreement among lawyers and commentators as to whether "legally issued" includes an opinion as to compliance with laws. However, it is the Committee's view that the terms "validly issued" and "legally issued" should be deemed to have the same meaning. Further, the Committee believes that the "legally issued" opinion required under Regulation S-K is different and of narrower scope than an opinion regarding the legality of the offering in which such securities are issued.

3. Fully Paid. Shares are "fully paid" if (i) the consideration required by the resolutions authorizing or ratifying the issuance of the shares and required by any applicable subscription, option or other agreement authorizing the issuance of the shares, has been paid and (ii) the consideration was sufficient in kind and amount under applicable law and the Articles of Incorporation and bylaws of the corporation. Shares issued for a consideration less than the par value thereof are not considered "fully paid." For Texas corporations, Tex. Const. art. 12, § 6 requires that consideration paid for the issuance of shares consist of money paid, labor done or property received. Shares having a par value may not be issued for a consideration less than the par value thereof.[266]

Shares which are "fully paid" are not subject to any further call for payment, and are non-assessable.[267]

Review Procedure: The Opinion Giver should review the same documents noted above under "duly authorized" and "validly issued." The sufficiency of the consideration must be reviewed qualitatively and quantitatively. The consideration must be not only in the correct amount, but also of an acceptable nature.

Where property or services form part or all of the consideration for the issuance of shares, the Opinion Giver must deal with the question of valuation as established by the board of directors or shareholders, as the case may be. TBCA art. 2.16 provides that, in the absence of fraud in the transaction, the judgment of the board of directors or the shareholders, as the case may be, shall be conclusive as to the value of the consideration received for shares. Typically, the corporate records should contain resolutions establishing that valuation. The view of the Committee is that the Opinion Giver is not required to look beyond the minute book

---

[265] 17 C.F.R. § 229.601(b)(5)(i) (1991).

[266] See TBCA art. 2.15.

[267] See TBCA art. 2.16.

or other corporate records of the corporate Client in order to prove or establish actual receipt of consideration for shares.

Share dividends may present special problems. TBCA art. 2.38-1 provides that when a share dividend is payable in authorized but unissued shares having a par value, the shares shall be issued at par value, and an amount of surplus designated by the board of directors in an amount not less than the aggregate par value of the shares to be issued as a share dividend shall be transferred to stated capital. If the required transfer to stated capital were not authorized or made, a question could be raised as to whether sufficient consideration had been given for the shares. A similar question could arise with respect to shares issued without par value, if a transfer to stated capital were not authorized or made.

4. **Non-Assessable**. In Texas, shares which are fully paid are by definition "non-assessable." TBCA art. 2.21 provides that a shareholder shall "be under no obligation to the corporation or to its obligees with respect to . . . such shares other than the obligation to pay to the corporation the full amount of the consideration, fixed in compliance with Article 2.15 of this Act, for which such shares were or are to be issued. . . .". Furthermore, TBCA art. 2.16 specifically provides that when the consideration for shares has been paid in full, the shares "shall be considered fully paid and non-assessable."

5. **Uncertificated Securities**. Chapter 8 of the Texas Business and Commerce Code,[268] which had previously provided a legal framework to govern the rights, obligations and relationships of issuers and others dealing with shares evidenced by physical stock certificates, has been amended to include shares the issuance, recordation and transfer of which are accomplished by registration upon books maintained for the purpose of recording transfers by or on behalf of the issuer and do not involve any issuance of physical certificates ("uncertificated securities"). TBCA art. 2.19 has also been amended to permit non-public as well as public issuers to adopt a system of issuance, recordation and transfer of shares using uncertificated securities.

The enactment of these statutory changes has not altered the legal requirements imposed upon a corporation in connection with the authorization and issuance of its securities. Shares still must be authorized for issuance in the Articles of Incorporation and by proper action by the corporation's board of directors, and still must be issued for valid consideration. Accordingly, the attorney who is requested to provide an opinion with respect to the due authorization, valid issuance and fully paid nature of uncertificated securities will be required to go through the same analysis as for certificated securities.

The actual issuance of an uncertificated security is evidenced by a writing known as an initial transaction statement ("ITS") instead of a physical stock certificate. At the time of issuance of the uncertificated security, the ITS must be validly executed and delivered by the issuer to the purchaser (or transferee) in the same manner as a physical stock certificate. Every corporation which has implemented a system using uncertificated securities is required to maintain a permanent record of the ITS issued as to every uncertificated security. Thus, an essential difference in the diligence that must be conducted by the attorney concerning actual issuance is that the review of the stock records of the corporation is likely to involve a review of the records held by the corporation or transfer agent as to uncertificated securities.

F. No Breaches or Defaults.

In a typical transaction, an opinion will be requested that neither the Transaction Documents nor the consummation of the Transaction will violate or cause a breach or default under, or "conflict with" (i) the Client's charter or bylaws, (ii) the Client's existing agreements with third parties, or (iii) any judgments or rulings binding on the Client.

Although this opinion may be sometimes referred to as the "no conflicts" opinion, the better view is that the opinion should be addressed in terms of "breach" or "default" rather than "conflict." This is the approach

---

[268] Tex. Bus. & Com. Code Ann. §§ 8.101 et. seq. (Vernon 1968 & Supp. 1991).

taken by the ABA Report,[269] with which the Committee concurs. The conceptual basis for this formulation of the opinion, which may vary somewhat from the current practice of some firms, is that various aspects of Transaction Documents or a Transaction may differ from or "conflict with" other agreements, without the difference constituting a material breach or an "event of default." The ABA Report states as follows:

> The Accord uses the terminology of "breach or default" rather than "conflict". When the words "conflict with" (or generally equivalent wording) are used in this context, they mean a conflict that constitutes a breach or default, unless the Opinion Letter clearly indicates a different interpretation. In this context, "breach or default" includes only an action that, with the giving of notice or the passage of time (or both), would constitute an "event of default" or other event having similar remedial consequences under an Other Agreement or a Court Order.[270]

In part the "no breach or default" opinion readdresses matters already covered by other standard opinions (e.g., corporate power and authority and enforceability), but the opinion also addresses other important matters not addressed by any other opinion. For example, a Client may be a party to a credit agreement containing negative covenants prohibiting the incurrence of additional debt. If aware of this prohibition, it is unlikely that a lender would extend a loan to the Client given that the loan would cause an immediate breach of the preexisting credit agreement, followed by the detrimental consequences associated with such a breach. Consequently, it is not unreasonable to request that the Client's attorney provide comfort as to such matters.

Proposed Opinion Form

> **The execution and delivery by the Corporation of, and performance of its agreements in, the Transaction Documents do not (i) violate the articles of incorporation or bylaws of the Corporation, breach, or result in a default under, any existing obligation of the Corporation under [contracts dealing with money borrowed by the Corporation] [contracts filed by the Corporation with the SEC] [specify other method used to determine, or specifically identify, the "Other Agreements"], or (ii) [to our knowledge] breach or otherwise violate any existing obligation of the Corporation under [a court order disclosed in the Agreement or an exhibit, annex or schedule thereto, or in a certificate of an officer of the Corporation] [specify other method used to determine, or specifically identify the court orders].**

Analysis and Commentary

1. General. The proposed opinion form addresses the execution and delivery of the Transaction Documents, the consummation of the transactions contemplated thereby, and compliance by the company with its provisions. The ABA Report notes that references to the "transactions contemplated" by the agreement may be overly vague and may be read to be more expansive than the Opinion Giver intends. In that regard, the ABA Report recommends that the transactions be described with particularity if the opinion is to include such coverage.[271]

2. No Breaches or Defaults Under Charter or Bylaws. The opinion regarding the absence of breaches or defaults under the Company's charter or bylaws arising from the execution of the Transaction Documents and their performance is straightforward and requires no elaboration. Nor is there any need for any express or implied qualifications or exceptions thereto. If the company is a Delaware corporation, the reference to "articles of incorporation" should be replaced with "certificate of incorporation."

---

[269] ABA Report, supra note 3, at Commentary ¶ 15.2.

[270] Id.

[271] ABA Report, supra note 3, at Commentary ¶ 15.1.

Review Procedure: The Opinion Giver should secure a copy of the company's articles of incorporation and all amendments thereto certified as complete by the Secretary of State as of a recent date. A copy of the company's bylaws, certified as of a recent date by the secretary or other authorized officer of the company, should also be obtained.

3. **No Breaches or Defaults Under Agreements**. The three principal issues that arise in connection with the opinion on conflicts with other agreements are (i) the identification of the agreements covered by the opinion, (ii) the type of violation, breach, or default intended to be addressed by the opinion, and (iii) the law applicable to the review of such agreements to the extent that the agreements that are subject to review are governed by laws other than the laws of the State of Texas.

With respect to identifying the agreements subject to review, the preferred approach is to expressly limit the agreements subject to review to those identified to the Opinion Giver by the company in an officer's certificate. The principal advantage of this formulation is that it unequivocally establishes the review responsibility of the Opinion Giver. This approach shifts responsibility back to the Opinion Recipient and its counsel to determine whether there are other agreements of which they are aware that the Opinion Recipient would like the Opinion Giver's opinion to address. Of course, the Opinion Giver should not blindly rely upon the officer's certificate if he or she has actual knowledge of a conflicting provision of an agreement to which the Client is a party or by which it is bound that does not appear on the list contained in the officer's certificate. The traditional expression of the "no breaches or defaults under agreements" opinion identifies the agreements covered by the opinion as those agreements "known to us," rather than by express reference to agreements identified in an officer's certificate. Such a formulation raises any number of interpretive issues associated with the scope of inquiry comprehended by such term. The ABA Report contemplates discontinuation of knowledge references in most cases under Accord practice.[272] If the knowledge qualification is used, then the scope of its meaning must be considered by the Opinion Giver. In the absence of a definition of the term "known to us," the consensus of the Committee is that the Opinion Giver would typically rely upon a certificate of the Client identifying the contracts by which the Client is bound and would then conduct a review of the contracts so identified. Of course, the certificate may disclose a vast number of contracts, which is probably not cost effective, may not be feasible given time constraints, and very likely goes well beyond the review necessary to provide adequate comfort to the Opinion Recipient. A common variation of this opinion format limits the agreements reviewed to "material" agreements "known to us." While this approach narrows the universe of agreements subject to review, it raises the question of how materiality should be determined and, more significantly, who should make that determination. If such a formulation is used, the Committee believes that the Opinion Giver may, in the determination of materiality, rely upon the judgment of the Client.

The next issue to be considered in rendering an opinion with respect to breaches or defaults under existing agreements is what kinds of violations, breaches, or defaults should be expected to be noted in the review. Some attorneys expressly state that the opinion extends only to violations that are readily ascertainable from the face of the agreement. Some go further to provide that no opinion is expressed with respect to violations arising under or based upon covenants of a financial or numerical nature or requiring computation. The Committee believes that the proposition that only violations readily ascertainable from the face of the agreement are addressed by the opinion should be deemed implicit. On the other hand, entirely excluding covenants of a financial or numerical nature or requiring computation is more problematic. In some cases the fact that a violation, breach, or default under a financial covenant may be created as a result of the agreement to be entered into may be readily ascertainable from the face of the agreement, whereas in other cases it may not be ascertainable. For example, in reviewing the debt covenant of a subordinated debt indenture, it may be obvious that the amount of indebtedness to be incurred in the transaction that is the subject of the opinion will clearly exceed the dollar amount of permitted indebtedness under the indenture covenant. While this is a numerical covenant, determining the violation does not require any special accounting expertise. Accordingly, the duty of the attorney to make some judgment with respect to financial or numerical covenants should not be entirely excluded by implication, but rather should be excluded entirely only if expressly so stated. If not expressly excluded, in order to avoid uncertainty as to what violations, breaches, or defaults should or should

---

[272] ABA Report, supra note 3, Commentary, ¶ 6.4.

not be apparent from the face of the instrument, it would seem that the safer course is to obtain a certificate from the company's chief financial officer or outside accountants with respect to covenants of a financial or numerical nature, and expressly state in the opinion that as to such covenants, the attorneys relied upon that certificate.

Finally, the Opinion Giver will invariably find that many of the documents being reviewed for purposes of the "no breaches or defaults under agreements" opinion are governed by the laws of a state other than the state in which he or she is licensed. To the extent that the review of the document requires legal interpretation, the question arises whether the attorney has a duty to inquire into the laws of the state governing the instrument, whether it may be assumed the laws of the state in which he or she is licensed are applicable to the agreement for purposes of the review, or whether the review is law neutral, i.e., the review consists only of a plain reading of the instrument without regard to legal interpretation. In this regard, the Committee adopts the position of the ABA Report to the effect that the Opinion Giver is entitled to assume, when reviewing agreements not governed by the law of the Opining Jurisdiction, that those documents would be enforced as written and to evaluate potential violations or breaches of, or defaults under, those documents on the basis of that assumption without need to address the possibility that legal issues not present under the law of the Opining Jurisdiction may be presented by the applicable governing law.[273] The ABA Report further notes, however, that if the Opinion Giver recognizes a question of legal construction in a document governed by the law of a jurisdiction other than the Opining Jurisdiction that is relevant to the opinion rendered, the Opinion Giver should consider bringing the matter to the attention of the Opinion Recipient.[274]

Review Procedures: The Opinion Giver should review the documents identified for purposes of the opinion (whether through an officer's certificate or otherwise) for any violations, breaches, or defaults under existing agreements that would result from the execution, delivery, and performance of the Transaction Documents. If an accountant's certificate with respect to financial or numerical covenants is obtained, the Opinion Giver should also review it.

4. **No Breaches or Defaults Under Judgments and Rulings**. As in the case of agreements, the opinion with respect to violation of judgments and rulings is limited as to those judgments and rulings which have been disclosed to the Opinion Giver in a manner in which the Opinion Giver can rely under the Accord. Also as in the case of agreements, such judgments and rulings should be expressly limited to those identified in an officer's certificate. Because the number of judgments and rulings subject to review should be relatively small, in comparison to the universe of contracts to which the Client is a party, there would appear to be no need to attempt to limit the review to material judgments and rulings.

As in the case of agreements, the opinion with respect to judgments and rulings should be expressly limited to such violations as are readily ascertainable from the face of such judgments and rulings.

Review Procedures: The judgments, writs, injunctions, decrees, orders and rulings disclosed in the applicable officer's certificate should be reviewed. Because the Opinion Giver is relying solely upon the officer's certificate, there is no need to search court records to identify possible judgments or rulings that may conflict with the agreement to be entered into.

G. No Violation of Law.

In a typical transaction, an opinion will be requested that neither the Transaction Documents nor the consummation of the Transaction will violate or "conflict with" any laws or regulations applicable to the Client. For the reasons discussed above, it is recommended that this opinion be expressed in terms of "violation" rather than "conflict."

---

[273] ABA Report, supra note 3, Commentary, ¶ 15.6.

[274] Id.

Proposed Opinion Form

The execution and delivery of the Transaction Documents, the consummation of the transactions contemplated thereby, and compliance by the Company with the provisions thereof will not violate any Texas or federal statute or regulation [, or Delaware Corporation Law].

Analysis and Commentary

The proposed form of opinion specifies the laws addressed by the opinion, i.e., Texas and federal statutes or regulations, and if the company is a Delaware corporation, Delaware corporate statutes. Because of the large number of Delaware corporations that are involved in business transactions and the general familiarity of most Texas business lawyers with those laws, it is typical practice to agree to opine on Delaware corporate statutes to the extent applicable to the transaction.

The proposed opinion form contains no exceptions for laws intended to be excepted from the scope of the opinion. In the event that the Accord is incorporated into the opinion, all of the various laws identified in § 19 of the Accord (such as federal securities laws and regulations, federal and state antitrust laws, and fraudulent conveyance laws) are omitted from the reach of the opinion. Even if the Accord is incorporated into the opinion, the Opinion Giver should consider whether other laws should be expressly excepted from the opinion. Further, in the event that the Accord is not incorporated, the Opinion Giver should consider to what extent the laws identified in § 19 of the Accord should be expressly excepted from the reach of the opinion. For example, in the case of transactions involving securities, an exception for federal and state securities laws would commonly be included. This does not mean that no securities opinion will be rendered in the context of a securities transaction. Rather, it simply means that a blanket opinion as to compliance with federal and state securities laws is virtually always overly broad. Such opinions should be negotiated and tailored to the transaction in question, with all applicable assumptions, qualifications, limitations and exceptions. Certain transactions may also raise significant issues under other laws, such as federal and state antitrust laws or laws applicable to regulated industries, as to which a blanket opinion is inappropriate. Again, in such context, such laws should be expressly excepted and, to the extent appropriate, a more narrowly crafted opinion included with respect to such matters. The attorney should also give special consideration to transactions within regulated industries.

The proposed form of opinion does not expressly state that the opinion is limited to existing laws, based upon the Committee's conclusion that such a limitation is implicit.

Questions have been raised on occasion as to whether an opinion that a transaction does not violate any provision of Texas law could be read broadly to extend to the political subdivisions within the state of Texas, for example to local zoning ordinances. The view of the Committee is that the general opinion form does not extend to laws of the political subdivisions of the state and that any opinion on municipal ordinances or other local laws must be set forth expressly.

On occasion, Opinion Givers may seek to limit the "no violation of laws" opinion to those laws known to a counsel. The view of the Committee is that such an exception is inappropriate. However, the Accord states as follows concerning the "no violation of laws" opinion, with which the Committee concurs.

> § 16. No Violation of Law. When a No Violation of Law Opinion is given, it means that execution and delivery by the Client of, and performance by the Client of its agreements in, the specified Transaction Document neither is prohibited by, nor subjects the Client to a fine, penalty or other similar sanction under, any statute or regulation of the Opining Jurisdiction that a lawyer in the Opining Jurisdiction exercising customary professional diligence would reasonably recognize as being directly applicable to the Client, the Transaction, or both.[275]

[275] ABA Report, supra note 1, at § 16.

The Commentary to § 16 of the Accord in the ABA Report further states as follows:

> ¶ 16.1 General. The No Violation of Law Opinion, when included in the Opinion Letter, is intended to fill the gaps left by other opinions, such as the Remedies Opinion and an opinion as to the valid issuance of capital stock. It does not serve, and should not be sought, as a substitute for those other opinions (e.g., a "backdoor" Remedies Opinion). Unlike the Remedies Opinion, this opinion does not directly address the rights the parties have bargained for vis-a-vis each other. It addresses the issue of whether performance by the Client of the obligations undertaken by it in the specified Transaction Documents will expose the Client to a sanction for violating a statutory or regulatory prohibition (either civil or criminal in nature). It also provides additional assurance that such performance is not prohibited by any statute or regulation of the Opining Jurisdiction. And unlike the stock issuance opinion, it does not focus on the legal status of the shares or the rights of holders as against the issuer. A traditional Remedies Opinion might be rendered even if performance by the Client of an obligation violates a law. For example, if the Client were a regulated company that needed governmental agency approval to borrow money and failure to obtain that approval could result in a substantial fine but would not cause the Transaction Document (a credit agreement) to be void or voidable, the Remedies Opinion could be rendered notwithstanding the failure to obtain the required approval prior to the Client's borrowing at the closing .... The No Violation of Law Opinion complements (but is distinguishable from) the Remedies Opinion in that it addresses, in addition to some violation of law issues that may be covered by the Remedies Opinion, other possible violations of law that are not. This opinion is not intended to impose on the Opinion Giver responsibility for identifying areas of law that a lawyer in the Opining Jurisdiction exercising customary professional diligence would not reasonably recognize as being applicable. The cost of such an undertaking would far exceed any benefits the Opinion Recipient might gain and, as a consequence, it is not appropriate to require the Opinion Giver to conduct so far-reaching an inquiry. Because the General Qualifications do not automatically apply to a No Violation of Law Opinion . . ., the Opinion Giver must expressly state in the Opinion Letter that they do apply if the Opinion Giver so intends.[276]

Review Procedures: The "no violation of law" opinion is generally based upon the Opinion Giver's experience and familiarity with the laws in question and such other special research as required under the circumstances. In certain circumstances, it may be necessary to obtain factual representations to support the opinion, but experience suggests that such circumstances are rare.

H. No Governmental Approvals.

The opinion addressing required governmental approvals is related to, and in part overlaps with, the "no violation of laws" opinion. A "no governmental approvals" opinion is frequently required in a Transaction because (i) lack of requisite regulatory approval could render the agreement void or voidable, (ii) failure to obtain a required approval may subject the Client to governmental disciplinary action which may adversely affect its business and (iii) failure to obtain a required regulatory consent or approval may constitute an event of default under loan agreements, indentures and other material contracts to which the Client is a party.[277]

Proposed Opinion Form

> **No consent, approval, waiver, license or authorization or other action by or filing with any governmental authority is required under Texas or federal statutes or regulations, [or under Delaware corporate statutes,] in connection with the execution and delivery by the Company of the Transaction Documents, except for those already obtained or completed.**

---

[276] Id. at Commentary ¶ 16.1.

[277] Tri-Bar Report, supra note 1, at 1920.

Analysis and Commentary

As in the case of the "no violation of laws" opinion, the governmental authorities covered by the opinion addressing requisite governmental approvals are expressly identified for purposes of clarity notwithstanding the fact that such limitation is already imposed by the general practice limitation appearing elsewhere in the opinion letter. Also as in the case of the "no violation of laws" opinion, the reference to Texas governmental authority should not be read to include any political subdivision of the state. Any opinion relating to local governmental consents should be specifically requested and separately addressed. As noted in the discussion of the "no violation of law" opinion, in the event that the Accord is incorporated into the opinion, then those laws identified in § 19 of the Accord will be excepted from the scope of the opinion unless the opinion otherwise provides. If the Accord is not incorporated, the Opinion Giver should consider excluding certain laws expressly, either because the Opinion Giver declines to address the issues presented by such laws entirely or because the Opinion Giver intends to address such laws in a more restrictive manner elsewhere in the opinion. For example, in the case of a non-registered sale of securities, the Opinion Giver may wish to decline to address the availability of an exemption from registration under applicable federal and state securities laws or may wish to address the availability of the exemption more narrowly, with appropriate assumptions, qualifications, limitations, and exceptions. Similarly, in a registered offering the Opinion Giver will address various specific aspects of the offering, such as the effectiveness of the registration statement under the Securities Act of 1933, directly but will not address the general application of the federal securities laws to the offering or the application of state securities laws to the offering. In either such case, the general opinion regarding approvals and filings should contain the following exception: "and except for federal and state securities or blue sky laws, as to which we express no opinion."

The proposed opinion form assumes that all governmental approvals and filings required to consummate the transactions contemplated by the agreement have been obtained and completed. To the extent that any such approval has not been obtained or any filing has not been made at the time the opinion is rendered, such approvals or filings should be expressly excepted from the opinion. For example, if an opinion is rendered in a merger transaction prior to the time of filing the merger certificate, such filing should be excepted from the opinion.

Under § 19 of the ABA Accord, federal securities laws, "Blue Sky" laws, Federal Reserve Board margin regulations, ERISA, federal and state laws and regulations concerning filing and notice requirements (e.g., Hart-Scott-Rodino Act), Local Law, fraudulent transfers, and a number of other matters are excluded from Opinions, unless explicitly addressed in the Opinion Letter.[278] If Hart-Scott-Rodino is specifically addressed in an Opinion Letter in connection with an acquisition, and if it is necessary to make a filing under the Hart-Scott-Rodino Antitrust Improvements Act, then the Opinion Giver must ascertain that the requisite filing was made and that the applicable waiting period has expired.

Generally, the agreement will contemplate a business transaction, such as an acquisition, sale of securities or loan transaction, that will be consummated on a specified closing date and the opinion rendered will be rendered in connection with that closing. In such a transaction, because the opinion with respect to requisite governmental approvals and filings only addresses approvals required for the consummation of the transactions contemplated by the agreement, only authorizations required at or prior to the closing are comprehended by the opinion. Approvals or filings that are required subsequent to the closing are not covered by the opinion as so formulated. On the other hand, if the opinion is expanded to address governmental approvals and filings required in connection with the "performance" of the agreement, the opinion may be interpreted to extend to post-closing approvals and filings required in connection with the subsequent performance of obligations imposed by the agreement (e.g., the registration of securities under the Securities Act of 1933 upon exercise of registration rights).[279] If the opinion relates to actions required to be taken subsequent to the closing date, the

---

[278] ABA Report, supra note 3, at § 19, p. 215.

[279] See Tri-Bar Report, supra note 1, at 1921.

Opinion Giver must list all post-closing governmental approvals and filings as exceptions to the opinion. Such an opinion is of questionable value and may impose an unnecessary burden on the Opinion Giver.

Special attention should be given to any special licenses or other approvals required by companies engaged in business in regulated industries, such as insurance, communications or public utilities.

Review Procedures: This opinion will be based upon the review by the Opinion Giver of all filings made with governmental authorities, and the correspondence from, and approvals issued by, such governmental authorities, and the Opinion Giver's familiarity with the regulatory requirements of the specified jurisdictions.

I. Legal Proceedings.

Often, the opinion recipient will request the Opinion Giver to confirm the absence of litigation, or the existence and status of legal proceedings that are pending or threatened against the Client. In this context, the opinion recipient is requesting the attorney to confirm matters of fact and is not seeking legal judgment. The ABA Report addresses the "legal proceedings" opinion in Section 17, which reads as follows:

> § 17 Legal Proceedings. A confirmation provided by the Opinion Giver in the Opinion Letter regarding the existence of legal proceedings that are pending or threatened against the Client, whatever the wording actually used, relates only to legal proceedings pending before an adjudicative tribunal (including an arbitration panel) or legal proceedings overtly threatened by a written communication. It is based only upon information established pursuant to § 3 and a review of the Opinion Giver's litigation docket. The Opinion Giver need not review court or other public records or undertake any broader review of its own files.

Technically, the "legal proceedings opinion" is usually not really a "legal" opinion, but a form of factual confirmation. As stated in the Commentary to Section 17 of the ABA Report:

> A request for information regarding the existence of pending or threatened legal proceedings seeks additional assurance that there exists no pending or threatened legal proceeding that the Client has not disclosed in the Transaction Documents and no pending or threatened legal proceeding seeking to enjoin or otherwise interfere with the Transaction. While the matter is inherently factual, the request is addressed to the Opinion Giver as a likely source of information relating to the topic. Because no legal issue or professional judgment is typically involved, the information may be furnished in the form of a factual confirmation as opposed to a legal opinion.[280]

The Committee proposes the use of the following form of confirmation for "legal proceedings":

> Proposed Form of Confirmation
> Regarding Legal Proceedings
>
> **We hereby confirm to you, pursuant to the request set forth in Section [specify section] of the Agreement, that there are no actions or proceedings against the Corporation, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in [the Agreement or an exhibit, annex or schedule thereto] [an officer's certificate], come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold].**

[280] ABA Report, supra note 3, Commentary, ¶ 17.1.

Analysis and Commentary

An "absence of litigation" opinion is essentially a factual verification, and as such is arguably an inappropriate subject for the opinion letter to address. A valid case can be made, on the other hand, for cold comfort with respect to the absence of litigation seeking to enjoin or otherwise challenge the Transaction Documents or the transactions contemplated thereby. Because of the counsel's active involvement in the Transaction, it is likely that he or she would become aware of such litigation or the threat of such litigation and accordingly confirmation as to the absence of such litigation may be appropriate.

Any request for a more expansive opinion addressing litigation generally is inappropriate and should be resisted. If, notwithstanding the foregoing, the Opinion Giver agrees to address the absence of litigation generally, a suggested formulation is as follows:

> **To our Actual Knowledge, there is no litigation, proceeding or governmental investigation pending or overtly threatened against the Company (i) which seeks to question, delay or prevent the consummation of the transactions contemplated by the Transaction Documents or which seeks monetary or other relief in respect thereof or (ii) except as set forth in Schedule A to this opinion, which, if adversely determined, would have a material adverse effect on the business, assets or financial condition of the Company and its subsidiaries taken as a whole.**

The proposed opinion form references a schedule to be attached to the opinion. Other acceptable approaches are to refer to the appropriate schedule set forth in the Transaction Documents or to litigation identified in an officer's certificate, if the officer's certificate is to be provided to the Opinion Recipient.

Before disclosing information with respect to overtly threatened litigation, the Opinion Giver should discuss with the Client the risk that disclosures relating to unasserted claims may prejudice the Client's position by breach of the attorney-Client privilege or disclosure of facts or conclusions which could prove damaging to the Client if made available to potential claimants.

Review Procedures: The absence of pending or threatened litigation challenging the Transaction should be addressed by an officer's certificate. The Opinion Giver should also poll the attorneys working on the Transaction (in the case of Accord practice, the Primary Lawyer Group) and review the firm's litigation docket to conclude that no such litigation is pending or threatened. The Committee is of the view that under no circumstances is it necessary to search the court records in the jurisdiction in which the company's principal place of business is located, or elsewhere, to confirm that no lawsuits are on file that have not yet been served.[281]

---

[281] This view is consistent with § 17 of the Accord. The commentary to § 17 of the Accord states as follows:

> The Opinion Giver need do no more with respect to pending or threatened legal proceedings than confirm information listed or otherwise provided by the Client to the Opinion Recipient in or pursuant to the Transaction Documents. For legal proceedings in which the Opinion Giver has professional involvement, a review of its litigation docket (or an analogous record listing legal proceedings being given substantive attention by the organization) is the appropriate procedure. For other legal proceedings, the Opinion Giver relies on information provided by others (e.g., a certificate as to the existence of such legal proceedings) in the same way it establishes other information . . . . In particular, the Opinion Giver is not expected to review court or other public records or its own files (other than its litigation docket) to verify information as to the existence of such legal proceedings.
>
> ABA Report, supra note 3, at Commentary ¶ 17.2.

IX. OPINIONS CONCERNING SECURITY INTERESTS IN PERSONAL PROPERTY

A. Introduction.

The treatment of legal opinions regarding personal property security interests is less uniform than the treatment of many other opinions addressed in this report. This is due in part to the difficulty in making unqualified determinations on title, perfection, and priority as to personal property. A number of reports and articles have, however, given guidance on legal opinions in this area.[282]

This report deals only with opinions regarding property which is subject to the Uniform Commercial Code as adopted in Texas[283] (the "UCC"). Opinions regarding property subject to security devices under federal law or under laws of a jurisdiction outside of the United States of America and opinions regarding security interests under non-UCC state law require special expertise or investigation and are not generally covered by this report.

The reasonableness of a requested opinion in this area must be considered in the context of the particular transaction applying the policy considerations discussed in Part V, supra. For instance, in transactions in which both the lawyer requesting the opinion and the lawyer rendering the opinion practice in the state whose laws govern the transaction in question and the security agreement covers broad categories of collateral, a broadly stated opinion from debtor's counsel regarding perfection and priority of a security interest in all collateral may be very expensive and time consuming and may provide little value to the party requesting the opinion. In such a situation, the secured party's counsel should already be knowledgeable about the extensive exceptions or factual investigations which must be made for such an opinion and should have independently discussed these matters with the secured party. On the other hand, a broadly stated opinion which requires the recital of the exceptions applicable under a particular state's laws may be reasonable when such opinion is requested by an out of state attorney under circumstances in which the value of the collateral justifies the cost of such an opinion.

B. The Security Agreement Enforceability Opinion.

An opinion that a security agreement is enforceable is frequently requested in the context of a secured transaction. It is often called a remedies opinion. This opinion indicates the extent to which the rights of the Opinion Recipient will be respected in court.

1. Remedies Opinion; Enforceable in Accordance with its Terms. See Part VII of this Report for a discussion of the remedies opinion generally. As to opinions concerning enforceability of security agreements, the UCC provides little guidance as to the meaning of "enforceable in accordance with its terms." In the section of the UCC addressing the general validity of a security agreement, the drafters used the phrase "effective according to its terms."[284] Notwithstanding this terminology, the typical opinion requested is that the security agreement is "enforceable in accordance with its terms." It is unclear whether, when the drafters used the phrase "effective according to its terms," they intended a meaning different from "enforceable in accordance with its terms." Under Article 9, "effective" may mean that a security agreement containing language sufficient to provide for a security interest as well as a sufficient description of the collateral has been executed, but may not include any assurance as to the availability of specific remedies. However, the phrase "enforceable in

---

[282] Ryan, Legal Opinions to Third Parties, Representations, and Warranties Covering Security Interests in Personal Property, in 2 Banking and Commercial Lending Law 123 (ALI-ABA 1981); A. Field & R. Ryan, supra note 5; FitzGibbon & Glazer, Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property, 44 Bus. Law. 655 (1989); Maryland Report, supra note 1; California UCC Report, supra note 1.

[283] Tex. Bus. & Com. Code Ann. §§ 1.101-11.108 (Vernon 1968 & Supp. 1991) [hereinafter UCC].

[284] UCC § 9.201.

accordance with its terms" should be read to include the phrase "effective according to its terms". Therefore, an additional opinion as to the "effectiveness" of the security agreement is unnecessary.

A security agreement gives rise to remedies not only against the debtor but also against the collateral covered by the security agreement. Those remedies would include, as a matter of law under the UCC, the right of the secured party to collect an assigned account, chattel paper, general intangible or instrument, the right to take possession of the collateral after default, the right to dispose of collateral after default and the right to propose to accept the collateral in discharge of the secured obligation.[285] The security agreement may purport to modify or supplement those rights and to add further remedies. Thus, a remedies opinion addresses the availability of both the basic statutory rights and any supplementary rights and remedies against the collateral.

While an enforceability opinion should not be expected to provide an enumeration of all provisions that may not be enforceable, the lawyer should direct the Opinion Recipient toward those provisions that impair the meaning and purpose of the security agreement so as to affect materially the fundamental rights of the secured party under the agreement. The Opinion Giver may choose to highlight other significant provisions of the security agreement that may be unenforceable. For example, the security agreement may provide that the debtor waives certain of its rights upon default thereunder. The Opinion Giver may elect to mention those waivers that might be unenforceable under existing law or may instead categorically except waivers of rights from the opinion. Security agreements frequently set out standards for, or concepts of, such UCC concepts as reasonable notification, commercially reasonable disposition and the commercially reasonable manner for collection from account debtors or obligors. Although a court could find the standards contained in the security agreement to be unreasonable, unconscionable or against public policy, some lawyers take the position that the standard "general principles of equity" exception to the remedies opinion is sufficiently flexible to encompass concerns of this nature and that, therefore, specific mention of these provisions is unnecessary.[286]

It is important to draw a distinction between enforceability of the provisions of the security agreement as a matter of contract law, and the ability of the secured party to enforce its security interest in the collateral against the debtor or third parties. The remedies opinion does not give assurance to the secured party that attachment of the security interest to particular collateral has occurred, that the security interest has been perfected or that the secured party has priority over third parties with respect to the collateral. If these issues are to be addressed, the lawyer should do so in other sections of the opinion. Moreover, the secured party may not rely on the remedies opinion as an opinion on the ultimate disposition of the collateral in the secured party's favor. In addition, if the Opinion Recipient has specific concerns relating to the validity of a particular provision or the availability of a particularly remedy, a specific opinion should be requested with respect thereto. The Opinion Recipient should not assume that such matters are covered by the general remedies opinion relating to the security agreement.[287]

Review Procedure: To give a remedies opinion in a Transaction relating to enforceability of a security agreement which creates a security interest under the UCC, the Opinion Giver should review the written security agreement to be sure that it meets the general requirements of contract law and that it contains nothing to render it unenforceable as a whole. In addition, the lawyer should also be satisfied that the security agreement is signed by the debtor, describes sufficiently the collateral and provides for the creation of a security interest that secures the payment of certain described obligations. Because the UCC does not specifically outline those events which will constitute a default under the security agreement, the lawyer should be sure the security agreement specifies those events.

---

[285] UCC §§ 9.502-.505.

[286] Opinion-related concerns of the type mentioned in this paragraph may also, of course, be ameliorated by including in the security agreement modifying language such as "to the extent permitted by applicable law" or "[the Debtor and the Secured Party agree], to the maximum extent that they may lawfully do so."

[287] See Part VII of this Report for a discussion of the scope and meaning of the Remedies Opinion.

Many believe that the Opinion Giver should take the responsibility for assessing the available remedies in determining whether the remedial provisions of the security agreement are customarily acceptable to secured parties in similar transactions. The lawyer might therefore give assurance on this issue by rendering the additional opinion set forth in one of the Generic Exceptions referred to above.[288]

2. **The Bankruptcy and Insolvency Exception**. All of the secured party's rights and remedies are, of course, affected by the bankruptcy of the debtor. For example, under Bankruptcy Code Section 362[289] the filing of a petition in bankruptcy by or against the debtor acts as an automatic stay of any act to enforce any lien against property of the debtor. A secured party may be compelled, under Bankruptcy Code Section 543, to turn over collateral to the bankruptcy trustee. The trustee may, under Bankruptcy Code Section 363, use, sell or lease such collateral. In each of these cases the Bankruptcy Code has a direct effect on the secured party's rights against the collateral, and the insertion of the bankruptcy exception tells the recipient of the opinion of the general bankruptcy limitation on rights and remedies.

An opinion which adopts the Accord automatically includes, as an exception to the Remedies Opinion, the Bankruptcy and Insolvency Exception. Under § 12 of the Accord, the enforceability of any Transaction Documents, as referred to in the Remedies Opinion, is subject to the effect of a broad range of bankruptcy, insolvency, receivership and similar laws.

The Committee is of the view that the Bankruptcy and Insolvency Exception excludes any opinion about the enforceability of provisions of the security agreement or the extent to which the security interest created thereby may be avoided or subordinated through the exercise of the rights and powers granted to parties in interest by the Bankruptcy Code or under state laws relating to the rights of creditors generally. The standard Bankruptcy and Insolvency Exception would, therefore, exclude any opinion respecting defenses to enforcement such as fraudulent conveyance, preference and equitable subordination arising under state law or the Bankruptcy Code. This view of the Bankruptcy and Insolvency Exception thus protects the Opinion Giver by excepting from the opinion those and other bankruptcy limitations.

A more limited view of an exception for bankruptcy, insolvency, receivership, and similar laws would encourage lawyers to expand the bankruptcy exception by attempting to enumerate the myriad ways in which bankruptcy law or related state law might limit the enforceability of the security agreement or result in the avoidance of the security interest. Nevertheless, some lawyers undertake such enumeration, and this practice, although not manifestly unreasonable, is unnecessary and in most instances not cost-effective. In addition, although broad factual assumptions might permit the giving of an opinion that carved out of its bankruptcy exception fact-driven issues such as those described above, such an opinion would not provide the secured party with much assurance since the factual assumptions would cause the legal opinions themselves to be of largely illusory value. Most lawyers believe that it is not appropriate for the lawyer rendering a remedies opinion to have to make the difficult determinations regarding financial concepts and complex factual issues which the area of federal bankruptcy and state creditors' rights law requires.[290] Instead, these matters are more appropriately the subject of advice given to the secured party by its own counsel.

3. **Equitable Principles Limitation**. The exercise of any contractual remedy is subject to the restrictions imposed by general principles of equity. The UCC expressly imposes an equitable obligation of good faith on the performance or enforcement of every contract within its scope.[291] While parties may vary some provisions of the UCC by agreement, the obligations of good faith and reasonableness may not be wholly

---

[288] See Part VII.C of this Report for a discussion of Generic Exceptions.

[289] 11 U.S.C. § 362 (1988).

[290] California UCC Report, supra note 1, at 803-04.

[291] UCC § 1.203.

disclaimed.[292] The equitable principles of materiality or reasonableness may be used to deny enforcement of the literal default language of an agreement secured by personal property. Principles of estoppel might be used to deny enforcement of a secured party's rights under Article 9.[293] Therefore, the remedies opinion should contain an equitable principles exception.

An opinion which adopts the Accord automatically includes, as an exception to the Remedies Opinion, the Equitable Principles Limitation, as defined in § 13 of the Accord.

In a non-Accord Opinion Letter, inclusion of the Equitable Principles Limitation is recommended, but whether or not this limitation is expressly stated it should be understood to be applicable. However, the secured party will want to be assured that the possible unenforceability of some provisions will not adversely affect the remaining provisions, and that the remaining provisions are within the range of provisions customarily acceptable to secured parties. Such assurance may be provided in the "practical realization" opinion suggested under the Review Procedure of subpart 1 above.

C. The Security Agreement Attachment Opinion.

The "attachment" opinion, standard in most commercial secured financing, carries the secured party one step beyond the remedies opinion and provides the assurance that the technical requirements for the creation of an Article 9 security interest have been met.

1. Proposed Form of Opinion Concerning Creation of a Security Interest. The Committee recommends that the following form of opinion be used in connection with the expression of an opinion as to creation of a UCC security interest under a security agreement:

> **The Security Agreement creates in favor of the Secured Party a security interest in all of Debtor's right, title, and interest in those items and types of Collateral described in the Security Agreement in which a security interest may be created exclusively under Article 9 of the Uniform Commercial Code in effect in the State of Texas.**

2. Analysis and Commentary. This opinion indicates that the security agreement gives to the secured party an interest in the described collateral which secures payment of the described obligations and which would be recognized by a court. It is recommended that the General Qualifications of the Accord be adopted by reference with respect to a "creation of security interest" opinion. The opinion does not pass upon the perfection of the security interest or its priority over other interests. Those matters are covered, if at all, in other parts of the opinion.

Most so-called "attachment" opinions state that the security agreement "creates" or that its provisions are "sufficient to create" a security interest or that the security interest "exists." The term "create" is found in UCC Section 9.105(a)(12), where it is used in the definition of a security agreement. Many lawyers do not distinguish between the word "create" on the one hand and the phrase "sufficient to create" on the other. They believe that "create", like "sufficient to create," deals with the steps taken to bring a security interest into existence rather than the application of that interest to any particular item of collateral. Still, some ambiguity may remain and "sufficient to create," which more clearly makes the point that the opinion is not intended to pass upon the debtor's rights in the collateral, is therefore the preferable form unless the Opinion Giver makes

---

[292] UCC § 1.102(c).

[293] Ryan, supra note 282, at 157.

express assumptions concerning the debtor's rights in the collateral or unless, as is the case with the proposed opinion form, the opinion addresses only that right, title and interest (if any) the debtor has.[294]

The term "attach" appears in UCC Section 9.203, but an opinion that a security interest has attached implies, among other things, that the debtor has rights in the collateral. Because lawyers are rarely in a position to pass upon rights to personal property, an opinion that the debtor in fact has rights in the collateral is almost never appropriate. No system exists for determining rights in most personal property. Even if a lawyer could verify that the debtor has possession of the collateral, possession alone does not establish rights in the collateral. In virtually all situations, a secured party should look to the representations and warranties of the debtor rather than an opinion of counsel for assurance that the debtor has rights in the collateral. Except in very limited circumstances, an assumption by the lawyer that the debtor has rights in the collateral is justified.[295]

Furthermore, the collateral ordinarily includes after-acquired property, in which the debtor by definition has no rights at the time the opinion is rendered. Of course, a lawyer could expressly assume that the debtor will acquire rights in the collateral or rely upon a representation to that effect. However, the debtor having rights in the collateral is such an important element of the concept of attachment that many lawyers fear that reliance on such a far-reaching and fundamental representation or assumption could mislead Opinion Recipients. To avoid any implication that it addresses the debtor's ownership of the collateral, the proposed language limits the opinion by stating that the agreement is sufficient to create a security interest only in whatever "right, title and interest" the debtor has in the collateral rather than that the security interest has attached to the collateral.

Therefore, if an opinion on the creation of a security interest is given, such an opinion typically does not provide assurance that the security interest in fact has attached or will attach in the future, but only that a security agreement which contains both operative language creating a security interest and an adequate description of collateral has been executed and delivered. Furthermore, the opinion on the creation of a security interest means no more than that the necessary steps to bring the security interest into existence have been taken under applicable commercial, corporate and contract law. The opinion does not address what remedies will be available, even though every well-drafted security agreement contains remedy provisions.

Due to the limited nature of the "attachment" opinion, Opinion Givers need not identify every legal problem that may arise under each potentially applicable law or statute. If a secured party is concerned about a particular type of collateral or a specific law, it should request a legal opinion that expressly addresses the problem. A lawyer who knows of a serious legal problem should, however, bring it to the attention of the Opinion Recipient and, depending upon the circumstances, may decline to render any opinion at all on the issue.[296]

An opinion that the provisions of the security agreement create, or are sufficient to create, a security interest in the property of the debtor confirms: (i) that the debtor has entered into a written security agreement or that the collateral is in the possession of the secured party pursuant to agreement; (ii) that the agreement has been duly authorized, executed, and delivered by the debtor (thus, the opinion overlaps the Remedies Opinion somewhat); (iii) that the agreement reasonably identifies the collateral; and (iv) that the security agreement and the authority of the signing officer(s) to act on behalf of the debtor remain in effect.

3. Review Procedure. Each security interest will call for analysis under the laws applicable to it. Security interests in property subject to Article 9 of the UCC will call for analysis under that article. But more than one law may apply to a security interest. The lawyer should begin by determining what law governs the creation of security interests in the collateral. The lawyer should review UCC Section 9.104 to see if any of

---

[294] FitzGibbon & Glazer, supra note 282, at 662.

[295] California UCC Report, supra note 1, at 809-10.

[296] FitzGibbon & Glazer, supra note 282, at 667.

the collateral or interests therein are excluded from Article 9. If acceptable to the secured party, interests not governed by the UCC might be excluded from consideration by the lawyer's relying on the debtor's representations, by making an assumption, or by excluding these interests from the scope of the opinion. If the secured party considers such interests to be important, the lawyer would then research the appropriate law in order to be able to give the opinion requested.[297]

If the collateral consists of securities, Article 8, which deals with investment securities and includes provisions relating to the attachment and perfection of security interests in certificated and uncertificated securities, will apply. Attachment of a security interest in investment securities is governed by UCC Section 8.321(a). In addition to a written security agreement or possession of the securities by agreement, it requires a transfer to the secured party or its designee under UCC Section 8.313(a). Since several different means of transfer under Section 8.313(a) will allow a security interest in investment securities to attach, some applicable only to certificated securities, some only to uncertificated securities, and some to both, the assumption of facts necessary for the contemplated transfer is appropriate.

The adequacy of the collateral description should, if possible, be addressed in drafting the security agreement rather than in qualifying the lawyer's opinion. Nevertheless, the Opinion Giver must decide whether the description in the agreement reasonably identifies what it is intended to describe. At one extreme is the description which is too general to identify reasonably the collateral. For example, "all property" is too broad. A description which is of the most exact and detailed nature, meeting the so-called "serial number" test, may be so detailed that it misdescribes the collateral in such a way as to fail the "reasonable identification" test. Between these extremes is the common practice of using generic descriptions under the UCC such as accounts, equipment and inventory. It is generally assumed that the generic descriptions under the UCC are classes which provide a reasonable basis for identification and are therefore adequate. (It should be noted, however, that doubts have been raised about the sufficiency of the term "general intangibles," because it includes property as diverse as partnership interests, patents, contract rights and trade names without any subcategories defined in the UCC.) Careful lawyers often use the generic descriptions found in the UCC followed by illustrative, but not exclusive, lists of common names of collateral which come within those generic descriptions.

Because the UCC specifically permits security agreements to cover after-acquired collateral, the security agreement should list after-acquired property if that is the intention. The Opinion Giver should also determine whether the security interest reasonably describes the secured obligations. These, too, should be described as future advances when the parties intend future advances to be secured.

"Attachment" requires that value be given. As for the requirement that value be given, funds will often be advanced at the closing relating to the security agreement. The value requirement may also be satisfied, however, when a security interest is given in support of a pre-existing loan, in return for a binding commitment to advance funds, and probably as consideration for an immediately available line of credit or similar facility, even though advances are at the secured party's discretion.[298] This requirement may be satisfied even when the loan is extended to some party other than the grantor of the security interest since value may be given when funds are committed or advanced regardless of the identity of the debtor.[299]

The question of giving value is rarely a problem at the initial closing under a loan or similar agreement. The issue may, however, pose a problem if additional funds are advanced at a subsequent closing. Before delivering an opinion at that closing, the lawyer should confirm that the agreement has not expired by its terms and should be satisfied, ordinarily by obtaining an officer's certificate, that the debtor has not taken any steps to abrogate the agreement and that the officer acting on behalf of the debtor is authorized to do so.

---

[297] Ryan, supra note 282, at 163.

[298] UCC § 1.201(44).

[299] See UCC § 1.201(44)(D).

D. Opinions as to Perfection.

Forms of opinions regarding perfection of security interests in personal property under the UCC are suggested below. The actual form and scope of the perfection opinion that may be appropriate will depend upon the circumstances of each particular transaction.

This section assumes that the lawyer rendering the "perfection" opinion is also giving an opinion on the attachment of a security interest as described in the preceding subsection C. If an "attachment" opinion is not given, the lawyer rendering the "perfection" opinion must assume that the security interest has attached or that the elements necessary for attachment of the security interest exist.[300]

Perfection generally means that, assuming the security interest has been properly created and has attached to certain property, the secured party's rights in such property are enforceable to the extent provided under the UCC or under other applicable law against claims by third parties, including purchasers,[301] holders of unperfected security interests,[302] lien creditors,[303] and trustees or debtors-in-possession under the Bankruptcy Code,[304] subject to various exceptions under applicable law. Perfection is also a factor in determining the priority of claims made by two or more secured parties in the same property.[305] Perfection generally occurs when the steps set forth under the UCC, under the applicable certificate of title or registration law or under other applicable law have been taken. An opinion as to perfection does not mean that the secured party's security interest is free from competing claims by third parties nor that the security interest has a particular priority. Further, such opinion does not address the existence or perfection of the security interest beyond the date of the opinion and does not address the specific manner and extent to which the security interest may be enforced against the debtor or against third parties holding the property.

The legal and factual determinations that must be made in order to verify that a security interest has been perfected will vary with each particular item of collateral. Such legal and factual determinations include analysis of the collateral to determine whether the perfection of the security interest is governed by the UCC or other law,[306] analysis of conflicts of law rules to determine whether the laws of the State of the Texas or the

---

[300] See UCC § 9.203.

[301] UCC §§ 9.307, 9.308 and 9.309 describe the circumstances under which a purchaser may take property free of a perfected security interest.

[302] UCC § 9.301(a)(1).

[303] UCC § 9.301(d).

[304] Bankruptcy Code § 544(a)(1)-(2). The "perfection" opinion does not assure the opinion recipient that the security interest is not voidable as a preference under Bankruptcy Code § 547 or as a fraudulent transfer under Bankruptcy Code § 548 or under applicable state fraudulent transfer statutes.

[305] UCC § 9.312.

[306] UCC § 9.104 describes transactions which are excluded from the scope of the UCC. UCC §§ 9.302(a), (c) and (d) describe circumstances in which the filing of a financing statement is not effective to perfect a security interest in property subject to the UCC. Other laws which may be applicable include the Certificate of Title Act, as amended, Tex. Rev. Civ. Stat. Ann. art. 6687-1 (Vernon 1977 & Supp. 1991), regarding vehicles; Tex. Parks & Wild. Code Ann. § 31.045-055 (Vernon 1976 & Supp. 1991), regarding motorboats and outboard motors; Texas Manufactured Housing Standards Act, as amended, Tex. Rev. Civ. Stat. Ann. art. 5221f, (Vernon 1987 & Supp. 1991), regarding mobile homes; certificate of title

(continued...)

laws of another jurisdiction will govern the perfection of the security interest,[307] analysis of the UCC classification into which the particular collateral would fall[308] and the proper method of perfection of such collateral, whether through possession, the filing of a financing statement, or other method,[309] the location of the collateral, any intent to move the collateral to another location, the location of the debtor's residence or place of business (or the debtor's chief executive office in case it has more than one place of business) and other factors. Such determinations are practical as a matter of course and an encompassing opinion on perfection may be reasonable where specific items of collateral are addressed. On the other hand, transactions more often involve creation of security interests in all of the debtor's property or in broad categories of the debtor's property where the cost and complexity of requiring the Opinion Giver to confirm that the security interest has been perfected in each of the items of collateral within such broad categories is generally considered to be inappropriate.[310] If a "perfection" opinion is to be rendered for such broad categories of property, the use of the narrow form of opinion set forth below is recommended.

1. **Proposed Opinion Form for Perfection by Filing**. The Committee recommends that the following form of opinion be used in connection with the expression of an opinion as to perfection of a security interest by filing under the UCC:

> **The filing of the Financing Statements [in the Office of the Secretary of State of the State of Texas] [in each of the filing offices described in Schedule __ hereto] has resulted [will result] in the perfection (within the meaning of the UCC in Texas) of the security interest with respect to all Collateral in which a security interest has been created under the Security Agreement and in which a security interest may be perfected by the filing of financing statements [under the UCC in Texas] [in such office].**[311]

a. **Analysis and Commentary**. The proposed form does not unconditionally confirm the perfection of the referenced security interest. For example, the proposed form does not require the Opinion Giver to address whether Texas is the proper jurisdiction in which filings should be made or whether possession

---

[306](...continued)
statutes of other jurisdictions; 49 U.S.C. § 1403 (1988), regarding aircraft; 46 U.S.C. §§ 31321-43 (1988), regarding vessels; 17 U.S.C. §§ 201-05 (1988), regarding copyrights; and 35 U.S.C. § 261 (1988), regarding patents.

[307] UCC § 9.103 sets forth the conflicts of law principles that determine which state's laws govern perfection of a security interest. Although beyond the scope of a Texas opinion, the parties to the transaction should refer to the comparable provisions of other jurisdictions in which the collateral or the debtor's offices are located to determine whether such jurisdictions have a nonstandard version or an earlier version of the Uniform Commercial Code. Consideration of the perfection laws and conflicts of law principles of jurisdictions other than the United States may also be necessary.

[308] See UCC §§ 9.105, 9.106 and 9.109 for the definitions of the classifications of property.

[309] UCC §§ 9.302, 9.304 and 9.305 describe when filing a financing statement perfects a security interest and when possession of the collateral or documents of title covering the collateral perfects a security interest.

[310] See California UCC Report, supra note 1, at 811; Maryland Report, supra note 1, at 753-54.

[311] See note 306, supra, and note 317, infra and accompanying text regarding the bracketed language.

or another method for perfection is necessary for the particular items of collateral.[312] The proposed form does provide assurance that the form of the financing statement is sufficient for the particular type of collateral covered by the security agreement and that the filing will be made in the appropriate office within Texas for filings with respect to the type of collateral covered by the financing statement. In many circumstances it is appropriate to except from the coverage of the perfection opinion any security interest in fixtures, equipment used in farming operations, farm products, accounts or general tangibles arising from or relating to the sale of farm products by a farmer, consumer goods, crops growing or to be grown, timber to be cut, minerals or the like (including oil and gas) or accounts resulting from the sale of minerals at the wellhead or minehead. The use of a broader form of opinion on perfection must be appropriate for the particular transaction and must be appropriate in relation to the time and expense which will be required for the lawyer to render such an opinion.

b. Review Procedure. The Opinion Giver should verify that the name of the debtor on the financing statement is its correct legal name (including a review of the debtor's corporate or partnership records when applicable)[313] and that the financing statement contains the mailing address of the debtor. The financing statement must give the name of the secured party and the address of the secured party from which information concerning the security interest may be obtained. The financing statement must contain a description of the collateral by indicating the types of collateral or identifying the items of the collateral. The Opinion Giver must take care in the area of collateral description, particularly when the financing statement description differs from the description in the security agreement[314] or when the descriptions in the security agreement or the financing statement do not cover all of the debtor's property of a particular type that is described by reference to UCC categories.[315] To the extent possible, the adequacy of the description of collateral should be addressed in the drafting of the security agreement and financing statement and not in exceptions to the "perfection" opinion.

The Opinion Giver must verify that the debtor authorized the execution, delivery and filing of financing statements in connection with verification of the authorization of the execution and delivery of the security agreement.

The proposed opinion form contemplates that the opinion covers the actual filing of the financing statements. In those instances where the financing statements are prefiled, the Opinion Giver must confirm that

---

[312] The limited language of this form must not be used to mislead the Opinion Recipient, and if the Opinion Giver knows of facts relevant to the opinion being rendered which have not been considered by the secured party, such facts should be disclosed. This disclosure may occur as a matter of course in connection with representations related to certificates and representations given by the debtor to the secured party which deal more broadly with personal property security interests.

[313] It is not necessary to add trade names of the debtor or, in the case of a partnership, the names of partners. Use of a trade name or assumed name alone is not sufficient "unless the trade name or assumed name is so similar to the debtor's legal name that the trade name or assumed name filing would be discovered in a search of the filing officer's records pursuant to Subsection (b) of Section 9.407, conducted in response to a request using the legal name of the debtor." UCC § 9.402(g).

[314] The standards for description of collateral in the security agreement under UCC § 9.110 and in the financing statement under UCC § 9.402 are different, and different descriptions may therefore be appropriate, particularly when the security agreement includes an extensive list of collateral in addition to descriptions by UCC categories.

[315] Categories of property defined by the UCC include accounts (UCC § 9.106), general intangibles (UCC § 9.106), documents (UCC § 9.105(a)(6)), instruments (UCC § 9.105(a)(9)), chattel paper (UCC § 9.105(a)(2)), goods (UCC § 9.105(a)(8)), and particular types of goods such as consumer goods (UCC § 9.109(1)), equipment (UCC § 9.109(2)), farm products (UCC § 9.109(3)), and inventory (UCC § 9.109(4)).

the financing statements have been filed with the appropriate filing fee in the proper filing office for the type of collateral.[316]

The lawyer rendering the opinion must determine whether the security agreement covers or is broad enough to cover property of a type that must be perfected by filing a financing statement with the office of a county clerk in the UCC records or in the real property records of the county.[317] If a county filing is required, the financing statement must additionally comply with the requirements of UCC Section 9.402 applicable to such type of collateral. The location of the collateral and additional description needed for the filing must be established, such as by reference to a representation in the security agreement, by a separate certificate or by an assumption in the opinion.

c. **Subsequent Events**. The proposed opinion is intended to address only the facts existing or assumed at the time the opinion is rendered and should not require the Opinion Giver to advise the Opinion Recipient of any change in circumstances that might render the opinion incorrect as of a later date. Practitioners, however, will frequently describe particular circumstances in which the security interest is no longer perfected. Those limitations should be understood to apply even if they are not expressly stated. For example, the opinion may state:

> **Continuation statements complying with the UCC must be filed with the filing offices in which each Financing Statements was filed not more than six months prior to the expiration of a five year period dating from the date of filing of the Financing Statement (or otherwise within the time permitted by § 9.403 of the UCC) and subsequent continuation statements must be filed within six months prior to the end of each subsequent five year period and amendments or supplements to the Financing Statements and or additional financing statements may be required to be filed in the event of a change of name, identity or corporate structure of the debtor or if the debtor changes the jurisdiction of its place of business (or, if it has more than one place of business, its chief executive office) or the jurisdiction in which collateral is located.[318] The continuation of any security interest and perfection of any security interest in proceeds is limited to the extent set forth in § 9.306 of the UCC.**

---

[316] If the opinion covers the filing of the financing statement, the lawyer may rely upon a copy of the financing statement bearing an acknowledgment by the filing office as evidence of acceptance of the filing, or may rely upon the actual filing by his or her firm of the documents and the acceptance of the financing statements by the filing officer. "Presentation for filing of a financing statement . . . and tender of the filing fee or acceptance of the financing statement . . . by the filing officer constitutes filing under this chapter." UCC § 9.403.

[317] UCC § 9.401 requires a county filing in the case of consumer goods, timber to be cut, minerals or the like (including oil and gas), accounts resulting from the sale of minerals or the like (including oil and gas) at the wellhead or minehead, and fixture filings under UCC § 9.313. If the description in the security agreement is broad enough to cover such collateral but no such collateral is intended to be covered, these items should be specifically excepted from the opinion. Alternatively, where the language change is not misleading to the secured party, the last phrase of the proposed opinion form, "under the UCC in Texas", may be changed to "in such office."

[318] See UCC § 9.403 for the requirements for continuation statements; UCC § 9.402 for requirements following a change of name, identity or corporate structure; UCC § 9.103 for requirements following a change of jurisdiction of the debtor's place of business or location of collateral. Other factors which may also impair perfection and which may be expressly excepted from the opinion are rights of subsequent purchasers or holders under UCC §§ 9.307, 9.308 or 9.309; and a change in the county of the debtor's residence, place of business or location of the collateral, when such location controls a county filing under UCC § 9.401.

Although the "perfection" opinion addresses only perfection at the time the opinion is rendered, the proposed form should not be used to mislead the recipient, and if the Opinion Giver knows of circumstances which will cause perfection to terminate, the proposed opinion form should not be used. For instance, the "perfection" opinion should not be based upon temporary perfection when steps have not been taken to continue perfection beyond the temporary perfection period.[319] Also, when a change in the debtor's name, identity or corporate structure or in the debtor's residence or place of business or in the location of the collateral is contemplated, which would limit the effectiveness of a financing statement, such matters should be discussed.

2. **Proposed Opinion Form for Perfection by Possession**. The Committee recommends that the following form of opinion be used in connection with the expression of an opinion as to perfection of a security interest by possession under the UCC:

> **Upon taking possession thereof, the secured party will have perfected its security interest in the Pledged Collateral.**

a. **Analysis and Commentary; Review Procedure**. The proposed opinion form should be used to address specific collateral which is of such a type that may be perfected by possession.[320] The lawyer rendering the opinion must confirm that the property referred to in the opinion may be properly perfected by possession. A security interest in money or instruments (other than certificated securities or instruments that constitute chattel paper) can be perfected only by the secured party's taking possession,[321] except for temporary perfection[322] and perfection as to proceeds.[323] A security interest in letters of credit, goods, negotiable documents and chattel paper may be perfected by possession of the collateral as well as by filing.[324] Pursuant to UCC Section 9.305, possession by the secured party may be accomplished by direct possession or through a bailee who is in possession of such collateral. The perfection of a security interest in investment securities (including certificated securities and uncertificated securities) is governed by UCC Section 8.321. Such an interest may be perfected under the applicable methods set forth in UCC Section 8.313(a), including possession of certificated securities by the secured party. A security interest in book-entry Treasury securities may be perfected by compliance with 31 C.F.R. Section 306.115-.122.[325]

b. **Subsequent Events**. As with other opinions addressed in this Report, the proposed opinion is intended to address only the facts existing or assumed at the time the opinion is rendered, and should not require the Opinion Giver to advise the Opinion Recipient of any change in circumstances which might later

---

[319] See UCC § 9.304 as to temporary perfection of a security interest in instruments, negotiable documents or goods in possession of a bailee other than one who has issued a negotiable document therefor; UCC § 9.401(c) as to temporary perfection after a change in the county of the debtor's residence or place of business or location of the collateral; UCC § 9.103 as to temporary perfection after a change in the jurisdiction of the debtor's residence or place of business or location of the collateral.

[320] See UCC §§ 9.304 and 9.305 as to perfection by possession.

[321] UCC § 9.305.

[322] UCC § 9.304.

[323] UCC § 9.306.

[324] UCC § 9.304-05.

[325] For a comprehensive discussion of federal book-entry securities, see Katzman, Security Interests in Federal Agency Book-Entry Securities: Doing it with Mirrors, 42 Bus. Law. 157 (1986).

render the opinion incorrect. Practitioners, however, frequently describe particular circumstances in which the security interest is no longer perfected.[326] Those limitations should be understood to apply even if not expressly stated. As previously stated, however, the opinion should not be used to mislead the recipient.

3. **Proposed Opinion Form on Perfection Under Law of Another State**. An opinion may be requested as to the perfection of a security interest which, pursuant to the conflicts of law rules under UCC Section 9.103, is governed by the law of a jurisdiction other than Texas. Due consideration should be given to policy considerations generally applicable to rendering opinions on the law of states other than that in which the lawyer practices. Normally, when the importance of the collateral warrants an opinion, such an opinion should be obtained from an attorney licensed to practice in such state. One of the underlying purposes and policies of the UCC, however, is to make laws uniform among the various jurisdictions,[327] and an attorney's knowledge of the UCC in Texas should enable him or her to give a limited opinion as to perfection under the laws of a jurisdiction other than Texas. The parties should agree upon a review of the specific provisions of the foreign jurisdiction's UCC because other laws may be applicable which may not be referenced in the UCC and non-uniform provisions contained in other sections of that jurisdiction's UCC which may alter the results of the uniform provisions may not be noticed by the Opinion Giver. The lawyer should qualify the opinion by reference to the specific sources used because the Opinion Giver should not be responsible for inaccuracies or incomplete updating of the available reporting materials. The Committee recommends the following form of opinion for expressing an opinion as to perfection of a security interest under the UCC provisions in effect in another state:

> **Based solely on the review of the provisions of Sections _____ of the Uniform Commercial Code as adopted in the State of _____ (the "UCC"), as reported in _____, the financing statements appear to be in appropriate form to perfect (within the meaning of the UCC) a security interest under the law of such State in the collateral described therein, as to property which may be perfected by the filing of a financing statements in that State.**

---

[326] This exception may be stated as follows:

> "(a) in the case of the issuance of additional shares or other distributions in respect of the Pledged Shares of additional instruments (as such term is defined in Article 9 of the UCC), the security interests . . . will be perfected only if possession thereof is obtained in accordance with the provisions of [Article 9 of the UCC]; and (b) in the case of non-identifiable cash proceeds, continuation of perfection of the . . . security interests therein is limited to the extent set forth in Section 9-306 of the UCC."

Ryan, supra, note 282, at 207. Also, under UCC § 8.321(d) a security interest in investment securities will cease to be perfected upon a subsequent transfer to the debtor or a person designated by the debtor pursuant to a provision of UCC § 8.313(a). Other factors which may also impair the perfection and which may be expressly excepted from the opinion are rights of subsequent purchasers or holders and loss of possession of collateral.

[327] UCC § 1.102(b).

E. Opinions As To Priority.[328]

In order to render a "priority" opinion, a lawyer must determine (i) the nature of the collateral, (ii) the steps which must be taken to perfect a security interest in the collateral, and (iii) liens of record or those arising as a matter of law which could affect the priority of the secured party's security interest. This section will discuss the due diligence requirements and factual assumptions and appropriate exceptions which should be made or taken in a priority opinion.

1. Meaning Of A "Priority" Opinion. Arguably, a "first priority" opinion means that no person could, under any law or circumstance, acquire an interest in the pledged assets of a debtor that is superior to the security interest of the secured party.[329] Such a broad interpretation of the phrase "first priority" would make it impossible for an attorney to conduct the required due diligence to render the opinion. An attorney would have to examine every conceivable factual situation and be conversant on any law which could possibly impact the secured party's priority.[330] Alternatively, counsel could make certain factual assumptions and take certain exceptions in the opinion, but those exceptions and factual assumptions could consume the opinion. A "priority" opinion should inform the recipient that the secured party has priority over unperfected security interests and certain other claims in the collateral. The opinion should also identify some or all of the parties who may have prior legal rights under Texas and applicable federal law and the circumstances under which such rights may be asserted.[331]

2. Proposed Opinion Form. Searches conducted with the Texas Secretary of State or county clerks will not reveal all competing security interests. Certain security interests will not be a matter of record (such as those arising by possession) and liens may arise as matter of law.[332] Even if all competing liens are matters of public record, a lien search may not reveal certain hidden liens.[333]

---

[328] The Committee wishes to acknowledge the significant influence of the works of the Business Law Section of the State Bar of California, Ira D. Einsohn, and Patricia J. Naghshineh in the drafting of this Subpart of the Report. For additional information concerning priority opinions on personal property under Article 9, see California UCC Report, supra note 1; Einsohn & Naghshineh, Legal Opinions on Perfection of Security Interests Under Article 9, at 27-1 in Commercial Finance Guide 27-1 to -32 (J. Norton, T. Gillespie & D. Rice eds. 1990).

[329] Ryan, supra note 282, at 179.

[330] California UCC Report, supra note 1, at 818.

[331] Id. at 818-19. See Part IX, Subpart E.5, infra.

[332] See e.g., UCC § 9.301 (rights of a lien creditor against a secured party).

[333] There are a number of "hidden" financing statements, which may determine a secured party's priority in collateral, that would not be disclosed in most lien searches. For example, financing statements may have been mis-filed or mis-indexed. Under UCC § 9.403(a), a financing statement is filed upon presentation and payment of filing fee. A financing statement may be filed under the debtor's prior name. UCC § 9.402(g) (a financing statement filed under the debtor's prior name will continue to perfect a security interest that existed at the time of the name change). The collateral may be covered by a financing statement filed in another jurisdiction which may still be effective. UCC § 9.103(a)(4) (a financing statement in another state covering collateral moved to Texas will continue to perfect a security interest for up to four months after the collateral is moved). A financing statement may name the prior owner of the collateral. UCC § 9.402(g) (a financing statement remains effective as to collateral transferred by the debtor even though the secured party knows of or consents to the transfer). Such "hidden" financing statements can perfect or continue to perfect a security interest even though their

(continued...)

Even assuming all competing liens and security interests could be discovered with respect to the assets of a debtor, the relative priority of such liens and security interests may not be easily determined. Statutes governing the priority of liens and security interests are scattered throughout federal and state statutes.[334] In priority conflicts involving the federal government, federal statutes may give priority to the federal government.[335] In certain circumstances a lien creditor may gain a superior position ahead of a perfected first priority lien holder.[336]

As a result of the foregoing problems in rendering "priority" opinions, if a "priority" opinion is given, it should be significantly qualified as to the types of collateral and competing interests covered by the opinion. In transactions where the Opinion Recipient is represented by its own Texas counsel, it is rarely appropriate to request a "priority" opinion since the Opinion Recipient may look to its own counsel for advice on the limitations on priority under the Texas UCC. In most other circumstances, a secured party should request only a limited priority opinion addressing collateral subject to perfection by filing under the UCC. In many transactions a secured party should be willing to rely upon the secured party's own review of UCC search certificates.[337] However, if such a "priority" opinion were to be required, it might read as follows:

> **Such security interests are prior to any other security interest in the collateral granted by the debtor that is or would be perfected solely by the filing of financing statements pursuant to the UCC in the State of Texas.**[338]

The suggested language does not opine that the secured party's security interest is senior to all third parties (such as those having a lien arising outside of the UCC). The opinion covers the priority of the secured party's security interest against other security interests that are filed under the Texas UCC.[339]

The proposed language is merely a suggestion. The actual opinion must reflect the nature of the transaction, the types of collateral covered by the opinion, and the understanding of the parties as to the scope of the opinion. In certain unusual circumstances, counsel may be required to give a comprehensive "first priority" opinion. In such a situation, it will be necessary for counsel to make a number of factual assumptions and take a number of exceptions.[340]

---

[333](...continued)
existence might not be disclosed by a lien search. California UCC Report, supra note 1, at 819-826.

[334] California UCC Report, supra note 1, at 824.

[335] See, e.g., 31 U.S.C. § 3713 (1988). See also California UCC Report, supra note 1, at 824.

[336] UCC § 9.301(d) (priority of a lien creditor). See also Tex. Tax Code Ann. § 32.05 (Vernon 1982 & Supp. 1991) (a tax lien in favor of the State of Texas has priority over a security interest which was prior to the tax lien).

[337] California UCC Report, supra note 1, at 825.

[338] Id. The opinion must also assume that there are no misfiled or misindexed financing statements.

[339] California UCC Report, supra note 1, at 826.

[340] Exceptions to an opinion on the priority of a security interest would often include at least the following exceptions: (i) a seller's rights under UCC Chapter 2; (ii) rights of buyers in the ordinary course of business under UCC § 9.307; (iii) the rights of a consignor under UCC § 9.114; (iv) the rights of an issuer of a negotiable document for goods in the issuer's possession under UCC § 9.304(b) and UCC
(continued...)

3. Due Diligence, Assumptions, and Qualifications. Generally, it would be impossible to outline the scope of due diligence, factual assumptions, and exceptions necessary in all circumstances in rendering a "priority" opinion.[341] The work to be undertaken in rendering a "priority" opinion is a moving target which will reflect the scope of the opinion, the collateral covered by the opinion, and restraints of time and resources. The discussion contained herein is intended to highlight some of the key issues which will be confronted in rendering most priority opinions.

a. Pre-Filing of Financing Statements. The vast majority of opinions are dated as of and delivered at the closing of a commercial transaction. In order to render a "priority" opinion, counsel must be able to conduct the necessary searches for conflicting security interests or liens prior to closing.[342] At a minimum, searches should include all relevant state and county records. Counsel must search all mortgage,[343] tax (federal, state, and local), judgment, and other recordable liens relating to the debtor in the appropriate locations or take suitable exceptions in the opinion letter.[344] The Texas Secretary of State is generally unable to render a certificate showing the filing of a secured party's financing statement until several days after the statement is filed. In order for the debtor's attorney to deliver a "priority" opinion at closing, the financing statements must be filed sufficiently in advance of the closing so as to permit a UCC search. Alternatively,

---

[340](...continued)
§ 9.305; (v) the rights of a secured party holding a document of title for goods in possession of a bailee under UCC § 9.304(c); (vi) the rights of persons under statutes and rules of law who in the ordinary course of business furnish services or materials to a debtor under UCC § 9.310; (vii) the priority of a security interest in proceeds pursuant to UCC § 9.306; (viii) the perfection of a security interest in accounts as set forth in UCC § 9.302(a)(5); (ix) purchase money security interests under UCC § 9.312(c);(x) security interests in goods, chattel paper or negotiable instruments in the possession of a third party on the date of the opinion pursuant to UCC § 9.312(e); (xi) security interests in instruments or negotiable documents that may have arisen within twenty-one days prior to the opinion under UCC § 9.304(d); (xii) items presented to a collecting bank, for which such bank has not received a final settlement under UCC § 4.208; (xiii) the rights of a purchaser of chattel paper under UCC § 9.308; (xiv) the rights of a holder to whom a negotiable document of title has been negotiated, or a bona fide purchaser of a security under UCC § 9.309; (xv) a security interest perfected in another jurisdiction in collateral which has been moved to Texas within four months prior to the opinion pursuant to UCC § 9.103(a)(4); (xvi) the rights of persons who become lien creditors of the debtor after the opinion is given under UCC § 9.301(d); (xvii) the priorities of federal tax liens and liens under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq. (1988); (xviii) security interests created by predecessors to debtor's title in the collateral under UCC § 9.307 and UCC § 9.402(g); (xix) the effect of a proceeding by or against debtor under the Bankruptcy Code or similar laws affecting the rights of creditors generally; (xx) other liens given priority by operation of law; and (xxi) the rights of the United States and federal agencies under federal priority statues (e.g. 41 U.S.C. § 225). For a more comprehensive discussion of priority opinions and exceptions contained therein, see Einsohn & Naghshineh, supra note 328.

[341] See supra note 328.

[342] California UCC Report, supra note 1, at 828.

[343] UCC § 9.402(f) (a mortgage is effective in some circumstances as a financing statement).

[344] Einsohn & Naghshineh, supra note 317, at § 27.03[1].

counsel must assume in the opinion that no financing statements will have been filed of record other than those reflected on UCC searches available at closing.[345]

b. **Misindexing and Misfiling of Financing Statements**. A financing statement presented to the filing officer with the appropriate fee is effective even if misfiled or misindexed by the filing officer.[346] A similar problem arises when a prior secured party has filed a financing statement in the wrong jurisdiction (such as with the Harris County Clerk instead of with the Montgomery County Clerk) or with the wrong filing officer (such as with a county clerk instead of the Secretary of State) but the secured party has knowledge of the financing statement.[347] Such a financing statement is effective against a party with actual knowledge of its existence.[348] In order to avoid the risk of a misfiled or misindexed financing statement, a lawyer will often include a qualification in the opinion to the effect that:

> **In our examination of the UCC search certificate described above, we have assumed that all financing statements other than the financing statements in favor of secured party described above have been properly filed and indexed with the Texas Secretary of State; that such certificate is accurate and complete; and that secured party does not have knowledge of the contents of any other financing statement covering the collateral or the existence of other security interests (perfected or unperfected) in the collateral.**[349]

c. **Financing Statements Not Filed Under the Name of the Debtor**. The UCC search certificate from the Secretary of State of the State of Texas may not reveal financing statements filed under the prior name of the debtor unless a secured party has taken affirmative action to amend such financing statements. Such financing statements may still be effective.[350] In order to render a "priority" opinion, it is essential that the Opinion Giver obtain from the debtor a list of all names and trade names which have been utilized by the debtor in the immediately preceding five years. UCC searches must be conducted under prior names in order to render an opinion without an exception for former names. While financing statements filed under trade names are not generally effective, if the secured party has notice, it may also be necessary to conduct searches under trade names of the debtor.[351] If lien searches are not conducted under other names, it is appropriate to include a qualification in the opinion to the effect that:

---

[345] Id.

[346] UCC §9.403(a) (a financing statement is effective upon presentation to the filing officer and payment of the filing fee).

[347] UCC § 9.401(b).

[348] UCC § 9.401(b).

[349] California UCC Report, supra note 1, at 828.

[350] UCC § 9.402(g) (a financing statement filed under the debtor's prior name will continue to perfect a security interest that existed at the time of the name change).

[351] Financing statements filed under a trade name are not sufficient to perfect a security interest unless the trade name is so similar that it would be discovered in the search of the filing officer's records. UCC § 9.402(g). But see UCC § 9.401(b) (financing statement is effective against parties with actual knowledge of its existence).

a. Assumptions Regarding Financing Statements.

In our examination of the UCC Reports, we have assumed the following: (i) that all financing statements, other than the Financing Statements, in which Borrower is named as debtor have been properly filed and indexed in the appropriate filing offices in the State[s], (ii) that such UCC Reports are accurate and complete, (iii) that Lender has no knowledge of the contents of any other financing statement covering the Collateral or the existence of other security interests (perfected or unperfected) in the Collateral, and (iv) that existing financing statements, if any, have been filed under the correct name of the Borrower. Our opinion as to priority of security interests does not apply to security interests in the Collateral created by Borrower and perfected by the filing of financing statements under any name other than the present name of the Borrower.

In appropriate cases, if the opinion is delivered before filing has occurred, or before confirmation of filing has been received, the following assumption may be appropriate:

For purposes of this opinion, we have assumed the proper filing of the Financing Statements in the offices and in the jurisdictions set forth on Annex A attached hereto.

b. Assumptions Concerning Collateral.

We have also assumed that the following facts concerning the Collateral are true in rendering this opinion:

i **(a) Borrower's right, title and interest to the assets to be subject to security interests of the Lender are free and clear of any liens, encumbrances, or claims, except (i) Permitted Liens (as defined in the Transaction Documents), and (ii) as shown in the UCC Reports, (b) the Borrower has good and sufficient title to these assets, (c) the Borrower has "rights in the collateral" as that term is used in Section 9.203 of the UCC, (d) value has been given within the meaning of Section 9.203 of the UCC, and (e) the Borrower's chief executive office is located at [specify location].**

[ii [Use only if stock is pledged] The original certificates evidencing the stock pledged pursuant to the Security (Pledge) Agreement have been endorsed and delivered to the Lender, who has taken possession in the ordinary course of its business, and the Lender is a purchaser for new value in good faith and without notice of any adverse claim to the stock or knowledge that it is subject to a security interest.]

6. Qualifications Regarding Security Interests in Personal Property. The following are proposed qualifications to be used in connection with the "priority" opinion above. These qualifications will need to be modified, depending on the type of assets included within the Collateral. Unless otherwise indicated, an opinion which incorporates the Qualifications Regarding Security Interests in Personal Property (herein so called) from this Report by reference includes the following qualifications, without the need to recite them in the opinion.

The foregoing opinion concerning the security interest of Lender in the Collateral is qualified as follows:

The opinions given herein as to the creation and perfection and priority of security interests do not cover real property and other property transactions excluded from the coverage of the UCC pursuant to Sections 9.102 and 9.104. The opinion given above as to the priority of security interests does not apply to instruments as defined in UCC Section 9.105(1)(i) (other than the Stock), money, insurance payable by reason of loss or damages to the Collateral to the extent payable to a person not a party to the security agreement, and other property subject to perfection procedures other than the filing of a financing statement pursuant to UCC Section 9.302. Further, we express no opinion regarding the accuracy or

completeness of any property descriptions contained in the Transaction Documents, or the title to any assets pledged to you by the Borrower.

We call your attention to, and our opinions are limited by, the fact that:

(a) in the case of Collateral consisting of instruments not constituting part of chattel paper (as such terms are defined in Chapter 9 of the UCC), including the Pledged Shares, the security interests of the Lender therein cannot be perfected by the filing of UCC financing statements but will be perfected if possession thereof is obtained in accordance with the provisions of the Security Agreement;

(b) in the case of Collateral consisting of motor vehicles for which certificates of title have been issued and for which the exclusive manner of perfecting a security interest is by noting the Lender's security interests on the certificate of title in accordance with the Texas Certificate of Title Act or other comparable law of the other States, the Lender's security interests therein cannot be perfected by the filing of a UCC financing statement but will be perfected if the Lender's security interests are so noted;

(c) The continuation of any security interest and perfection of any security interest in Collateral consisting of proceeds is limited to the extent set forth in § 9.306 of the UCC;

(d) Continuation statements complying with the UCC must be filed with the filing offices in which each Financing Statement was filed not more than six months prior to the expiration of a five year period dating from the date of filing of the Financing Statement (or otherwise within the time permitted by § 9.403 of the UCC) and subsequent continuation statements must be filed within six months prior to the end of each subsequent five year period and amendments or supplements to the Financing Statements and or additional financing statements may be required to be filed in the event of a change of name, identity or corporate structure of the debtor or if the debtor changes the jurisdiction of its place of business (or, if it has more than one place of business, its chief executive office) or the jurisdiction in which collateral is located;

(e) in the case of property which becomes Collateral after the date hereof, Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case under the Federal Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of the case;

(f) Although the filing of a financing statement will perfect a security interest in chattel paper and negotiable documents, the perfected security interest is subject to the rights of subsequent holders or purchasers (including secured parties) without actual knowledge of the security interest;

(g) As against third parties having or acquiring an interest in or a lien on the real property to which any fixtures are attached, the rights and duties of the law of the States relating to real property and fixtures may apply;

(h) Holders of purchase money security interests (a) may have rights in the Collateral superior to those of Lenders if any Borrower obtained possession of Collateral other than inventory less than 10 days prior to the effective date of the UCC Reports and a financing statement was filed within 10 days after delivery of the Collateral to such Borrower, and (b) may obtain superior rights if the purchase money secured party follows certain other procedures with respect to future Collateral;

(i) We express no opinion as to the creation, perfection or priority of any security interest in any deposit account except as such may be identifiable proceeds;

(j) We express no opinion as to the priority of such security interest in:

(A) any Collateral which has been consigned or which is commingled with consigned goods,

(B) any Collateral consisting of goods as against another security interest therein perfected under the laws of any jurisdiction other than the State [of Texas],

(C) any Collateral consisting of goods as against a security interest therein created by any person other than any Borrower prior to its acquisition by such Borrower,

(D) any Collateral consisting of goods as against a "buyer in ordinary course of business" (as such term is defined in the UCC) of such Collateral,

(E) any Collateral consisting of chattel paper which is not stamped by a Borrower with a legend showing the Lender's security interest (as provided by the Security Agreement) as against a purchaser of such chattel paper who would take priority over an earlier security interest under Section 9.308 of the UCC,

(F) any Collateral consisting of goods covered by a document of title or in the possession or custody of a bailee,

(G) any Collateral consisting of goods as against a lien therein given by statute or rule of law for materials or services,

(H) any Collateral consisting of goods which are installed in or affixed to, or become a part of a product or mass with, goods which are not items of Collateral, and

(I) any Collateral or portions thereof which are or become subject to [a] liens for taxes, assessments, levies, fees and other governmental and similar charges and other claims of any type of any governmental authority, in each case that may be afforded priority over the security interest by federal law or state law, or [b] rights of governmental or public authorities to condemn, appropriate, use or control the use of any of the Collateral, or [c] setoffs, counterclaims or defenses of account debtors or obligors on any chattel paper which constitutes Collateral; and

(k) We express no opinion as to the perfection or priority of the security interest in any Collateral to the extent the Lender consented to any security interest in favor of any other party or has authorized the disposition of any Collateral or released or subordinated the Lender's security interest therein;

(l) Our opinions concerning the perfection, priority and enforceability of the security interest in the Collateral are in all cases limited to the borrowing under the Transaction Documents and such future advances as are made thereunder in accordance with the terms of the Transaction Documents; no opinion is expressed as to the effectiveness of the Transaction Documents to grant and create a security interest with respect to any indebtedness other than that created by borrowings under the Transaction Documents; and

(m) Further, our opinion with respect to the perfection or priority of any security interest in documents, instruments and goods in which the grantor of such security interest acquires rights after the date hereof is limited to property (a) which is located in Texas when such grantor acquires rights therein of (b) in which the secured party has a purchase money security interest and (i) which the secured party or parties and such grantor understand, at the time such grantor

acquires rights therein, will be kept in Texas and (ii) which arrives in Texas within thirty days after such grantor receives possession thereof.

7. **Incorporation of Assumptions and Qualifications by Reference**. To incorporate the Assumptions Regarding Security Interests in Personal Property and the Qualifications Regarding Security Interests in Personal Property by reference in an Opinion Letter, the following language is suggested:

> **This Opinion Letter incorporates by reference the Assumptions and Qualifications Regarding Security Interests in Personal Property, as defined in the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions of the Business Law Section of the State Bar of Texas (1992). Accordingly, this Opinion Letter should be read in conjunction therewith.**

X. FACTUAL BASIS FOR LEGAL OPINIONS; HOW TO GATHER FACTS FOR AN OPINION

A. Factual Investigation.

To the extent not assumed, the underlying facts relating to any proposed Opinion Letter must be established through reliance on information provided by others, as contemplated by § 3 of the ABA Accord[359], or other methods of factual investigation. The results of this investigation should be documented in the files of the Opinion Giver. The following is a brief discussion of the factual bases for opinions, and some recommendations on how to gather facts for an opinion.

B. Standards for Factual Examinations.

Attorneys conducting factual investigations in preparation for rendering an Opinion Letter should generally comply with the following guidelines:

(1) the lawyer performing the examination should have sufficient technical training and expertise to perform all phases of the investigative task;

(2) the Opinion Giver should maintain an independence in attitude in all matters relating to the investigation, and should avoid conflicts of interest;

(3) the lawyer should exercise due professional care in the performance of the examination and the preparation of memoranda or other written evidence documenting the scope and results of the investigation; and

(4) the Opinion Giver should make certain that the investigation is sufficiently complete to provide appropriate evidentiary matter as to relevant facts through inspection, observation, inquiry, confirmation, and research to afford a reasonable factual basis for the opinion.

C. How to Gather Facts for an Opinion.

1. **Review of Transaction Documents**. The Transaction Documents for the Transaction should be reviewed thoroughly by the Opinion Giver in preparation for rendering a legal opinion. In complex transactions, there will be a number of related documents that will need to be reviewed, and in some cases more than one opinion of counsel will be required. If the Transaction Documents refer to Other Documents they should also be reviewed.

2. **Preparation of Preliminary Checklist**. After the lawyer has reviewed the relevant operative documents, an outline or checklist should be prepared to facilitate the investigation. The outline

---

[359] ABA Report, supra note 3, at § 3, p. 184, and Commentary.

should list the major types of investigations involved, the documents to be reviewed, and the investigations to be made to establish the factual basis for each opinion.

3. **Conducting the Factual Investigation; Checklist for Corporate Examination**. The factual investigation to support an opinion, including any necessary corporate examination of minute books, corporate stock records, and other records, should be conducted as early as possible in the process after the general scope and nature of the inquiry has been determined. If the Transaction is negotiated over a long period of time, it may be necessary to update aspects of the examination to a date close to the Closing, to determine that no new facts have developed and that changes have not occurred between the date of the initial examination and the date of delivery of the opinion.

4. **Record of the Factual Investigation**. The factual investigation should be documented appropriately in the files of the Opinion Giver. The attorney performing the factual investigation should prepare for the internal records of the Opinion Giver a summary of what has been done to support the opinion. This summary does not need to set forth the examination in detail, but rather should summarize the examination, highlighting any possible problems noted and actions taken to correct the problem or suggestions as to methods of solution. The summary should be in a form that will be helpful to the attorney at the time of the investigation and to the firm later, if it is asked to substantiate the factual investigation made to support the opinion. The summary should be in a form that will allow the Opinion Giver to determine what work needs to be done and to make an estimate of the timing of the investigation and the number of lawyers, paralegals and other staff personnel necessary to accomplish the investigation.

XI. PROCEDURES AND POLICIES TO MAINTAIN PROFESSIONALISM AND QUALITY CONTROL

A. Professionalism and Quality Control.

Professionalism and quality control in connection with legal opinions is essential. Set forth below are recommended procedures and policies that may be utilized to promote and maintain such professionalism and quality control.

1. **Issue Identification; Defining the Scope and Substance of Legal Opinions**. In connection with the issuance of legal opinions, the Opinion Recipient's counsel must advise the Opinion Recipient as to what legal opinions the Opinion Recipient should obtain and from whom such opinions should be obtained, including any which should be obtained from the Opinion Recipient's counsel rather than or in addition to counsel to other parties to the Transaction. Once the relevant issues are identified by the Opinion Recipient's counsel, the Opinion Recipient should be advised as to the necessary investigation of facts and law required for any legal opinion the Opinion Recipient's counsel will render. Furthermore, the Opinion Recipient's counsel should advise the Opinion Recipient as to whether the Opinion Recipient appears to be adequately protected in relying upon opinions to be received from counsel to other parties in the transaction.

Because the main goal of legal opinions is to inform, the Opinion Recipient's counsel should confer with the Opinion Recipient and discuss matters covered by the legal opinion to the extent necessary (i) to inform the Opinion Recipient as to matters which may affect the Opinion Recipient's conduct or judgment in the transaction, (ii) to inform the Opinion Recipient of matters of which the Opinion Recipient needs to be apprised in order to make business decisions, which are properly made by the Opinion Recipient rather than its lawyer, and (iii) to inform the Opinion Recipient of matters which may significantly increase the cost of the transaction, through increased legal fees or otherwise.

2. **Internal Review of Opinions**.

a. **Opinion Committee**. A law firm may establish an opinion committee that will have the responsibility for establishing firm policies and for issuing legal opinions. In addition, the opinion committee may have responsibility for reviewing opinions issued by the firm. Typically, this review occurs prior to the signing and delivery of the opinion. Opinion Givers are encouraged to obtain approval from the opinion committee of their firms early in the Transaction, to avoid "eleventh hour" negotiations. Some firms

require the approval of a member of the opinion committee as well as the approval of the opinion by a partner experienced and knowledgeable in the substantive area addressed by the opinion.

b. Substantive Review by Experienced Individual Attorneys. In the absence of an opinion committee (or depending on the function of the opinion committee), a law firm should require that a firm opinion be reviewed by a partner or shareholder before it is delivered. Although the practice among firms appears to vary widely, the most important aspect of this type of review is the substantive review by an experienced individual attorney knowledgeable in the areas of practice addressed in the opinion. The advantages of having opinions reviewed by a single partner or shareholder rather than an opinion committee may be that the process is less cumbersome and more efficient, and can be accomplished in a more timely manner.

B. Opinion Manuals or Memoranda of Firm Policy.

A firm that renders a significant number of opinions as part of its traditional practice should consider developing a manual containing policies and procedures concerning the issuance of legal opinions. Preferably, such an opinion manual would be a looseleaf compilation, so that the policies and procedures of the firm could be updated or changed as needed. The manual or memorandum approach may be used in addition to, or possibly in lieu of, the approval of opinions by an opinion committee. The use of an opinion manual may be particularly desirable for larger firms, since it can be used to encourage uniformity in the giving of opinions and adherence to policies for rendering opinions based on many years of collective experience and accumulated know-how.

XII. CONCLUSION

The primary purpose of a legal opinion is to inform the Opinion Recipient, and to provide assurance that the Opinion Recipient will benefit from the intended legal consequences of its actions and those of the other parties to the Transaction. Unfortunately, there is a lack of clear legal precedent and there are differences of opinion among members of the legal profession regarding the meaning of legal opinions. The Texas Report and the ABA Report have been designed to provide guidelines and principles for issuing legal opinions, and thereby to (i) minimize or avoid unnecessary qualifications and overly complex and ambiguous language, (ii) help save time, avoid confusion, and consequently reduce legal fees for the issuance of legal opinions, and (iii) create an increased professional awareness and understanding by lawyers concerning opinion language and their professional responsibilities in issuing legal opinions. Hopefully, the publication of the ABA Report and the Texas Report in final form, and their broad acceptance and use by members of the legal profession will accomplish these goals, thereby enabling lawyers to better serve their Clients and their profession.

EXHIBIT "A"

ILLUSTRATIVE FORM OF OPINION LETTER
ADOPTING THE ABA ACCORD IN A
SECURED LOAN TRANSACTION

[The following is an illustrative form of borrower's counsel's opinion to lender in a secured loan transaction including security interests in personalty under the Uniform Commercial Code. This Opinion Letter is an illustration of how an Opinion Giver might issue an Opinion which (i) adopts the ABA Accord, (ii) which alternatively either incorporates by reference the Other Common Texas Qualifications from the Texas Report, or utilizes a Generic Exception to the Remedies Opinion, and (iii) incorporates by reference the Assumptions and Qualifications Regarding Security Interests in Personal Property of the Texas Report ("UCC Qualifications"). This illustrative form of Opinion Letter generally follows the form and the order of the illustrative Opinion Letter in the ABA Report. Many of the assumptions, exceptions, and explanations and other matters often set forth are not stated because they are automatically included as a consequence of the adoption of the ABA Accord, and the incorporation by reference of the Other Common Texas Qualifications and the UCC Qualifications.]

[Letterhead of Borrower's Counsel]

[Date of Closing of the Transaction]

[NAME OF LENDER(S)]
[ADDRESS]

Re: **[Insert brief description of the Transaction]**

Ladies and Gentlemen:

[INTRODUCTION] We have acted as **[describe limited or special role, if appropriate]** counsel to **[identify Client]** (the "Corporation") in connection with that certain **[describe Credit Agreement]** (the "Agreement"), and **[the ancillary Transaction Documents, if any, to be described and defined]** which provide for **[describe Transaction]**. This Opinion Letter is provided to you pursuant to Section **[specify section]** of the Agreement. Except as otherwise indicated herein, capitalized terms used in this Opinion Letter are defined as set forth in the Agreement or the Accord (see below).

This Opinion Letter is governed by, and shall be interpreted in accordance with, the Legal Opinion Accord (the "Accord") of the ABA Section of Business Law (1991). As a consequence, it is subject to a number of qualifications, exceptions, definitions, limitations on coverage and other limitations, all as more particularly described in the Accord, and this Opinion Letter should be read in conjunction therewith. The law covered by the opinions expressed herein is limited to **[the Federal Law of the United States and]** the Law of the State of **[specify state]**.

[QUALIFICATIONS OF FACTUAL EXAMINATION]. [If factual representations of the Client are to be relied upon for purposes of the Opinion Letter, include the following language:]

We have relied upon factual representations made by the Corporation in **[Sections (specify) of]** the Agreement.

[If the parties to the Transaction and their counsel have agreed that the factual basis for the Opinion Letter may be established in part based upon reliance on certificates of officers of the Client, the following language should be included.]

As to questions of fact material to such Opinions, we have, where relevant facts were not independently verified or established, relied upon certifications by officers of the Corporation.

[If the introductory paragraphs of the Opinion Letter did not list the documents and certificates examined, this limitation can be expressed in the body of the Opinion Letter by reference to facts and documents disclosed in an officer's certificate with respect to specific paragraphs of the Opinion Letter. An example of this approach would be as follows:]

In giving the Opinion expressed in paragraph **[specify paragraph]** above, we have relied solely upon a Certificate of **[name of officer]** as to **[listing of factual matters contained in the certificate or other writing]**.

[QUALIFICATION FOR RELIANCE ON LOCAL COUNSEL]. [The following language defining or limiting the responsibility of the principal counsel with respect to reliance on an opinion of local counsel may be used, unless the local counsel opinion is "isolated" from the primary opinion:]

In rendering the opinion expressed in paragraph **[specify paragraph]** above, we have relied solely on the opinion of **[name of counsel in other jurisdiction]**, dated **[specify date]** a copy of which is concurrently being delivered to you, to the extent those opinions concern the law of **[Other Jurisdiction]**. We have made no independent examination of the laws of the Other Jurisdiction.

[If the opinions of Other Counsel are "isolated" from the Opinion Letter, and therefore not covered by the Opinion of the Opinion Giver, the following language may be used:]

We note that various issues concerning matters of **[specify State]** Law are addressed in the opinion of **[Other Counsel - identify by name]**, separately provided to you **[, and we express no opinion with respect to those matters]**.

[UCC Searches. Uniform Commercial Code searches ("UCC Searches") may be made and relied on with respect to the existence of liens or encumbrances on personal property. The Secretary of State of the State of Texas will provide a certificate listing financing statements, but delivery of this certificate tends to be somewhat slow, and attorneys will frequently rely on private document firms in Austin to provide these reports. Information on Uniform Commercial Code financing statement filings is obtainable only as of a date some time prior to the closing (usually several days), and cannot be updated by telegram. Accordingly, this limitation on availability requires the attorney to qualify any reference to UCC Searches by including language similar to the following:]

Insofar as this opinion relates to security interests, liens or encumbrances, we have relied upon, and assumed the completeness and accuracy of the report of **[Name of search company]** dated **[specify date]**, relating to financing statement filings showing **[name of debtor]** as debtor, with the Office of the Secretary of State of the State of Texas, current through **[specify date]**, at **[_.m.--specify time]** (the "UCC Searches). Information regarding such filings does not include any filings filed or terminated in the State of Texas after the effective date indicated in the report, and accordingly, we express no opinion relating to any security interests which may be effected or filings filed or recorded after such effective date.

[ASSUMPTIONS] [Any assumptions to be stated, if not dealt with in the Accord and therefore not automatically included as a consequence of the adoption of the Accord, should be stated here.]

[OPINIONS] [The substantive portion of the opinion should typically begin with an introductory statement as follows:]

Based upon and subject to the foregoing and the other qualifications and limitations stated in this Opinion Letter, we are of the opinion that:

[Instruction. There should be set forth here, in separately numbered paragraphs, the responses called for by the specific legal issues the Opinion is to address. Often, three such issues, with which the Accord specifically deals, would be a Remedies Opinion, a No Breach or Default Opinion, and a No Violation of Law Opinion.]

[Certain commonly used opinion clauses are set forth below and may be used, as applicable]:

[1] The Corporation is duly incorporated, validly existing, and in good standing under the laws of the State of **[specify state]**.

[2] The Corporation has the corporate power and authority to execute, deliver, and perform its obligations under the Transaction Documents. The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Corporation and have been duly executed and delivered by the Corporation.

[3] The Transaction Documents to which the Corporation is a party are enforceable against the Corporation.

[4] Execution and delivery by the Corporation of, and performance of its agreements in, the Transaction Documents do not (i) violate the Constituent Documents, breach, or result in a default under, any existing obligation of the Corporation under **[contracts dealing with money borrowed by the Corporation] [contracts filed by the Corporation with the SEC] [specify other method used to determine, or specifically identify, the "Other Agreements"]**, or (ii) breach or otherwise violate any existing obligation of the Corporation under **[a Court Order disclosed in the Agreement or an exhibit, annex or schedule thereto or in a certificate of the Client] [specify other method used to determine, or specifically identify the Court Orders]**.

[5] Execution and delivery by the Corporation of, and performance by the Corporation of its agreements in, the Agreement do not violate applicable provisions of statutory law or regulation.

[6] No consent, approval, waiver, license or authorization or other action by or filing with any governmental authority is required under Texas or federal statutes or regulations in connection with the execution and delivery by the Corporation of the Transaction Documents, except for those already obtained or completed.

[7] The Corporation's authorized capitalization consists of **[specify number]** shares of common stock, **$[specify par value]** par value per share, of which **[specify number]** shares are issued and outstanding. The outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.

[8] Assuming that Lender takes and keeps possession of the Shares under the Security (Pledge) Agreement, all actions have been taken to create and to perfect the security interest of Lender in the Shares.

[9] The filing of the Financing Statements in the Office of the Secretary of State of Texas will result in the perfection of security interests (the "Security Interests") with respect to all Collateral in which a security interest has been created under the Security Agreement and in which a security interest may be perfected by filing of financing statements under the UCC in Texas.

[10] Based on the UCC Searches, copies of which have been furnished to you, the Security Interests are prior to any other security interest in the Collateral granted by the debtor that is or would be perfected solely by the filing of financing statements pursuant to the UCC in the State of Texas.

[11] [The Corporation is not an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act of 1940, as amended.]

[Instruction. **Any exceptions, limitations or qualifications to the Remedies Opinion or any other opinion - other than the General Qualifications, which are automatically included with respect to the Remedies Opinion as a consequence of the adoption of the Accord - should be stated here immediately following the numbered opinion paragraphs (if not contained in the particular opinion paragraph to which each relates.)**]

[INCORPORATION OF ASSUMPTIONS AND QUALIFICATIONS REGARDING SECURITY INTERESTS IN PERSONAL PROPERTY FROM THE TEXAS REPORT] With respect to the Opinions stated in paragraphs [9] and [10] above, the Assumptions and Qualifications Regarding Security Interests in Personal Property contained in the State Bar of Texas Business Law Section Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions (1992) ("Texas Report") are hereby incorporated by reference. As a consequence, these opinions are subject to a number of qualifications, exceptions, and limitations on coverage, all as more particularly described in the Texas Report, and this Opinion Letter should be read in conjunction therewith.

[ENFORCEABILITY LIMITATIONS - OTHER COMMON TEXAS QUALIFICATIONS]. [If so desired, the Other Common Texas Qualifications may be incorporated by reference using the language set forth below. If one of the Generic Exceptions is used, then the Other Common Texas Qualifications do not need to be incorporated by reference, since they are automatically included in the Generic Exception, along with the General Qualifications of the Accord.]

This Opinion incorporates by reference the Other Common Texas Qualifications contained in the State Bar of Texas Business Law Section Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions (1992) (the "Texas Report"), and this opinion should be read in conjunction with the Texas Report.

[ENFORCEABILITY LIMITATIONS - GENERIC EXCEPTION] [One of the following generic exceptions may be used, if applicable:]

Either,

[A] The opinion expressed herein that the Transaction Documents are enforceable against [the Client] is also subject to the qualification that certain of the remedial, waiver and other provisions of the Transaction Documents may not be enforceable; but such unenforceability will not, in our judgment, render the Transaction Documents invalid as a whole, or substantially interfere with the realization of the principal legal benefits provided by the Transaction Documents, except to the extent of any procedural delay which may result therefrom.

or,

[B] The opinion expressed herein that the Transaction Documents are enforceable against [the Client] is also subject to the qualification that certain of the remedial, waiver, and other provisions of the Transaction Documents may not be enforceable; but, such unenforceability will not, in our judgment, render the Transaction Documents invalid as a whole and, in the event of a material breach of a material covenant in the Transaction Documents, the Lender may exercise remedies that would normally be available to a secured lender.

[If the Generic Exception is to be interpreted in accordance with the Texas Report, add the following language:]

The foregoing exception has the meaning set forth in the State Bar of Texas Business Law Section Report of the Legal Opinion Committee Regarding Legal Opinions in Business Transactions (1992) (the "Texas

Report") and Part VII, Subpart C.3 of the Texas Report is hereby incorporated by reference, and this Opinion Letter should be read in conjunction therewith.

[CONFIRMATION REGARDING LEGAL PROCEEDINGS]. [Instruction. **If the Opinion Letter is to provide information as to pending or threatened legal proceedings, use the following language:]**

We hereby confirm to you, pursuant to the request set forth in Section **[specify section]** of the Agreement, that there are no actions or proceedings against the Corporation, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in [the Agreement or an exhibit, annex or schedule thereto] [an officer's certificate], come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold].

[EXPLAINED OPINION] [Instruction. **If an explained opinion is to be provided, it may be included or referred to at this place in the Opinion Letter.]**

[CHANGES TO THE ACCORD PURSUANT TO ACCORD § 21] **[Instruction: If the Accord is to be modified by private ordering pursuant to § 21 of the Accord, use the following language:]**

To the extent not specifically modified above, the Opinion Letter modifies the Accord, pursuant to § 21 of the Accord, as follows:

The following assumptions are made, in addition to those set forth in § 4 of the Accord:

(i) This Opinion Letter incorporates by reference the Assumptions Regarding Security Interests in Personal Property of the Texas Report;

(ii) **[other assumptions--specify]**.

[Instruction. **If any of the General Qualifications (see §§ 11-14 of the Accord) are to be made applicable to any Opinion other than the Remedies Opinion, such as the No Violation of Law Opinion, the following sentence should be included at this place in the Opinion Letter:]**

[The General Qualifications] [The Bankruptcy and Insolvency Exception] [The Equitable Principles Limitation] [The Other Common Qualifications] apply to the opinion(s) set forth in paragraphs(s) **[specify paragraphs]** above as well as to the Opinion **[i.e., the Remedies Opinion]** set forth in paragraph **[specify paragraph]** above.

[Instruction. **If a tailored framework for the Primary Lawyer Group has been agreed upon with the Opinion Recipient (see ¶ 6.3 of the Accord Commentary), it should be described with the following language:]**

The phrase "Primary Lawyer Group," as used in the Accord, is hereby modified and for purposes of applying the Accord to this Opinion Letter the Primary Lawyer Group means [the lawyers in this firm who have given substantive legal attention to representation of the Corporation in connection with the Transaction] [other tailored framework].

[Instruction. **If any person other than the Opinion Recipient is to be entitled to rely on the Opinion, that arrangement should be described with the following language:]**

A copy of this Opinion Letter may be delivered by you to **[lending bank] [syndicate participants] [subsequent purchasers] [rating agency] [other]** in connection with **[state purpose]**, and such **[person] [persons]** may rely on this Opinion Letter as if it were addressed and had been delivered to **[it] [them]** on the date hereof. Subject to the foregoing, this Opinion Letter may be relied upon by you only in connection with the Transaction and may not be used or relied upon by you or any other person for any purpose whatsoever, except to the extent authorized in the Accord, without in each instance our prior written consent.

Very truly yours,

[LAW FIRM]

By:_____

Exhibit "B"

ILLUSTRATIVE FORM OF NON-ACCORD OPINION
LETTER IN A SECURED LOAN TRANSACTION

[The following is an illustrative form of non-Accord borrower's counsel's opinion to lender in a secured loan transaction, including perfection and priority of security interests in personalty under Article 9 of the Uniform Commercial Code. The Opinion Letter that follows is an illustration of how an Opinion Giver might issue an Opinion (i) which does not adopt the ABA Accord, (ii) which alternatively either (A) sets forth in exhibits to the Opinion Letter the Other Common Qualifications from the ABA Report and the Other Common Texas Qualifications from the Texas Report, or (B) utilizes a Generic Exception to the Remedies Opinion, and (iii) which sets forth in the text of the Opinion Letter the Assumptions and Qualifications Regarding Security Interests in Personal Property of the Texas Report].

[Letterhead of Borrower's Counsel]

[Date of Closing of the Transaction]

[NAME OF LENDER(S)]
[ADDRESS]

Re: **[Insert brief description of the Transaction]**

Ladies and Gentlemen:

[INTRODUCTION] We have acted as **[describe limited or special role, if appropriate]** counsel to **[identify Client]** (the "Corporation") in connection with **[insert description of Transaction]**. This Opinion Letter (herein so called) is furnished to you as required by Section **[specify section]** of the **[name of agreement]** (the "Agreement"). Capitalized terms used in this Opinion Letter and not defined herein are defined as set forth in the Agreement.

[LIMITATION OF LAW ADDRESSED BY OPINION LETTER] [Instruction. The Opinion Giver should expressly limit the Opinion Letter to the Law of designated jurisdictions and, where appropriate, to discrete laws within a particular jurisdiction, in each case to the specified in the Opinion Letter. In this regard, the following language is suggested:]

Our opinions are limited in all respects to the substantive law of the State of Texas **[and the General Corporation Law of the State of Delaware]**, and the federal law of the United States, and we assume no responsibility as to the applicability thereto, or the effect thereon, of the laws of any other jurisdiction.

1. Documents Reviewed

[DOCUMENTS REVIEWED--LOAN DOCUMENTS]. As counsel to the Corporation, we have reviewed the following documents and instruments (collectively, the "Transaction Documents"):

(i) the Agreement;

(ii) Promissory Note, dated as of **[specify date]**, executed by Borrower and payable to the order of Lender in the original principal amount of $**[specify amount]**;

(iii) Security Agreement, dated as of **[specify date]**;

(iv) Security (Pledge) Agreement, dated as of **[specify date]**; and

(v) **[Insert Description of other Transaction Documents]**.

[DOCUMENTS REVIEWED--OTHER DOCUMENTS EXAMINED:] In addition to the Transaction Documents, other documents we have examined in rendering this opinion, and upon which we have relied, include the following:

(i) The Articles of Incorporation of the Corporation, certified by the Secretary of State of **[specify state]** on **[specify date]**;

(ii) The Bylaws of the Corporation, certified to be true and correct by the Secretary of the Company as of **[specify date]**;

(iii) Certificates from the Secretary of State of **[specify state]** indicating that the Corporation is in good standing in the State of **[specify state]** as of **[specify date]**;

[(iv)] **[Certificate dated [specify date] of the Comptroller of Public Accounts of the State of Texas attesting to the current payment by the Corporation of all franchise and similar taxes;]**

(v) Copies of resolutions adopted by the Board of Directors of the Corporation authorizing the execution, delivery, and performance of the Transaction Documents, and certified by its Secretary;

(vi) Certificate of **[title of officer]** of Borrower, dated the date hereof certifying as to certain factual matters, **[including litigation and other proceedings, etc.]** and identifying **[certain material agreements] [and court orders]** to which the Corporation is a party (the "Borrower Certificate");

(vii) Documents listed in the Borrower Certificate; and

(viii) **[LIST OTHER DOCUMENTS REVIEWED]**.

2. Qualifications to Factual Examination [;Reliance on Local Counsel]

[GENERAL QUALIFICATION TO FACTUAL INVESTIGATION, INCLUDING RELIANCE ON OFFICER'S CERTIFICATES.] [If an Opinion is given in part in reliance on officers' certificates, the following language may be set forth in the Opinion:]

> We have been furnished with and examined originals or copies, certified or otherwise identified to our satisfaction, of all such records of the Corporation, agreements and other instruments, certificates of officers and representatives of the Corporation, certificates of public officials, and other documents, **[and we have had such discussions with appropriate officers of the Corporation]** as we have deemed necessary or desirable as a basis for the opinions hereinafter expressed. As to questions of fact material to such opinions, we have, where relevant facts were not independently verified or established, relied upon certificates of **[and discussions with]** officers of the Corporation.

[If factual representations of the Client are to be relied upon for purposes of the Opinion Letter, include the following language:]

We have relied upon factual representations made by the Corporation in **[Sections (specify) of]** the Agreement.

[If the introductory paragraphs of the Opinion did not list the documents and certificates examined, this limitation can be expressed in the body of the Opinion by reference to facts and documents disclosed in an officer's certificate with respect to specific paragraphs of the Opinion. An example of this approach would be as follows:]

In giving the opinion expressed in paragraph **[specify paragraph]** below, we have relied solely upon a Certificate of **[name of officer]** as to **[listing of factual matters contained in the certificate or other writing]**.

[If the Opinion Giver and counsel for the Opinion Recipient agree that the Opinion Giver may limit the scope of inquiry to particular documents, matters or procedures, the following statement should be included:]

In rendering the opinions hereinafter expressed, we have, with your consent, relied only upon our examination of the foregoing documents and certificates, and we have made no independent verification of the factual matters set forth in such documents or certificates.

[QUALIFICATION FOR RELIANCE ON LOCAL COUNSEL.] **[The following language defining or limiting the responsibility of the principal counsel (the Opinion Giver) with respect to reliance on an Opinion Letter of local counsel may be used, unless the local counsel Opinion Letter is "isolated" from the primary Opinion Letter:]**

In rendering the opinion expressed in paragraph **[specify paragraph]** below, we have relied solely on the opinion of **[name of counsel in other jurisdiction]**, dated **[specify date]**, a copy of which is being concurrently delivered to you, to the extent those opinions concern the law of **[specify other jurisdiction]**. We have made no independent examination of the laws of the State of **[specify other jurisdiction]**.

[In certain appropriate circumstances, the following alternative language may be added in lieu of the last sentence of the foregoing statement:]

Although we have not reviewed the foregoing matters for purposes of rendering any opinions with respect thereto, we have reviewed and are satisfied with the form and scope of such opinion and believe that you are justified in relying thereon.

[If the Opinions of Other Counsel are "isolated" from the Opinion Letter, and therefore not covered by the Opinion Letter of the Opinion Giver, the following language may be used:]

We note that various issues concerning matters of **[specify Other Jurisdiction]** are addressed in the opinion of **[Other Counsel - identify by name]**, separately provided to you **[, and we express no opinion with respect to those matters]**.

[UCC SEARCHES.] **[Uniform Commercial Code searches ("UCC Searches") may be made and relied on with respect to the existence of liens or encumbrances on personal property. The Secretary of State of the State of Texas will provide a certificate listing financing statements, but delivery of this certificate tends to be somewhat slow, and attorneys will frequently rely on private document firms in Austin to provide these reports. Information on Uniform Commercial Code financing statement filings is obtainable only as of a date some time prior to the closing (usually several days), and cannot be updated by telegram. Accordingly, this limitation on availability requires the attorney to qualify any reference to UCC Searches by including language similar to the following:]**

Insofar as this opinion relates to security interests, liens or encumbrances, we have relied upon, and assumed the completeness and accuracy of the reports of [Name of search company] dated

[specify date], relating to financing statement filings showing [name of debtor] as debtor, with the Office of the Secretary of State of the State of Texas, current through **[specify date]**, at **[_.m. - specify time]** (the "UCC Reports"). Information regarding such filings does not include any filings filed or terminated in the State of Texas after the effective date indicated in the UCC Reports, and accordingly, we express no opinion relating to any security interests which may be effected or filings filed or recorded after such effective date.

3. Assumptions

For purposes of this opinion, we have assumed: (i) the genuineness of all signatures on all documents (other than **[the Corporation]** on the Transaction Documents); (ii) the authenticity of all documents submitted to us as originals; (iii) the conformity to the originals of all documents submitted to us as copies; (iv) the correctness and accuracy of all facts set forth in all certificates and reports identified in this opinion; and (v) the due authorization, execution, and delivery of and the validity and binding effect of the Transaction Documents with regard to the parties to the Transaction Documents other than the Corporation.

[NON-ACCORD OPINION PRACTICE--CHOICE OF LAW ASSUMPTION THAT OTHER LAW IS THE SAME AS THE OPINING JURISDICTION.] [When a borrower with its principal offices in one state borrows money from a lender with its principal offices in another state, the lender frequently requires that the debt instrument contain contractual choice of law provisions which state that the laws of the state in which the lender is located will govern the Transaction. If the Accord is not adopted in an Opinion Letter, and if the Opinion Giver and the counsel to the Opinion Recipient agree that the cost of investigating the law of the Other Jurisdiction or retaining counsel in the Other Jurisdiction are not cost--effective, when compared to any benefit that may be derived from the Opinion, then the Opinion Giver may be allowed to assume that the substantive law of the Other Jurisdiction is the same as that of the Opining Jurisdiction. A suggested form of this assumption is as follows:]

The Agreement provides that it will be governed by the laws of the State of **[specify state]** (the "Other Jurisdiction"). For purposes of this Opinion Letter, we have assumed that the laws of the Other Jurisdiction are identical to the laws of the State of **[specify state]** (the "Opining Jurisdiction"). Accordingly, the Opinion expressed in paragraph [3] below **[the Remedies Opinion]** is given as if the law of the Opining Jurisdiction governs the Agreement without regard to the fact that the Agreement provides that the law of the Other Jurisdiction shall govern the Agreement.

4. Opinions

[OPINIONS] [The substantive portion of the Opinion Letter should typically begin with an introductory statement as follows:]

Based upon and subject to the foregoing and the other qualifications and limitations stated in this Opinion Letter, we are of the opinion that:

[Instruction. There should be set forth here, in separately numbered paragraphs, the responses called for by the specific legal issues the Opinion Letter is to address. Certain commonly used opinion clauses are set forth below and may be used, as applicable:]

[1] The Corporation is duly incorporated, validly existing, and in good standing under the laws of the State of **[specify state]**.

[2] The Corporation has the corporate power and authority to execute, deliver, and perform its obligations under the Transaction Documents. The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Corporation and have been duly executed and delivered by the Corporation.

[3] The Transaction Documents to which the Corporation is a party are enforceable against the Corporation.

[4] The execution and delivery by the Corporation of, and performance of its agreements in, the Transaction Documents do not (i) violate the articles of incorporation or bylaws of the Corporation, breach, or result in a default under, any existing obligation of the Corporation under **[contracts dealing with money borrowed by the Corporation] [contracts filed by the Corporation with the SEC] [specify other method used to determine, or specifically identify, the "Other Agreements"]**, or (ii) **[to our knowledge]** breach or otherwise violate any existing obligation of the Corporation under **[a court order disclosed in the Agreement or an exhibit, annex or schedule thereto, or in the Borrower Certificate] [specify other method used to determine, or specifically identify the court orders]**.

[5] The execution and delivery of the Transaction Documents, the consummation of the transactions contemplated thereby, and compliance by the Company with the provisions thereof will not violate any Texas or federal statute or regulation **[, or Delaware Corporation Law]**.

[6] **[To our knowledge]** No consent, approval, waiver, license or authorization or other action by or filing with any governmental authority is required under Texas or federal statutes or regulations in connection with the execution and delivery by the Corporation of the Transaction Documents, except for those already obtained or completed.

[7] The Corporation's authorized capitalization consists of **[specify number]** shares of common stock, **$[specify par value]** par value per share, of which **[specify number]** shares are issued and outstanding. The outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.

[Paragraphs [8] and [9] below state opinions concerning perfection of security interests under Article 9 of the UCC:]

[8] Assuming that Lender takes and keeps possession of the Shares under the Security (Pledge) Agreement, all actions have been taken to create and to perfect the security interest of Lender in the Shares.

[9] The filing of the Financing Statements in the Office of the Secretary of State of Texas will result in the perfection of security interests (the "Security Interests") with respect to all Collateral in which a security interest has been created under the Security Agreement and in which a security interest may be perfected by filing of financing statements under the Uniform Commercial Code, as in effect in the State of Texas (the "UCC").

[Paragraph [10] below states an opinion concerning priority of security interests under the UCC, to the extent of priority with respect to only any other security interests that are or would be perfected solely by filing under the UCC:]

[10] Based on the UCC Searches, copies of which have been furnished to you, the Security Interests are prior to any other security interest in the Collateral granted by the debtor that is or would be perfected solely by the filing of financing statements pursuant to the UCC in the State of Texas.

[11] **[The corporation is not an "investment company" or a company "controlled" by an "investment company,' within the meaning of the Investment Company Act of 1940, as amended].**

[12] **[The loan, as evidenced by the Transaction Documents, is not usurious.]**

5. Assumptions Concerning Perfection and Priority of Security Interests Under The UCC

With respect to the Opinions stated in paragraphs [9] and [10] above, the following assumptions are applicable:

(a) Assumptions Regarding Financing Statements.

In our examination of the UCC Reports, we have assumed the following: (i) that all financing statements, other than the Financing Statements, in which Borrower is named as debtor have been properly filed and indexed in the appropriate filing offices in the State[s], (ii) that such UCC Reports are accurate and complete, (iii) that Lender has no knowledge of the contents of any other financing statement covering the Collateral or the existence of other security interests (perfected or unperfected) in the Collateral, and (iv) that existing financing statements, if any, have been filed under the correct name of the Borrower. Our opinion as to priority of security interests does not apply to security interests in the Collateral created by Borrower and perfected by the filing of financing statements under any name other than the present name of the Borrower.

[In appropriate cases, if the opinion is delivered before filing has occurred, or before confirmation of filing has been received, the following assumption may be appropriate:]

For purposes of this opinion, we have assumed the proper filing of the Financing Statements in the offices and in the jurisdictions set forth on Annex A attached hereto.

(b) Assumptions Concerning Collateral.

We have also assumed that the following facts concerning the Collateral are true in rendering this opinion:

(i) (A) Borrower's right, title and interest to the assets to be subject to security interests of the Lender are free and clear of any liens, encumbrances, or claims, except (1) Permitted Liens (as defined in the Transaction Documents), and (2) as shown in the UCC Reports, (B) the Borrower has good and sufficient title to these assets, (C) the Borrower has "rights in the collateral" as that term is used in Section 9.203 of the UCC, (D) value has been given within the meaning of Section 9.203 of the UCC, and (E) the Borrower's chief executive office is located at [specify location].

(ii) **[Use only if stock is pledged]** [The original certificates evidencing the stock pledged pursuant to the Security (Pledge) Agreement have been endorsed and delivered to the Lender, who has taken possession in the ordinary course of its business, and the Lender is a purchaser for new value in good faith and without notice of any adverse claim to the stock or knowledge that it is subject to a security interest.]

6. Qualifications to Opinions Regarding Perfection and Priority of Security Interests under Article 9 of the UCC

With respect to the Opinion stated in paragraphs [9] and [10] above, the Opinions concerning the Security Interests of Lender in the Collateral is qualified as follows:

(iii) The Opinions given herein as to the creation and perfection and priority of security interests do not cover real property and other property transactions excluded from the coverage of the UCC pursuant to Sections 9.102 and 9.104. The Opinion given above as to the priority of security interests does not apply to instruments as defined in UCC Section 9.105(1)(i) (other than the Stock), money, insurance payable by reason of loss or damages to the Collateral to the extent payable to a person not a party to the security agreement, and other property subject to perfection procedures other than the filing of a financing statement pursuant to UCC Section 9.302. Further, we express no Opinion regarding the accuracy or completeness of any property descriptions contained in the Transaction Documents, or the title to any assets pledged to Lender by the Corporation.

(iv) We call your attention to, and our Opinions are limited by, the fact that:

(a) in the case of Collateral consisting of instruments not constituting part of chattel paper (as such terms are defined in Chapter 9 of the UCC), including the Pledged Shares, the security interests of the Lender therein cannot be perfected by the filing of UCC financing statements but will be perfected if possession thereof is obtained in accordance with the provisions of the Security Agreement;

(b) in the case of Collateral consisting of motor vehicles for which certificates of title have been issued and for which the exclusive manner of perfecting a security interest is by noting the Lender's security interests on the certificate of title in accordance with the Texas Certificate of Title Act or other comparable law of the other States, the Lender's security interests therein cannot be perfected by the filing of a UCC financing statement but will be perfected if the Lender's security interests are so noted;

(c) The continuation of any security interest and perfection of any security interest in Collateral consisting of proceeds is limited to the extent set forth in § 9.306 of the UCC;

(d) Continuation statements complying with the UCC must be filed with the filing offices in which each Financing Statement was filed not more than six months prior to the expiration of a five year period dating from the date of filing of the Financing Statement (or otherwise within the time permitted by § 9.403 of the UCC) and subsequent continuation statements must be filed within six months prior to the end of each subsequent five year period and amendments or supplements to the Financing Statements and or additional financing statements may be required to be filed in the event of a change of name, identity or corporate structure of the debtor or if the debtor changes the jurisdiction of its place of business (or, if it has more than one place of business, its chief executive office) or the jurisdiction in which collateral is located;

(e) in the case of property which becomes Collateral after the date hereof, Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case under the Federal Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of the case;

(f) Although the filing of a financing statement will perfect a security interest in chattel paper and negotiable documents, the perfected security interest is subject to the rights of subsequent holders or purchasers (including secured parties) without actual knowledge of the security interest;

(g) As against third parties having or acquiring an interest in or a lien on the real property to which any fixtures are attached, the rights and duties of the law of the State[s] relating to real property and fixtures may apply;

(h) Holders of purchase money security interests (A) may have rights in the Collateral superior to those of Lenders if the Corporation obtained possession of Collateral other than inventory less than 10 days prior to the effective date of the UCC Reports and a financing statement was filed within 10 days after delivery of the Collateral to the Corporation, and (B) may obtain superior rights if the purchase money secured party follows certain other procedures with respect to future Collateral;

(i) We express no opinion as to the creation, perfection or priority of any security interest in any deposit account except as such may be identifiable proceeds of Collateral;

(j) We express no opinion as to the priority of such security interest in:

(A) any Collateral which has been consigned or which is commingled with consigned goods,

(B) any Collateral consisting of goods as against another security interest therein perfected under the laws of any jurisdiction other than the State [of Texas],

(C) any Collateral consisting of goods as against a security interest therein created by any person other than the Corporation prior to its acquisition by the Corporation,

(D) any Collateral consisting of goods as against a "buyer in ordinary course of business" (as such term is defined in the UCC) of such Collateral,

(E) any Collateral consisting of chattel paper which is not stamped by a Borrower with a legend showing the Lender's security interest (as provided by the Security Agreement) as against a purchaser of such chattel paper who would take priority over an earlier security interest under Section 9.308 of the UCC,

(F) any Collateral consisting of goods covered by a document of title or in the possession or custody of a bailee,

(G) any Collateral consisting of goods as against a lien therein given by statute or rule of law for materials or services,

(H) any Collateral consisting of goods which are installed in or affixed to, or become a part of a product or mass with, goods which are not items of Collateral, and

(I) any Collateral or portions thereof which are or become subject to (1) liens for taxes, assessments, levies, fees and other governmental and similar charges and other claims of any type of any governmental authority, in each case that may be afforded priority over the security interest by federal law or state law, or (2) rights of governmental or public authorities to condemn, appropriate, use or control the use of any of the Collateral, or (3) setoffs, counterclaims or defenses of account debtors or obligors on any chattel paper which constitutes Collateral; and

(k) We express no opinion as to the perfection or priority of the security interest in any Collateral to the extent the Lender consented to any security interest in favor of any other party or has authorized the disposition of any Collateral or released or subordinated the Lender's security interest therein;

(l) Our Opinions concerning the perfection, priority and enforceability of the security interest in the Collateral are in all cases limited to the borrowing under the Transaction Documents and such future advances as are made thereunder in accordance with the terms of the Transaction Documents; no Opinion is expressed as to the effectiveness of the Transaction Documents to grant and create a security interest with respect to any indebtedness other than that created by borrowings under the Transaction Documents; and

(m) Further, our opinion with respect to the perfection or priority of any security interest in documents, instruments and goods in which the grantor of such security interest acquires rights after the date hereof is limited to property (a) which is located in Texas when such grantor acquires rights therein of (b) in which the secured party has a purchase money security interest and (i) which the secured party or parties and such grantor understand, at the time such grantor acquires rights therein, will be kept in Texas and (ii) which arrives in Texas within thirty days after such grantor receives possession thereof.

7. Enforceability Limitations

[ENFORCEABILITY LIMITATIONS--BANKRUPTCY AND EQUITABLE PRINCIPLES:] The opinion expressed in paragraph [3] **[and--specify any other applicable Opinion]** is qualified and may be limited as follows:

a. The **[enforceability of the Transaction Documents] [and--specify other opinion, if any, to which this exception applies]** is subject to the effect of bankruptcy, insolvency,

reorganization, receivership, moratorium, or other similar laws affecting the rights and remedies of creditors generally.

b. The **[enforceability of the Transaction Documents]** is subject to the effect of general principles of equity, **[whether applied by a court of law or equity]**.

[ENFORCEABILITY LIMITATIONS - OTHER COMMON QUALIFICATIONS FROM THE ABA AND TEXAS REPORTS]. [If so desired, the Other Common qualifications of the ABA Report and the Other Common Texas Qualifications of the Texas Report may be set forth in Exhibits to the Opinion Letter which are referred to here, as follows:]

The Opinion set forth in paragraph [3] above that the Transaction Documents are enforceable against the Corporation is subject to **[the Other Common Qualifications set forth in Exhibit "A" attached hereto] [and] [the Other Common Texas Qualifications set forth in Exhibit "B" attached hereto.]**

[ENFORCEABILITY LIMITATIONS - GENERIC EXCEPTION] [One of the following Generic Exceptions may be used, if applicable; if one of the Generic Exceptions is used, then the Other Common Qualifications of the ABA Report and the Other Common Texas Qualifications of the Texas Report do not need to be set forth, as they are included within the generic exceptions:]

[Either,]

A. The opinion expressed herein that the Transaction Documents are enforceable against **[the Corporation]** is also subject to the qualification that certain of the remedial, waiver and other provisions of the Transaction Documents may not be enforceable; but such unenforceability will not, in our judgment, render the Transaction Documents invalid as a whole, or substantially interfere with the realization of the principal legal benefits provided by the Transaction Documents, except to the extent of any procedural delay which may result therefrom.

[or,]

B. The opinion expressed herein that the Transaction Documents are enforceable against **[the Corporation]** is also subject to the qualification that certain of the remedial, waiver, and other provisions of the Transaction Documents may not be enforceable; but, such unenforceability will not, in our judgment, render the Transaction Documents invalid as a whole and, in the event of a material breach of a material covenant in the Transaction Documents, the Lender may exercise remedies that would normally be available to a secured lender.

[CONFIRMATION REGARDING LEGAL PROCEEDINGS]. [Instruction. If the Opinion Letter is to provide information as to pending or threatened legal proceedings, use the following language:]

We hereby confirm to you, pursuant to the request set forth in Section_**[specify section]** of the Agreement, that there are no actions or proceedings against the Corporation, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in **[the Agreement or an exhibit, annex or schedule thereto] [the Borrower Certificate]**, come within **[the objective standard established in the Agreement for disclosure of such matters] [other objective threshold]**.

[EXPLAINED OPINION.] [Instruction. If an explained opinion is to be provided, it may be included or referred to at this place in the Opinion Letter. In an "explained" or "reasoned" opinion, the lawyer presents a discussion of statutory and judicial authority, indicating that the matter is uncertain or perhaps "not free from doubt," and gives a prediction of the likely resolution of the matter if the issue is appropriately presented to a court of competent jurisdiction. If investigation and research lead to the conclusion that the law is unclear, the attorney should so inform the Client and note the uncertainty in the Opinion].

[DEFINITION OF KNOWLEDGE]: [Instruction. Use the following definition if "to our knowledge" or like language is used as a qualification to any Opinion:]

The qualification of any opinion or statement herein by the use of the words "to our knowledge" or "known to us" means that during the course of representation as described in this Opinion Letter, no information has come to the attention of the attorneys in this firm involved in the transactions described which would give such attorneys current actual knowledge of the existence of the facts so qualified. Except as set forth herein, we have not undertaken any investigation to determine the existence of such facts, and no inference as to our knowledge thereof shall be drawn from the fact of our representation of any party or otherwise.

[LIMITATION ON RELIANCE; NO DUTY TO UPDATE.] [The following limitation on reliance and duty to update may be used:]

This Opinion Letter (i) has been furnished to you at your request, and we consider it to be a confidential communication which may not be furnished, reproduced, distributed or disclosed to anyone without our prior written consent, (ii) is rendered solely for your information and assistance in connection with the above transaction, and may not be relied upon by any other person or for any other purpose without our prior written consent, (iii) is rendered as of the date hereof, and we undertake no, and hereby disclaim any, obligation to advise you of any changes or any new developments which might affect any matters or opinions set forth herein; and (iv) is limited to the matters stated herein and no opinions may be inferred or implied beyond the matters expressly stated herein.

[An alternative formulation of the language limiting reliance on the Opinion Letter is as follows:]

This Opinion Letter is limited to the matters stated herein and no opinion is implied or may be inferred beyond the matters expressly stated. This Opinion Letter is provided at your request and is to be limited in its use to reliance by you in consummating the transactions described herein and no other person or entity may rely or claim reliance upon this Opinion Letter.

Very truly yours,

[LAW FIRM]

By: _____

Exhibit "C"

OTHER COMMON TEXAS QUALIFICATIONS

Other provisions which may be excepted from the Remedies Opinion by Texas lawyers and which are not found in the Other Common Qualifications under the ABA Accord, include the following (herein referred to as the "Other Common Texas Qualifications"):

(a) provisions restricting access to courts or to legal or equitable remedies or purporting to affect the jurisdiction or venue of courts;

(b) provisions purporting to establish evidentiary standards for suits or proceedings to enforce the Transaction Documents;

(c) provisions purporting to waive rights to notice, legal defenses, statutes of limitations, or other benefits that cannot be waived under applicable law;

(d) provisions granting powers of attorney or authority to execute documents or to act by power of attorney on behalf of the Client;

(e) self-help remedies provided for in the Transaction Documents (other than those remedies available pursuant to an exercise in accordance with the provisions of Section 51.002 of the Property Code or Chapter 9 of the Texas Business and Commerce Code);

(f) provisions providing that remedies are cumulative;

(g) provisions that decisions by a party are conclusive;

(h) provisions purporting to provide remedies inconsistent with the UCC, to the extent the UCC is applicable thereto;

(i) provisions purporting to grant to or limit rights of third parties; and

(j) provisions purporting to create a trust or constructive trust without compliance with applicable trust law.

Exhibit "D"

ASSUMPTIONS REGARDING SECURITY
INTERESTS IN PERSONAL PROPERTY

[The following assumptions are proposed by the Committee to be used in connection with a "priority" opinion under the Texas UCC. These assumptions may need to be modified, depending upon the circumstances. Unless otherwise indicated, an Opinion Letter which incorporates the Assumptions Regarding Security Interests in Personal Property (herein so called) from the Texas Report by reference includes the following assumptions, without the need to recite them in the Opinion Letter.]

a. **Assumptions Regarding Financing Statements.**

In our examination of the UCC Reports, we have assumed the following: (i) that all financing statements, other than the Financing Statements, in which Borrower is named as debtor have been properly filed and indexed in the appropriate filing offices in the State[s], (ii) that such UCC Reports are accurate and complete, (iii) that Lender has no knowledge of the contents of any other financing statement covering the Collateral or the existence of other security interests (perfected or unperfected) in the Collateral, and (iv) that existing financing statements, if any, have been filed under the correct name of the Borrower. Our opinion as to priority of security interests does not apply to security interests in the Collateral created by Borrower and perfected by the filing of financing statements under any name other than the present name of the Borrower.

In appropriate cases, if the opinion is delivered before filing has occurred, or before confirmation of filing has been received, the following assumption may be appropriate:

For purposes of this opinion, we have assumed the proper filing of the Financing Statements in the offices and in the jurisdictions set forth on Annex A attached hereto.

b. **Assumptions Concerning Collateral.**

We have also assumed that the following facts concerning the Collateral are true in rendering this opinion:

[i] **(A) Borrower's right, title and interest to the assets to be subject to security interests of the Lender are free and clear of any liens, encumbrances, or claims, except (1) Permitted Liens (as defined in the Transaction Documents), and (2) as shown in the UCC Reports, (B) the Borrower has good and sufficient title to these assets, (C) the Borrower has "rights in the collateral" as that term is used in Section 9.203 of the UCC, (D) value has been given within the meaning of Section 9.203 of the UCC, and (E) the Borrower's chief executive office is located at [specify location].**

[ii] **[Use only if stock is pledged] [The original certificates evidencing the stock pledged pursuant to the Security (Pledge) Agreement have been endorsed and delivered to the Lender, who has taken possession in the ordinary course of its business, and the Lender is a purchaser for new value in good faith and without notice of any adverse claim to the stock or knowledge that it is subject to a security interest.]**

Exhibit "E"

QUALIFICATIONS REGARDING SECURITY INTERESTS IN PERSONAL PROPERTY

[The following are proposed qualifications to be used in connection with a "priority" opinion under the Texas UCC. These qualifications will need to be modified, depending on the type of assets included within the Collateral. Unless otherwise indicated, an Opinion Letter which incorporates the Qualifications Regarding Security Interests in Personal Property (herein so called) from the Texas Report by reference includes the following qualifications, without the need to recite them in the Opinion Letter.]

The foregoing opinion concerning the security interest of Lender in the Collateral is qualified as follows:

The Opinions given herein as to the creation and perfection and priority of security interests do not cover real property and other property transactions excluded from the coverage of the UCC pursuant to Sections 9.102 and 9.104. The Opinion given above as to the priority of security interests does not apply to instruments as defined in UCC Section 9.105(1)(i) (other than the Stock), money, insurance payable by reason of loss or damages to the Collateral to the extent payable to a person not a party to the security agreement, and other property subject to perfection procedures other than the filing of a financing statement pursuant to UCC Section 9.302. Further, we express no Opinion regarding the accuracy or completeness of any property descriptions contained in the Transaction Documents, or the title to any assets pledged to you by the Borrower.

We call your attention to, and our opinions are limited by, the fact that:

(a) in the case of Collateral consisting of instruments not constituting part of chattel paper (as such terms are defined in Chapter 9 of the UCC), including the Pledged Shares, the security interests of the Lender therein cannot be perfected by the filing of UCC financing statements but will be perfected if possession thereof is obtained in accordance with the provisions of the Security Agreement;

(b) in the case of Collateral consisting of motor vehicles for which certificates of title have been issued and for which the exclusive manner of perfecting a security interest is by noting the Lender's security interests on the certificate of title in accordance with the Texas Certificate of Title Act or other comparable law of the other States, the Lender's security interests therein cannot be perfected by the filing of a UCC financing statement but will be perfected if the Lender's security interests are so noted;

(c) The continuation of any security interest and perfection of any security interest in Collateral consisting of proceeds is limited to the extent set forth in § 9.306 of the UCC;

(d) Continuation statements complying with the UCC must be filed with the filing offices in which each Financing Statement was filed not more than six months prior to the expiration of a five year period dating from the date of filing of the Financing Statement (or otherwise within the time permitted by § 9.403 of the UCC) and subsequent continuation statements must be filed within six months prior to the end of each subsequent five year period and amendments or supplements to the Financing Statements and or additional financing statements may be required to be filed in the event of a change of name, identity or corporate structure of the debtor or if the debtor changes the jurisdiction of its place of business (or, if it has more than one place of business, its chief executive office) or the jurisdiction in which collateral is located;

(e) in the case of property which becomes Collateral after the date hereof, Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the

commencement of a case under the Federal Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of the case;

(f) Although the filing of a financing statement will perfect a security interest in chattel paper and negotiable documents, the perfected security interest is subject to the rights of subsequent holders or purchasers (including secured parties) without actual knowledge of the security interest;

(g) As against third parties having or acquiring an interest in or a lien on the real property to which any fixtures are attached, the rights and duties of the law of the State[s] relating to real property and fixtures may apply;

(h) Holders of purchase money security interests (a) may have rights in the Collateral superior to those of Lenders if any Borrower obtained possession of Collateral other than inventory less than 10 days prior to the effective date of the UCC Reports and a financing statement was filed within 10 days after delivery of the Collateral to such Borrower, and (b) may obtain superior rights if the purchase money secured party follows certain other procedures with respect to future Collateral;

(i) We express no opinion as to the creation, perfection or priority of any security interest in any deposit account except as such may be identifiable proceeds of Collateral;

(j) We express no opinion as to the priority of such security interest in:

(A) any Collateral which has been consigned or which is commingled with consigned goods,

(B) any Collateral consisting of goods as against another security interest therein perfected under the laws of any jurisdiction other than the State [of Texas],

(C) any Collateral consisting of goods as against a security interest therein created by any person other than any Borrower prior to its acquisition by such Borrower,

(D) any Collateral consisting of goods as against a "buyer in ordinary course of business" (as such term is defined in the UCC) of such Collateral,

(E) any Collateral consisting of chattel paper which is not stamped by a Borrower with a legend showing the Lender's security interest (as provided by the Security Agreement) as against a purchaser of such chattel paper who would take priority over an earlier security interest under Section 9.308 of the UCC,

(F) any Collateral consisting of goods covered by a document of title or in the possession or custody of a bailee,

(G) any Collateral consisting of goods as against a lien therein given by statute or rule of law for materials or services,

(H) any Collateral consisting of goods which are installed in or affixed to, or become a part of a product or mass with, goods which are not items of Collateral, and

(I) any Collateral or portions thereof which are or become subject to [a] liens for taxes, assessments, levies, fees and other governmental and similar charges and other claims of any type of any governmental authority, in each case that may be afforded priority over the security interest by federal law or state law, or [b] rights of

governmental or public authorities to condemn, appropriate, use or control the use of any of the Collateral, or [c] setoffs, counterclaims or defenses of account debtors or obligors on any chattel paper which constitutes Collateral; and

(k) We express no opinion as to the perfection or priority of the security interest in any Collateral to the extent the Lender consented to any security interest in favor of any other party or has authorized the disposition of any Collateral or released or subordinated the Lender's security interest therein;

(l) Our Opinions concerning the perfection, priority and enforceability of the security interest in the Collateral are in all cases limited to the borrowing under the Transaction Documents and such future advances as are made thereunder in accordance with the terms of the Transaction Documents; no Opinion is expressed as to the effectiveness of the Transaction Documents to grant and create a security interest with respect to any indebtedness other than that created by borrowings under the Transaction Documents; and

(m) Further, our opinion with respect to the perfection or priority of any security interest in documents, instruments and goods in which the grantor of such security interest acquires rights after the date hereof is limited to property (a) which is located in Texas when such grantor acquires rights therein of (b) in which the secured party has a purchase money security interest and (i) which the secured party or parties and such grantor understand, at the time such grantor acquires rights therein, will be kept in Texas and (ii) which arrives in Texas within thirty days after such grantor receives possession thereof.

Exhibit "F"

OFFICER'S CERTIFICATE

The undersigned, the duly elected or appointed, acting and qualified **[Title of Officer]** of **[name of corporation]**, a **[state of incorporation]** corporation (the "Company"), hereby certifies, in connection with that certain **[name of Transaction Document]** (the "Agreement"), dated **[date of Transaction Document]**, by and among the Company and **[names of other parties to Transaction Document]**, as follows:

1. Articles of Incorporation. Attached hereto as Exhibit A is a correct and complete copy of the Articles of Incorporation of the Company, which Articles of Incorporation have not been amended or revoked and are now in full force and effect.

2. Bylaws. Attached hereto as Exhibit B is a correct and complete copy of the Bylaws of the Company, which Bylaws have not been amended or revoked and are now in full force and effect.

3. Resolutions of Directors. Attached hereto as Exhibit C is a true and correct copy of the resolutions of the Company duly adopted by the Board of Directors of the Company and such resolutions have not been amended or revoked in any respect and are now in full force and effect.

4. Incumbency. The following named persons are duly elected or appointed, acting and qualified officers of the Company holding at the date hereof the office set opposite their respective name, and the signature appearing opposite their respective name is their respective genuine signature:

Name	Title	Signature
_____	_____	_____
_____	_____	_____

5. Authorization of Officers. The officers referred to above are authorized to execute on behalf of the Company the Agreement and any other document or instrument relating thereto.

IN WITNESS WHEREOF, the undersigned has executed this Certificate and affixed the seal of the Company as of the ___ day of _____, 19__.

_____

Name: _____

The undersigned is **[title of officer, other than the one signing immediately above]** of the Company, and hereby certifies that **[name of other officer signing above]** is the duly elected or appointed, acting, and qualified **[title of officer signing above]** of the Company, and is authorized in such capacity to execute and deliver this Officer's Certificate on behalf of the Company, and that the signature of **[name of other officer]** is **[his or her]** genuine signature.

_____

Name:_____

Exhibit "G"

STATE BAR OF TEXAS
BUSINESS LAW SECTION
COMMITTEE ON LEGAL OPINIONS

SELECTED TEXAS CASES

1. Archer v. State, 548 S.W.2d 71 (Tex. Civ. App. -- El Paso 1977, writ ref'd n.r.e.)

2. Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988), rev'g 741 S.W.2d 957 (Tex. App. -- Houston [14th Dist.])

3. Bell v. Manning, 613 S.W.2d 335 (Tex. Civ. App. -- Tyler 1981, writ ref'd n.r.e.)

4. Bernard Johnson, Inc. v. Continental Constructors, Inc., 630 S.W.2d 365 (Tex. App. -- Austin 1982, writ ref'd n.r.e.)

5. Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. App. -- San Antonio 1986, writ dism'd by agr.)

6. Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.)

7. Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1378 (5th Cir. 1987)

8. Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App. -- Fort Worth 1968, no writ)

9. Citizens' Nat'l Bank v. Morrison, 50 S.W.2d 346 (Tex. Civ. App. -- Austin 1932, no writ)

10. Continental Sav. Ass'n v. Sneed, Vine, Wilkerson, Selman & Perry, (W.D. Tex. May 16, 1989)

11. Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App. -- San Antonio 1966, no writ)

12. Cook Consultants, Inc. v. Larson, 700 S.W.2d 231 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.)

13. Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989)

14. DeBakey v. Staggs, 605 S.W.2d 631 (Tex. Civ. App. -- Houston [1st Dist.] 1980), writ ref'd n.r.e., 612 S.W.2d 924 (Tex. 1981)

15. DeBakey v. Staggs, 612 S.W.2d 924 (Tex. 1981)

16. Dennis v. Allison, 698 S.W.2d 94 (Tex. 1985)

17. Dickey v. Jansen, 731 S.W.2d 581 (Tex. App. -- Houston [1st Dist.] 1987, writ ref'd n.r.e.)

18. Fielder v. Abel, 680 S.W.2d 655 (Tex. App. -- Austin 1984, no writ)

19. First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410 (Tex. App. -- Dallas 1983, writ ref'd n.r.e.)

20. Hicks v. State, 422 S.W.2d 539 (Tex. Civ. App. -- Houston [14th Dist.] 1967, writ ref'd n.r.e.)

21. Hideca Petroleum Corp. v. Tampimex Oil Int'l, Ltd., 740 S.W.2d 838, (Tex. App.-- Houston [1st Dist.] 1987, no writ)

22. Joachim v. Magids, 737 S.W.2d 852 (Tex. App. -- Houston [1st Dist.] 1987, writ denied)

23. Marshall v. Quinn-L Equities, Inc., 704 F.Supp. 1384 (N.D. Texas. 1988).

24. Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. -- Corpus Christi 1978, writ ref'd n.r.e.)

25. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987)

26. Parker v. Carnahan, 772 S.W.2d 151 (Tex. App.--Texarkana 1989, writ denied).

27. Rosenthal v. Blum, 529 S.W.2d 102 (Tex. Civ. App. -- Waco 1975, writ ref'd n.r.e.)

28. Seay v. Travelers Indem. Co., 730 S.W.2d 774 (Tex. App. -- Dallas 1987, no writ)

29. Shatterproof Glass Co. v. James, 466 S.W.2d 873 (Tex. Civ. App. -- Fort Worth 1971, writ ref'd n.r.e.)

30. State v. Baker, 539 S.W.2d 367 (Texas Civ. App. -- Austin 1976, writ ref'd n.r.e.)

31. Traders & Gen. Ins. Co. v. Keith, 107 S.W.2d 710 (Tex. Civ. App. -- Amarillo 1937, writ dism'd)

32. Wavell v. Roberts, 818 S.W.2d 462 (Tex. App.--Corpus Christi 1991, no writ).

33. Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988)

Exhibit "H"

STATE BAR OF TEXAS
BUSINESS LAW SECTION
COMMITTEE ON LEGAL OPINIONS

SELECTED BIBLIOGRAPHY--ARTICLES, BOOKS, AND BAR ASSOCIATION COMMITTEE REPORTS

ARTICLES AND BOOKS ON LEGAL OPINIONS

Ambro, "Third Party Legal Opinions," Ch. 15A in 2 H. Ruda, Asset Based Financing: A Transactional Guide (Matthew Bender 1990).

Ambro & Bidwell, Some Thoughts on the Economics of Legal Opinions, 1989 Colum. Bus. L. Rev. 307 (1989).

Annotation, Attorney's Liability, to One Other Than His Immediate Client, for Consequences of Negligence in Carrying Out Legal Duties, 45 A.L.R. 3d 1181 (1972).

Babb, Barnes, Gordon, & Kjellenberg, Legal Opinions to Third Parties in Corporate Transactions, 32 Bus. Law. 553 (1977).

Bermant, The Role of the Opinion of Counsel: A Tentative Reevaluation, 49 Cal. St. B.J. 132 (1974).

Cohen & Friedman, Legal Opinions and Accountant Certifications (PLI Corporate Law and Practice Course Handbook Series Nos. 166 & 167, vols. 1 & 2, 1975).

Davis, Glazer, Man & Marx, Securities Law Opinions in Exempt Offerings, 20 Rev. Sec. and Comm. Reg. 31 (1987).

Evans, Disclosure Obligations of Lawyers Advising in the SEC Area, 31 Bus. Law. 468 (1975).

Field & Ryan, Legal Opinions in Corporate Transactions, Matthew Bender Business Law Monographs No. 26 (1988).

FitzGibbon & Glazer, Legal Opinions on Incorporation, Good Standing, and Qualification To Do Business, 41 Bus. Law. 461 (1986).

FitzGibbon & Glazer, Legal Opinions on Secondary Sales of Stock, 30 Boston B.J. 30 (November/December 1986).

FitzGibbon & Glazer, Legal Opinions in Corporate Transactions: The Opinion that Stock is Duly Authorized, Validly Issued, Fully Paid and Nonassessable, 43 Wash. & Lee L. Rev. 863 (1986).

FitzGibbon & Glazer, Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property, 44 Bus. Law. 655 (1989).

Freeman, Current Trends in Legal Opinion Liability, 1989 Colum. Bus. L. Rev. 235 (1989).

Freeman, Opinion Letters and Professionalism, 1973 Duke L.J. 371 (1973).

Fuld, Lawyers' Standards and Responsibilities in Rendering Opinions, 33 Bus. Law. 1295 (1978).

Fuld, Legal Opinions in Business Transactions - An Attempt to Bring Some Order out of Some Chaos, 28 Bus. Law. 915 (1973).

Glazer & Field, Business Opinions (PLI Corporate Law and Practice Course Handbook Series No. 624, 1988).

Glazer & Field, Business Opinions 1990 (PLI Corporate Law and Practice Course Handbook Series No. 674 and 675, vols. 1 & 2, 1990).

Gonson, Disciplinary Proceedings and Other Remedies Available to the SEC, 30 Bus. Law. 191 (Special Issue, March 1975).

Harter & Klee, The Impact of the New Bankruptcy Code on the "Bankruptcy Out" in Legal Opinions, 48 Fordham L. Rev. 277 (1979).

Hiller & Scruggs, Legal Opinion Letters and Texas Usury Laws, 10 St. Mary's L.J. 719 (1979).

Hoffman, On Learning of a Corporate Client's Crime or Fraud - The Lawyer's Dilemma, 33 Bus. Law. 1389 (1978).

Jacobs, Opinion Letters in Securities Matters: Text-Clauses-Law (Clark Boardman, rev. ed. 1989).

Janis, The Lawyer's Responsibility for Foreign Law and Foreign Lawyers, 16 Int'l Law 693 (1982).

Jennings, The Corporate Lawyer's Responsibilities and Liabilities in Pending Legal Opinions, 30 Bus. Law. 73 (Special Issue March 1975).

Karmel, Attorneys' Securities Laws Liabilities, 27 Bus. Law 1153 (1972).

Kirby, McGuinness & Kandel, Fraudulent Conveyance Concerns in Leveraged Buyout Lending, 43 Bus. Law. 27 at 48-49 (1987).

Landau, Legal Opinions Rendered in Securities Transactions, in Eighth Annual Institute on Securities Regulations 11 (PLI Corporate Law and Practice Course Handbook Series No. 224, 1976).

L. Loss, The SEC Lawyer, in Fundamentals of Securities Regulation 1217 (1983 & Supp. 1984).

Rowe, R., Opinions in SEC Transactions (PLI Corporate Law and Practice Course Handbook Series No. 623, 1988).

Rowe, R., Opinions in SEC Transactions 1990 (PLI Corporate Law and Practice Course Handbook Series No. 673, 1990).

Rowe, R., Opinion Letters of Counsel (PLI Corporate Law and Practice Course Handbook Series No. 459, 1984).

Rowe, R., Opinion Letters of Counsel 1985 (PLI Corporate Law and Practice Course Handbook Series No. 506, 1985).

Redlich, Lawyers' Standards and Responsibilities in Rendering Opinions - Commentary, 33 Bus. Law. 1317 (1978).

Riordan & Wragg, Examination of Corporate Books in Connection with Stock Offerings and Acquisitions, 18 Bus. Law. 677 (1963).

Robinson, Procedures and Responsibilities of Purchasers' Special Counsel in Private Placements of Securities with Institutions, 31 Bus. Law. 1489 (1976).

Ryan, Legal Opinions to Third Parties, Representations and Warranties Covering Security Interests in Personal Property, Banking and Commercial Lending Law 121 (ALI ABA 1981).

Segall & Arouh, How to Prepare Legal Opinions, 25 Prac. Law. 29 (June 1979).

Seneker, Land Use and Environmental Opinions - A Practitioner's Perspective in Environmental Issues from a Transactional Perspective (American College of Real Estate Lawyers, Apr. 22, 1988).

Sterba, M., Drafting Legal Opinion Letters (John Wiley & Sons, Inc., 1988).

Vagts, Legal Opinions in Quantitive Terms: The Lawyer As Haruspex or Bookie?, 34 Bus. Law. 421 (1979).

Weise & Duncan, "Loan Transactions", in R. Rowe Opinion Letters of Counsel 1985 (PLI Corporate Law and Practice Course Handbook Series No. 506, 1985).

COMMITTEE REPORTS ON LEGAL OPINIONS

ABA and Bureau of National Affairs, Inc., ABA/BNA Lawyers' Manual on Professional Conduct (1984).

ABA Comm. on Ethics and Professional Responsibility, Professional Ethics Opinions, 60 A.B.A.J. 488 (1974).

ABA Sec. of Bus. Law, "The Silverado Summit: The Standardization of Legal Opinions--Order Out of Chaos", (1989) (program and reference materials).

ABA Sec. of Bus. Law, "Third Party Legal Opinions: The Silverado Process--Before the Dawn", (1990) (program and reference materials).

ABA Sec. of Corp., Banking and Bus. Law Uniform Commercial Code Committee, Opinions of Counsel in Secured Transactions (1982).

Association of the Bar of the City of New York, Report by Special Committee on Lawyers' Role in Securities Transactions, 32 Bus. Law. 1879 (1977).

Boston Bar Ass'n Securities Law Comm., Report by Boston Bar Association Securities Law Committee on Securities Law Opinions in Exempt Offerings, 30 Boston B.J. 6 (November/December 1986).

Committee of Real Property and Financial Services Sections of Hawaii State Bar, Borrower's Counsel's Opinions to Lenders, 20 Hawaii B.J. 129 (1987).

Committee on Corporations of the Business Law Section of the State Bar of California, Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions, 14 Pac. L.J. 1001 (1983); 1989 Report, 45 Bus. Law. 2169 (1990).

Committee on Developments in Bus. Financing, Sections of Corporation, Banking and Business Law, ABA, Legal Opinions Given in Corporate Transactions, 33 Bus. Law. 2389 (1978) (program transcript).

Committee on Lawyers Opinion Letters in Mortgage Loan Transactions, Draft Statement of Policy Regarding Lawyers Opinion Letters in Mortgage Loan Transactions (1984), reprinted in Real Property Financing Newsletter of the Real Estate Financing Comm. Real Estate Sec., ABA (1984).

Joint Comm. of the Real Prop. Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Ass'n, Legal Opinions in California Real Estate Transactions, 42 Bus. Law. 1139 (1987); Cal. Real Prop. J. Fall 1985 - 1; Joint Committee Report--An Addendum (March 14, 1990).

National Association of Bond Lawyers, Model Bond Opinion Project (1987 Rev.) and The Function and Professional Responsibilities of Bond Counsel (1987).

Section of Corporation, Banking and Business Law, ABA, Advisors to Management Responsibilities and Liabilities of Lawyers and Accountants, 30 Bus. Law 1 (Special Issue, March 1975) (Proceedings ABA National Institute Oct. 3-5, 1974).

Special Committee on Lawyers' Roles in Securities Transactions, Association of the Bar of the City of New York, Report, 32 Bus. Law. 1879 (1977).

Special Comm. on Legal Opinions in Commercial Transactions, New York County Lawyers' Ass'n, in cooperation with the Corp. Law Comm., Ass'n of the Bar of the City of New York and Corp. Law Comm. of the Banking Corp. and Bus. Law Sec., New York, State Bar Ass'n, Legal Opinions to Third Parties: An Easier Path, 34 Bus. Law. 1891 (1979); An Addendum: Legal Opinions to Third Parties: An Easier Path, 36 Bus. Law 429 (1981); and Second Addendum to Legal Opinions to Third Parties: An Easier Path, by the TriBar Opinion Committee, 44 Bus. Law. 563 (1989).

Special Joint Committee on Lawyers' Opinions in Commercial Transactions of the Maryland State Bar Association, Inc. and The Bar Association of Baltimore City, Report, 45 Bus. Law. 705 (1990).

State Bar of Arizona Corporate, Banking, and Business Law Section Subcommittee on Rendering Legal Opinions in Business Transactions, Report, (1989).

State Bar of Texas Bus. Law Sec. Comm. on Legal Opinions, "Application of New Texas Disciplinary Rules to Lawyers Rendering Legal Opinions to Third Parties in Business Transactions," Bulletin of the Business Law Section Vol. 27, p. 1 (Sept. 1990).

State Bar of Texas, Sec. on Corp., Banking & Bus. Law, Ad Hoc Comm. on Corporate Legal Opinions, "Corporate Legal Opinions in Texas--An Overview of Potential Liabilities," Bulletin of the Sec. on Corporation, Banking, Business Law of the State Bar of Texas, Vol. 24, p. 2 (Nov. 1986).

State Bar of Texas Comm. on Lawyers' Opinion Letters in Mortgage Loan Transactions, "Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions," 23 St. B. Newsletter, Real Est. Prob. Trust Law, at 20 (1985).

Subcommittee on Opinion Writing, Comm. on Corp. Banking and Bus. Law, Massachusetts Bar Ass'n, Omnibus Opinion for Use by Seller's Counsel in the Sale of a Closely-Held Business, 61 Mass. L.Q. 108 (1976).

Subcommittee on Opinion Writing, Comm. on Corp. Banking and Bus. Law, Massachusetts Bar Ass'n, Omnibus Opinion for Use in Loan Transactions, 60 Mass. L.Q. 193 (1975).

Uniform Commercial Code Committee of the Business Law Section of the State Bar of California, Legal Opinions in Personal Property Secured Transactions, 44 Bus. Law. 791 (1989).