

**MORTGAGE LOAN OPINIONS:
Working Within Customary Practice**

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Source Materials	1
III.	The Evolution of Opinion Practice	1
IV.	Duty of Care of the Opinion Giver to the Opinion Recipient.....	3
V.	Customary Practice	3
A.	Customary Practice Defined	3
B.	Assumptions of Customary Practice.....	4
C.	Source of Customary Practice.....	4
VI.	Alternative General Standards	5
VII.	Effective Opinion Drafting	5
A.	Determining Whether an Opinion Letter is Warranted.....	6
B.	Use of Forms	6
C.	Legal Opinions Are Not Guarantees.....	6
D.	The Golden Rule.....	6
E.	Addressees and Reliance Rights	7
F.	Customary Practice Statement	8
G.	Departure from Customary Practice	8
H.	Limitations on Due Diligence Review.....	8
1.	Express Limitations	9
2.	Implicit Assumptions	9
3.	Nonstandard Assumptions	10
I.	Coverage Limitations.....	10
J.	Excluded Laws	11
K.	Status Opinion	11
L.	Generic Exception and Assurance	12
M.	Laundry List	13
N.	Choice of Law	14

O.	Usury Opinions	15
P.	“Adequacy” or “All Essential Remedies” Opinions	16
Q.	Governmental Approvals, Legal Compliance and Conflict Opinions	17
R.	No Litigation Opinions	17
S.	Knowledge Qualifications and Confirmation of Lack of Knowledge	18
T.	Mortgage and UCC Opinions	19
U.	Jurisdictional Requirements.....	20
VIII.	Conclusion	20
Exhibit A	Source Materials	
Exhibit B	Form of Opinion	
Exhibit C	Form of Opinion (Redlined)	

I. INTRODUCTION

This paper reviews the meaning and role of “customary practice” in the preparation of mortgage loan opinion letters (often referred to as a “closing opinion” or “third-party opinion.”) This analysis does not touch on every issue involved in the preparation of an opinion letter based on customary practice, but rather attempts to provide the reader a general understanding of the skills required and tools available to effectively discharge his or her responsibilities when engaged in the negotiation and preparation of an opinion letter based on customary practice, whether as an attorney preparing, giving, or counseling the recipient of an opinion letter.

II. SOURCE MATERIALS

A number of national and state bar association groups, including the Texas bar, have produced a body of literature that endeavors to elucidate the meaning of the language used, and delineate the nature and extent of the diligence required, in the preparation of opinion letters. For the reader’s convenience, a list of the principal national and Texas sources of authority on legal opinions, frequently relied upon by the seasoned practitioner, is attached as Exhibit A to this paper, along with the internet address (when available) at which many of these reports may be accessed electronically. All capitalized terms used but not defined in the body of this paper shall have the meanings ascribed to such terms in the attached list of source materials.

Most of the listed source materials, as well as a substantial volume of other authority, may be found in *Glazer and FitzGibbon on Legal Opinions*¹. Additionally, James H. Wallenstein’s article *Provisions Often Negotiated in Mortgage Loan Opinion Letters*² is an excellent source of forms and other opinion-related materials.

¹ DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* (2d ed. 2001 & Supp. 2006) [hereinafter *GLAZER*].

² James H. Wallenstein, *Provisions Often Negotiated in Mortgage Loan Opinion Letters*, 26TH ANN. ADVANCED REAL ESTATE L. COURSE, July 8-10 2004, available at http://www.texasbarcle.com/materials/events/3680/56792_01.pdf [hereinafter *Wallenstein*].

III. THE EVOLUTION OF OPINION PRACTICE

Over the past forty years, the custom and usage of opinion letters has grown into a sophisticated practice area that evolved as a byproduct of the everyday practice of business lawyers. While opinion letters involve various legal issues taught in law schools, such as the laws of contracts and remedies, no course focused on the custom and usage of opinion letters as such forty years ago, and as yet most institutions provide little instruction in the way of a comprehensive approach to their preparation and use. In addition, there were very few court decisions dealing with the basic concepts involved in the giving and receiving of legal opinions. Those of us involved in the preparation and interpretation of opinion letters during the 1970s well remember the extensive negotiations and considerable insecurity attendant upon the process. Consequently, as the practice of giving and receiving opinion letters has grown, it is no wonder that business lawyers began to investigate, and to collaborate in an effort to develop, a common understanding of the role and vocabulary of opinion letters and the responsibilities of the attorney involved in the process.

In the late 1980s two competing approaches to the drafting and interpretation of opinion letters emerged, one based on customary practice and the other based on a set of alternative general standards derived from a comprehensive set of rules. The initial reports of the TriBar Legal Opinion Committee³ (the “**TriBar Committee**”) and the Committee on Corporations of the California Bar’s Business Section⁴ (the

³ Tri-Bar Opinion Committee, *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979); see also Tri-Bar Opinion Committee, *An Addendum--Legal Opinions to Third Parties: An Easier Path*, 36 BUS. LAW. 429 (1981); Tri-Bar Opinion Committee, *Second Addendum to Legal Opinions to Third Parties: An Easier Path*, 44 BUS. LAW. 563 (1989) [hereinafter *TriBar 1989 Report*]; Tri-Bar Opinion Committee, *Third-Party "Closing" Opinion*, 53 BUS. LAW. 592 (1998), available at <http://www.abanet.org/buslaw/tribar/materials/20050303000003.pdf> [hereinafter *TriBar Report*].

⁴ 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

“**California Committee**”) were based on the customary practice of attorneys in the giving and receiving of opinion letters, as more particularly described in their respective reports. However, those reports included a significant difference of opinion as to the meaning of the remedies opinions: the TriBar Committee’s 1989 Report⁵ reaffirmed its position that the remedies opinion covers all undertakings in an agreement, whereas the California Committee’s 1989 Report⁶ confirmed its previously stated view that only “material” undertakings were covered.⁷

As a result of the different views of the TriBar Committee and the California Committee, in 1989 the Legal Opinions Committee of the Business Law Section of the American Bar Association organized a meeting, known as the Silverado Conference, in which the three groups and others interested in opinions could undertake to resolve the conflict. While the members of the conference ultimately resolved to support the TriBar Committee position, they also voted to endorse an alternative to customary practice which resulted in the creation and publication of the ABA Accord⁸ and ABA/ACREL Report⁹ (collectively, the “**Accord and Report**”) (discussed below).

The Business Law Section of the Texas Bar Association, like many other state bar associations, followed with its own report in

which it adopted the ABA Accord.¹⁰ The Texas Report is particularly helpful to the Texas practitioner because it “discuss[es] both the ABA Accord and the traditional non-Accord practice for many common opinions.”¹¹ While the term “customary practice” is not used in the Texas Report, the Texas Report does recognize that “the meaning and language of legal opinions have evolved over a period of decades by custom and usage in the United States business law practice.”¹² The Texas Report was followed by the publication of the Texas Supplement, which was prepared by the Real Estate, Probate and Trust Law Sections of the State Bar of Texas to be used in the preparation of opinion letters with respect to mortgage loan transactions.¹³ While the Texas Supplement focused on the use of the Accord and Report and did not address the use of customary practice, it is a helpful source of guidance with respect to the position of the Texas real estate bar on a number of issues relevant to customary practice.

To date, customary practice has emerged “as the unifying tenant of recent literature discussing

(1983); *see also* 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 Report*].

⁵ *See TriBar 1989 Report*, *supra* note 3.

⁶ *See California 1989 Report*, *supra* note 4.

⁷ *See generally* GLAZER, *supra* note 1, § 9.7.

⁸ Section of Business Law of the ABA, Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 BUS. LAW. 167 (1991) [hereinafter *ABA Accord*].

⁹ Section of Business Law of the ABA for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the ABA and the ACREL, *Report on Adaptation of the Legal Opinion Accord*, 29 REAL PROP. PROB. & TR. J. 569 (1994) [hereinafter *ABA/ACREL Report*].

¹⁰ State Bar of Texas Business Law Section, *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 29 ST. B. OF TEX. BULL. OF THE BUS. L. SEC. 2 & 3, § I.D.3 (1992), available at <http://www.texasbusinesslaw.org/SFXA42.pdf> [hereinafter *Texas Report*]; *see also* State Bar of Texas Business Law Section, *Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 31 ST. B. OF TEX. BULL. OF THE BUS. L. SEC. 4 (1994), available at <http://www.texasbusinesslaw.org/Supplement1.tif> [hereinafter *Supplement 1*]; State Bar of Texas Business Law Section, *Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 37 TEX. J. BUS. L. 2 (2001), available at <http://www.texasbusinesslaw.org/Supplement2.pdf> [hereinafter *Supplement 2*].

¹¹ *Texas Report*, *supra* note 10, § I.D.3.

¹² *Id.*

¹³ 1996 *Texas Supplement Regarding Lawyers’ Opinion Letters in Mortgage Loan Transactions*, 35 ST. B. NEWSL. FOR REAL EST., PROB. & TR. L. 1 (State Bar of Texas Committee on Lawyers’ Opinion Letters in Mortgage Loan Transactions, Austin, TX), Oct. 1996, available at <http://www.reptl.org/information/opinionletter.html> [hereinafter *Texas Supplement*].

third-party legal opinions”¹⁴ and the dominant approach to the drafting and interpretation of opinion letters.

IV. DUTY OF CARE OF THE OPINION GIVER TO THE OPINION RECIPIENT

The opinion giver owes a duty of care to the opinion recipient, even though the recipient is not the opinion giver’s client.¹⁵ This duty requires the opinion giver not to “function as an advocate for the legal or factual position of the lawyer’s client” but to provide the recipient an opinion that is “fair and objective”¹⁶ and that has been prepared with the competence and diligence normally exercised by lawyers in similar circumstances.”¹⁷ In order to satisfy the duty of care, the opinion giver is expected to possess “the skill and knowledge normally possessed by members of that profession...in good standing.”¹⁸ The duty owed to the opinion recipient “is one of reasonableness in the circumstances.”¹⁹ Unless otherwise agreed, what is reasonable in the case of a closing opinions is determined by the customary practice of lawyers who regularly give and who regularly represent recipients of opinions of the kind involved.²⁰

V. CUSTOMARY PRACTICE

A. Customary Practice Defined

Customary practice provides (i) a general guide for conduct among lawyers and clients giving, receiving and interpreting legal opinions, and (ii) a standard for determining whether the legal duty of care owed by the opinion giver to the

recipient has been met.²¹ Customary usage and customary diligence are the principal aspects of customary practice,²² which is the starting point in the preparation of a legal opinion.²³

Customary usage relates to how words are used in opinion letters. By using words in accordance with customary usage, the opinion giver enables the recipient’s attorney to properly interpret and evaluate the contents of the opinion letter. In particular, customary usage defines the words and phrases used in the context of the opinion rather than the dictionary meaning or the meaning of the same words and phrases in other context. An oft cited example is the phrase “legal, valid, binding and enforceable” frequently used in the context of the remedies opinion. These words, whether used together or separately, are understood to mean “enforceable,” as opposed to the aggregate of the dictionary meaning for each word.²⁴

Customary diligence relates to the factual and legal investigation an opinion giver undertakes to support a particular opinion. The use of customary practice by lawyers similarly situated is a key standard for diligence in preparing legal opinions.²⁵ In other words, once the form of opinion has been agreed on, customary practice will also determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with its issuance.²⁶

¹⁴ State Bar of California Business Law Section, *Report on Third Party Remedies Opinions*, app. 5, § I (2004), at http://calbar.ca.gov/calbar/pdfs/sections/buslaw/opinion-resources_2005_third-party-remedies-opinions.pdf [hereinafter *California 2004 Remedies Opinion Report*].

¹⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2)(a).

¹⁶ *Id.* § 95 cmt. c.

¹⁷ *Id.* § 52(1)(a).

¹⁸ *Id.* § 52 cmt. b.

¹⁹ *Id.*

²⁰ GLAZER, *supra* note 1, § 1.6.1 (quoting RESTATEMENT, *supra* note 15, § 95 cmt. e).

²¹ *Id.* at 2; *see generally* ACREL Attorneys’ Opinion Committee and the ABA Section of Real Property Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 2 (2003) [hereinafter *ABA/ACREL Guidelines*], available at www.abanet.org/rppt/cmtes/rp/i5/final-opinion-2003.pdf; Section of Business Law of the ABA, Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998), available at <http://www.abanet.org/buslaw/tribar/materials/20050120000000.pdf> [hereinafter *ABA Principles*].

²² *TriBar Report*, *supra* note 3, § 1.1.

²³ *Id.* § 1.4(a); *California 2004 Remedies Opinion Report*, *supra* note 14, at app. 5, § III.

²⁴ *TriBar Report*, *supra* note 3, §§ 1.4(b), 3.1.

²⁵ RESTATEMENT, *supra* note 15, §§ 95 cmt. e, 52 cmt. c; *TriBar Report*, *supra* note 3, § 1.4(c).

²⁶ RESTATEMENT, *supra* note 15, § 95 cmt. e.

It should be noted that customary practice has two additional applications to closing opinions beyond customary usage and customary diligence. The first is the application of customary practice in determining customary competence, one of the components of the duty of care the opinion giver owes to the opinion recipient (discussed in further detail above).²⁷ Specifically, even if the opinion letter is not correct, the opinion giver will generally not be liable to the opinion recipient unless the opinion letter fails to meet professional standards. The opinion giver, in order to meet his or her duty of care running to the opinion recipient, is required to demonstrate “competence cannot[ing] a level of knowledge, understanding and skill of the opinion giver in applying (i) substantive law to recognize legal issues raised by the documentation opined on and (ii) principles and practices relating to the process of preparing the remedies opinion.”²⁸ The second is the application of customary practice to limit the coverage of the opinion letter to “only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.”²⁹

B. Assumptions of Customary Practice

It is generally understood that, except as otherwise disclosed in the opinion letter, the opinion preparer is bound to follow customary practice in the preparation of the opinion letter.³⁰ That is, unless an opinion letter provides otherwise, an opinion giver is entitled to assume that the opinion recipient understands customary practice concerning the preparation and interpretation of the opinion letter,³¹ and the opinion recipient is entitled to assume that the opinion giver has followed customary practice in rendering the opinion.³² While an opinion giver may vary customary practice “by including an

express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel,”³³ the mere submission of an opinion letter to the opinion recipient, absent such a variance, is a representation that the opinion meets customary practice standards.³⁴

C. Source of Customary Practice

One of the uncertainties related to the use of customary practice is the possibility that customary practice may differ from one jurisdiction to another. This difference can result in lawyers in an interstate transaction – that is, transactions in which the law governing the agreement to which the opinion letter relates (the “**Subject Agreement**”), the parties and their counsel are not limited to a single state – not understanding customary practice in the same way. In these circumstances, how do lawyers determine what is customary? The practice experience of the lawyers in the transaction and the firms in which they practice are the best sources. The lawyers involved in the process should first seek to reach a common understanding of the meaning of customary practice, absent which they must consider the various bar association reports.

Fortunately, many attorneys involved in the opinion letter practice have acknowledged the evolution toward a national standard of customary practice and have generally recognized the reports prepared by the Committee on Legal Opinions of the ABA’s Business Law Section, the Joint Drafting Committee of the ACREL and the Section of Real Property, Probate and Trust Law of the ABA, and the TriBar Opinion Committee (collectively, the “**National Reports**”) as the best sources.³⁵ The evolution continues as state bar associations, such as the Business Law Section of the Texas Bar Association, are reviewing a proposed customary practice statement with a view toward confirming the

²⁷ *Id.* §§ 51(2), 51(2) cmt. e, 95(1), 95(3).

²⁸ *California 2004 Remedies Opinion Report*, *supra* note 14, at app. 5, § III.

²⁹ *ABA Principles*, *supra* note 21, at 2.

³⁰ *See ABA Principles*, *supra* note 21, § I.B.; *TriBar Report*, *supra* note 3, § 1.4(a).

³¹ *ABA/ACREL Guidelines*, *supra* note 21, § 1.7.

³² *TriBar Report*, *supra* note 3, § 1.4(a).

³³ *ABA Principles*, *supra* note 21, § I.C.

³⁴ ARTHUR NORMAN FIELD & JEFFREY M. SMITH, *LEGAL OPINIONS IN CORPORATE TRANSACTIONS* § 1.09 (MB Business Law Monographs, Corporate Series vol. C6 2006).

³⁵ GLAZER, *supra* note 1, § 1.6.1.

role of customary practice in the preparation and understanding of legal opinions.

In interstate transactions, customary practice does not require that the opinion recipient and its counsel familiarize themselves with the bar association reports of each state involved.³⁶ Instead, unless the parties otherwise stipulate in the opinion, opinion recipients in interstate transactions are entitled to assume that the opinion letters furnished to them have been prepared and are to be interpreted in accordance with customary practice as articulated by the National Reports.³⁷ However, it must be emphasized that not all practitioners agree that the National Reports are “THE” source, particularly attorneys in jurisdictions like Texas that have not adopted the current version of the ABA/ACREL Guidelines or the ABA Principles.

In intrastate transactions – that is, transactions in which the law governing the Subject Agreement, the parties and their counsel are limited to a single state – customary practice also requires that the lawyers responsible for the drafting of an opinion letter also look for guidance to the bar association report for that state, if any.³⁸ The Texas practitioner is best advised to look to the Texas Report and the Texas Supplement, as well as the National Reports. In those instances where uncertainties arise, the attorneys involved in the process must communicate in order to develop a common understanding of the diligence required and terminology used in preparation of the closing opinion in question.

VI. ALTERNATIVE GENERAL STANDARDS

The most frequently relied upon alternative to the employment of customary practice is to incorporate specific standards from an external source, such as the comprehensive set of rules set forth in the Accord and Report. For example, the Texas Report adopted the ABA Accord and the Texas Supplement³⁹ adopted the Accord and Report and recommended the use of

a form of opinion based on the Accord and Report.

The ABA Accord stimulated considerable interest when it was first published and was widely adopted by national and state bar associations (albeit with varying degrees of deviation from the Accord and Report). Unfortunately, it has not enjoyed the anticipated widespread practical use. This disappointing response was in part the result of the mixed reviews it received. Some felt the ABA Accord favored the opinion giver, while others praised its precision and certainty. Many concluded it required a significant preliminary investment of time required to learn to use it efficiently and effectively for only occasional use. However, attorneys involved in the opinion process recognize the fact that the incorporation of alternative general standards, such as those set forth in an opinion based on the ABA Accord (with or without the ABA/ACREL Report, an “**Accord Opinion**”), are often an effective method of simplifying the opinion rendering process and curtailing its cost by paring down the time and expense otherwise often necessarily attendant upon negotiations. Even though the Accord and Report, and state forms based on the Accord and Report, are infrequently employed, such forms comprise an excellent resource and should be readily available to the attorney preparing, or counseling the recipient of, an opinion letter.

It is important to note that an opinion is not governed by the Accord and Report unless it contains language like that found in second through third sentences of the first paragraph of the Texas Supplement form (the “**Accord Incorporation Provision**”).⁴⁰

VII. EFFECTIVE OPINION DRAFTING

There are a number of issues to be considered and steps to be taken by the practitioner involved in the preparation or interpretation of an opinion letter in order to satisfy his or her duty. These issues are best demonstrated by working through an example of a typical transaction. With this purpose in mind, we have attached as Exhibit B to this paper a requested form of opinion (the “**Requested Form of**

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Texas Supplement, supra* note 13, at app. 1.

⁴⁰ *See id.*

Opinion”) that was presented to an opinion preparer in an actual mortgage loan transaction, with appropriate changes made to protect the innocent. The remainder of this paper will focus on various provisions, or the lack thereof, in the Requested Form of Opinion and suggested revisions demonstrated in the form of a revised version of the Requested Form of Opinion attached to this paper as Exhibit C (the “**Revised Form of Opinion**”) which is blacklined to highlight the revisions. For purposes of our exercise, we will assume that the Borrower is a Texas Corporation organized by counsel other than the opinion giver, the Lender is a National Bank located in New York, the Loan Documents are governed by Texas law, the Lender is represented by New York counsel and not represented by Texas counsel, and the loan proceeds are to be used to purchase improved real property located Harris County, Texas, which will secure the loan.

A. Determining Whether an Opinion Letter is Warranted

The threshold issue for the opinion giver is to question the need for an opinion letter and, if the answer is in the affirmative, to make an effort to narrow its scope. It is appropriate for the opinion preparer, mindful of the time required to prepare an opinion letter and the attendant cost, both in terms of time and financial expense, to question the necessity of the rendering of an opinion. As a result, only opinions that justify their cost should be rendered.⁴¹ For example, the ABA Guidelines underscore that a remedies opinion may not be “cost justified” in intrastate transactions or in interstate transactions in which the recipient is represented by local counsel.⁴² In particular, such a transaction may not be cost justified in that the recipient’s counsel should be just as familiar with the laws of the relevant jurisdiction as the opinion giver, rendering any opinion letter furnished by a counterparty addressing such local law issues gratuitous.

B. Use of Forms

⁴¹ See ABA/ACREL Guidelines, *supra* note 21, § 1.2 (stating that “[t]he benefit of an opinion to the recipient should warrant the time and expense required to prepare it.”); see also Texas Report, *supra* note 10, § V.A.

⁴² See ABA/ACREL Guidelines, *supra* note 21, § 1.2.

If the parties determine the circumstances do warrant the rendering of an opinion letter, the lawyer representing the opinion recipient will usually provide the opinion giver a form of the opinion required by his or her client. As noted above, the Requested Form of Opinion is illustrative of a typical request. The typical requested form of opinion letter, as in the case of the Requested Form of Opinion, will not contemplate an Accord Opinion and, consequently, will not include the Accord Incorporation Provision. However, this does not mean the opinion preparer, who is proficient in the use of the Accord and Report, should not raise the issue of whether the rendering of an Accord Opinion would be acceptable. It also does not mean the requested form of opinion should be considered non-negotiable – to the contrary, the requested form should be considered by the parties as merely a starting point. In most transactions, the lawyer representing the opinion recipient would refuse to accept a final opinion in the requested form without any revisions.

If given the opportunity to prepare the initial draft of the opinion, the opinion giver should not attempt to use a previously drafted opinion letter in an independent transaction or even a form, “because no form of opinion can be drafted which is appropriate for all transactions.”⁴³ The fact that the opinion preparer has rendered an opinion letter in a similar situation is of little relevance. Although the form of the opinion and related provisions should be used, the opinion letter as drafted must ultimately be appropriate for and tailored to the transaction in question. It should not be approached as if one size fits all.

C. Legal Opinions Are Not Guarantees

Legal opinions are construed as expressions of professional judgment and do not hold the same juridical status as a guaranty or an insurance policy.⁴⁴ Nevertheless, an opinion giver’s failure to demonstrate the requisite degree of competence may expose him or her to liability.

D. The Golden Rule

⁴³ Texas Report, *supra* note 10, § I.E.1.

⁴⁴ ABA Principles, *supra* note 21, § I.D.

If the opportunity arises early in negotiations, it can be helpful to discuss with opposing counsel the use of what is traditionally referred to as the “Golden Rule” in opinion practice, which is succinctly expressed in the ABA/ACREL Guidelines as follows:

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these *Guidelines* and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.⁴⁵

Obviously, some attorneys will elect not to adhere to the Golden Rule even if they are familiar with it and its application. Abiding by the Golden Rule usually has a salutary effect on the opinion process – even if only one of the attorneys involved in the opinion process chooses to respect the Golden Rule, other attorneys generally respond more favorably and the negotiations are often dramatically reduced. On those occasions when a lawyer approaches the opinion process as if it were a business negotiation, it sometimes helps to remind him or her of the Golden Rule.

E. Addressees and Reliance Rights

Only the addressee and other parties specified in the opinion letter are entitled to rely upon or assert any legal rights based upon the opinion letter.⁴⁶ Obviously, it is in the opinion giver’s best interest to expressly limit the number of the

parties entitled to rely on the opinion. Except in special cases, the opinion recipient’s counsel should not be allowed to rely on the opinion letter as proposed in the Requested Form of Opinion. In addition to the desire to limit its exposure, it is beneficial to the opinion giver for the recipient’s counsel to perform his or her own due diligence, thus reducing the possibility of error.

In order to eliminate any question of reliance by anyone other than an addressee, experienced practitioners generally include a provision expressly limiting reliance for any purpose to the addressee and prohibiting reliance by the addressee for any purpose other than the transaction.⁴⁷ An exception to this limitation has developed in transactions in which assignment is contemplated, such as syndicated loan transactions and securitizations, where the opinion recipient often requests reliance by successors and assigns (i.e., future members of the syndicate).

Over time, the reliance by successors and assigns of the opinion recipient has become more customary, even in transactions in which no assignment is contemplated in the transaction documents. However, in the past several years, many firms have resisted requests for reliance where no assignment is contemplated, typically for one or more of the following reasons: (i) a concern that problem loans are likely to be assigned to so-called “vulture funds” that are more likely than the traditional lenders to view the opinion giver as a source of recovery; (ii) the possibility of multiple claims being made by syndicate members, making it more difficult to resolve the claims; (iii) a concern that successors and assigns may not appreciate the limitations on the opinion letter, that the opinion letter may be deemed to be reissued as of the date the assignee acquires its interest in the loan, or that portions of the opinion could differ depending

⁴⁵ See ABA/ACREL Guidelines, *supra* note 21, § 3.1; see also Texas Report, *supra* note 10, § V.D.1.

⁴⁶ See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999); Texas Report, *supra* note 10, § VI.A.2.

⁴⁷ See ABA, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, Subcommittee on Creation of an Inclusive Opinion & ACREL Attorneys’ Opinions Committee, *Inclusive Real Estate Secured Transaction Opinion*, § V (1999), <http://www.acrel.org/Documents/PublicDocuments/InclusiveRealEstateSecuredTransactionOpinion.htm> [hereinafter *Inclusive Opinion*]; Texas Report, *supra* note 10, ex. b at 10 (Limitation on Reliance).

on the status of the assignee; or (iv) a possibility of claims in unknown and distant jurisdictions and uncertainty as to the governing law.

One way to resolve these conflicts and accommodate both the concerns of opinion givers and the needs of opinion recipients is to expressly provide in the opinion letter that successors and assigns may rely on the opinion letter subject to certain stated limitations.⁴⁸ As an example, the American Bar Association has reported that Lawrence Safran of Latham & Watkins LLP “has developed a slightly different form of reliance language that has now been accepted by many of the large lenders,” which provides as follows:

At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [] of the Credit Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.⁴⁹

If such an express provisions is rejected, the opinion giver and opinion recipient might reconcile their differences by permitting only parties that become successors and assigns

within a short, expressly stated period of time after the initial closing to rely on the opinion, as of the date of the opinion and only to the same extent as the original recipient, or alternatively by allowing only an agent, on behalf of the recipient and their successors and assigns, to rely on the opinion.

F. Customary Practice Statement

As noted above, by issuing an opinion letter that does not expressly indicate otherwise, the opinion giver indicates that customary practice was followed. Nevertheless, opinion preparers often include a statement in the opinion letter to specifically express this understanding. This statement, typically stated as a recital preceding the body of the opinion, usually provides that, in connection with the opinion letter, “We have made such other investigation as we have deemed appropriate,”⁵⁰ such as that found in the last sentence of the first grammatical paragraph of the Requested Form of Opinion.

G. Departure from Customary Practice

Most opinion letters deviate in some respect from customary practice in order to tailor the opinion to the facts and circumstances of the transaction at hand. Nevertheless, the language used in the opinion letter should generally conform to customary usage unless the opinion giver and opinion recipient have agreed to a departure and expressly so provide in the opinion letter.⁵¹ For example, and as discussed above, the use of certain words and phrases in opinion letters are understood to have special meaning as a result of the customary use of such words and phrases to express legal concepts in opinion letters.⁵² Any variance from these conventions should be expressly stated in order to prevent their misinterpretation.

H. Limitations on Due Diligence Review

⁵⁰ See FIELD & SMITH, *supra* note 34, § 3.03[6].

⁵¹ See Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Limiting Negligent-Misrepresentation Liability for Third-Party Legal Opinions*, 38 TEX. J. BUS. L. 20, 23 (2003) [hereinafter *Limiting Liability*].

⁵² These special meanings, as with other customary practices, are explained in the Source Materials and other professional sources on legal opinions.

⁴⁸ See ABA/ACREL Guidelines, *supra* note 21, § 1.7.

⁴⁹ Report on Reliance Project, LEGAL OPINION NEWSL. (ABA Section of Bus. L. Comm. on Legal Opinions, Chicago, Ill.), September, 2005, at 4, available at <http://www.abanet.org/buslaw/newsletter/0040/materials/pp6.pdf>.

1. Express Limitations. The opinion preparer will be presumed to have conducted the diligence “as is professionally appropriate to render the opinions given unless the opinion provides for expressly stated limitations.”⁵³ Limitations on the opinion giver’s due diligence review as undertaken take the form of qualifications on the nature of the factual diligence and assumptions set forth in the body of the opinion.⁵⁴ Unless the opinion letter expressly states limitations on the scope of the inquiry to particular documents, matters, or procedures, the opinion giver does not, by including in the opinion letter a typical recital of specific documents reviewed, matters considered, or other procedures followed (such as the recital set forth in Section 1.4 of the Inclusive Opinion), alter this presumption of diligence.⁵⁵

In order to deviate from the customary presumption, the opinion giver and the opinion recipient must agree to depart from customary practice by an expressly stated limitation on the scope of the opinion giver’s investigation,⁵⁶ such as:

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.⁵⁷

The opinion preparer also should be on the alert for documents or portions thereof expressly incorporated into the Subject Agreement, which often occurs in transactions involving loan assumptions. In such circumstances the opinion preparer must either review the incorporated documents or expressly exclude such review, with a provision such as:

In rendering the opinion set forth in Paragraph ____ above, we have based our opinion on our review of the Assumption Documents without including therein any document or portion thereof that we have not reviewed and that is referred to in or incorporated by reference into the Assumption Documents.

2. Implicit Assumptions. Customary practice over time has recognized many factual assumptions as an appropriate basis for the giving of opinions, many of which are understood to be implicit in the opinion. These implicit assumptions, often referred to as “standard assumptions” or “assumptions of general applications,” as their name might suggest, need not be stated expressly. As provided by the ABA Principles, the factual assumptions “that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties.”⁵⁸ As examples of implicit assumptions, the ABA Principles cite assumptions that copies of documents are identical to the originals, that signatures are genuine, and that the parties other than the opinion giver’s client have the power to enter into the transaction.⁵⁹

Additionally, a variety of assumptions are similarly implicit in an Accord Opinion and are specifically enumerated in Section 4 of the ABA Accord.⁶⁰ Although this schedule of assumptions only applies to Accord Opinions, it does represent what the members of the ABA Legal Opinions Committee considered assumptions traditionally regarded as implicit in opinion letters. Various other bar association groups have similarly compiled their own schedules of implicit assumptions.⁶¹ It should be noted that the Texas Report recognizes that the assumptions listed in Section 4 of the ABA

⁵³ See *ABA/ACREL Guidelines*, *supra* note 21, § 3.3.

⁵⁴ See, e.g., *Inclusive Opinion*, *supra* note 47, §§ 1.4, 1.5, 3.1.

⁵⁵ See *Texas Report*, *supra* note 10, § VI.C.1; see also *Inclusive Opinion*, *supra* note 47, § 1.4.

⁵⁶ See *Limiting Liability*, *supra* note 51, at 22.

⁵⁷ See *Texas Report*, *supra* note 10, § VI.C.4.

⁵⁸ *ABA Principles*, *supra* note 21, § III.D.

⁵⁹ *Id.*

⁶⁰ See *ABA Accord*, *supra* note 8, § 4. These assumptions are the same as those listed in Section 3.1 of the *Inclusive Opinion* except for assumptions (q) and (r), which were added by the *ABA/ACREA Report*. See *Inclusive Opinion*, *supra* note 47, § 3.1; *ABA/ACREL Report*, *supra* note 9, at 578.

⁶¹ See GLAZER, *supra* note 1, § 4.3.3 n. 13.

Accord “need not be stated in the Opinion Letter” without qualifying its use of the term “Opinion Letters” to those that adopt the Accord.⁶² While one could argue the reference to “Opinion Letter” was meant to include non-Accord opinions, some opinion givers, out of an abundance of caution, continue to expressly state all assumptions of general application in their opinion letters.

3. Nonstandard Assumptions. The opinion giver also may rely on nonstandard assumptions expressly stated in the opinion letter.⁶³ For example, the opinion giver will usually expressly assume, in giving a remedies opinion, that the Subject Agreement is binding on the parties other than its client. The adoption of such nonstandard assumptions often relieves the opinion giver of its responsibility to establish facts that would be very costly or difficult, or possibly impracticable, to establish and would produce little if any corresponding benefit.

In addition, opinion givers customarily rely on representations made by their clients in connection with the opinion, such as representations made by a client in the Subject Agreement, or certificates furnished by the client’s officers and third parties with respect to factual matters, and will expressly provide in the body of the opinion that the opinion giver has relied upon the same, without further investigation. In response to the opinion giver’s inclusion of such qualifications, opinion recipients will sometimes request that the opinion giver limit these qualifications with a representation that the opinion giver has no knowledge that any of such representations on which it is relying are untrue. Opinion givers are well advised to avoid making such statements because they may be interpreted as effectively providing a “negative assurance” independent of the contents of the opinion itself which, if incorrect, may give rise to a claim against the opinion giver even if the opinions stated therein are otherwise correct.

The ABA/ACREL Guidelines suggest that “[a] request for negative assurance is appropriate only when it is requested for that

purpose in connection with a registered securities offering or, depending on the nature of the disclosure document and the process by which it was prepared, an offering of securities exempt from registration.”⁶⁴ Such assurance should be otherwise generally considered unnecessary since customary practice precludes reliance on factual information that “appears irregular on its face.”⁶⁵ In addition, the opinion giver is constrained not to render an opinion “that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.”⁶⁶ The foregoing guidelines and principles will generally provide sufficient protection to an opinion recipient in the absence of the inclusion of a negative assurance.

I. Coverage Limitations

In order to limit the nature and extent of the law covered by a legal opinion, opinion letters customarily include qualifications expressly limiting the law covered to the law of stated jurisdictions and sometimes to specific statutes or regulations of the stated jurisdiction.⁶⁷ A typical provision is set forth in Section 1.3 of the Inclusive Opinion.⁶⁸ If these coverage limitation provisions do not state that the opinion covers federal law or the law of a particular jurisdiction, that law is understood by customary practice not to be covered except to the extent it is expressly addressed by specific opinions in the opinion letter.⁶⁹ Customary practice further limits the coverage of the opinion letter to “only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter exercising customary professional diligence would reasonably be expected to recognize as being

⁶² See *Texas Report*, *supra* note 10, §§ I.C., I.E., II.B.2.

⁶³ *Texas Report*, *supra* note 10, § VI.D.1.

⁶⁴ *ABA/ACREL Guidelines*, *supra* note 21, § 4.5.

⁶⁵ *ABA Principles*, *supra* note 21, § III.A; GLAZER, *supra* note 1, § 4.2.3 n. 32.

⁶⁶ *ABA/ACREL Guidelines*, *supra* note 21, § 1.5.

⁶⁷ *ABA Principles*, *supra* note 21, § II.A; *TriBar Report*, *supra* note 3, § 4.1; GLAZER, *supra* note 1, § 2.7.

⁶⁸ See *Inclusive Opinion*, *supra* note 47, § 3.1.

⁶⁹ *TriBar Report*, *supra* note 3, § 4.1.

applicable to the entity, transaction, or agreement to which the opinion letter relates.”⁷⁰

The opinion giver, which is typically a law firm and not an individual attorney, should not render an opinion unless the opinion giver is thoroughly familiar with the law of the jurisdiction covered, as it relates to the issues raised in the opinion. If the opinion giver satisfies this “thoroughly familiar” requirement, it is not necessary for the opinion giver to be licensed in the jurisdiction covered by the opinion. Specifically, if the opinion giver is sufficiently knowledgeable regarding the legal issues presented, a firm may properly render an opinion of a state in which none of its partners are admitted to practice, such as routine questions involving Delaware corporate law as provided for in Section 1.3 of the Inclusive Opinion.⁷¹ The giving of an opinion on the law of a state where the opinion preparers are not licensed is not the “practice of law” in that state.⁷²

An opinion that does not contain a coverage limitation, particularly in a transaction invoking the law of multiple jurisdictions, might be interpreted to extend beyond the opinion preparer’s competence or intention.⁷³ This is particularly true with respect to opinion givers with partners in multiple jurisdictions. On the other hand, the coverage limitation is not construed to limit the law covered by the opinion letter with respect to certain types of opinions, such as the no litigation opinion.⁷⁴

J. Excluded Laws

In addition to any law excluded from the coverage of an opinion by the coverage limitation, certain laws are understood to be excluded as a matter of customary practice.⁷⁵ For example, the Texas Report, like the ABA Principles, provides that an opinion letter should not be read to cover the laws of the political subdivisions of a state unless it does so

expressly.⁷⁶ Additionally, Section 19 of the ABA Accord excludes from the scope of an Accord Opinion an array of laws listed therein unless otherwise provided.⁷⁷ In contrast to the ABA Principles and the TriBar Report, the Texas Report takes the position that “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.”⁷⁸ As in the case of implied assumption, the cautious Texas lawyer is more likely to expressly exclude certain laws, as is done in the Revised Opinion Letter, than to rely on an exclusion by implication.

Even if the list of exclusions set forth in the Accord and Report is incorporated by reference, the opinion preparer should always consider whether other laws should be expressly excluded.

K. Status Opinion

We focus on the status opinion, which is set forth in the first clause of opinion paragraph 1 in the Requested Form of Opinion, not because it is unique or difficult, but as another example of the importance of the meaning of the terms used, even when rendering this very customary opinion. In fact, the status opinion is found in most opinions involving entities incorporated or formed in the jurisdiction covered by the opinion, as it is in the Requested Form of Opinion. Unless the opinion preparer understands the meaning of the phrase “duly organized,” as used in the Requested Form of Opinion, he or she is likely to misunderstand its significance. It would be easy to think “is a corporation,” “is duly incorporated” and “is duly organized” are synonymous. Of course, each has a distinct meaning and requires a different

⁷⁰ *ABA Principles*, *supra* note 21, § II.B.

⁷¹ *See Inclusive Opinion*, *supra* note 47, § 3.1.

⁷² *RESTATEMENT*, *supra* note 15, § 3 cmt. e.

⁷³ *GLAZER*, *supra* note 1, § 2.7.1 n. 8.

⁷⁴ *Id.* § 2.7.4; *TriBar Report*, *supra* note 3, § 6.5.6.

⁷⁵ *ABA Principles*, *supra* note 21, § II.B-D; *TriBar Report*, *supra* note 3, § 6.6.

⁷⁶ *Texas Report*, *supra* note 10, § VIII.G-H; *ABA Principles*, *supra* note 21, § III.C.

⁷⁷ *See Inclusive Opinion*, *supra* note 47, § 3.2 (enumerating legal issues excluded by the ABA Accord).

⁷⁸ *Texas Report*, *supra* note 10, § VIII.G; *see also id.* § VIII.H.

level of diligence.⁷⁹ The status opinion serves as a good example of why an attorney who does not understand the unique meaning of the terms used throughout the opinion should not be involved in the opinion process.

L. Generic Exception and Assurance

The enforceability or remedies opinion and the bankruptcy and equitable principles qualifications set forth in opinion paragraph 3 of the Requested Form of Opinion are so well established and understood that this paper will only focus on the need for further qualification of the broad scope of the enforceability opinion. A majority of the reports, including the Texas Report and the TriBar Report, take the view that the remedies opinion covers each and every agreement made in the Subject Agreement and each right and remedy conferred therein.⁸⁰ As a result of the broad scope of the enforceability opinion, it is customary in real estate secured loan transactions to include some form of generic exception, along with an assurance from the opinion giver.⁸¹

Because the first part of the generic exception (viz. that certain provisions of the loan documents may be further limited or rendered unenforceable) could be construed to mean certain remedies essential to the opinion recipient are unenforceable, it is customary to include with the generic exception an assurance that provides comfort to the recipient. This assurance has evolved into two forms over time. The first, generally referred to as the “practical realization” assurance, assures the recipient that the generic exception to enforceability will not impair the “practical realization of the principal benefits included in the loan documents (or words to that effect)”⁸² an example of which is set forth in qualification (A) of the Requested Form of Opinion. As a result of the ambiguity of the terms “practical realization” and “principal benefits,” the “practical realization”

assurance is increasingly disfavored.⁸³ After noting this criticism, the Texas Report concludes that “in appropriate circumstances [citing mortgage loan transactions as an example], 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.”⁸⁴ The Texas Report suggests two alternative formulations, including a formulation that drops the word “practical” and qualifies the word “benefits” with the phrase “principal legal,” and another formulation that uses the concept of normal remedies rather than the concepts of realization and benefits.⁸⁵

The second form of assurance is aptly summarized by the ABA/ACREL Guidelines as follows:

[T]hat certain provisions of the loan documents may be unenforceable; however, such unenforceability will not render the transaction documents “invalid as a whole” nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provisions of the transaction documents.⁸⁶

The Texas Supplement adopts this second form of assurance.⁸⁷ The generic qualification proposed in the Texas Supplement is set forth in qualification paragraph (B) of the Revised Form of Opinion. Section 3.6 of the Inclusive Opinion

⁷⁹ See *Texas Report*, *supra* note 10, § VIII.B (providing a critical analysis of the difference between the terms “is a corporation,” is duly incorporated” and “is duly organized.”)

⁸⁰ See *Texas Report*, *supra* note 10, § VII.A; *TriBar Report*, *supra* note 3, § 3.1.

⁸¹ *ABA/ACREL Guidelines*, *supra* note 21, § 4.0.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Texas Report*, *supra* note 10, § VII.C.1.

⁸⁵ See *id.* § VII.C.2.

⁸⁶ *ABA/ACREL Guidelines*, *supra* note 21, § 4.0.

⁸⁷ *Texas Supplement*, *supra* note 13, §§ 4.3–4 (setting forth the recommended form and an interpretation thereof, respectively); see also ACREL, *Statement of Policy on Mortgage Loan Enforceability Opinions*, *Statement of Policy on Mortgage Loan Enforceability Opinions*, in THE ATTORNEY’S OPINION LETTER IN REAL ESTATE TRANSACTIONS 1 (Am. C. of Real Est. Law. ed., 1992) [hereinafter *ACREL SOP*]; *ABA/ACREL Report*, *supra* note 9, ¶ 11A (setting forth the “expanded ACREL SOP (Statement of Policy),” the form from which the form recommended by the *Texas Supplement* is adapted).

is an example of another generic qualification derived from the ACREL SOP.⁸⁸ The ABA/ACREL Guidelines endorse the use of the generic qualification together with the ACREL SOP form of assurance.⁸⁹

Attorneys involved in real estate secured transactions generally accept the general exception tempered by a version of the second form of assurance set forth above.

M. Laundry List

The principle reason for the development and use of the generic exception was to eliminate negotiations over “laundry lists” of exceptions, as was customary the late 1970’s and early 1980’s.⁹⁰ Nevertheless, the listing of some specific exceptions continues to be a customary practice in connection with the rendering of legal opinions. The ABA/ACREL Guidelines addresses the inclusion of such laundry lists as follows:

Such specific exceptions, when taken, should be unnecessary except with respect to (i) matters that may not be clearly encompassed by the bankruptcy, equitable principles or generic exceptions, and (ii) matters that may be of notable importance to the opinion recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware (e.g., anti-deficiency foreclosure legislation) or contractual provisions that are known by the opinion giver to have been controversial or heavily negotiated during the preparation of transactional documents.⁹¹

⁸⁸ See *Inclusive Opinion*, *supra* note 47, § 3.2; *ACREL SOP*, *supra*, note 86.

⁸⁹ See *ABA/ACREL Guidelines*, *supra* note 21, § 4.0.

⁹⁰ *TriBar Report*, *supra* note 3, § 3.4.1; see, e.g., *Preliminary Draft of a Statement of Policy Regarding Lawyers’ Opinion Letters in Mortgage Loan Transactions*, STATE BAR NEWSL. FOR REAL EST., PROB. AND TR. L. (Real Estate, Probate and Trust Law Section’s Comm. on Lawyer’s Opinion Letters in Mortgage Loan Transactions, January, 1985).

⁹¹ *ABA/ACREL Guidelines*, *supra* note 21, § 4.0.

Additional qualifications that should be considered with respect to transactions secured by Texas real property, together with examples of specific exception for each, include the following:⁹²

Prepayment Fee Charged in Involuntary Prepayment: “We express no opinion as to the effect of provisions which purport to cause a fee or premium to be charged in the event of an involuntary payment of the Loan (i.e., upon Lender’s acceleration of the maturity date of the Loan).”

Waiver of Jury Trial: “We express no opinion as to the effect of provisions which purport to waive the right to a jury trial: however, we direct your attention to the opinion of the Texas Supreme Court in the case of *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004), in which the five-Justice majority (with the Court also publishing a four-Justice dissent) upheld the contractual waiver of jury trial in that case.”

Absolute Assignment of Rents. “We express no opinion as to the enforceability of any assignment of rents prior to the appointment of a receiver for the Mortgaged Property or foreclosure of the lien of the Deed of Trust or the taking of other equivalent action.”

Sections 51.003, 51.04, and 51.05 of the Texas Property Code. “The recourse provisions of the Loan Documents are subject to Sections 51.003, 51.04, and 51.05 of the Texas Property Code.” [NOTE: This special exception will not be required if the generic exception recommended in the Texas Supplement is used.]

Provisions Causing a Non-Recourse Loan to Become Full Recourse. “We express no opinion as to the provisions in the Loan Documents which purport to cause

⁹² See *Texas Supplement*, *supra* note 13, app. 3 (providing critical analysis of a number of potential additional qualifications).

the Borrower and/or Guarantor to be liable for the entire Loan upon certain events.”

Indemnity and Release Provisions:

“We express no opinion with respect to the enforceability of any provisions in the Loan Documents releasing, exculpating or exempting a party from, or requiring indemnification or contribution of a party for liability for, its own action or inaction, to the extent that (i) such provisions are inconsistent with public policy or are otherwise prohibited by applicable federal or state laws, (ii) such action or inaction involves negligence, strict liability, gross negligence, recklessness, willful misconduct, unlawful conduct, fraud or illegality, or (iii) such provisions otherwise operate to shift risk in an extraordinary way.”⁹³

Negating Land Use and Enforceability Opinions.

“We express no opinion as to compliance with any building code, zoning or other land use laws or regulations, or any environmental laws.”⁹⁴

Receivership. “We express no opinion with respect to the enforceability of any provisions in the Loan Documents purporting to grant a right to the appointment of a receiver other than as provided under Texas law.”

An example of specific exceptions typical of an opinion letter rendered by Texas counsel is set forth in qualification paragraph (C) of the Revised Form of Opinion.

N. Choice of Law

⁹³ See generally Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law*, 41 TEX. J. BUS. L. 271 (2006) (including an excellent analysis of indemnity enforceability opinions).

⁹⁴ ABA/ACREL Guidelines, *supra* note 21, § 4.3a.

Under customary practice, when the Subject Agreement selects as its governing law the same law as designated for coverage of the opinion, an enforceability opinion includes the validity of such choice of law by implication.⁹⁵ Consequently, the opinion preparer must carefully consider the choice of law rules of the chosen state in order to make the professional judgment that, were an action brought to enforce the Subject Agreement in such state, the courts of that state would give effect to such choice of law provision and, in deciding whether to enforce the Subject Agreement, would apply such state’s substantive law. The experienced Texas practitioner rendering an opinion covered by Texas law ordinarily will be able to conclude that the governing law clause choosing Texas law will be given effect, even though the analysis is far from simple. If the opinion giver is unable to render an enforceability opinion with respect to such a choice of law provision, the opinion must expressly exclude any opinion as to the enforceability of such clause.

Somewhat more difficult issues arise when the choice of law provided for in one or more of the Subject Agreements is different from the law covered by the opinion letter. In this situation, the opinion giver is usually not in a position to render an enforceability opinion with respect to the law governing the Subject Agreements and should explore with counsel representing the opinion recipient as to whether and to what extent the opinion will address such issues. Once counsel have reached such an understanding, the opinion should properly reflect it by specifying how the opinion is affected by the exclusion from the opinion’s coverage of the law chosen in the Subject Agreement as its governing law.⁹⁶

Such an agreement will typically accord with one of the following alternatives: (i) obtain the enforceability opinion from local counsel; (ii) forego the opinion on the enforceability of the Subject Agreement under the governing law; (iii) render an opinion that the parties’ choice of

⁹⁵ *Id.* § 4.9; *TriBar Report*, *supra* note 3, § 4.4. This is the so called “default concept” adopted by the ABA Accord and the ABA/ACREL Report and is analyzed extensively in the Texas Supplement. See *Texas Supplement*, *supra* note 13, § 8.

⁹⁶ ABA/ACREL Guidelines, *supra* note 21, § 4.9; *TriBar Report*, *supra* note 3, § 4.6.

law will be given effect under the choice rules of the jurisdiction covered by the opinion; (iv) render an opinion that the Subject Agreement would be enforceable (subject to the usual limitations) if the law of the opining jurisdiction were to be applied instead of the law chosen by the parties; or (v) a combination of the alternatives summarized in clauses (iii) and (iv). Given the complexity of the required factual evaluations and legal analyses and the unpredictability of judicial decisions, many attorneys refuse to render, and expressly exclude, any choice of law opinions.

The ABA/ACREL Guidelines recognize that “[c]hoice of law opinions are often given as ‘reasoned’ or ‘explained’ opinions based upon factual assumptions bearing on the opinion conclusion and most often can be only a description of the approach likely to be taken by a court applying existing law in the opinion giver’s jurisdiction.”⁹⁷

Section IV.J.3 of *Wallenstein* provides several excellent examples of express choice of law opinions and qualifications.⁹⁸ Additionally, a comprehensive analysis of the interaction between the coverage limitation and the governing law clause is available in Section 9.12 of *Glazer*.⁹⁹

O. Usury Opinions

Under customary practice, a usury opinion is included in the enforceability opinion unless it is expressly excluded.¹⁰⁰ Nevertheless, in mortgage loan transactions, it is customary for the usury opinion to be expressly stated rather than left to implication.¹⁰¹ While the bankruptcy and insolvency exception, the equitable principles limitation and other common qualifications do not apply to a usury opinion, certain qualifications do apply, some implied

and other expressly stated.¹⁰² Section 7.4 of the Texas Supplement sets out several express qualifications worthy of consideration.¹⁰³ A typical Texas usury qualification frequently used in mortgage loan transactions provides:

In rendering the opinion expressed in Paragraph ____ above [*the usury opinion*], we [have excluded from our opinion the effect of any right of Lender to receipt of an equity interest in Borrower] [and of any credit to the indebtedness evidenced by the Note which might be required as a result of any “absolute” assignment of rents contained in the Loan Documents, and] have further assumed that (i) no fees, charges or other compensation will be paid to or for the benefit of Lender except as specified in the Loan Documents, (ii) all charges for reimbursement of services paid to third parties will be for actual out-of-pocket expenses paid to third parties incurred in documenting the Loan for services actually rendered by such parties, (iii) that all fees and charges provided for in the Loan Documents to be paid to Lender constitute bona fide commitment fees and not interest on the Loan, (iv) that Lender will observe and comply with the provisions of the “usury savings clause” of the Loan Documents limiting all amounts characterizeable as interest which are charged or collected by Lender on or in connection with the Loan to amounts that do not exceed the maximum rate or amount of interest that may lawfully be contracted for, charged or collected thereon or in connection therewith under applicable Texas law, and (v) in complying with the provisions of the “usury savings clause” of the Loan Documents, Lender will give due consideration to all fees, charges or other compensation which under applicable law may be or is deemed to be interest on the Loan, including but not limited to any amount characterizeable as a

⁹⁷ ABA/ACREL Guidelines, *supra* note 21, § 4.9.

⁹⁸ See *Wallenstein*, *supra* note 2, § IV.J.3.

⁹⁹ GLAZER, *supra* note 1, § 9.12.

¹⁰⁰ ABA/ACREL Guidelines, *supra* note 21, § 4.0.b; *TriBar Report*, *supra* note 3, § 3.5.2(a)(iii); *Texas Supplement*, *supra* note 13, § 7.1.

¹⁰¹ ABA/ACREL Guidelines, *supra* note 21, § 4.0.b; *Texas Supplement*, *supra* note 13, § 7.2.

¹⁰² *Texas Supplement*, *supra* note 13, §§ 7.3-7.4; ABA/ACREL Guidelines, *supra* note 21, § 4.0.b.

¹⁰³ See *Texas Supplement*, *supra* note 13, § 7.4.

“prepayment” fee or premium payable in the event of the acceleration of the maturity of the indebtedness evidenced by the Note by Lender.

P. “Adequacy” or “All Essential Remedies” Opinions

Notwithstanding the fact that the ABA/ACREL Guidelines specifically provide that “such opinions should not be requested or given,”¹⁰⁴ opinion recipients frequently request an “adequacy of document” or “all essential remedies opinion,” an example of which can be found in opinion paragraph 8 of the Requested Form of Opinion. In support of its conclusion that such assurance is “inappropriate,” the ABA/ACREL Guidelines provide:

In rendering a third party legal opinion to a lender, the opinion giver does not give legal advice to a client, but rather provides an “evaluation” of discrete legal issues specifically included in the opinion request. An opinion request addressing matters that are beyond specific legal issues and that are of the nature of the “broader guidance and counsel” that a lawyer provides to one’s own client (see BLS Accord, *supra* note 3, § 7) is inappropriate in scope. Accordingly, a request for an assurance that the loan documents are legally adequate for the lender’s intended purposes is inappropriate.¹⁰⁵

In lieu of the provision of an adequacy opinion, the ABA/ACREL Guidelines suggest that in certain limited circumstances, i.e. “where a lender is not represented by, or has not had its loan documents reviewed by its own counsel, and the chosen in-state lawyer is unable to represent the lender directly,” the opinion giver may provide a more limited assurance “to the effect that the loan documents do not omit essential remedies that in the opinion giver’s experience are generally found in similar documents for comparable mortgage loan transactions in the opinion giver’s

jurisdiction.”¹⁰⁶ Some Texas practitioners are willing to provide such assurance as follows:

The Deed of Trust contains the terms and provisions necessary to enable Lender, following a default under the Deed of Trust, to exercise the non-judicial foreclosure remedy customarily available to a real estate lienholder under the laws of the State of Texas.

If this limited assurance cannot be given, in one form or another, the guidelines further suggest as follows:

In itself, in the event such an assurance cannot be given, the opinion giver may not provide further response without obtaining the client’s informed consent (*see, supra* §1.1a; *see also* Model Rule of Professional Conduct R, 2.3(b) (2001)). The opinion giver should consult the rules of professional conduct of the opinion giver’s jurisdiction to satisfy oneself about ethical obligations. In addition, the inference created by refusal to provide such an assurance when it cannot be given places the opinion giver in an ethical dilemma in the same manner as in the case of dual representation (*see supra*, §1.1a). It is for this reason that this opinion request itself is regarded as inappropriate by many experienced opinion givers.¹⁰⁷

Some practitioners observe that the attorney who accepts the responsibility of rendering an “adequacy” or “essential remedies” opinion, but concludes that the forms provided are themselves inadequate, may be confronted with an unavoidable violation of the disciplinary rules, whether the attorney either points out the inadequacy without having first obtained the clients informed consent or refuses to render the opinion after having first agreed to do so.

¹⁰⁴ ABA/ACREL Guidelines, *supra* note 21, § 1.1.b.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Q. Governmental Approvals, Legal Compliance and Conflict Opinions

Opinion recipients also frequently request opinions on no governmental approvals, no violation of law, and no breach or default under agreements, examples of which can be found in opinion paragraph 6 of the Requested Form of Opinion. As with adequacy opinions, the ABA/ACREL Guidelines suggest each such opinion is inappropriate and should not be requested or given.¹⁰⁸ The ABA/ACREL Guidelines specifically provide that “[n]either a materiality exception nor a knowledge limitation makes these opinions appropriate.”¹⁰⁹

The only alternative suggested by the ABA/ACREL Guidelines, which is provided solely with respect to legal compliance opinions, is to give such an opinion only if it is specifically requested by counsel for the opinion recipient and its coverage is expressly limited to specified laws.¹¹⁰ The opinion preparer, armed with the ABA/ACREL Guidelines and concerned about the potential for increased liability exposure arising from such opinions, is well advised to refuse to render these types of opinions.

If the opinion preparer does determine to render one or more of these opinions, he or she should strictly limit the scope of the opinion. For example, the opinion giver, in rendering a no breach or default opinion, should limit such opinions to certain identified agreements, as provided for in the Revised Form of Opinion, or alternatively, to agreements known to and reviewed by the opinion giver.

It also is important that, in the context of rendering any of these opinions, the opinion preparer understand the difference between the opinion addressing “the performance of its obligations thereunder,” as proposed in the Requested Form of Opinion, in contrast to addressing “the consummation of the transaction contemplated by the Loan Documents,” as suggested in the Revised Form of Opinion. Under customary practice, consummation is understood to be limited to the company’s

obligations up to and including the closing, while performance is understood to include any post closing obligations.¹¹¹ If the opinion addresses “the performance by the Borrower of its obligations,” the scope of such performance should be considered and, if possible, limited, as for example to payment of principal and interest in the context of a loan transaction.

R. No Litigation Opinions

A typical requested no litigation opinion is set forth in opinion paragraph 7 of the Requested Form of Opinion.

As a result of the concerns respecting risk and the belief that factual confirmations, even when related to litigation, are inappropriate, some firms are refusing to address litigation in rendering a legal opinion except under unusual circumstances, while others are expressly narrowing the scope of the opinion provided. Concern over the risks involved in the rendering of lack of knowledge opinions stems in large part from recent cases involving the issuance of no litigation opinions. Chief among these cases is the Dean Foods case,¹¹² in which a law firm was held liable for an opinion providing that, to its knowledge, its client was not subject to any pending or threatened investigation. Additionally, many lawyers prefer not to address the absence of litigation against a party as an opinion, but rather to furnish the information in the form of a factual confirmation in a paragraph separated from the opinions.

The Texas Report provides that a request by counsel for the opinion recipient of anything more than a confirmation of the absence of litigation “is inappropriate and should be resisted,” but nonetheless provides a form of no litigation opinion for use by an opinion giver in the event he or she ultimately does agree to address the issue.¹¹³ Needless to say, opinion givers, if unable to avoid rendering a no litigation opinion, should make every effort to narrow the scope of the statement (see examples

¹⁰⁸ *Id.* § 4.3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *TriBar Report, supra* note 3, §§ 6.5 n. 149, 6.7 n. 171; GLAZER, *supra* note 1, §§ 13.2.3, 14.4, 15.5, 16.3.6.

¹¹² *Dean Foods Co. v. Pappathanasi*, No. 012595BLS, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004).

¹¹³ *Texas Report, supra* note 10, § VIII.I.

set forth in the following paragraph), whether expressed in the form of a confirmation or an opinion, and should understand that, under customary practice, a no litigation opinion is not deemed to include an evaluation of the expected outcome of pending or threatened litigation, which the opinion giver “ordinarily should not be asked to express.”¹¹⁴

The opinion giver should recognize that not all no litigation opinions are created equal. A no litigation opinion may be expressly limited to litigation affecting the transaction, or may alternatively be broader, covering litigation affecting the company generally. Such an opinion may cover threatened and/or pending litigation and may cover investigations to which the client is subject. Additionally, such an opinion may or may not be limited to litigation known to the opinion giver. It is important to remember that, if the opinion preparer has a suspicion, much less knowledge, of relevant and adverse information, the limitations in the opinion letter may be of little assistance in defending an opinion.

The no litigation paragraph in the Boston Streamlined Opinion¹¹⁵, which offers an interesting contrast to the opinion requested in the Requested Form of Opinion, reads as follows:

[Except as disclosed in Schedule ____ to the Credit Agreement,] we are not representing Holdings or either of the Subsidiaries in any pending litigation in which it is a named defendant[, or in any litigation that is overtly threatened in writing against it by a potential claimant,] that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Credit Agreement.¹¹⁶

S. Knowledge Qualifications and Confirmation of Lack of Knowledge

¹¹⁴ ABA/ACREL Guidelines, *supra* note 21, § 4.7.

¹¹⁵ Boston Bar Association Legal Opinions Committee, *Streamlined Form of Closing Opinion*, 61 BUS. LAW. 389 (2005), available at http://www.abanet.org/buslaw/mo/premium-cl/tbl/2005_061_01/0008/0008.pdf.

¹¹⁶ *Id.* at 396.

While the opinion preparer is well advised not to render what are often referred to as “factual opinions,” such as the no conflict opinions and the no litigation opinion, a legal opinion may by necessity include such opinions. Such factually oriented opinions are often expressed and qualified as being to the opinion giver’s knowledge. If the qualification “to our knowledge” or similar qualifications is used, the opinion should expressly define the term “knowledge” for purposes of the opinion.¹¹⁷ This definition often tracks the recommendations of the ABA/ACREL Guidelines providing as follows:

Qualifications as to the knowledge of the opinion giver are often stated in terms of the actual knowledge of the opinion author and identified other individuals in his or her law firm, *e.g.*, a “primary lawyer group” including the opinion author, lawyers involved in preparing or supporting the opinion and lawyers actively involved in the transaction and, occasionally, the attorney who is the primary client contact. The term “actual knowledge” (or words to that effect) means that the opinion in question is being limited to the conscious awareness of the identified persons, with no other investigation or inquiry having been made (see BLS Accord § 6-B), and such limitations will be given effect.¹¹⁸

For example, the Texas Report suggests the following provision for use in non-Accord opinions:

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

¹¹⁷ ABA/ACREL Guidelines, *supra* note 21, § 3.4; Texas Report, *supra* note 10, § VII.C.5.f.

¹¹⁸ ABA/ACREL Guidelines, *supra* note 21, § 3.4.a.

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.¹¹⁹

In recognition of the risks inherent in lack of knowledge statements, opinion givers, in accordance with ABA/ACREL Guidelines¹²⁰ and with increasing frequency, should generally refuse to make statements that they lack knowledge of particular factual matters, even when framed narrowly to cover only the assumption or representation on which they are relying.

The only exception to the foregoing principal recognized by the ABA/ACREL Guidelines is “the ‘confirmation’ often included in closing opinions regarding the opinion giver’s knowledge of legal proceedings to which the client is a party,” discussed in greater detail below.¹²¹

T. Mortgage and UCC Opinions

Opinion paragraph 4 of the Requested Form of Opinion appears to be a sweeping UCC Article 9 attachment and perfection opinion with respect to “all collateral described therein” owned or later acquired by the Borrower. One would expect the collateral described in the Deed of Trust to include both real and personal property, and we will assume that to be the case for purposes of our exercise. But the absence of any reference to the lien created under the Deed of Trust and the use the terms “security interest” and “perfection” suggest the opinion recipient intended to limit the collateral to personal property and is only requiring an attachment and perfection opinion with respect to the personal property collateral. This leads the opinion giver to question whether the opinion recipient expects the enforceability opinion to include an implied opinion that the Deed of Trust is in a

form sufficient to create a lien on the real property collateral described therein.

Before resolving these issues, the opinion giver should first question the necessity for either of the opinions for the reasons raised in paragraph VII.A above. It is difficult to justify the cost of these opinions in an intrastate transaction or in an interstate transaction in which the recipient is represented by local counsel. In addition, the quantity of the personal property involved in the typical mortgage loan usually is not significant enough to justify the cost of an attachment and perfection opinion. It should be noted that it has become more customary for opinion givers not to render either of these opinions in transactions in which the lawyer representing the opinion recipient is licensed to practice law in the jurisdiction covered by the opinion letter.

For purposes of our exercise, we will assume that our efforts to eliminate the requested opinion were unsuccessful because the opinion recipient is not represented by local counsel. We will further assume that during the course of the discussions with the opinion recipient’s lawyer regarding the need for these opinions, it became clear that the opinion recipient must have an opinion on the creation of the lien on the real property collateral, as well as an attachment and perfection opinion with respect to the personal property.

Returning to opinion paragraph 4 of the Requested Form of Opinion, it should be further noted that the opinion addresses “all collateral described therein,” some items of which may not be covered by Article 9 of the Uniform Commercial Code. In addition, the financing statement in certain items of personal property is likely to be perfected by means other than the filing of a security interest. The reader will note these issues have been addressed in opinion paragraphs 4 and 5 of the Revised Form of Opinion. In order to render these opinions, the opinion giver should include in the opinion letter the assumptions set forth in subparagraphs (x), (xi) and (xii) of opinion paragraph (I) of the Revised Form of Opinion and the qualifications set forth in paragraphs (F) and (G) thereof.

An additional word of caution is in order. Lawyers preparing or counseling the recipient with respect to UCC opinions should be well versed in Article 9 of the UCC, the TriBar UCC

¹¹⁹ *Texas Report*, *supra* note 10, § VI.C.5.f.

¹²⁰ *ABA/ACREL Guidelines*, *supra* note 21, § 4.4; GLAZER, *supra* note 1, § 18.8.

¹²¹ *ABA/ACREL Guidelines*, *supra* note 21, § 4.4 n. 16.

Report¹²² and Section IX of the Texas Report, as updated by Supplements 1 and 2 to the Texas Report¹²³.

U. Jurisdictional Requirements

In interstate transactions the opinion recipient often will request “qualification to do business” and “no tax” opinions, such as those requested in the Requested Form of Opinion in opinions 9 and 10, respectively. Although the ABA/ACREL Guidelines indicate that such opinions “are generally not cost justified in view of the extensive and time consuming legal and factual inquiry required and the often limited value of the resulting opinion,”¹²⁴ most Texas practitioners will nevertheless render the opinions in substantially the form set forth in the Revised Form of Opinion.

VIII. CONCLUSION

Preparing and interpreting legal opinions requires expertise. In order for a Texas practitioner to safely render an opinion or provide counsel to an opinion recipient he or she must, at a minimum, be completely familiar with the National Reports, the Texas Report and the Texas Supplement. In addition, he or she must have the legal insight, and ultimately develop the practical experience, necessary to understand the relevant issues and respond appropriately.

¹²² See TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449, § 4.1 n. 96 (August 2003), available at <http://www.abanet.org/buslaw/tribar/materials/20050303000011.pdf>.

¹²³ See *Texas Report*, *supra*, note 10; *Supplement 1*, *supra* note 10; *Supplement 2*, *supra* note 10.

¹²⁴ ABA/ACREL Guidelines, *supra* note 21, § 4.1.a.

Exhibit A
Source Materials

NATIONAL REPORTS:

TriBar Report: Tri-Bar Opinion Committee, *Third-Party "Closing" Opinion*, 53 BUS. LAW. 592 (1998), available at <http://www.abanet.org/buslaw/tribar/materials/20050303000003.pdf>

TriBar UCC Report: TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449 (2003), available at <http://www.abanet.org/buslaw/tribar/materials/20050303000011.pdf>.

TriBar Remedies Report: TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483 (2004), available at <http://www.abanet.org/buslaw/tribar/materials/20050303000002.pdf>.

TriBar LLC Report: TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006), available at <http://www.abanet.org/buslaw/tribar/materials/20060720000000.pdf>.

ABA Accord: Section of Business Law of the ABA, Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 BUS. LAW. 167 (1991).

ACREL SOP: ACREL, *Statement of Policy on Mortgage Loan Enforceability Opinions, Statement of Policy on Mortgage Loan Enforceability Opinions*, in THE ATTORNEY'S OPINION LETTER IN REAL ESTATE TRANSACTIONS 1 (Am. C. of Real Est. Law. ed., 1992).

ABA/ACREL Report: Section of Business Law of the ABA for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the ABA & the ACREL, *Report on Adaptation of the Legal Opinion Accord*, 29 REAL PROP. PROB. & TR. J. 569 (1994).

ABA Principles: Section of Business Law of the ABA, Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998), available at <http://www.abanet.org/buslaw/tribar/materials/20050120000000.pdf>.

Inclusive Opinion: ABA, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, Subcommittee on Creation of an Inclusive Opinion & ACREL Attorneys' Opinions Committee, *Inclusive Real Estate Secured Transaction Opinion*, § V (1999), <http://www.acrel.org/Documents/PublicDocuments/InclusiveRealEstateSecuredTransactionOpinion.htm>.

ABA/ACREL Guidelines: ACREL Attorneys' Opinion Committee & the ABA Section of Real Property Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 2 (2003), available at www.abanet.org/rppt/cmtes/rp/i5/final-opinion-2003.pdf.

TEXAS REPORTS:

Texas Report: State Bar of Texas Business Law Section, *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 29 ST. B. OF TEX. BULL. OF THE BUS. L. SEC. 2 & 3 (1992), available at <http://www.texasbusinesslaw.org/SFXA42.pdf>; see also State Bar of Texas Business Law Section, *Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 31 ST. B. OF TEX. BULL. OF THE BUS. L. SEC. 4 (1994), available at <http://www.texasbusinesslaw.org/Supplement1.tif>; State Bar of Texas Business Law Section, *Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business*

Transactions, 37 TEX. J. BUS. L. 2 (2001), available at <http://www.texasbusinesslaw.org/Supplement2.pdf>.

Texas Indemnification Report: Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law*, 41 TEX. J. BUS. L. 271 (2006).

Texas Supplement: *1996 Texas Supplement Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 35 ST. B. NEWSL. FOR REAL EST., PROB. & TR. L. 1 (State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, Austin, Tex.), Oct. 1996, available at <http://www.reptl.org/information/opinionletter.html>.

Limiting Liability: Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Limiting Negligent-Misrepresentation Liability for Third-Party Legal Opinions*, 38 TEX. J. BUS. L. 20 (2003).

OTHER AUTHORITY:

Restatement: RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51, 52, 95 (2000).

Exhibit B
[TO BE PREPARED ON THE LETTERHEAD OF BORROWER'S COUNSEL]

June __, 2007

Big Bucks Bank

New York, New York _____

Re: Loan (the “**Loan**”) in the amount of \$10,000,000 by Big Bucks Bank (“**Lender**”) to Able Development, Inc., a Texas corporation (“**Borrower**”) and secured by property in Harris County, Texas, generally known as Able Enterprises Plaza (the “**Property**”)

Ladies and Gentlemen:

We have served as special counsel for Borrower in connection with the Loan. The opinions contained herein are being delivered to you pursuant to the requirements of Section 4.4 of the Loan Agreement (as hereinafter defined), as a condition of your making the Loan to Borrower and consummating the transaction contemplated in the Loan Agreement (the “**Transaction**”). Any capitalized term used but not defined herein shall have the meaning given such term in the Loan Agreement. References herein to the “**UCC**” are to the Uniform Commercial Code currently in effect in the State of Texas. All terms in Paragraphs 4, 5, (G), and (I)(xi) hereof that are defined in the UCC and that are not capitalized have the meaning given to them in the UCC.

In connection therewith, we have reviewed the following:

1. The following loan documents, each dated the date hereof unless otherwise noted (the “**Loan Documents**”):
 - (a) Loan Agreement (the “**Loan Agreement**”) between Borrower and Lender;
 - (b) Note from Borrower to Lender in the amount of the Loan (the “**Note**”);
 - (c) Deed of Trust and Security Agreement (the “**Deed of Trust**”) from Borrower for the benefit of Lender encumbering the real and personal property described therein (inclusive of the Property, the “**Collateral**”), to be recorded in the Official Public Records of Real Property of Harris County, Texas (the “**Recording Office**”);
 - (d) Assignment of Leases and Rents;
 - (e) Hazardous Material Indemnification Agreement;
 - (f) _____; and
 - (g) _____.
2. Two UCC-1 Financing Statements (the “**Financing Statements**”), one (the “**Central Financing Statement**”) naming Borrower as debtor and Lender as secured party to be

filed in the Office of the Secretary of State of the State of Texas (the “**Texas SOS**”), and the other (the “**Local Financing Statement**”) to be recorded in the Recording Office.

3. The following organizational documents of Borrower (“**Borrower’s Organizational Documents**”):
 - (a) Certificate of Formation of Borrower as certified by the Texas SOS on June ___, 2007, and By-Laws of Borrower;
 - (b) Borrower’s Certificate of Existence as certified by the Texas SOS on June ___, 2007;
 - (c) Certificate issued by the Texas Comptroller of Public Accounts on June ___, 2007; and
 - (d) Resolution of the Directors of Borrower certified by the Secretary of Borrower on June ___, 2007.

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.

Based on the foregoing, and except as hereinafter limited, we are of the opinion that:

1. Borrower is a corporation validly existing and is in good standing under the laws of the State of Texas, and has all requisite corporate power and authority to own, lease and operate the Property and to execute, deliver and perform its obligations under the Loan Documents.
2. The execution, delivery and performance of the Loan Documents by Borrower have been duly authorized by Borrower.
3. The Loan Documents have been duly executed and delivered by Borrower and constitute valid and binding obligations of Borrower enforceable against Borrower in accordance with their respective terms.
4. The Deed of Trust (i) is in form sufficient under applicable laws of the State of Texas to be accepted for recording by the Recording Office; (ii) is in form sufficient to create in favor of Lender (A) a valid lien on that portion of the Collateral that constitutes real property (the “**Real Property**”) and (B) a valid security interest (the “**Article 9 Security Interest**”) in that portion of the Collateral that constitutes personal property owned by Borrower and described therein in which a security interest may be created under the provisions of Article 9 of the UCC (the “**Article 9 Collateral**”), including, without limitation, that portion of the Collateral that constitutes fixtures (the “**Fixtures**”); and (iii) when properly filed with the Recording Office, together with the Local Financing Statement, will (A) give notice to third parties of the creation of the lien on the Real Property and (B) perfect the security interest in the Fixtures.
5. The Central Financing Statement is in proper form for filing with the Texas SOS. Upon the proper filing of the Central Financing Statement with the Texas SOS (including the payment of requisite nominal filing fees), the Article 9 Security Interest will be perfected in that portion of the Article 9 Collateral described in the Central Financing Statement that may be perfected by filing a financing statement with the Texas SOS under the UCC.

6. The Loan Documents do not on their face require the payment of interest at a rate which is in violation of the applicable usury laws of the State of Texas.
7. The execution and delivery by Borrower of the Borrower Loan Documents and the consummation of the Transaction, (i) will not violate the Borrower's Organizational Documents; (ii) will not breach or result in a violation of any judgment, order or decree listed on the attached Schedule 1; or (iii) will not breach or result in a violation of any contract, indenture, instrument or other agreement listed on the attached Schedule 2.
8. No taxes or other charges, including, without limitation, intangible or documentary stamp taxes, mortgage or recording taxes, transfer taxes or similar charges, are payable to the State of Texas or to any jurisdiction therein on account of the execution or delivery or recording or filing of the Deed of Trust, or the creation of the indebtedness secured by the Deed of Trust, as applicable, except for nominal filing or recording fees.
9. Assuming that the only contact of Lender with the State of Texas is the holding of a lien and security interest against the Collateral, (i) Lender will not be required to qualify to do business in the State of Texas solely to make the Loan and enforce the provisions of the Loan Documents (but without opining as to such in the event Lender were ever to become the owner of any part of the Collateral as a result of the exercise of such remedies or in the event that Lender were to either directly or through agents become active in the management of any part of the Collateral), and (ii) the holding of a lien and security interest in the Collateral will not result in the imposition on Lender of any taxes of the State of Texas or any subdivision thereof in which the Collateral is located (including, without limitation, franchise, license, tax on interest received or income taxes), other than any taxes which Lender would be required to pay (A) if it were to engage in any of the activities which would require it to qualify to do business in the State of Texas, or (B) if Lender undertakes any activity in the State of Texas with respect to its rights and remedies against any part of the Collateral, either directly or through an agent, whether pursuant to the rights provided to it under the Deed of Trust or otherwise, including, but not limited to, the use of a loan servicer in the State of Texas to administer any part of the Collateral located in the State of Texas, taking possession of any part of the Collateral prior to foreclosure or otherwise becoming active in the management of any part of the Collateral, undertaking collection actions in the State, including, but not limited to, foreclosure of such liens and security interests, and taking title to any part of the Collateral, whether or not through foreclosure. In rendering the opinions contained in this Paragraph 9, we have relied on Sections 9.051 and 9.251 of the Texas Business Organizations Code, Section 171.001(a)(1) of the Texas Tax Code, Section 3.546 and Section 3.554 of the Texas Comptroller's Franchise Tax Rules and applicable letter rulings of the Texas Comptroller of Public Accounts.

This opinion is subject to the following:

(A) Our opinions set forth in Paragraph 3 above are subject to the qualification that the enforcement of the Loan Documents may be limited by (i) applicable bankruptcy, insolvency, reorganization, arrangement, fraudulent transfer, moratorium or other laws affecting creditors' rights generally, and (ii) general equitable principles and the availability of equitable remedies, as such, in connection with the enforcement of rights granted under the Loan Documents, including, but not limited to, specific performance, and the effects of the application of principles of equity (regardless of whether enforcement is considered in proceedings in law or in equity).

(B) Certain remedies, waivers and other provisions of the Loan Documents may not be enforceable; nevertheless, subject to the other qualifications set forth herein, such unenforceability will not render the Loan Documents invalid as a whole or preclude (i) the judicial enforcement of the

obligation of Borrower to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the Note, subject to Sections 51.003, 51.004 and 51.005 of the Texas Property Code and the express limitations set forth in the Loan Documents, (ii) the acceleration of the obligation of Borrower to pay such principal, together with such interest, after a material default of Borrower in payment of such principal or interest, or (iii) after maturity or after acceleration as provided in clause (ii) above, the judicial foreclosure or, if you elect to so pursue, the non-judicial foreclosure (i.e., pursuant to the power of sale as specified in the Deed of Trust), in accordance with applicable law and the Loan Documents, of the lien on and security interest in the Collateral.

(C) We express no opinion with respect to the enforceability of any provisions (i) imposing penalties or forfeitures, (ii) releasing, exculpating or exempting a party from, or requiring indemnification or contribution of a party for liability for, its own action or inaction, to the extent that (a) such provisions are inconsistent with public policy or are otherwise prohibited by applicable federal or state laws, (b) such action or inaction involves negligence, strict liability, gross negligence, recklessness, willful misconduct, unlawful conduct, fraud or illegality, or (c) such provisions otherwise operate to shift risk in an extraordinary way; (iii) restricting access to courts or to legal or equitable remedies or purporting to affect the jurisdiction or venue of courts; (iv) purporting to establish evidentiary standards for suits or proceedings to enforce the Loan Documents; (v) purporting to waive rights to notice, legal defenses, trial by jury, statutes of limitations or other benefits that cannot be waived under applicable law; (vi) relating to liquidated damages, delays or omissions of enforcement of rights or remedies, consent judgments or summary proceedings; (vii) purporting to grant powers of attorney or authority to execute documents or to act by power of attorney on behalf of any Borrower; (viii) purporting to grant the right of any person or entity to institute or maintain any action in any court; (ix) purporting to restrict or limit transfer or alienation of real property; (x) purporting to transfer assets which by their nature are nontransferable; (xi) purporting to grant a right to the appointment of a receiver other than as provided under Texas law; (xii) purporting to grant self-help remedies (other than those remedies available pursuant to an exercise in accordance with the provisions of Section 51.002 of the Texas Property Code or Chapter 9 of the UCC); (xiii) purporting to provide remedies inconsistent with the UCC, to the extent that the UCC is applicable thereto; (xiv) purporting to grant to or limit rights of third parties; or (xv) purporting to cause a fee or premium to be charged in the event of an involuntary payment of the Loan.

(D) We express no opinion as to the enforceability of any assignment of rents prior to the appointment of a receiver for the Collateral or foreclosure of the lien of the Deed of Trust or the taking of other equivalent action, or whether an “absolute” assignment of rents (instead of assigning the rents as collateral) would require a credit to the indebtedness evidenced by the Note prior to the actual receipt by Lender of such rents.

(E) In rendering the opinion expressed in Paragraph 6 above, we have excluded from our opinion the effect of any credit to the indebtedness evidenced by the Note which might be required as a result of any “absolute” assignment of rents contained in the Loan Documents, and have further assumed that (i) no fees, charges or other compensation will be paid to or for the benefit of Lender except as specified in the Loan Documents, (ii) all charges for reimbursement of services paid to third parties will be for actual out-of-pocket expenses paid to third parties incurred in documenting the Loan for services actually rendered by such parties, (iii) all fees and charges provided for in the Loan Documents to be paid to Lender constitute bona fide commitment fees and not interest on the Loan, (iv) Lender will observe and comply with the provisions of the “usury savings clause” of the Loan Documents limiting all amounts characterizable as interest which are charged or collected by Lender on or in connection with the Loan to amounts that do not exceed the maximum rate or amount of interest that may lawfully be contracted for, charged or collected thereon or in connection therewith under applicable Texas law, and (v) in complying with the provisions of the “usury savings clause” of the Loan Documents, Lender will give due consideration to all fees, charges or other compensation which under applicable law may be or is deemed to be interest on the Loan, including but not limited to any amount characterizable as a “prepayment” fee or premium payable in the event of the acceleration of the maturity of the indebtedness evidenced by the Note by Lender.

(F) We express no opinion with respect to the existence, location, description or ownership of, or state or condition of title to, the property described in the Loan Documents, the priority of any liens or security interests created by any of the Loan Documents, or except as expressly set forth in Paragraphs 4 and 5 above, the perfection of any security interests created by any of the Loan Documents.

(G) Insofar as it relates to the Article 9 Collateral constituting proceeds, our opinions in Paragraphs 4 and 5 above are subject to the limitations set forth in Section 9-315 of the UCC. We also call your attention to the fact that security interests in certain categories of the Article 9 Collateral may not be subject to perfection by the filing of a financing statement with the Texas SOS. We express no opinion with respect to the choice of law governing perfection, the effect of perfection and non-perfection or priority of security interests.

(H) Our opinions expressed in Paragraph 1 above are based solely upon the Borrower's Organizational Documents, and we render such opinions as of the date of such documents, as applicable.

(I) We have assumed, with your permission and without independent investigation or inquiry:

(i) the genuineness of all signatures (other than those of Borrower) on all documents examined;

(ii) the authenticity of all documents submitted to us as originals and the conformity to authentic originals of documents submitted to us as certified, conformed or photostatic copies;

(iii) all natural persons who are a party, or involved on behalf of any party, to the Loan Document have sufficient legal capacity to enter into and perform the obligations of such party under the Loan Documents;

(iv) the due authorization of the Loan Documents by each of the parties thereto (other than Borrower);

(v) each of the parties to the Loan Documents (other than Borrower) is duly organized or formed, validly existing and in good standing under the laws of its jurisdiction of incorporation or formation and has full power and authority to execute, deliver and perform its obligations under each of the Loan Documents to which it is a party; and each of the Loan Documents constitutes a valid and legally binding obligation of each of the parties thereto (other than Borrower), enforceable against such parties in accordance with its terms;

(vi) each of the Loan Documents has been duly executed and delivered by all of the parties thereto (other than Borrower);

(vii) each of the Loan Documents has been duly executed and delivered by all of the parties thereto in the same form that we have examined, with any blank properly filled in and correct exhibits attached, and has been acknowledged where required;

(viii) the execution and delivery of the Loan Documents are free from any fraud, misrepresentation, undue influence, duress, mutual mistake, or criminal activity;

(ix) the terms and conditions of the Loan Documents have not been amended, modified or supplemented by any other agreement or understanding of the parties, or by waiver of any of the material provisions of the Loan Documents;

(x) Borrower has title to or other interest in each item of the Collateral;

(xi) the descriptions of the Collateral (including the fixtures) contained in the Loan Documents and the Financing Statements accurately and reasonably identify the property in which liens and security interests are intended to be granted by Borrower and are sufficient under applicable law (i) to provide notice to third parties of the liens and security interests created thereby and (ii) to create an effective contractual obligation under applicable law;

(xii) Lender's name and address is correctly stated in the Deed of Trust and the Financing Statements; and

(xiii) Borrower has received consideration for its obligations under the Loan Documents.

Except as disclosed in Schedule 3 to the Loan Agreement, we are not representing Borrower in any pending litigation in which it is a named defendant, or in any litigation that is overtly threatened in writing against it by a potential claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Loan Documents.

Members of our firm are licensed to practice law only in the State of Texas and other jurisdictions the laws of which are not applicable to the Loan, Borrower, or the opinions expressed herein. We express no opinion herein as to the laws of any jurisdiction other than the laws of the State of Texas.

The opinions contained herein are limited solely to the matters stated in Paragraph 1 through 9 hereof, and no opinion is to be inferred or may be implied beyond the matters expressly stated herein. Moreover, the opinions contained herein do not address any of the following legal issues, and we specifically express no opinion with respect to the effect or application of: (a) any securities or "blue sky" laws, including, but not limited to, the Securities Act of 1933, as amended, and the Texas Securities Act; (b) pension and employee benefit laws and regulations; (c) environmental, land use, zoning and other local laws and regulations, including, without limitation, compliance of any or all of the Collateral therewith; (d) tax laws and regulations; (e) health and safety laws and regulations, including, without limitation, compliance of any or all of the Collateral therewith; (f) antitrust and criminal laws, including provisions of such criminal laws relating to forfeiture; (g) the Patriot Act, money-laundering laws or other similar Homeland Security laws; and (h) other laws excluded by customary practice.

The opinions expressed herein are as of the date first set forth above, and we do not assume or undertake any responsibility or obligation to supplement or to update such opinions to reflect any facts or circumstances which may hereafter come to our attention or any changes in the laws which may hereafter occur.

This opinion letter has been rendered solely for your benefit and may not be used, circulated, quoted, relied upon or otherwise referred to for any other purpose without our prior written consent; provided, however, that this opinion letter may be relied on by any future assignee of your interest in the Loan under the Loan Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section 7.3 of the Loan Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee, or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

Very truly yours,

[Name of Opinion Giver]

