

AN INTRODUCTION TO THIRD-PARTY CLOSING OPINION LETTERS (PART 1)



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Before writing this article, I intended to jump right to the details of third-party closing opinion letters for secured lending transactions involving personal property collateral. However, after reviewing many materials and reflecting on my experience in the opinion letter arena, jumping directly in seemed premature. Instead, I believe the better approach is to undertake a three-step process using three articles. In this first article, we lay a foundation of the fundamental opinion practice concepts. The second article will build upon the first and focus on opinion letters in real estate secured loan transactions. In the concluding article, we turn our attention to opinion letters in secured loan transactions the UCC governs.

I recently re-watched the 1998 Coen Brothers' cult classic film "The Big Lebowski," starring Jeff Bridges as Jeff "The Dude" Lebowski, John Goodman as Walter Sobchak and Steve Buscemi as Theodore Donald "Donny" Kerabastos.¹ The film follows The Dude, who is mistaken for a millionaire of the same name. The millionaire's wife finds trouble with the wrong people, who break into The Dude's home and urinate on his rug. Hilarity ensues as The Dude and his bowling pal Walter seek restitution for the rug.² Writers use the Big Lebowski as a tool to explain the American mind.³ I am ill equipped to do the same, but can use quotes from the film as a narrative device to guide us through our opinion letter discussion.⁴

INTRODUCTION

[Scene: The Dude's bungalow. This quote is from a conversation between Jeffrey "The Dude" Lebowski and Maude Lebowski, the other Jeffrey Lebowski's scheming daughter, who Julianne Moore plays.]

MAUDE: *So Deiter has the money?*

DUDE: *Well, no, not exactly. It's a complicated case Maude. Lotta ins. Lotta outs. And a lotta strands to keep in my head, man. Lotta strands....*

This article should do a better job of explaining the complicated topic of opinion letter practice than The Dude does in explaining his complicated case to Maude Lebowski. There are multiple challenges to overcome before issuing a third-party closing opinion letter. Most experienced lawyers are adept at the challenge of preparing the substantive legal analysis. The more difficult challenge may be navigating the practice habits of opposing counsel who apply sometimes-misguided pressure to include or exclude certain opinions and limitations. Some lawyers treat issuing an opinion letter as a rote exercise, others take it to an unreasonable extreme, while many strike an appropriate balance. That disparity may lie in how many of us learned to prepare opinion letters, which is where a senior attorney provides a quick overview of the transaction and refers us to an opinion letter from a precedent transaction to follow. Over time, our substantive knowledge of the legal topics about which we opine becomes strong and we focus on the result (i.e., issuing the opinion letter), but we may not have had the mentoring or opportunity to step back and develop a full appreciation for some of the fundamental opinion practice issues. Developing and occasionally brushing up on these fundamentals can help us better serve clients, reduce stress and decrease liability exposure. This article attempts to distill the primary points of a broad, complex and sometimes controversial subject

into a practical framework. Copious endnotes accompany this article with citations to resources that provide in-depth guidance on opinion practice issues the reader should find helpful. In the coming pages and later articles, we will explore the ins, outs and strands of opinion practice. Lotta strands.

WHAT IS A THIRD-PARTY CLOSING OPINION LETTER?

[Scene: Hollywood Lanes Bowling Alley. *The Dude*, Walter and Donny are looking across the length of the bowling alley and discussing a tall, thin, Hispanic rival bowler displaying perfect form — Jesus Quintana, who John Turturro plays. Jesus wears an all-in-one stretch Dracon polyester bowling outfit with a racing stripe down each side.]

WALTER: *When [Jesus] moved down to Venice he had to go door-to-door to tell everyone he's a pederast.*

DONNY: *What's a pederast, Walter?*

WALTER: *Shut the [expletive] up, Donny.*⁵

Like Water, we will not answer Donny's question. However, we will answer this question: *What is a Third-Party Closing Opinion Letter?* The essence of an attorney's job is to obtain the facts and the law with due diligence and then give advice.⁶ When an attorney gives that advice in writing, typically in a letter, that writing is a legal opinion.⁷ The phrases "legal opinion" and "opinion letter" are synonymous and denote a broad category of legal opinions having various purposes and formats such as title opinions, business transaction opinions and insurance coverage opinions.⁸ Who may rely on a legal opinion depends on factors such as the addressee and the nature of the opinion.⁹ A legal opinion guarantees no particular result; it is an informed judgment on a specific question of law.¹⁰ The category of legal opinion most familiar to the reader is likely a third-party closing opinion letter, which lenders, investors or others make a condition of closing a transaction.¹¹ A closing opinion letter provides assurances that the transaction works from a legal viewpoint and serves as a part of the opinion recipient's diligence.¹² The client requests the lawyer to prepare, address and deliver the opinion to the other side at the closing (i.e., the third party), which is why we call them "closing opinions" or "third party opinions."¹³ These opinion letters normally share certain characteristics of format and language, distinguishing them from correspondence to a client or others. We structure opinion letters with a section on assurances the opinion giver

prefaces with the phrase "we are of the opinion that . . .," a section describing the transaction documents and sections with assumptions about and limitations on the opinions.¹⁴ Each separate assurance or conclusion the opinion letter expresses is an "opinion."¹⁵ Because the attorney is rendering legal advice to an adverse party, albeit in a limited way by letter, third-party closing opinions are legal oddities. At their simplest, opinion letters focus on opinions that: (1) the client exists, is in good standing and has the authority to engage in the transaction; (2) the transaction-related agreements are enforceable against the client; and (3) the transaction does not violate laws or contracts.¹⁶ A third-party closing opinion does not evaluate the inherent business wisdom of the transaction, nor is it a substitute for legal advice, which should be more extensive.¹⁷ In contrast to Walter's refusal to answer Donny's question, we answer to the question the descriptive heading of this section poses.

Practice Tip

Understand the business transaction at hand.¹⁸ Different transactions require different opinions and lawyers with different areas of expertise to give them. Requests for an opinion letter arising at the 11th hour are too late. If the lawyers wait until near the end of the transaction to negotiate the opinion, it is likely to irritate the clients on both sides of the transaction. The time for the opinion giver to consider the opinion, due diligence and other requirements is early in the transaction. This analysis is not a job for an inexperienced lawyer, although it frequently ends up there. If the opinion giver uses an opinion letter from a reputedly similar prior deal as the starting point, the opinion giver must review it carefully against the facts of the transaction, applicable law and opinion literature. This is not a "change the names and dates" exercise. The precedent opinion letter is a guide the opinion giver can follow. If the other side provides a form of opinion letter, the opinion giver can use it as a base document, but must compare it to an internal precedent or form. The opinion recipient will frequently want to impose more obligations on the opinion giver than the recipient would give, which violates the "Golden Rule" of opinion giving.¹⁹

SKELETON OPINION LETTER

[Scene: *The study in Jeffrey Lebowski's mansion. Mr. Jeffrey Lebowski, a successful, wealthy and rotund sixtyish man, who David Huddleston plays, enters the study on a motorized wheelchair. Mr. Lebowski's assistant Brandt, who the*

late great Phillip Seymour Hoffman plays, listens to the conversation between the two unrelated Lebowskis that share the same name.]²⁰

MR. LEBOWSKI: *You're just looking for a handout like every other—are you employed, Mr. Lebowski?*²¹

DUDE: *...I'm The Dude. So that's what you call me. That or, Duder. His Dudeness. Or El Duderino, if you're not into the whole brevity thing.*

I am into the “brevity thing” and it has implications. One is that I refer to Jeff “The Dude” Lebowski simply as The Dude. In the opinion letter context, my predilection for brevity has three primary implications. First,

[Law Firm Letterhead]

[Date]

[Opinion Recipient's name and address]

Re: [Describe Transaction]

Ladies and Gentlemen:

We have acted as counsel to [name of client] in connection with [describe agreement].

- I. Background²³
- II. Assumptions²⁴
- III. Opinions²⁵
- IV. Certain Limitations²⁶
- V. Use of this Opinion Letter²⁷

We put the meat on the bones of the skeleton in the second and third articles of this series. In the interim, the skeletal endnotes give us a primer on those details. The balance of this article explores fundamental opinion practice issues. Before moving on, we must round out the brevity theme by discussing the importance of drafting legal documents, including opinion letters, in a clear and concise modern style. This begins with attempting to overcome dysfunctional traditional drafting endemic in the legal profession. A good place to start is by eliminating archaisms, legalistic prose,

I admire the brevity and simplicity of the skeleton opinion letter below, which serves as our fundamental reference point and drives the structure of the two succeeding articles.²² Second, the customary practice materials this article discusses are an excellent tool for opinion givers to introduce brevity to their opinion letters to the extent they are comfortable doing so. Third, as transactional lawyers, we should strive to draft all of our work clearly and concisely.

Regarding the skeleton opinion letter, it puts what can seem like a daunting process into perspective by framing the major opinion letter elements, and sets the stage for everything that follows. It is a worthwhile exercise to step back and look at this skeleton, everything we need is right here:

Sincerely,
Opinion Giver, LLC²⁸

redundancies and overlong sentences resulting from mindlessly revising and cutting and pasting from precedent documents.²⁹ The benefits of using a modern drafting style are many and the reader can learn about them in the invaluable resource, *A Manual of Style for Contract Drafting* by Ken Adams.³⁰

Practice Tip

My drafting preference is to use a clear and modern style. This is not outside the bounds of customary opinion letter practice, but I would recommend using

it judiciously in the opinion letter context. This is not because the illustrative opinions in the bar reports are models of clarity and concision, but because most practitioners rigidly adhere to a traditional style, making it unproductive to expend time debating over it. However, there are places to apply a modern drafting style in opinion practice without ruffling traditional feathers, as we demonstrate in the later articles. My practical tip to Donny to enable him to answer his inquiry to Walter is to consult a dictionary. Likewise, I encourage you consult Black's Law Dictionary to look up five or ten legalistic terms that appear in your next opinion letter. You may be surprised what you learn (I was).

WHAT LAW GOVERNS OPINION PRACTICE?

[Scene: The study in Jeffrey Lebowski's mansion. This quote is from a discussion between Jeffrey "The Dude" Lebowski and Mr. Jeffrey Lebowski, with Mr. Lebowski's assistant Brandt listening in.]

DUDE: Look, let me explain something. I am not Mr. Lebowski. You're Mr. Lebowski, I'm The Dude...³¹

The plot of the film hinges on people confusing Jeff "The Dude" Lebowski with a millionaire of the same name. That confusion leads to more confusion, adds complexity, and is part of the reason The Dude cannot explain the progress of his complicated situation to Maude Lebowski. In the opinion letter context, a place where confusion can arise is in understanding what law governs opinion practice. The answer to this seemingly straightforward question has a blend of liability, ethical and practice implications. This question is not about the substantive law applicable to the transaction that is the subject of the opinion letter, but instead concerns the law that determines if the opinion giver is liable to the third party for rendering a faulty or erroneous opinion.³² This substantive law governing the transaction and the law governing opinion practice itself are different but intertwined, much like the two Jeffrey Lebowskis.

Lawyers are subject to many duties when giving an opinion.³³ A lawyer that fails to meet the standard of care may be liable for malpractice, while one that fails to meet ethical obligations may face disciplinary proceedings.³⁴ The primary source on the standard of care is the Restatement of the Law Governing Lawyers (the "Restatement") and the primary source on ethical obligations are the Model Rules of Professional Conduct

(the "Model Rules").³⁵ The Model Rules provide the ethical basis upon which lawyers rely that enables them to provide an evaluation for someone other than the client to use (e.g., an opinion letter).³⁶ The Restatement elaborates on the Model Rules and covers disparate evaluations lawyers undertake for third parties such as audit response letters, internal investigations and third-party legal opinions.³⁷ To meet the standard of care the lawyer owes to the third party, the lawyer must exercise the competence and diligence lawyers in similar circumstances normally exercise.³⁸ Case law on the standard of care in this context is sparse, so courts turn to the Restatement for guidance.³⁹ The Restatement applies the concept of customary practice and treats bar association reports as valuable sources of guidance for measuring competence, defining the standard of care and interpreting the opinion letter (the "Customary Practice Materials").⁴⁰ Aside from setting a baseline for competence, the Customary Practice Materials comprise an emerging consensus of the framework and professionalism from which opinion givers and recipients can operate and bring order to a formerly chaotic practice area.⁴¹ Throughout this article, we examine the interplay between the Restatement, Model Rules and Customary Practice Materials.

Practice Tip

To alleviate lingering confusion on how the Restatement, Model Rules and Customary Practice Materials relate to one another—read them. Because the Model Rules vary between jurisdictions, know when the local rules diverge from the model set. Likewise, know that many jurisdictions have local Customary Practice Materials, some of which contribute to regional differences in customary practice.

WHAT IS CUSTOMARY PRACTICE?

[Scene: Hollywood Lanes Bowling Alley. Smokey, who Jimmie Dale Gilmore plays, turns from his last roll to look at Walter. This quote is from the ensuing conversation between Walter and Smokey about Smokey's alleged lane violation.]

SMOKEY: *Eight, Dude.*

WALTER: *Over the line, Smokey! I'm Sorry. That's a foul.*

SMOKEY: *[Expletive]. Eight, Dude.*

WALTER: *Excuse me! Mark it zero. Next frame.*

SMOKEY: *[Expletive]. Walter!*

WALTER: *This is not 'Nam. This is bowling. There are rules.*

Bowling has rules, so does opinion letter practice. Unlike the Playing Rules of the United States Bowling Congress, the rules of customary practice applicable to opinion practice are flexible, and come with regional and practice area variations. Customary practice is analogous to a typical pair of glasses, where each lens shows a different perspective, but they work together to provide a clear picture. One lens brings liability into perspective because we measure the standard of care the lawyer owes to the opinion recipient by applying customary practice, which we explore in the Liability section. The other lens helps lawyers see the ground rules for rendering and receiving opinion letters from professionalism and collegiality perspectives. Customary practice aids this by allowing opinion givers and recipients to have common understandings about an opinion without spelling them out by: (1) identifying the factual and legal work lawyers are expected to perform to give an opinion (i.e., customary diligence); and (2) providing guidance on how words and phrases commonly used in opinions are understood (i.e., customary usage).⁴² This permits the opinion giver to omit many definitions, assumptions, limitations and exceptions, reducing the number of words to communicate complex thoughts.⁴³ Some closing opinions refer to applying customary practice. Others do not. Either way, customary practice applies.⁴⁴ An opinion giver may depart from customary practice, but to do so must: (1) explicitly call out the departure in the opinion letter; or (2) issue an “Accord-based” opinion by incorporating the American Bar Association’s Third-Party Opinion Report by reference.⁴⁵ The latter approach is uncommon because most opinion givers and recipients look to customary practice to guide their work.⁴⁶ To apply customary practice to opinion letters, we use the Customary Practice Materials. Criticisms of the customary practice approach include its potential lack of precision and regional and practice area differences. Despite those criticisms, customary practice is a monumental upgrade over the lawless ‘Nam-like pre-Accord and pre-customary practice eras. The customary practice rules are not as black-and-white as the bowling rules, but that is because customary practice needs flexibility to accommodate a complex and diverse subject.

Practice Tip

The ABA’s online Legal Opinion Resource Center provides easy access to the Customary Practice Materials, including state and local bar reports.⁴⁷ A list of the primary Customary Practice Materials covering “business law opinion practice” follows (e.g. asset purchases, stock transactions). We look to supplemental materials for guidance on subjects of significance in specialized categories of transactions (e.g., secured lending). In one sense, these specialized areas of opinion practice are a subset of the business law opinion practice because they use supplemental Customary Practice Materials that build off the overall business law opinion practice Customary Practice Materials. In another sense, they are distinct because the legal specialties of the lawyers rendering the opinion letters are different (e.g., real estate law, securities law, tax law, etc.). An example is a secured lending opinion practice, which we can distinguish further between a real estate opinion practice and a UCC opinion practice.⁴⁸ Following is a list of the primary Customary Practice Materials. We will discuss the supplemental Customary Practice Materials in the later articles.

Statement on the Role of Customary Practice

This statement expands on the Restatement by summarizing the role customary practice plays in opinion practice.

Statement of Opinion Practices; Core Opinion Principles⁴⁹

The Statement of Opinion Practices: (1) is new; (2) builds off the Statement on the Role of Customary Practice and Opinion Letter Guidelines; (3) replaces some of the Opinion Letter Guidelines; (4) provides guidance on how to use customary practice; and (5) integrates the Core Opinion Principles. The Core Opinion Principles comprise a more concise statement of most of the opinion principles in the Statement of Opinion Practices, giving those wanting to incorporate a separate document into an opinion letter a way to do so with more brevity.

Opinion Letter Guidelines

The Opinion Letter Guidelines: (1) are similar to the Statement of Opinion Practices; (2) provide guidance on how to use aspects of customary practice the Statement of Opinion Practices does not address; and (3) complements and is read and applied with the Core Opinion Principles.

Bar Reports

Bar reports are national and local in scope. The primary bar association report on third-party closing opinions is the Tri-Bar Report, which covers issues including: (1) the content of opinion letters; (2) the procedures opinion givers follow when conducting the factual and legal investigations to support their opinions; and (3) the meaning of language that opinion letters often use.

ETHICAL CONSIDERATIONS

[Scene: The outdoor pool at Mr. Lebowski's mansion. The Dude tentatively grabs hold of the foot of Bunny Lebowski, who Tara Reid plays. Bunny is the attractive twenty-something wife of Mr. Jeffrey Lebowski and is painting her toenails poolside. A man passed out in the pool is bobbing in an inflatable chair.]

DUDE: *You want me to blow on your toes?*

BUNNY LEBOWSKI: *Uh-hum...I can't blow that far.*

[The Dude looks over at the man passed out in the pool]

DUDE: *You sure he won't mind?*

BUNNY LEBOWSKI: *Uli doesn't care about anything. He's a nihilist.*

Uli is the leader of a group of German nihilists who cause trouble for The Dude. Uli's nihilistic beliefs and corresponding behavior landed him passed out in a pool in the middle of the day. A lawyer with comparable morals and ethics will join Uli in the proverbial pool, but will be floating face down or resting on the bottom. Issuing opinion letters is a routine part of many law practices, which can create a tendency among some lawyers to neglect to pause and ponder important ethical considerations.⁵⁰ A third-party closing opinion expresses a lawyer's professional judgment made at the client's request for the benefit of the third-party opinion recipient.⁵¹ The Model Rules reconcile this ethical anomaly and prescribe the lawyer's ethical obligations to the third party opinion recipient (e.g., duties of care and truthfulness), which arise even though the third party does not become the client.⁵² Those duties differ in several respects from those the lawyer owes to the client.⁵³ For example, the duties of loyalty and confidentiality run only to the client.⁵⁴ Regarding the client, the lawyer must have the client's consent to render a third-party closing opinion, which

can be express (i.e., an engagement letter) or implied (i.e., a commitment letter or agreement the client signs requiring the delivery of a third-party legal opinion as a condition of closing).⁵⁵ Regarding the lawyer's duty of care to the third party, this article addresses it elsewhere. Regarding truthfulness, that duty entails: (1) not making false statements of material fact or law to the third party; and (2) not failing to disclose a material fact to a third party when disclosure is necessary to avoid assisting a fraudulent act by a client.⁵⁶ Those ethical obligations have tentacles, but the primary takeaway is that if the lawyer knows about facts inconsistent with the assumed facts and issues an opinion, doing so could lead to a disciplinary proceeding and may be a misrepresentation that is a basis of a lawsuit.⁵⁷ Beyond the duty of truthfulness, the lawyer cannot assist a client in conduct the lawyer knows is criminal or fraudulent, nor can the lawyer engage in dishonesty, fraud, deceit or misrepresentation.⁵⁸ Violating the Model Rules does not necessarily give rise to a legal cause of action against a lawyer, nor does it create a presumption the lawyer breached a legal duty.⁵⁹ However, evidence of a violation is unfavorable admissible evidence against a lawyer defending a malpractice claim, which leads us to our discussion in the next section about liability.⁶⁰ Legally nihilistic lawyers struggle with our ethical rules and are more likely to be professionally incompetent.⁶¹ The next section on liability discusses how those shortcomings intersect.

Practice Tip

Although not always required, an engagement letter provides a good opportunity to: (1) obtain the client's express consent to render the third-party closing opinion (instead of relying on implied consent); (2) confirm the opinion recipient is not engaging the lawyer on its own behalf (in which case the lawyer may be rendering a direct opinion for the client); and (3) address potential issues if the third-party opinion covers multiple clients (e.g., a borrower and a guarantor).⁶² This is also the time to vet new or relatively new clients by making appropriate inquiries. How long has the firm had a relationship with the client, and for what range of services? How did the client find the firm? Is a background check appropriate?⁶³

LIABILITY

[Scene: Hollywood Lanes Bowling Alley. The Dude and Walter are sitting on a circular bench having a

conversation during their bowling match. Walter is wearing khaki shorts and an army surplus shirt with the sleeves cut off over an old bowling shirt. He is squinting through the smoke from his own cigarette as he converses with *The Dude* at the scoring table.]

WALTER: *This was a valued rug.*

DUDE: *Yeah man, it really tied the room together.*

[Donny, the strike-scoring bowler enters and sits next to Walter]

DONNY: *What tied the room together, Dude?*

WALTER: *Were you listening to *The Dude's* story?*

DONNY: *I was bowling —*

WALTER: *So you have no frame of reference, Donny. You're like a child who wanders into the middle of a movie and wants to know —*

DONNY: *What the [expletive] is [Walter] talking about?*

DUDE: *My rug.*

WALTER: *Forget it, Donny, you're out of your element.*

Opinion practice can involve significant risk and is not a good place for lawyers to be out of their element. It requires experience, diligence, substantive expertise and teamwork. Law firms routinely give third-party closing opinions on transactions involving hundreds of millions of dollars, exposing themselves to potentially catastrophic third-party liability.⁶⁴ If a deal goes bad, the third-party investors, lenders or purchasers entitled to rely on the opinion may sue the law firm for an erroneous or faulty opinion letter (i.e., negligence), often coupled with other claims (e.g., negligent misrepresentation, fraud and securities law violations).⁶⁵ The law firm carries the opinion letter risk, not the client.⁶⁶ The law firm renders the opinion, not the individual lawyer working on it, so it does not matter if the attorney that issued the opinion is no longer at the firm.⁶⁷ While the standard of professional competence and liability for negligence for opinion letters is comparable to that for other legal evaluations and judgments, the opinion giver delivers the third party opinion in an adversary context in which the opinion recipient may make a considerable investment and incur liability exposure

in express reliance upon the lawyer's assurances.⁶⁸ If a dispute arises between the transaction parties, the opinion recipient, in a search of a deep pocket, may assert a claim against the opinion giver.⁶⁹ A negligence claim arises when the attorney does not meet the duty of care owed to the third-party opinion recipient, which occurs when the lawyer fails to exercise the competence and diligence lawyers in similar circumstances normally exercise.⁷⁰ Exercising care, a standard customary practice typically determines, is normally not an issue for thoughtful and experienced attorneys remarkably proficient with their substantive analysis in the opinion letter.⁷¹ Instead, the sources of most litigation relate to factual issues about the opinion (i.e., negative assurance and no litigation opinions) and areas outside of not exercising care.⁷² In these cases, the acrid aroma of fraud often fills the air and invites allegations of fraud or securities law violations.⁷³ We mitigate opinion practice risk with malpractice insurance, but it is subject to policy limits, coverage exclusions and provides no protection for reputational risk. Another risk mitigation tool is for firms to adopt model opinion forms and establish an opinion committee to review the opinion author's work product before releasing it.⁷⁴ An opinion committee should function in a less draconian manner than how Walter dismisses Donny, but should have sufficient authority to oversee the firm's opinion practice. Other risk reduction suggestions involve using alternative dispute resolution and limitation of liability provisions, each of which will face strong headwinds.⁷⁵

Practice Tip

For each opinion, ask yourself and be able to establish the answer to this question: "How do I know that?"⁷⁶ Back up the answer to that question with due diligence: (1) document review; (2) factual certificates; and (3) organizational and governance documents and resolutions.⁷⁷ Do not issue a misleading opinion.⁷⁸ An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to miscalculate the opinion.⁷⁹ Avoid the risk of a misleading opinion by making an appropriate disclosure in the opinion letter when the opinion giver diverges from customary practice.⁸⁰

WHY IS A LEGAL OPINION NECESSARY?

[Scene: *Hollywood Lanes Bowling Alley*. Jesus Quintana, on his way out of the bowling alley, looks down at *The*

Dude and Walter. Over his polyester all-in-one jumpsuit, he now wears a windbreaker with a racing stripe and “Jesus” stitched on the breast. He is holding a fancy black-and-red leather ball satchel (perhaps a Sylvia Wein). Behind him stands O’Brien, a short fat Irishman with tufted red hair.]

JESUS: *I see you rolled your way into the semis. Deos mio, man. Seamus and me, we’re gonna [expletive] you up.*

DUDE: *Yeah, well, you know, that’s just, like, your opinion, man.*

Do the opinions in an opinion letter have more value than Jesus’ opinion on what bowling team will win in the semifinals of the bowling tournament? The answer to the question about the value and necessity of an opinion letter is not without controversy. Some may answer it with the same attitude as The Dude responding to Jesus, while others would vehemently disagree. Third-party closing opinions are a fixture of the American legal scene, routine in financings, mergers and acquisitions, stock issuances and other complex transactions.⁸¹ We have them for both economic and non-economic reasons. The economic component is that opinions aid the due diligence process, distributing value-adding informational burdens in a way that no other transactional feature could by reducing information asymmetries.⁸² The non-economic components appear to include their path-dependent character (i.e., they are on the “checklist”) and the assertions of self and status of the attorneys and clients involved in opinion practice (i.e., “pride”).⁸³ Many say opinions are not cost-justified, yet they endure as routine features of transactions.⁸⁴ Others observe that it is difficult to determine when a closing opinion is cost-justified, because parties do not know the value of the opinion until after the client incurs the costs of its preparation.⁸⁵ If an opinion letter reveals important information about a transaction, it can be well worth its cost to the parties and if not, it may cost more than the information it provides adds to the deal.⁸⁶ Some question the usefulness of opinions’ signaling or certification capacity, given they are often highly qualified and difficult to interpret.⁸⁷ Opinions can be so full of caveats and qualifications that their

effectiveness is questionable.⁸⁸ While some critics find a highly qualified opinion to be of little value, others find that the uncertainty such an opinion can convey is itself valuable information about a deal.⁸⁹

Practical Tip

If rendering an opinion letter is inevitable, remember that a major part of the lawyer’s job is to help the client close the deal. Being unreasonable, refusing to opine on what is customary or procrastinating can hurt the client and often only increase the client’s deal costs.

CONCLUSION

[Scene: The bar area of the Hollywood Lanes Bowling Alley. The Dude is at the bar and “Tumbling Tumbleweeds” by the Sons of the Pioneers has come up on the jukebox. A middle-aged, amiable, craggily handsome man with a large Western-style mustache, denims, a yoked shirt and a cowboy hat, who Sam Elliot plays, ambles up to the bar.]

THE STRANGER: *Howdy do, Dude.*

DUDE: *Oh, hey man, how are ya? I wondered if I’d see you again.*

THE STRANGER: *Wouldn’t miss the semis. How things been goin’?*

DUDE: *Ahh, you know. Strikes and gutters, ups and downs.*

We will be back for the opinion letter semis, and then on to the finals. In the two forthcoming articles, we hope to tie the third-party closing opinion letter discussion together the way The Dude’s rug tied his living room together. The semifinal article will build upon this article and focus on opinion letters in real estate secured loan transactions, while the final article will tackle opinion letters in secured loan transactions the UCC governs. The Stranger is not planning to miss the semis, and presumably not the finals if The Dude/Walter combo gets past the formidable Jesus/Seamus squad. Likewise, I hope you are not planning to miss the two later installments of our opinion letter series. 🍀

Notes

- 1 In December of 2014, “The Big Lebowski” became one of 700 “culturally, historically, or aesthetically significant” films the Library of Congress preserves for future generations through its National Film Registry. The Registry praises the “tale of kidnapping, mistaken identity, and bowling” for its exploration of “alienation, inequality, and class structure via a group of hard-luck, off-beat characters suddenly drawn into each other’s orbits.” The 2014 class of films include “Saving Private Ryan,” “Rosemary’s Baby,” “Willy Wonka and the Chocolate Factory” and Ferris Bueller’s Day Off.”
- 2 We summarize the plot in this sentence, but think about the many things you love about “The Big Lebowski”: the performances, the musical sequences, the endless onslaught of brilliantly quotable lines, the Jesus. Strangely, the actual plot of the movie is secondary to most people’s enjoyment of the movie. According to Joel Coen, they knew the plot would probably be a bit confounding to most viewers on the first watch, and they knew that it probably would not matter. “The plot is sort of secondary to the other things that are sort of going on in the piece,” he said in a DVD extra for the film. “I think that if people get a little confused it’s not necessarily going to get in the way of them enjoying the movie.” Adam D’Arpino, “23 Huge Facts about the Big Lebowski,” Mental Floss, March 6, 2018.
- 3 See, e.g., David Haglund, Walter Sobchak, “Neocon, The prescient politics of the Big Lebowski,” Slate, September 11, 2008; David Martin-Jones, “Representing Automobility: No literal connection: images of mass commodification, US militarism, and the oil industry, in The Big Lebowski,” The Sociological Review, September 18, 2006.
- 4 The use of a quote from “The Big Lebowski” is not without jurisprudential precedent. In the 2014 case of *Kinney v. Barnes*, the Texas Supreme Court cited “The Big Lebowski” in a legal decision in a freedom of speech case. The Court noted that it is common knowledge that prior restraint, or censorship prior to an expression taking place, has been largely rejected by “the Supreme Court, this Court, Texas courts of appeals, legal treatises, and even popular culture.” A footnote in the opinion quotes Walter Sobchak’s claim that “the Supreme Court has roundly rejected prior restraint.” Adam D’Arpino, 23 Huge Facts about the Big Lebowski, *supra*.
- 5 Sam Elliot as the Stranger asks the Dude, “do you have to use so many cuss words?” It’s surprising that “Lebowski” is a film that gained much of its following via post-theater cable television airings, considering “f**k” is uttered 260 times throughout, making it one of the most f-bomb-laden feature films ever made. However, even the edited-for-cable versions have gained something of a cult following for their, shall we say, “creative” word replacements. Adam D’Arpino, 23 Huge Facts about the Big Lebowski, *supra*.
- 6 8 Arnold S. Jacobs, *Opinion Letters in Securities Matters* § 3, at Intro-12 (1998).
- 7 Black’s Law Dictionary, 1266 (10th ed. 2014), definition of “legal opinion.”
- 8 *Id.*, definition of “opinion”; Bryan A. Garner, *The Redbook: A Manual on Legal Style*, §20.1, p. 451 (4th ed. 2018). The Redbook: A Manual on Legal Style provides guidance on preparing opinion letters, but it is not applicable to the special types of opinion letters this article discusses.
- 9 Black’s Law Dictionary, *supra*, definition of “legal opinion.”
- 10 Statement of Opinion Practices § 4.1; Core Opinion Principles § 1.3; Real Estate Opinion Letter Guidelines § 1.1 at 243. See also, Steven L. Schwarcz, “The Limits of Lawyering: Legal Opinions in Structured Finance,” 84 Texas L. Rev 2005 1, at 9.
- 11 Statement of Opinion Practices § 1; Core Opinion Principles § 1.1; Real Estate Opinion Letter Guidelines § 1.1 at 243.
- 12 Statement of Opinion Practices § 1; Real Estate Opinion Letter Guidelines § 1.1 at 243. See also, Steven L. Schwarcz, “The Limits of Lawyering: Legal Opinions in Structured Finance,” *supra*, p. 10. Opinions are frequently categorized as “clean,” “bond” or “non-explained” opinions on the one hand and “reasoned” or “explained” opinions on the other. Robert A. Thompson, Real Estate Opinion Letter Practice, “Real Estate Opinion Letters: Introduction.” The level of assurance manifested by clean opinions states a professional judgment and prediction of how a court would adjudicate a particular matter if a dispute arises. *Id.* The opinion giver occasionally requests to give a reasoned opinion when, in an effort to give a clean opinion, the opinion giver identifies an issue of legal uncertainty, because of conflicting authority or lack of precedent. *Id.* The attorneys typically know of uncertainties in relevant areas of the law and often exclude them from a clean opinion through standard qualifications (e.g., effect of bankruptcy or the judicial applications of principles of equity). *Id.* The opinion giver typically frames a reasoned opinion in a different format than a clean opinion. Instead of the brief, conclusory statements of a series of black-letter legal conclusions or general assurances, a reasoned opinion is a discursive legal analysis of a specific issue followed by a conclusion frequently stated in the terms that a court “would hold,” “should hold,” or “is more likely than not to hold” in a particular manner. *Id.* The purpose of a reasoned opinion is not to provide assurances, but to disclose and evaluate legal risks, which the parties to the transaction assume or allocate between them. *Id.* Opinions have the same meaning whether stated as “would” or “should.” Opinion Guidelines, § 3.5 at 879; Real Estate Opinion Letter Guidelines § 3.5 at 250. Either way they express the opinion giver’s professional judgment in the circumstances. *Id.*
- 13 Thomas L. Ambro and Arthur Norman Field, “The Legal Opinion Risk Seminar Papers,” Vol. 62 No. 2 Bus. Law. 397, at 397 (February 2007).
- 14 Robert A. Thompson, Real Estate Opinion Letter Practice, “Real Estate Opinion Letters: Introduction,” *supra*.
- 15 Tri-Bar Report at 606. We typically refer to the letter the opinion giver delivers to the opinion recipient at the closing as an “opinion letter.” *Id.* Each separate conclusion it references is an “opinion.” In practice, the term “opinion” often refers to the opinion letter, with the context making it clear the meaning intended. *Id.* “Opinion letters” often contain many “opinions.” *Id.* For types of opinions, see the discussion on “qualified” or “reasoned” opinions. *Id.* Opinions that are primarily factual in nature (e.g., no litigation) are sometimes referred to as “confirmations.” *Id.*

- 16 Jonathan C. Lipson, "Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)," Vol. 3.1 *Berkeley Business Law Journal* 59, 62 (2005).
- 17 Statement of Opinion Practices, § 2, note 7, discussing duties opinion givers have to their own clients. See also, Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, supra, p. 11.
- 18 This Practical Tip is a synopsis of the suggestions from an excellent article by Herrick K. Lidstone, Jr., "The Anatomy of an Opinion Letter," May 15, 2013, at p. 6. <https://www.bfwlaw.com/wp-content/uploads/2014/12/Anatomy-of-a-Legal-Opinion.pdf>
- 19 The "Golden Rule" is set forth in the "Guidelines for the Preparation of Closing Opinions," 57 *The Bus. L. (ABA)* 875 (Feb. 2002) (ABA Guidelines) at § 3.1.
- 20 Mr. Lebowski's not-so-humble Beverly Hills dwelling is known as Greystone Mansion in real life, and has popped up in "The Muppets," "The Prestige," "Rush Hour," "The Social Network," "The Dirty Dozen", and, perhaps most notably, in the music video for Meat Loaf's "I'd Do Anything for Love (But I Won't Do That)." Adam D'Arpino, "23 Huge Facts about the Big Lebowski," supra.
- 21 Casting the role of Mr. Jeffrey Lebowski was one of the last decisions made before filming commenced. Names tossed around for the role included Robert Duvall, Anthony Hopkins and Gene Hackman. The Coens' ultimate Big Lebowski, however, was Marlon Brando, who by that time was reaching the end of his career (and life). The role would eventually go to the not-particularly-famous (but pitch perfect) veteran character actor David Huddleston. Adam D'Arpino, "23 Huge Facts about the Big Lebowski," supra.
- 22 This skeleton is a modified version of the skeleton shared by Edward J. Levin and Sterling Scott Willis in their presentation, "Real Estate Opinion Letters: Best Practices, Liabilities, and Strategies," *The American Law Institute Continuing Legal Education*, January 31, 2019.
- 23 The Background section typically addresses the opinion giver's role, documents reviewed, scope of review, opinion jurisdiction, reliance on other sources and the definition of "knowledge."
- 24 The Statement of Opinion Practices addresses reliance on facts (§§ 5.1, 5.2), scope of inquiry regarding facts (§ 5.3), reliance on representations that are legal conclusions (§ 5.4), factual assumptions (§ 5.5), limited factual confirmations (§ 5.6, replacing Opinion Guidelines § 4.4) and negative assurance (§ 5.6, replacing Opinion Guidelines § 4.5). The Core Opinion Principles also address those matters. Core Opinion Principles § 2. "Conduit" opinions (that is, opinions that rely exclusively on public agency certificates, title policies, UCC searches or other third-party sources) are generally objectionable, as they contain no substantive assurance by the opinion giver and may be misconstrued by the opinion recipient as reflecting an independent evaluation of the underlying source or other due diligence by the opinion-giver. Real Estate Opinion Guidelines § 1.5.b at 246. As with opinions regarding qualifications to do business or good standing in foreign jurisdictions based on public agency certificates, the delivery of the underlying public agency documents, title policies, or other primary sources should suffice. Id.
- 25 A closing opinion covers only those matters it specifically addresses. Statement of Opinion Practices; § 7.1 (replacing Opinion Guidelines § 1.2); Core Opinion Principles § 1.7; Real Estate Opinion Guidelines § 1.5.a at 246. Opinions as to other matters should not be inferred, but rather explicitly requested. Examples of opinions that in the real estate secured loan context should not be implied by a general enforceability opinion, and are not to be deemed to have been given unless expressly stated, include opinions regarding land use laws, environmental laws, and other similar matters. Real Estate Opinion Guidelines § 1.5.a at 246.
- 26 Opinions are subject to "qualifications," some stated and some not. *Tri-Bar Report*, supra, at 597. Each qualification is an "exception," which includes both a "limitation" and an "exclusion." Id. An opinion giver uses an exception to narrow an opinion. Id. at 606. The opinion giver often phrases an exception to indicate there is no opinion as to a particular provision in the agreement or specific aspect of the matter covered, rather than to provide a negative opinion on that provision or aspect. Id. We understand some exceptions to be applicable whether or not stated, which we refer to as "standard exceptions." Id. at 597. We understand other exceptions to be applicable only when stated. Id. Opinions subject to stated exceptions that are not customary in opinions of the type to which they relate are "qualified opinions." Id. In some cases opinion letters contain reasoned (sometimes called explained) opinions, which may or may not be qualified. Id.
- 27 Regarding reliance, see Statement of Opinion Practices, § 4.5, and Core Opinion Principles § 1.4.
- 28 The fact that an opinion letter is signed in the name of a law firm has given rise to confusion over the obligations of a law firm in preparing an opinion letter. *Tri-Bar Report*, supra, at 605. A law firm practices law only through the lawyers who work on its behalf. Id. The opinion preparers determine the content of the opinion letter and are responsible to perform the work required to support the opinions being expressed. Id. The law firm fulfills its obligations to the opinion recipient through the performance by the opinion preparers of customary diligence in preparing and delivering the opinion letter. Id.
- 29 This section on Drafting is a compilation of thoughts and writings from *A Manual of Style for Contract Drafting*, Fourth Edition by Kenneth A. Adams, and his excellent online material at Adams on Contract Drafting, <http://www.adamsdrafting.com/>.
- 30 Kenneth A. Adams, *A Manual of Style for Contract Drafting* § 19.8 (4th Ed. 2017). This book has a multitude of suggestions. Some are basic (e.g., when possible, draft in an active voice, not passive), others eliminate legal archaisms (e.g., Ladies and Gentlemen), others eliminate unnecessary legal rhetoric (e.g., there is no need reference the attachments when defining the term Opinion Letter—the body of the letter references them and that reference by itself is sufficient to bring them within the scope of the letter), while others make more efficient use of defined terms.
- 31 This may seem obvious to some, but it probably comes as a surprise to others. The title "The Big Lebowski" is a reference

to the millionaire Jeffrey Lebowsky, and not The Dude. Jeffrey Lebowsky is referred to as “the Big Lebowsky” many times throughout the script, but in the movie, the only evidence that he’s the “Big Lebowsky” comes when the Dude refers to him as such sporadically, just a few times throughout the film. Adam D’Arpino, 23 Huge Facts about the Big Lebowsky, *supra*.

- 32 Statement of Opinion Practices, §§ 6.1, 6.2; Core Opinion Principles § 3; Real Estate Opinion Guidelines § 1.2, at 244. The Opinion Guidelines (and Real Estate Opinion Letter Guidelines) address how to handle a situation when the law an opinion covers and the law governing an agreement are different. Opinion Guidelines, § 4.9, Real Estate Opinion Guidelines §§ 1.2 and 4.9, at 244, 257. The law governing the opinion letter and potential liability under it will not necessarily be the same as the law governing the transaction documents. Real Estate Report, ch. 2, Art. V at 25. Although the issue is implicit in every opinion letter, it generally has not been the subject of express treatment within opinion letters. *Id.* From the standpoint of professional liability, the standard of care of the opining lawyer would ordinarily be the standard recognized in the opinion giver’s practice jurisdiction. *Id.*
- 33 Charles E. McCallum and Bruce C. Young, “Ethics Issues in Opinion Practice,” 62 *Bus. Law.* 417, at 417 (2007).
- 34 *Id.*, citing Model Rules of Prof’L Conduct pmbll., cmt. 19; Restatement § 5.
- 35 A variety of sources prescribe or define a lawyer’s duties, including the rules of professional conduct, decisional law, opinions of committees of practicing lawyers and governmental agencies before which lawyers practice. Charles E. McCallum and Bruce C. Young, *Ethics Issues in Opinion Practice*, *supra*. Regarding a lawyer’s duties in the third-party closing opinion practice realm, we focus on the Restatement and the Model Rules.

Restatement. Restatement (Third) of the Law: Governing Lawyers § 95 (2000). By way of background, the Restatement is an influential treatise the American Law Institute publishes describing the law in a given area and guiding its development. *Black’s Law Dictionary*, *supra*. The Restatement addresses multiple areas of the law using a format of black letter rules, official comments, illustrations, and reporters notes. *Id.* The Restatement is one of the most highly regarded secondary authority sources and exerts considerable influence on the judicial process. *Id.* Courts and commentary frequently cite the Restatements, but they are secondary authority and not binding on a court unless the jurisdiction’s highest court adopts it as law. *Id.* Many courts have adopted Restatement sections verbatim as the law of their jurisdiction. *Id.* To put the applicability of the Restatement into perspective, it is helpful to review the introduction to the Restatement of the Law Governing Lawyers, which provides:

Lawyers are regulated by moral, professional, and legal constraints in discharging their several responsibilities as representatives of clients, officers of the legal system, and public citizens having special responsibilities for the quality of justice. This Restatement address only those constraints imposed by law — that is, official norms enforceable through a legal remedy administered by a court, disciplinary agency, or similar tribunal.

Model Rules. The Model Rules set forth certain obligations, prohibitions, and other guidelines concerning a lawyer’s professional conduct. Model Rules of Prof’L Conduct RR. 1.0-8.5. Most jurisdictions base their rules of professional responsibility on the Model Rules, and of those jurisdictions there are state-by-state variations.

- Charles E. McCallum and Bruce C. Young, “Ethics Issues in Opinion Practice,” *supra*, at 418 (2007). The Restatement covers most of the issues the Model Rules deal with, but also addresses the additional issues of disqualification, attorney-client privilege and malpractice liability. *Id.*, citing Restatement § 6 cmt; *id.* §§ 48-58, 68-86.
- 36 A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes doing so is compatible with other aspects of the lawyer’s relationship with the client. Model Rules of Prof’L Conduct R. 2.3(a).
 - 37 Restatement, § 95, cmt. a. In furtherance of the client’s objectives in a representation, a lawyer may provide a non-client the lawyer’s opinion on the matter. Restatement, § 95(1).
 - 38 In providing the opinion, the lawyer must exercise care with respect to the non-client. Restatement, § 95(3). A lawyer owes a duty to use care to a non-client when the lawyer invites the non-client to rely on the lawyer’s opinion and the non-client relies on it. Restatement, § 51(2). In addition to the other possible bases of civil liability, a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care if the lawyer fails to exercise care and the failure causes injury. Restatement, § 48. A lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances. Restatement, § 52(1).
 - 39 Koley Jessen, “Third-Party Legal Opinions: An Introduction to ‘Customary Practice,’” 35 *Creighton L. Rev.* 153, at 169 (2001).
 - 40 Restatement § 95, cmt. a, reporter’s note cmt. b; Statement on the Role of Customary Practice at 1278. The Restatement uses the phrase “custom and practice,” but it is interchangeable with the phrase “customary practice.” There have been two generations of bar reports that have guided lawyers, some restricted to a practice area, others to particular issues. Thomas L. Ambro and Arthur Norman Field, “The Legal Opinion Risk Seminar Papers,” *supra*. Most of these reports have come from state and local bar groups and others come from the ABA Section of Business Law. *Id.*
 - 41 The Customary Practice Materials are generally compatible with, reinforce the Restatement, and comprise opinion letter principles, statements, guidelines and reports. Following is a synopsis of the Customary Practice Materials generally applicable to “business opinion practice.” These are likewise applicable to “secured lending opinion practices,” as are the Customary Practice Materials specific to that practice area summarized below.

“Statement on the Role of Customary Practice in the Preparation and Understanding of Third Party Legal Opinions,” 63 *Bus. Law* 1277, at 1277 (2008) (the “**Statement on the Role of Customary Practice**”). A large number of bar associations and other professional

groups approved the Statement on the Role of Customary Practice, which expands on the Restatement and provides a brief summary of the context of customary practice in which opinion letters are prepared and interpreted. Statement of Opinion Practices, Explanatory Note at ____.

“Statement of Opinion Practices,” ____ Bus. Law ____ (20____) (the “**Statement of Opinion Practices**”). The Statement of Opinion Practices (accompanied by the Core Opinion Principles) were approved on May 29, 2018 and submitted to various groups for approval. Once approved, the Business Lawyer will publish them. You will find the most recent draft versions on the Legal Opinion Resource Center in the Business Law Section on the American Bar Association website. The Statement on the Role of Customary Practice expands on the Restatement, whereas the Statement of Opinion Practices builds on the Statement on the Role of Customary Practice that a broad range of bar groups and others can endorse to establish a national basis for the preparation and understanding of third-party closing opinions. Statement of Opinion Practices, Explanatory Note, at _____. The Statement of Opinion Practices replaces the Legal Opinion Principles with the Core Opinion Principles and updates selected provisions of the Opinion Guidelines. Statement of Opinion Practices, explanatory note, at § _____. The Statement of Opinion Practices: (1) builds on and amplifies the Statement on the Role of Customary Practice; (2) provides guidance regarding aspects of customary practice and other practices for giving and receiving opinion letters; (3) is derived principally from the Legal Opinion Principles and Guidelines for the Preparation of Closing Opinions; (4) updates the Opinion Guidelines; and (5) replaces the Legal Opinion Principles with the Core Opinion Principles. Id. introductory note and § 1 (replacing Opinion Guidelines § 3.1); Core Opinion Principles, introduction at _____.

“Core Opinion Principles,” Joint Committee on Statement of Opinion Practices, § 1.1, ____ Bus. Law ____ (20____) (the “**Core Opinion Principles**”). These accompany the Statement of Opinion Practices and replace the Legal Opinion Principles. Statement of Opinion Practices, explanatory note, at _____. The Core Opinion Principles: (1) are drawn from the Statement of Opinion Practices and provide guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in giving and receiving closing opinions; (2) amplify the Statement on the Role of Customary Practice; and (3) are designed for opinion givers who wish to incorporate or attach to their opinion letter a more concise statement of some of the opinion principles in the Statement of Opinion Practices. Id.

“Guidelines for the Preparation of Closing Opinions,” Committee on Legal Opinions of the Section of Business Law, American Bar Association, 57 Bus. Law. 1127 (2003) (the “**Opinion Guidelines**”). The Opinion Guidelines replaced the initial guidelines prepared with the Accord—“Guidelines for the Preparation of Legal Opinions,” 47 Bus. Law. 167, 169 (1991). The Statement

of Opinion Principles updates, but does not replace the Opinion Guidelines. Statement of Opinion Practices, § 2. For a list of the Opinion Guidelines the Statement of Opinion Practices updates, see Statement of Opinion Practices, explanatory note at _____. The Opinion Guidelines complement and are intended to be read and applied with the Legal Opinion Principles (now the Core Opinion Principles). Opinion Guidelines, at 875. Like the Core Opinion Principles, the Opinion Guidelines provide guidance regarding closing opinions whether or not the opinion letter refers to them. Opinion Guidelines at 875; Statement of Opinion Practices, § 2.

“Third Party ‘Closing’ Opinions,” TriBar Opinion Committee, 53 Bus. Law. 591, (1998) (the “**TriBar Report**”). Bar reports are national and local in scope. The primary bar association report on third-party closing opinions is the Tri-Bar Report, which covers issues including: (1) the content of opinion letters; (2) the procedures opinion givers follow when conducting the factual and legal investigations to support their opinions; and (3) the meaning of language that opinion letters often use.

- 42 Statement of Opinion Practices § 2; Core Opinion Principles § 1.1.
- 43 Statement on the Role of Customary Practice at 1277; Statement of Opinion Practices, § 2.
- 44 Statement on the Role of Customary Practice at 1278. There are exceptions to the application of customary practice. To carve out a customary practice application in a customary practice opinion, the opinion must clearly note the departure. Id. at 1277. An Accord-based opinion departs from customary practice by incorporating the American Bar Association’s Third-Party Opinion Report by reference (i.e., the Accord). Committee on Legal Opinions, “Legal Opinion Principles,” 53 Bus. Law. 831, 831 (1998) (the “Legal Opinion Principles,” replaced by the Core Opinion Principles).
- 45 Statement of Opinion Practices, § 10; see generally, Statement on the Role of Customary Practice; see also, Committee on Legal Opinions of the Section of Business Law, American Bar Association, Third-Party Legal Opinion Report, Including the Legal Opinion Accord, 47 Bus. Law. 167, 169 (1991) (the “Accord”).
- 46 Thomas L. Ambro and Arthur Norman Field, The Legal Opinion Risk Seminar Papers, *supra*; Legal Opinion Principles at 831. The Accord is a contract-based agreed protocol; that is, in large part, the Accord set out in written form the meaning of opinion letters and the diligence required to provide them. Real Estate Report, ch. 1, Art. III at 7. Customary practice takes a different approach. Id. Under customary practice, the meaning of the words an opinion letter uses and the diligence required to provide one, are determined by the customary practice of lawyers who give and receive them. Id. Criticisms of certain aspects of the “customary practice” approach include its potential lack of precision and the related concern that there may be regional, practice area, and other differences in customary practice across the country. Id. It may not be possible to eliminate the lack of precision that concerns some, and it may not be possible to eliminate regional differences in customary practice. Id. Nevertheless, published reports of bar associations and other professional groups

provide some guidance as to the meaning of customary practice for different practice areas and geographical regions. *Id.* The original authors and sponsor (the ABA Business Law Section) of the Accord have effectively abandoned it and many lawyers consider it outdated. *Real Estate Report*, ch. 1, Art. VII at 5. The Accord failed to gain national acceptance, although it generally helped advance a national consensus on opinion practice. Arthur Norman Field and Jeffrey M. Smith, *The Accord and Guidelines and the Formation of the Section’s Legal Opinions Committee*, *Business Law Today*, February 14, 2018.

47 https://www.americanbar.org/groups/business_law/migrated/tribar/

48 Following is a synopsis of the Customary Practice Materials generally applicable to “secured lending opinion practices:”

American College of Real Estate Lawyers Attorneys’ Opinion Committee and the American Bar Association Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 *Real Prop. Tr. & Est. L. J.* 241 (2003) (the “**Real Estate Opinion Letter Guidelines**”). The *Real Estate Opinion Letter Guidelines* provide valuable guidance regarding customary practice. *Real Estate Report*, ch. 1, Art. IV at 3. The *Real Estate Opinion Letter Guidelines* predate the updated *Opinion Guidelines* and *Core Opinion Principles*. Although it is not completely clear, they presumably adopt the *Guidelines* as updated by the *Statement on Opinion Practice* and the *Core Opinion Principles*. *Real Estate Opinion Letter Guidelines* at 241. If that is the case, they presumably incorporate the *Statement on Opinion Practices* as well. The *guidelines* and *principals* address many issues common to both real estate and business law opinion practice, by their own terms they address several important subjects of particular relevance and significance to real estate secured loan transactions, by far the most typical context for real estate opinion letters. *Id.* at 242. The intent of the *Real Estate Opinion Letter Guidelines* is to fill that void with a single integrated set of opinion guidelines reflecting the current state of customary practice. *Id.*

Joint Drafting Committee, *Real Estate Finance Opinion Report of 2012*, 47 *Real Prop. Tr. & Est. L. J.* 213 (2012) (the “**Real Estate Report**”). The *Real Estate Report* does not replace the *Real Estate Opinion Letter Guidelines*. *Real Estate Report*, ch. 1, Art. IV at 3. The *Real Estate Report* updates and expands the Joint ABA/ACREL Committee, *Inclusive Real Estate Secured Transaction Opinion* (Feb. 2, 1999) (the “**Inclusive Opinion**”), which drew on the Accord and the Section of Real Property, Probate, and Trust Law of the ABA, and ACREL, *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, 29 *Real Prop. Prob. & Tr. J.* 569, 578 (1994) (the “**Adaptation Report**”). The Accord did not address many issues pertinent to real estate finance transactions, which led to the *Adaptation Report*. In preparing the *Illustrative Opinion Letter language* for the *Real Estate Report* (the “**Illustrative Real Estate Opinion**”), the drafters began with the *Inclusive Opinion*, which, in

turn, was based on the Accord and the *Adaptation Report*. *Real Estate Report*, ch. 1, § VII at 5. The Accord has been effectively abandoned by its original author and sponsor, the ABA Business Law Section. *Id.* As a result, many lawyers consider the Accord, *Adaptation Report* and *Inclusive Opinion* outdated. *Id.* The drafters chose, nonetheless, to use this approach of updating the *Inclusive Opinion* because: (1) the *Inclusive Opinion* is the only example of an opinion letter that has been widely read and commented on by a national real estate legal audience; (2) it raises many of the same issues and requests commonly found in opinion practice that this Report addresses; and (3) it offers a structure and terminology that commonly are used in existing real estate finance opinion practice. *Id.*

William B. Dunn et. al., *Local Counsel Supplement*, 51 *Real Prop. Tr. & Est. L. J.* 167 (2016) (the “**Local Counsel Supplement**”), f/k/a *Local Counsel Opinion Letters in Real Estate Finance Transactions A Supplement to the Real Estate Finance Opinion Report of 2012*. Real estate finance transactions typically involve opinions from local counsel in discrete and often disconnected pieces of the transaction. *Id.* at 67. Because the *Real Estate Report* limits the discussion on local counsel and the relationship with lead counsel, the *Local Counsel Supplement* builds off the *Real Estate Report* to provide that guidance. *Id.*

Uniform Commercial Code Opinions in Real Estate Finance Transactions, ___ *Real Prop. Tr. & Est. L. J.* ___ (2019) (the “**Report on UCC Opinions in Real Estate Finance Transactions**”). The author’s copy is a pre-publication version. In real estate secured loan transactions, real estate is the primary collateral, but there is often personal property collateral related to the real estate. For those transactions, we have the *UCC Opinions in Real Estate Finance Transactions Report* that applies to both lead and local counsel opinion letters, and supplements the *Real Estate Report* and *Local Counsel Supplement*. *Id.* at 1.

Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions — Revised Article 9, 58 *Bus. Law.* 1449 (2003) (the “**TriBar UCC Report**”). In personal property secured loan transactions, personal property is the collateral. For these transactions, we turn primarily to the *TriBar UCC Report* that builds off the overall *Customary Practice Materials* and the real estate-related *Customary Practice Materials*.

49 The *Statement of Opinion Practices* and *Core Opinion Principals* are in the final stages of approval. The *Statement of Opinion Practices* is new and updates, but does not replace the *Opinion Letter Guidelines*, and replaces the *Legal Opinion Principles* with the *Core Opinion Principals*. This article assumes the adoption of each will occur.

50 *Statement of Opinion Practices*, § 3, see also Lydia C. Stefanowicz, *Ethical Considerations of Third-Party Legal Opinions*, *American College of Mortgage Attorneys*, *The Abstract* (Fall 2015). For purposes of this article, we refer to the *Model Rules of Professional Conduct*, but be aware that the text and application of the rules can vary from state-to-state.

51 *Statement of Opinion Practices*, § 4.1; *Core Opinion Principles* § 1.3. See also, Lydia C. Stefanowicz, *Ethical Considerations of*

Third-Party Legal Opinions, American College of Mortgage Attorneys, *supra*.

- 52 Lydia C. Stefanowicz, *supra*; citing Model Rules of Prof'L Conduct R. 2.3(a). Charles E. McCallum and Bruce C. Young, Ethics Issues in Opinion Practice, *supra*, at 419. Opinion givers do not ordinarily obligate themselves in advance to deliver opinion letters to non-clients. Tri-Bar Report, *supra*, §2.4 at 604. Indeed, they ordinarily have no obligation of any sort to the opinion recipient prior to delivering an opinion letter. *Id.* Even if the opinion giver is prepared to render the requested opinions, release of an opinion letter to a third party is ultimately a decision for the client, not the lawyer. *Id.*
- 53 Charles E. McCallum and Bruce C. Young, Ethics Issues in Opinion Practice, *supra*, at 419. The standards applicable to opinion letters to third parties often differ from those applicable to clients; that is because the duty to a client is ordinarily broader than that owed to the third party. Thomas L. Ambro and Arthur Norman Field, The Legal Opinion Risk Seminar Papers, *supra*, at 397, fn. 2. Thus, any discussion of closing opinion letters to clients is a sophistication added to the third party opinion analysis. *Id.*
- 54 The duties of loyalty and confidentiality run to the client, but not the third party. Charles E. McCallum and Bruce C. Young, Ethics Issues in Opinion Practice, *supra*, at 421 (2007). Regarding confidentiality, the opinions in a closing opinion ordinarily do not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the opinion giver is aware the client would wish to keep confidential, the opinion giver should discuss the implications with the client and not render the opinions unless the client consents to the disclosure. Opinion Guidelines, §2.4 at 877-878; Tri-Bar Report, *supra*, §2.4 at 604; see also, Real Estate Report, ch. 1, Art. II at 2-3, Local Counsel Real Estate Report Supplement, p 8-9. If the legal opinion involves the disclosure of confidential client information, the attorney may not disclose it unless the client consents after consultation. Model Rules of Prof'L Conduct R. 2.3(b). A related ethical issue can arise if the lawyer knows or reasonably should know that the evaluation is likely to materially and adversely affect the client's interest (e.g., if the opinion negotiations would reveal a major flaw in the client organizational documents). There, the lawyer must consult with the client, describe it in writing, and obtain the client's informed consent before addressing it with the third party. Model Rules of Prof'L Conduct R. 2.3(b). The lawyer must also keep the client reasonably informed about the status of a matter and explain it to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Lydia C. Stefanowicz, Ethical Considerations of Third-Party Legal Opinions, American College of Mortgage Attorneys, *supra*, citing Model Rules of Prof'L Conduct R. 1.4. This rule can be challenging within the context of opinion practice. *Id.*
- 55 Statement of Opinion Practices, § 8.4 (replacing Opinion Guidelines § 2.4); Opinion Guidelines, § 2.4 at 877-878; Real Estate Opinion Guidelines §2.4 at 246-247, Model Rules of Prof'L Conduct R. 1.2(a). If there are multiple clients, a conflict of interest could arise if the interests of the clients do not align, in which case the lawyer can use the engagement letter to obtain conflict waivers and the informed consent of each client and describe the joint representation. If there is joint representation of the borrower and the guarantors, this is a good opportunity to clarify that the scope of the representation is limited to issuing the opinion and excludes representing the guarantor in negotiating the terms of the guaranty. Sometimes, the borrower's counsel is asked to render an opinion as if the recipient were a client or to act as "counsel to the transaction." Real Estate Opinion Letter Guidelines, § 1.1.a, at 243. Requests for local counsel to in effect represent both parties to a loan transaction, through written legal opinions or otherwise, raise considerable ethical issues. *Id.* Some conflicts may be waivable in some jurisdictions. *Id.*
- 56 A lawyer communicating on behalf of a client with a non-client may not: (1) knowingly make a false statement of material fact or law to the non-client, (2) make other statements prohibited by law; or (3) fail to make a disclosure of information required by law. Restatement, § 98. The Model Rules share those sentiments, providing that in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless such disclosure is prohibited under Rule 1.6. Model Rules of Prof'L Conduct R. 4.1.
- 57 The more difficult setting is where the investigation is limited (because of considerations of cost or timing, for example), and where the lawyer has no reason to believe the facts may be inconsistent with the assumed facts. Charles E. McCallum and Bruce C. Young, Ethics Issues in Opinion Practice, *supra*, at 423 (2007), citing TriBar Report, at 613-14. The lawyer can address this by limiting the scope of an investigation relating to the evaluation (third-party opinion). *Id.*, citing Model Rules of Prof'L Conduct R. 2.3. To limit the scope, the opinion giver must clearly describe the limitations material to the legal conclusions and any departure from customary practice. *Id.*, citing Model Rules of Prof'L Conduct R. 2.3 cmt. 4, see also, Legal Opinion Principles, at 832 and TriBar Report at 603. A lawyer may negotiate with the opinion recipient concerning the form, assumptions and scope of investigation. *Id.* Despite being able to limit the scope, there are restrictions:
- An agreement for a limited representation does not relieve the lawyer of the duty to provide competent representation. *Id.*, citing Model Rules of Prof'L Conduct R. 1.2 cmt. 6.
 - The scope of representation may be limited only to the extent reasonable under the circumstances. *Id.*, citing Model Rules of Prof'L Conduct R. 1.2(c).
 - A limitation that prevents the lawyer from reaching conclusions upon which the client can rely is not reasonable. *Id.*, citing Model Rules of Prof'L Conduct R. 1.16(a)-(b).
 - If the client insists on unreasonable limitations on the scope of representation, they lawyer may be compelled to withdraw, and in any event has the right to withdraw. *Id.*, citing Model Rules of Prof'L Conduct RR. 1.16(a)(1), 1.16(b) (1), (4), or (b)7.
- 58 Model Rules of Prof'L Conduct 1.2(d). It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentations. Model Rules of Prof'L Conduct 8.4.

- 59 Charles E. McCallum and Bruce C. Young, "Ethics Issues in Opinion Practice," *supra*, citing Model Rules of Prof'L Conduct pmbll., cmt. 20.
- 60 *Id.*
- 61 Paul D. Carrington, "Of Law and the River," 34 *Journal of Legal Education* 222-228 (1984).
- 62 In rendering a third-party opinion in real estate secured loan transaction, the opinion giver normally represents its client, the borrower in providing limited advice and information to a non-client lender or its counsel. Real Estate Opinion Letter Guidelines § 1.1a, at 243.
- 63 Herrick K. Lidstone, Jr., "The Anatomy of an Opinion Letter," May 15, 2013, *supra*, p. 6.
- 64 Donald W. Glazer and Jonathan C. Lipson, "Courting the Suicide King, Closing Opinions and Lawyer Liability," *Business Law Today*, Vol. 17, No. 4 March/April 2008.
- 65 See, e.g., *Dean Foods Co. v. Pappathanasi*, 18 Mass L. Rptr. 598, 2004 WL 3019442 (Mass. Super. Dec. 3, 2004), p. 13 (quoting from the TriBar Committee Report, 53 *Bus. Law.* at 614); *In re CFS-Related Securities Fraud Litigation*, 223 F.R.D. 631 (N.D. Okla. 2004); *In re Enron Corporate Securities, Derivative and ERISA Litig.* 235 F. Supp. 2d 549 (S.D. Tex. 2002). See also, John K. Villa, "Liability of Lawyers to Non-Clients Arising Out of the Issuance of Opinion Letters," American Bar Association, Section of Real Property, Trust and Estate Law eCLE Webinar July 15, 2015. On a related note, we discuss potential third-party liability, but occasionally a former client may file a lawsuit involving an opinion, especially if the underlying loss is the result of a lawsuit by a third party. *Id.*, citing *Nomura v. Cadwalader Wickersham & Taft*, 2009 WL 1543682 (N.Y. Sup. Ct., April 28, 2009).
- 66 Herrick K. Lidstone, Jr., "The Anatomy of an Opinion Letter," *supra*.
- 67 John K. Villa, "Liability of Lawyers to Non-Clients Arising Out of the Issuance of Opinion Letters," American Bar Association, Section of Real Property, Trust and Estate Law eCLE Webinar, *supra*. See also, Tri-Bar Report, *supra*, at 605.
- 68 Robert A. Thompson, "Real Estate Opinion Letter Practice," *Real Estate Opinion Letters: Introduction*, *supra*.
- 69 *Id.*
- 70 Restatement (Third) of the Law Governing Lawyers §§ 95, 52(1) (2000). On a different but related note, there are many good reports and treaties covering giving legal opinions, but not much about lawyer responsibilities on receiving opinions on behalf of a client opinion recipient. To learn more from the perspective of the opinion recipient's lawyers, see Reade H. Ryan, Jr., "Recipient Counsel Responsibilities and Concerns," Vol. 62, No. 2 *Bus. Law.* 401 (February 2007).
- 71 John K. Villa, "Liability of Lawyers to Non-Clients Arising Out of the Issuance of Opinion Letters," American Bar Association, Section of Real Property, Trust and Estate Law eCLE Webinar, *supra*, at p. 36.
- 72 *Id.* at 32-33. Donald W. Glazer and Jonathan C. Lipson, "Courting the Suicide King, Closing Opinions and Lawyer Liability," *supra*.
- 73 Donald W. Glazer and Jonathan C. Lipson, "Courting the Suicide King, Closing Opinions and Lawyer Liability," *Business Law Today*, Vol. 17, No. 4 March/April 2008.
- 74 Survey of Risk Management Practices in Connection with Third Party Real Estate Mortgage Loan Closing Opinions, American College of Mortgage Attorneys Opinions Committee, July 2017. For an excellent discussion of mitigating opinion practice risks relating to best management policies and procedures, drafting, reliance and ways to limit liability, see Charles L. Menges and Edward J. Levin, "Risky Business: Who Gets Sued Over Opinion Letters and How Can You Reduce Your Chances of Being Next—Managing the Risks Associated with Real Estate Opinion Letters," American Bar Association, Section of Real Property, Trust and Estate Law eCLE Webinar July 15, 2015.
- 75 Donald W. Glazer and Jonathan C. Lipson, "Courting the Suicide King, Closing Opinions and Lawyer Liability," *supra*. A mechanism for dispute resolution could be similar to the approach investment bankers include in their engagement letters. *Id.* Arbitration is a private and possibly more efficient way to resolve a dispute and would involve a panel of experts on opinion giving. *Id.* Opinion givers could attempt to negotiate a cap on the dollar amount of the damages the recipient can recover. *Id.* The cap we envision would be large enough to assure that the opinion giver takes its responsibilities seriously (and would not apply to recklessness or willful misconduct). *Id.* It would not be so large, however, as to put a firm's future into jeopardy. *Id.* Ethical rules generally prohibit lawyers from limiting their liability to clients, but there appears to be no ethical rule precluding limiting opinion givers' liability to non-client opinion recipients. *Id.*
- 76 Edward J. Levin and Sterling Scott Willis, "Real Estate Opinion Letters: Best Practices, Liabilities, and Strategies," *The American Law Institute Continuing Legal Education*, *supra*, January 31, 2019.
- 77 Absent qualification, the opinion giver may be presumed to have undertaken such legal research, reviewed such documentation, and investigated such matters as is professionally appropriate to render the opinions given. Real Estate Opinion Guidelines § 3.3.a at 249. However, any expressly stated limitations as to documents reviewed or the scope of legal and factual inquiry will be given effect. *Id.* Such limitations may be particularly appropriate where the opinion giver is local counsel without a long standing client relationship with the borrower or first-hand involvement in the negotiation of transactional documents. *Id.*
- 78 Opinion givers and counsel for opinion recipients are each entitled to presume that the other is acting in good faith with respect to a closing opinion. Statement of Opinion Practices, § 4.6; Core Opinion Principles § 1.5. Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 ("No Opinion That Will Mislead Recipient"). Statement of Opinion Practices, § 5.5, note 10. Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption. *Id.* See also, Real Estate Opinion Letter Guidelines § 1.5, at 245.

- 79 Statement of Opinion Practices, § 12, note 11 (replacing Opinion Guidelines § 1.5). An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to miscalculate the opinion. *Id.* The risk of misleading an opinion recipient can be avoided by appropriate disclosure. *Id.* An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *Id.* Omissions from a closing opinion of information unrelated to the opinions given do not mislead. *Id.*
- 80 An opinion giver may limit the matters an opinion address by using specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. Statement of Opinion Practices, § 10; Core Opinion Principles § 1.2.
- 81 Jonathan C. Lipson, Price, Path & Pride: "Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)," Vol. 3.1 Berkeley Business Law Journal 59, 62 (2005).
- 82 Jonathan C. Lipson, Price, Path & Pride: "Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)," *supra*, at 124 (2005). The fundamental purpose and justification for an opinion letter from an adversary party's lawyer is to facilitate due diligence as to matters not otherwise, or not easily, accessible to the recipient and its counsel. Robert A. Thompson, Real Estate Opinion Letter Practice, "Real Estate Opinion Letters: Introduction," *supra*. The proper purpose of a third-party legal opinion is to assist in the Opinion Recipient's diligence. ABA Business Law Accord, Opinion Guidelines ¶ 1(B)(2). See also TriBar Closing Opinion Report at 596; 2005 California Business Law Report ¶ 2. It is not to transform the opinion giver into a surety for the client or to serve as a strategic device employed by any party to renew pursuit of its business objectives. *Id.*
- 83 Jonathan C. Lipson, Price, Path & Pride: "Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)," *supra*, at 65 (2005).
- 84 Heather Hughes, Non-Party Interests in Closing Opinion Letters, Vol. 3 Issue 1 Am. U. Bus. L. Rev. 183, at 186 (2013), citing Bus. Law Section, State Bar of Cal., "Report on Third-Party Remedies Opinions 2007 Update" (2007), available at <http://apps.americanbar.org/buslaw/tribar/materials/20120820000005.pdf>
- 85 The benefit to the recipient of a closing opinion and of any particular closing opinion should warrant the time and expense to give them. Statement of Opinion Practices, § 4.3 (replacing Opinion Guidelines § 1.2), Real Estate Opinion Guidelines § 1.2, at 244. Jonathan C. Lipson, "Cost-Benefit Analysis and Third-Party Opinion Practice," 63 Bus. Law 1187, 1198 (2008) (presenting a qualitative empirical analysis of whether and when closing opinions are justified by cost-benefit analyses).
- 86 *Id.*
- 87 *Id.*, citing Jonathan M. Barnett, "Certification Drag: The Opinion Puzzle and Other Transactional Curiosities," 33 J. Corp. L. 95, 102-03 (2007) (discussing the wide use of closing opinions in corporate practice even where opinions contribute little informational value).
- 88 *Id.*, citing Kenneth C. Kettering, "Securitization and Its Discontents: The Dynamics of Financial Product Development," 29 Cardozo L. Rev. 1553, 1684 (2008) (noting that opinion letters in securitization opinions can contain so many caveats that they are virtually ineffectual); see also Jeffrey Manns, "Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability," 87 N.C. L. Rev. 1011, 1070 n. 242, 1080 (2009) (referring to transactional lawyers' opinion letters as attorney work product loaded with ad nauseam caveats)
- 89 *Id.* Attorneys distinguish qualified opinions from "non-opinions"—opinions that are so extensively qualified that they do not actually give the opinion they purport to render. ABA Opinion Guidelines advise against issuing "non-opinion" letters in favor of more explicitly expressing to the client and third party that the attorney cannot give the requested opinion. See, e.g., The ABA Silverado Guidelines, II.C. (4) (1991) (accompanying the 1991 Third-Party Legal Opinion Report and Accord).