

Real Estate Opinions in Colorado

The Evolution of Customary Practice

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This article considers the substance and form of legal opinions with a focus on legal opinions in real estate finance transactions.

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”¹

Humpty Dumpty would have been a mas-

ter at the art of issuing legal opinions. Terms such as “enforceable in accordance with its terms,” “practical realization,” “knowledge,” and “applicable law” would have been perfect for him. What do the words in an opinion mean? Lawyers giving and receiving legal opinions often struggle with this issue. James Fuld was an early pioneer in searching for an answer to this question. In his seminal article published

nearly 45 years ago, he noted the dearth of authority on the subject:

I can find hardly any cases considering the substance and form of legal opinions; there is virtually no printed word on the subject in the law books or articles; so far as I know, neither the law schools nor the institutes for practicing lawyers consider the subject; and, unlike the accountants, the

lawyers do not have any generally accepted principles covering opinions.

Legal opinions are thus being delivered every day without any common understanding of the ground rules. One word which is held to mean something different from what its writer thought it meant, one careless word in an opinion, or one aspect not thought of or sufficiently investigated can be most costly to a lawyer or law firm.²

What started out as a trickle with Fuld's article has turned into a flood. In recent years, there have been numerous articles by various committees of business lawyers and real estate lawyers, all attempting to explain and define what Humpty Dumpty might have meant if he had issued a legal opinion. This article considers this extensive legal scholarship and its application to opinions in real estate financing transactions.

Through the Looking Glass to Legal Opinions

Many bar associations have published reports discussing legal opinions in the context of local custom and practice.³ The issue was first addressed in Colorado in 1989 and 1990 in a two-part report by a Special Committee of the CBA Real Estate Law and Titles Section, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions."⁴ Since that time, the topic has been revisited by Colorado attorneys in several articles.⁵

What would Humpty Dumpty do when faced with this extensive, scholarly research and analysis on the topic of legal opinions? Would he still feel free to make words mean whatever he wanted them to mean? *Maybe not.*

A threshold question is often asked in real estate finance transactions: Why does the lender require an opinion? Many lawyers view an opinion request as a last-minute annoyance that creates unnecessary liability. Title insurance covers enforceability, lien creation, and priority. Isn't that enough? Yet opinions in such transactions are customary, and the literature suggests that they are not likely to disappear. They can, and often do, serve a useful purpose in enabling the parties to focus on the following issues that are important to the transaction:

- Who is the borrower? The existence of the

borrower and its power and authority to enter into the loan documents are essential to the validity of the transaction. Though title insurance covers enforceability of the deed of trust, validating these matters through borrower counsel's opinion forces a thorough review of the essential elements necessary to create an enforceable loan. Pursuing a title company on a claim after the transaction has failed is not a desirable remedy. It is much better to confirm these issues before the transaction closes. Usually, these issues are uniquely within the scope of responsibility of borrower counsel's responsibilities. Thus, an opinion regarding the borrower's existence, power, and authority is customary and not normally controversial.

- What are the important legal issues? The Enforceability Opinion, discussed below, is intended to identify important legal issues that must be resolved before the transaction closes. Although the Enforceability Opinion includes many customary assumptions, qualifications, and exclusions, these limitations do not reach (and are not intended to reach) the fundamental validity of the transaction. If there is a material legal defect in the loan documents, it should be identified before closing so it can be discussed and resolved or the transaction restructured to avoid the issue. If such issues are ignored, assumed away, or swept under the rug, neither party may be transacting as it intended. Thus, the due diligence and analysis required to give the opinion is a "litmus test" for important legal issues. However, an opinion recipient should not insist on an opinion that the opinion giver honestly believes cannot be given. If the opinion is wrong and the lender's only remaining remedy is an action against the lawyer for negligent misrepresentation, everyone loses, not just the opinion giver. Instead, important legal issues should be fully discussed and resolved before the transaction closes.
- Is there a basis for estoppel? It is axiomatic that the transaction represents a "meeting

of the minds," a joint agreement between the parties, and a shared purpose and objective. A borrower should not enter into a loan transaction with a concealed intent to challenge the transaction subsequently if matters do not go well. An opinion of borrower's counsel is evidence that the borrower understood the terms of the transaction and the scope of its obligations and that it intended to be bound by the loan documents. An opinion recipient can reasonably expect that borrower's counsel has discussed the documents with the client and explained relevant legal issues and risks. Thus, the opinion confirms that transaction documents express the intent of the parties.

- Is there multi-state efficiency in legal representation? In many transactions, the borrower and the collateral are located in Colorado and the lender and its counsel are located out of state. The deed of trust and certain other documents may be governed by Colorado law, so the lender will want assurance that such documents are enforceable in Colorado. Of course, the lender could retain Colorado counsel for that purpose, but it is not customary to do so unless some unusual issue arises. Instead, such an opinion is requested from borrower's counsel. In most transactions, lender's counsel fees are passed through to the borrower, so avoiding duplicate representation reduces costs and promotes efficiency.

Two important recent articles for real estate attorneys were published by joint drafting committees, comprising members of the Opinions Committees of the American Bar Association (ABA) Section of Real Property, Trust and Estate Law; the American College of Mortgage Attorneys; and the American College of Real Estate Lawyers:

- "Real Estate Finance Opinion Report of 2012" (2012 Report),⁶ and
- "Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012" (2016 Report).⁷

These reports provide a comprehensive

explanation of the issues involved in typical real estate finance transactions and set forth guidelines for preparing, issuing, and interpreting opinion letters.⁸

The ABA Business Law Section has published two important articles that also address Humpty Dumpty's concern:

- "Guidelines for the Preparation of Closing Opinions" (Guidelines),⁹ and
- "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions" (Statement of Customary Practice).¹⁰

The Guidelines and the Statement of Customary Practice address the growing concept of "customary practice" in the preparation of legal opinions and provide additional certainty regarding the scope of the lawyer's responsibility in issuing legal opinions and the meaning of the words used therein. Both reports are in the process of being updated.¹¹

The Statement of Customary Practice was approved by numerous bar associations and other professional groups and explains that the concept of customary practice enables an opinion giver and an opinion recipient to have a common understanding regarding the scope and meaning of the opinion:

1. It identifies the work (factual and legal) that opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.
2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.¹²

While we may not yet have arrived at the point of establishing "generally accepted principles covering opinions" envisioned by Fuld, we are getting close. In the event of a legal challenge to an opinion letter, the opinion recipient and the opinion giver may cite one or more of the published reports as authority.

Colorado Practice Concerns

The Statement of Customary Practice notes that

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bar association opinion reports are "valuable sources of guidance on customary practice,"¹³ and opinion practice is becoming national in scope. Colorado lawyers should be familiar with the 2012 Report and the 2016 Report to understand the expected scope of their responsibility and to resolve opinion requests in

accordance with national customary practice. Knowing what is considered appropriate and customary should help resolve unreasonable requests (often derived from archaic form letter requirements), avoid gamesmanship and intimidation, promote efficiency in the preparation and negotiation of opinions, and minimize the risk of liability.

A unique aspect of opinion practice is that legal advice is not given to the lawyer's client, but to a third party. The Colorado Rules of Professional Conduct permit a lawyer to provide "an evaluation of a matter affecting a client for the use of someone other than the client."¹⁴ Nevertheless, the lawyer's ethical duties to the client remain. Giving an opinion may involve the disclosure of confidential information, create conflicts of interest, or affect the client's ability to take an inconsistent position in subsequent litigation. As a result, the client should consent to the issuance of the opinion in the engagement letter. Such consent may also be implied from provisions in the loan documents that make the delivery of the opinion a condition of closing.

A lawyer issuing an opinion to a third party should not be liable to such person for legal malpractice, because the person is not the lawyer's client. This distinction is important because in addition to the duty of competence, the attorney-client relationship creates many other duties, including loyalty, confidentiality, and attorney-client privilege. These duties should not arise from the issuance of an opinion to a non-client.¹⁵ Instead, liability for such an opinion derives from the tort of negligent misrepresentation.¹⁶

Colorado originally followed the rule that an attorney could only be liable to a non-client for fraud or malicious conduct. This doctrine was overturned in *Mehaffey v. Central Bank Denver, N.A.*,¹⁷ where the Colorado Supreme Court held that an attorney who issued an opinion letter for the purpose of inducing a non-client to purchase municipal notes or bonds could be liable for negligent misrepresentation when the opinion letter contains material misstatements of fact. The Court stated that privity is not a necessary element of a negligent misrepresentation claim.¹⁸ Recent court decisions have expanded the extent of potential liability by adopting the doctrine

of “near privity” in allowing claims against opinion givers by non-clients.¹⁹

In *Mehaffey*, the Court defined negligent misrepresentation according to section 552 of the *Restatement (Second) of Torts* (1977) and stated:

To establish a claim for negligent misrepresentation, it must be shown that the defendant supplied false information to others in a business transaction, and failed to exercise reasonable care or competence in obtaining or communicating information on which other parties justifiably relied.²⁰

In *Mehaffey*, false information was contained in a series of opinion letters addressed to Central Bank as purchaser of certain notes and bonds issued by the Town of Winter Park and the Winter Park Development Authority. The opinion letters stated that the Town and the Authority adopted the applicable urban renewal plan in accordance with the laws of Colorado, the Town acted in accordance with Colorado law and its charter in determining that the project area was a “blighted area,” and allegations questioning those matters in certain litigation were “without merit.” The opinion letters also stated that the Town and the Authority complied with a statute that required factual findings before the urban renewal plan could be adopted. In a related case against the Town, the Court of Appeals held that the statutorily required factual findings regarding the need for an urban renewal program were, in fact, *not* made by the Town before the matter was referred to the electorate. Thus, the Court held that the opinion letters were mixed statements of law and fact that might constitute misrepresentations of material fact on which to base liability. The bank relied on the opinion giver’s representation of an erroneous fact, that the required findings were made by the Town, and on the resulting erroneous legal conclusion, that the litigation challenging the transaction was without merit. Although *Mehaffey* characterized the opinion as a “mixed statement of law and fact” to fit the case within traditional tort concepts, it seems likely that the result would be the same if the opinion involved only an erroneous conclusion of law.

In *Zimmerman v. Dan Kamphausen Co.*,²¹ the Court of Appeals also held that an opinion letter

contained mixed statements of law and fact and therefore, a claim of negligent misrepresentation by a non-client should not have been dismissed. The letter opined that a partnership giving a guarantee of a note was properly constituted, the partnership had the legal power to execute the guaranty and to perform its obligations thereunder, and a certain partner was authorized to sign the guaranty on behalf of the partnership. The Court held that there were disputed facts as to whether the partnership was only an agent of a disclosed trust that was a guarantor and whether the plaintiff rationally inferred from the opinion letter that the guarantee was binding on the partnership and each of the partners. Thus, the Court held that questions of law as to enforceability, power, and authority were not only a series of legal opinions but, by implication, also opinions of fact.

Mehaffey and *Zimmerman* instruct that a lawyer giving an erroneous opinion of law may be deemed to have made a negligent misrepresentation of fact that can provide a basis for liability to the opinion recipient.

Many questions remain unanswered as to the duties of the opinion giver. What is the appropriate standard of care? Is the duty of reasonable care or competence owed to a third party (tort concepts used in *Mehaffey*) the same standard as “competence” required by Colorado Rule of Professional Conduct 1.1 when representing a client?²² What impact does the concept of customary practice have? Does it change or measure the standard of care for the issuance of opinions to third parties? Though *Mehaffey* concerned the duty to exercise reasonable care and competence, is it the same standard used to analyze a claim of malpractice?²³

Applying the Framework

The 2012 Report, the 2016 Report, and the concept of customary practice help define the scope of the lawyer’s responsibility in the issuance of third-party opinions and offer a framework for requested opinions that provides reasonable protection to the opinion giver against a claim of liability. Using these sources should help settle issues of what is now customary and what should be the basis for resolution of opinion negotiations. These sources also offer a better

model than adherence to form opinions pulled “off the shelf” without understanding their meaning or relevance to opinion practice in Colorado.

With these principles in mind, this article considers some difficult issues that are often the subjects of controversy and debate and analyzes these issues in the context of the 2012 Report and the 2016 Report. Suggested solutions are included. Entity opinions regarding, for example, due organization, good standing, power and authority, and execution and delivery are not addressed because these opinions are typically not controversial and matters relating to entity formation and authority are often included as assumptions in local counsel opinions.²⁴ Opinions with respect to limited liability companies (the entity of choice for most real estate transactions) are covered extensively in *The Anatomy of a Legal Opinion*, by Herrick K. Lidstone, Jr.²⁵ The evolving concept of customary practice is discussed, as evidenced by the 2012 Report and the 2016 Report, and how it might narrow the focus of the opinion and clarify its meaning.

The 2012 Report and the 2016 Report contain extensive discussion of many other common opinion issues and include an Illustrative Opinion. Colorado lawyers should become familiar with these resources.

Applicable Law

The definition of “Applicable Law” is an important element of every opinion and should be used to focus the opinion on the issues that are material and relevant to the transaction. The definition should not be overlooked as boilerplate. A Colorado lawyer issuing an opinion should normally be expected to cover only Colorado law, though some lawyers are willing to include Delaware law for limited purposes related to specific matters if the law is clearly set forth in applicable statutes.

Generally, it is not appropriate to include laws relating to securities, bankruptcy, tax, environmental issues, local law, zoning, land use, and building codes, among other things.²⁶ Federal law is also not included, unless specifically requested for special or unique issues that are relevant to the transaction.²⁷

An opinion limited to Colorado law does not cover all Colorado law, but only specific Colorado law that is relevant to the transaction, which the lawyer “exercising customary professional diligence, would reasonably be expected to recognize as being applicable to the entity, transaction, or agreements to which the opinion letter relates.”²⁸

In a lead counsel opinion, if the loan documents are governed by Colorado law and the borrower is a Colorado entity, the scope of law covered by the opinion may be a bit broader. However, in a local counsel opinion, if the loan documents (other than the deed of trust) are governed by the law of another state (often New York) and if the borrower is an entity formed under the laws of another jurisdiction, the scope of law is much narrower. In that case, issues relating to the borrower’s existence, power and authority, execution, delivery, and similar matters are covered by assumptions. Thus, the scope of the applicable law and the extent of the lawyer’s responsibility vary depending on the circumstances. This limitation is typically set forth in two ways: an affirmative statement regarding the scope of law covered, and specific exclusions for areas of law that are not covered.

The 2012 Report and the 2016 Report state this concept as follows:

Further, and without limiting the foregoing provision of this Paragraph or other limitations on coverage, our opinions in this Opinion Letter relate to only such Law of the [State] [Opinion Jurisdictions] that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to any or all of the Borrower, the Guarantor, or the Transaction.²⁹

Many lawyers define this concept for purposes of the opinion as the “Applicable Law.” Although the definition of Applicable Law is intended as a limitation on the scope of responsibility, it can be ambiguous and create unintended risk. The limitation is intended to apply to a customary commercial real estate secured loan transaction. However, if the transaction involves unique or regulated parties,

businesses, collateral, or other unusual facts and circumstances, the “reasonably recognize” standard in the definition of Applicable Law may trigger increased responsibility. For example, if the parties are special entities (e.g., regulated, public, non-profit, or foreign), if the collateral is unique or regulated (e.g., casinos, hospitals,

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or nursing homes), or if the transaction was structured to achieve some legal, tax, or regulatory advantage, additional issues may arise that require further investigation and inquiry, or other limitations and exclusions in the opinion.

Regardless of where the borrower is orga-

nized, the question is whether the “reasonably recognize” standard includes matters relating to licenses, permits, and other operational issues relating to the borrower’s ownership of its assets and the conduct of its business in Colorado. While such issues may be important in corporate transactions, such as mergers and acquisitions, they are not usually relevant to real estate secured transactions unless they preclude the issuance of an enforceability opinion. Thus, unless the opining lawyer represents the borrower in its general business operations and such operations are directly relevant to the transaction, the opining lawyer should not be expected to address issues arising out of the borrower’s ongoing business activities, and the definition of Applicable Law should not be read to include them. If such operations and activities are relevant to the transaction, it may be appropriate for an opinion recipient to request and for an opining lawyer to give an opinion on such issues. However, the scope of review and responsibility should be negotiated and agreed in advance and not inadvertently included by default.

Assumptions

It is customary to include assumptions of facts in the opinion letter supporting the opinions that are given. These are usually not controversial because they are generally implied,³⁰ but opinion givers take comfort in expressing as many as are practical to provide evidence of the scope of the opinion and to avoid the implication that due diligence or analysis of assumed matters is required.

The analysis should start with the premise that every affirmative opinion expressed in the opinion letter must be based on matters within the lawyer’s scope of responsibility. If they are not within that scope, they must be based on appropriate assumptions. For example, if the lawyer is giving an enforceability opinion with respect to a deed of trust, the lawyer must review all of the legal elements necessary to reach that conclusion. Among these elements are the borrower’s existence, its good standing, and its power and authority to enter into the transaction and execute and deliver the deed of trust. If the borrower is organized under the

laws of another jurisdiction, the lawyer should not be expected to issue an opinion with respect to such matters. They should be set forth as assumptions. Every legal conclusion expressed in the opinion must be tested in this manner. With respect to each issue, the lawyer should ask, "How do I know this?" Questions that can't be answered because they are beyond the scope of the lawyer's responsibility or governed by the law of another state usually require an appropriate assumption.

In customary practice, some assumptions may be implied and others may require an express inclusion in the opinion. The Legal Opinion Principles attached as an Appendix to the Guidelines say:

Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of 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. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction.³¹

Notwithstanding the foregoing, many lawyers continue to include a long list of boilerplate assumptions. Most of such assumptions are not controversial and do not become the subject of negotiation, but certain recipients do resist the genuineness of signatures assumption. Notwithstanding such resistance, it is customary practice to include an express assumption that the signatures of the parties are genuine.

Fortress Credit Corp. v. Dechert LLP made

this assumption essential.³² In that case, attorney Dreier forged the signature of Solow Realty on loan documents and received loan proceeds of \$50 million. Dreier was Solow's attorney, but Solow had no knowledge of the loan, did not authorize it, and never received the loan proceeds. The lender required Dreier to engage an outside law firm to issue an enforceability opinion with respect to the loan. Dreier retained Dechert, LLP to issue the opinion. Dechert had no contact with Solow, only with Dreier. It undertook no due diligence to determine the involvement of Solow in the transaction. Dreier misappropriated the funds and was eventually convicted of orchestrating a massive Ponzi scheme. He was sentenced to 20 years in prison and disbarred. The lender then sued Dechert on its opinion.

The trial court determined that Dechert should have performed a more thorough inves-



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ELEVATE
v.: to move upward in place or position; to lift up

We assist our clients at the outset of a project in drafting, reviewing, and negotiating design and construction contracts to give our clients an advantage and to minimize the likelihood that claims and disputes will later arise—saving our clients both money and time. We represent owners and developers of construction projects, prime contractors, trade and specialty contractors, suppliers and surety companies.

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tigation and held Dechert liable, even though the opinion letter clearly stated that the law firm “assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts.” The trial court’s decision sent shock waves through the world of lawyers giving opinions, and Dechert appealed the decision.

The New York Supreme Court, Appellate Division, First Department reversed the trial court’s decision and held the assumptions and statements in the opinion were sufficient to shield the firm from liability. The assumption of genuineness that was ignored by the trial court was given full effect by the Supreme Court, which held that the statements in the opinion letter were not misrepresentations because the opinion letter specifically stated that Dechert had made no independent inquiry into the accuracy of the factual representations or certificates. The opinion also included an express assumption that all of the documents it had seen were authentic, and the Supreme Court stated that the opinion letter “was clearly and unequivocally circumscribed” by these qualifications. The Court dismissed the claim against Dechert.³³ An interesting question is whether the result would have been the same based on an implied assumption instead of an express assumption. Although we’ll never know the answer to that question, it has become customary practice to avoid the risk by including the assumption of genuineness.

As noted above, many assumptions are “generic” and do not require any justification for or explanation of the basis for the assumption. The Legal Opinion Principles³⁴ state that a lawyer is entitled to rely on factual information provided by others, including clients, unless the factual information on which the lawyer is relying “appears irregular on its face or has been provided by an inappropriate source.” In addition, the lawyer is not expected to conduct a factual inquiry of other lawyers in the firm or review firm files except to the extent the lawyer has identified a particular lawyer in the firm or a file “as being reasonably likely to have or

contain information not otherwise known” to the lawyer that he needs to support the opinion.³⁵ The 2012 Report contains a similar conclusion and states that assumptions are made “without investigation” whether or not the opinion letter so states.³⁶

Nevertheless, some lawyers believe that citing a source for their assumption somehow adds additional protection. For example, some include an assumption that all of the representations and warranties made by the borrower in the loan documents are true and correct. Many believe that this assumption broadens their protection when, in fact, the assumption may present a greater risk for the opinion giver. For example, representations and warranties are often highly negotiated and may be the result of a risk allocation strategy. A borrower may agree to make certain representations or warranties fully understanding that it may incur liability if the representations are false. While that may be an appropriate negotiating strategy for a borrower, it may not be appropriate for a lawyer to rely on an assumption that the representations of the borrower are true, especially if the lawyer participated in negotiation of the representations and warranties. Such reliance may not be reasonable. Likewise, relying on an officer’s certificate may not be reasonable if the lawyer knows that the officer has not performed adequate due diligence or is otherwise incompetent to sign the certificate. The Guidelines state that an opinion giver should not issue an opinion that will mislead the opinion recipient.³⁷ Certain self-serving assumptions may have a tendency to mislead, especially if they effectively “assume away” the opinion. The opinion giver should understand that what constitutes “misleading” the opinion recipient is likely to be determined in hindsight.

The 2012 Report contains a long list of recommended assumptions, and extensive assumptions are common in most opinion letters. There is a risk that an extensive list of express assumptions may invite the interpretation that other implied assumptions are not included. Nevertheless, all assumptions should be carefully drafted and analyzed to include every factual and legal issue necessary for every legal conclusion in the opinion letter that is not

otherwise based on the lawyer’s independent knowledge or supported by the lawyer’s legal analysis of the material issues required for the opinion.

The Enforceability Opinion

The “Enforceability Opinion” (sometimes called the “Remedies Opinion”) is the heart of most opinion letters.³⁸ The typical opinion is as follows:

Once the Deed of Trust has been properly recorded and indexed in the Recording Office, the Deed of Trust will constitute the legal, valid, and binding obligation of the Borrower, enforceable against the Borrower in accordance with its terms.

If, in addition to the deed of trust, other loan documents are governed by Colorado law and are covered by the opinion letter, a similar opinion is included with respect to the loan documents. The 2012 Report omits the words “legal, valid, and binding” on the assumption that they are implicitly included in the term “enforceable.”³⁹ Nevertheless, many lawyers continue to include them in the Enforceability Opinion.

Many lawyers interpret the Enforceability Opinion to cover “each and every” provision in the applicable loan documents.⁴⁰ The Tribar Opinion Committee contends that the words “in accordance with its terms” mean that each of the borrower’s undertakings in the agreement will be given legal effect.⁴¹ This potential interpretation is the source of most of the controversy and debate over the Enforceability Opinion. However, not even the most aggressive lender’s counsel believes that every provision in the loan documents will be given effect as written. As a result, it is customary practice to limit the scope of the opinion with additional qualifications.

These qualifications typically fall into four categories: (1) the bankruptcy exception, (2) the equitable principles limitation, (3) a “generic” qualification, and (4) many additional qualifications (usually referred to as the “Laundry List”). The bankruptcy exception and the equitable principles limitation are rarely controversial.

Both are broad form exceptions that include concepts well beyond bankruptcy law and the principles of equity. The 2012 Report contains the following example:

The opinions set forth in this Opinion Letter are subject to the following exceptions, exclusions, qualifications and other limitations:

[4.1] **Bankruptcy Exception:** The effect of bankruptcy, insolvency, fraudulent transfer, reorganization, receivership, moratorium, and other similar Law affecting the rights and remedies of creditors generally.

[4.2] **Equitable Principles Exception:** The effect of general principles of equity, whether applied by a court of law or equity, including, without limitation, principles governing the availability of specific performance, injunctive relief, and other equitable remedies, and principles of diligence, good faith, fair dealing, reasonableness, conscionability, materiality, and other equitable defenses.⁴²

However, most lawyers believe these broad form exceptions do not cover all potential issues and that it is necessary to include an additional “generic” exception. An additional generic exception, by itself, would effectively gut the Enforceability Opinion of any meaning. Thus, the generic exception includes two elements: (1) a “take away,” in which the opinion giver disclaims the “each and every” interpretation of the Enforceability Opinion and notes that many other terms and provisions may not be enforceable, and (2) a “give back,” in which the opinion giver notes that, despite the take away, some remedy is available in the event of a material default. These provisions are often referred to as the “Generic Qualification and Assurance.”⁴³ A typical provision is:

Certain remedies, waivers and other provisions of the Loan Documents are or may be unenforceable in whole or in part under Applicable Law, but, subject to the other limitations set forth in this Opinion Letter, the inclusion of such provisions does not render the Loan Documents invalid as a

whole under Applicable Law or preclude (i) the judicial enforcement in accordance with Applicable Law of the obligation of the Borrower to repay as provided in the Note, the principal of the Note, together with interest thereon (to the extent not deemed to be a penalty),⁴⁴ (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest or upon a material default by the Borrower in any other provision of the Loan Documents, and (iii) the foreclosure of the lien of the Deed of Trust and the security interest in the Fixtures in accordance with Applicable Law upon maturity or upon acceleration pursuant to clause (ii) above.⁴⁵

The foregoing formulation enjoys wide acceptance and is not usually controversial. Most of the debate regarding the Enforceability Opinion has centered on what is the appropriate “material default” standard, and whether the opinion should include a broader give back, such as the concept that the generic exception does not preclude the opinion recipient from receiving the “practical realization of the principal benefits of the transaction.”

The 2012 Report and the 2016 Report both adopt the material default standard, as do many Colorado lawyers. This is based on the fundamental principle of contract law that a material default is a condition that a party can use to excuse further performance.⁴⁶ It provides three important assurances: (1) enforcement of the debt, (2) acceleration of the debt upon a material default, and (3) foreclosure. Some lawyers worry about the inherent ambiguity in determining in advance what constitutes a material default, but it is not necessary to determine in advance which provisions are material and which are not. A material default will be determined at the time enforcement is sought based on the then existing facts and circumstances. If a court determines that a material default exists and if, notwithstanding such material default, enforcement, acceleration, and foreclosure would not be permitted, it must be because of some flaw (e.g., the loan

is usurious⁴⁷) in the loan documents. That’s precisely what the Enforceability Opinion is designed to cover.

The practical realization formulation has even more inherent ambiguity and is considered inappropriate in customary practice, although some lawyers continue to use it.⁴⁸ What constitutes the practical realization of the principal benefits of the transaction is subjective and ambiguous, creating unknown risk for the opinion giver. The precise scope and purpose of the Enforceability Opinion is not to assure the recipient that it will receive each and every benefit of the bargain; instead, it is to assure the opinion recipient that a contract has been formed, the documents opined on are sufficient to meet their fundamental purpose,⁴⁹ and certain defined remedies are available following a material default. Borrower’s counsel should not be expected to advise the lender regarding the quality or effectiveness of the loan documents, other than as may be necessary to give a customary enforceability opinion, and requests by the lender or its counsel for an opinion that the loan documents contain “all customary remedies” or similar requests are inappropriate.

It was the hope of many lawyers that a general consensus with respect to the formulation of the Generic Qualification and Assurance would avoid the need for an extensive Laundry List. But that has not been the case.⁵⁰ Most of these additional exceptions are not controversial and many are widely accepted by opinion recipients. But they clutter the opinion and can spark debate without providing any insight or constructive advice regarding the exercise of remedies. As noted above, the definition of Applicable Law is itself a significant limitation on the scope of the opinion that may render many of these additional exceptions unnecessary and moot. Thus, there is a trend to limit the Laundry List to specific matters and not include a mini treatise on the law of secured transactions in every opinion. Nevertheless, many opinions continue to include extensive Laundry Lists of exceptions and exclusions.

The Choice-of-Law Opinion

Choice-of-law issues arise where one or more

of the parties are organized under or one or more of the loan documents are governed by the law of another state (the Chosen State). Each circumstance presents unique and often complex choice-of-law issues.

Most Colorado lawyers do not give opinions regarding entities organized under the law of another state, although some may be willing to give limited opinions under Delaware law relating to organization and authority under the Delaware General Corporation Law or the Delaware Limited Liability Company Act. In such circumstances, reference is customarily made in the definition of Applicable Law only to statutes, specifically excluding judicial decisions interpreting those statutes. Entity opinions can sometimes indirectly involve the law of another state. For example, if the borrower is a Colorado limited liability company but its constituent members are entities organized under the law of another state, what is the scope of the “power” and “due authorization” opinion? How far up the chain of ownership does the lawyer have to go? In circumstances involving tiers of ownership with multiple layers of required approvals from parent or affiliated entities that may be governed by the laws of another state, compliance with required approval procedures above the entity level is customarily assumed.⁵¹ The 2012 Report cautions that such an assumption should be expressly stated, although the Tribar Report states that authorization by remote tiers of ownership is implicitly assumed.⁵²

More commonly, one or more of the loan documents are governed by the law of the Chosen State. This situation typically arises when property is located in Colorado and the lender is located in the Chosen State. In such a case, the lender usually requires that the loan documents, other than the deed of trust, be governed by the law of the Chosen State. Often, the deed of trust will include a “bifurcated” choice-of-law provision. A typical provision might read:

This Deed of Trust shall be governed by, and construed in accordance with, the laws of the State of New York; provided, however, at all times the provisions for the creation, perfection, priority, and enforcement of

the liens and security interests created pursuant hereto shall be governed by and construed in accordance with the law of the state in which the property is located, it being understood that, to the fullest extent permitted by the law of such state, the law of the State of New York shall otherwise govern the construction, validity and enforceability of this Deed of Trust.

When confronted with a request for an Enforceability Opinion with respect to loan documents governed by the law of the Chosen State and a deed of trust with a bifurcated choice-of-law provision, what should a Colorado lawyer do?⁵³ An Enforceability Opinion with respect to loan documents governed by the law of the Chosen State should not be requested or given unless the lawyer is admitted to practice in the Chosen State or is a member of a firm that has offices (and lawyers with relevant expertise) in the Chosen State. If this is not the case, local counsel in the Chosen State should be retained to give the opinion.

The first and more difficult question is what to do about the bifurcated choice-of-law provision in the deed of trust. If the lawyer issues an Enforceability Opinion with respect to the deed of trust, does the opinion cover, by implication, an opinion on the choice-of-law clause? Such provisions are inherently ambiguous with respect to what law applies to a myriad of legal, jurisdictional, procedural, and enforcement issues. The concept that the Enforceability Opinion includes “each and every provision” in the loan documents means that the opinion could be construed to include the enforceability of the choice-of-law provision. (See the discussion on the Enforceability Opinion above.) The 2012 Report states that a choice-of-law opinion should not be so construed, but it could be implied in the Enforceability Opinion. To avoid any such implication, the 2012 Report recommends that the opinion giver specifically exclude any opinion with respect to choice-of-law issues.⁵⁴ The case for excluding any opinion with respect to the choice-of-law provision seems overwhelming. A court will apply the law of the forum state unless and until one of the parties asks it to do otherwise.⁵⁵

Choice-of-law issues almost never arise in the abstract. Instead, they arise only if there is a significant difference between the laws of the forum state and the laws of the Chosen State with respect to a particular provision and such difference determines the outcome of the case. The choice-of-law provision itself will not be independently enforced except as a tool to reach a particular result. In a deed of trust containing a bifurcated choice-of-law provision, very complex issues arise in determining what law applies to matters concerning foreclosure. For example, in a Florida case involving the right to a deficiency judgment following the foreclosure of a Florida mortgage, the Florida court held the right to a deficiency judgment was a matter of Florida law, not Texas law, despite a choice of Texas law for everything other than “the creation, perfection, priority and foreclosure” of the lien created by the mortgage.⁵⁶ Based on its interpretation of Florida law that deficiency judgments were a part of “foreclosure,” the court saw no need to consider the bifurcated choice-of-law provision in the mortgage.

The next step is to determine whether any provisions in the deed of trust may trigger a choice-of-law dispute. To the extent the deed of trust secures obligations in the loan documents that are governed by the law of the Chosen State, including payment of the indebtedness evidenced by the note, the validity and enforceability of such obligations must be expressly assumed by the opining lawyer. In most cases, especially if the lawyer acts only as local counsel, the lawyer will not be issuing an opinion with respect to such documents and may not be expected to review them. Thus, such an assumption should not trouble the opinion recipient. But this assumption does not resolve the issue of the bifurcated choice-of-law provision in the deed of trust. Even if one could make a distinction between the law governing the obligation and the law governing the creation and enforcement of security interests in the collateral, such a distinction is illusory. Mortgages and deeds of trust typically contain many covenants and provisions that duplicate and overlap similar provisions in the loan documents.

For example, what if the deed of trust

contains a covenant to pay all secured obligations? Which law governs that covenant? What about the obligation to pay late charges, default interest, and prepayment penalties? Which law governs a due-on-sale clause? What about provisions relating to the application of insurance and condemnation proceeds? Does it matter whether these provisions appear in the loan documents or in the deed of trust, or both? What about notice provisions, rights to cure defaults, waivers of jury trials, arbitration provisions, jurisdictional requirements, and long-arm statutes?

Fortunately, there is a relatively easy way to analyze these issues. First, the lawyer should ignore the bifurcated choice-of-law clause in the deed of trust but include an assumption that the underlying secured obligations are valid, binding, and enforceable under the law of the Chosen State. Based on such an assumption and looking only at the provisions as they appear in the deed of trust, the lawyer should determine whether she could issue a normal and customary Enforceability Opinion under Colorado law with respect to the deed of trust, subject only to the generic qualification and assurance and other customary exceptions, exclusions, and qualifications. If such an opinion could be given, no unusual choice-of-law issues should arise and an opinion on the choice-of-law clause is unnecessary. In such a case, the lawyer could

either (1) include an assumption in the opinion that Colorado law applies to the deed of trust irrespective of the choice-of-law provision, or (2) qualify the Enforceability Opinion with the phrase: "To the extent governed by Colorado Law (without giving effect to its choice-of-law rules)." Such an opinion should also include an express exclusion with respect to any opinion regarding choice-of-law issues.⁵⁷

However, a more detailed choice-of-law analysis may be required if a customary Enforceability Opinion subject only to customary exceptions, exclusions, and qualifications could *not* be given based on the foregoing assumptions, or if the law of the Chosen State was deliberately selected to avoid some legal, tax, or regulatory issue in Colorado. In such a case, the analysis should focus only on the issue that precludes the issuance of the opinion. If appropriate and if supported by the law and the analysis, a reasoned choice-of-law opinion could be given with respect to only that issue. Colorado's choice-of-law policies may vary based on the issue, the parties, and the circumstances.

Each issue should be examined separately, and a "blanket" opinion on the effectiveness of the choice-of-law clause is inappropriate and ordinarily should not be requested or given. Nevertheless, some lenders and their counsel continue to ask for it, often without a lot of

thought as to why they want it and the quality of the response they receive. A typical response included in some Colorado opinions is:

To the extent that any of the Loan Documents chooses the law of a jurisdiction other than the State (i.e., the "Chosen State"), there is always the possibility that a court of the State would hold that it has a materially greater interest than the Chosen State in the determination of a particular issue arising under the Loan Documents (particularly because the Deed of Trust grants a lien on and security interest in property located in the State), that the laws of the State would apply absent the parties' choice-of-law, and that the application of the governing law of the Chosen State would be contrary to a fundamental policy of the State. As to the enforceability of the choice-of-law in the Deed of Trust, we have assumed that (i) the Lender's principal place of business is in the Chosen State; (ii) the Loan Documents were substantially negotiated in the Chosen State; (iii) the Loan will be made and funds advanced to the Borrower in the Chosen State; (iv) the Loan will be repaid by the Borrower in the Chosen State; (v) otherwise, there are significant contacts between the Chosen State and the transactions contemplated by the Loan Documents; and (vi) in selecting the law of the Chosen State to govern the

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Loan Documents, the parties acted in good faith and in the absence of misrepresentation, duress, undue influence or mistake.

Upon close analysis, such a provision is so qualified and “generic” as to be worthless to the opinion recipient. Terms like “materially greater interest,” “fundamental policy,” “substantially negotiated,” and “significant contacts” are elastic. Humpty Dumpty would love them! They do not identify any particular interest or policy and in the age of the Internet, physical contacts with a particular jurisdiction seem to have much less relevance. Nevertheless, some opinion recipients accept this very qualified opinion. An opinion recipient wants to know, and is entitled to know, whether it can enforce the deed of trust in Colorado subject only to customary exceptions, exclusions, and qualifications. A highly qualified generic opinion on the enforceability of the choice-of-law clause does not answer the question.

The better solution is to opine with respect to the enforceability of the deed of trust without regard to the choice-of-law clause and to exclude any opinion about choice-of-law. This is the structure that opinion givers and recipients should follow.

The Knowledge Opinion

Opinion recipients may sometimes request an opinion requiring a statement of the opinion giver’s “knowledge” of certain matters (the Knowledge Opinion). Often the request is also to provide “negative assurance” that the lawyer knows of nothing that would cause statements in the loan documents or assumptions in the opinion letter to be untrue. Such opinions may also be requested with respect to matters concerning existing or threatened litigation (see discussion of the No Litigation Opinion below), the accuracy of borrower’s disclosure affidavits, certificates, representations, or warranties, and local law issues (e.g., compliance with zoning laws).

The Knowledge Opinion is a confirmation of factual matters and should not be requested or given in opinion letters for real estate secured transactions. It seems to be a relic of corporate transactions regarding the adequacy of disclosures in a prospectus. The 2012 Report

concludes that: “opinion givers have moved away from providing confirmations that are purely factual”⁵⁸

The Guidelines make the following observation:

An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters. Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document . . . do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.⁵⁹

The Guidelines note that negative assurance with respect to adequacy of disclosures in a prospectus or other disclosure documents may be provided in limited circumstances in connection with a sale of securities. But such circumstances will rarely be applicable to real estate secured transactions.

Where the concept of “knowledge” is necessary for purposes of the opinion letter, the lawyer should include a definition of “knowledge.” In such circumstances, many firms will include a carefully circumscribed limitation that the opinion is made only to the extent of the “actual knowledge” of the lawyer who is responsible for the transaction, and then only to the extent of the lawyer’s “current consciousness without investigation.” The 2012 Report includes a similar definition.⁶⁰ The Guidelines note that, to avoid a possible misunderstanding over the meaning of “knowledge,” the lawyer should consider describing the factual inquiry that has been conducted, or state that the opinion is based on the lawyer’s personal knowledge without making any inquiry.⁶¹

However, using protective limitations such as “actual knowledge” and “current consciousness without investigation” may not provide adequate protection. Even if the opinion giver has no knowledge of a matter, notwithstanding such seemingly protective language, the Knowledge Opinion creates exposure to claims seeking to probe and exploit the extent of the opinion giver’s investigation. It is always difficult to rebut the charge that the lawyer “should have

known” about a factual matter. A highly qualified opinion with a severely restricted definition of “knowledge” provides little discernable benefit to the opinion recipient and still creates unacceptable risk for the opining lawyer.

The Knowledge Opinion should not be requested or given.

The No Litigation Opinion

The request for an opinion that the borrower is not the subject of legal proceedings, mediation, arbitration, regulatory proceedings, or similar pending or threatened matters (the No Litigation Opinion) has been a contentious opinion for many years. Lender’s counsel often requests it to gain comfort that the borrower is not at risk of incurring any loss that might materially affect its credit. Borrower’s counsel usually declines to give the opinion for the reasons described in this section. The request for this opinion is now generally criticized and is customarily deemed inappropriate. The 2012 Report, § 3.11(a) concludes: “The request for confirmations regarding legal proceedings increasingly is recognized as an inappropriate request for opinion letters, and this Report recommends that it should be resisted.”⁶²

The No Litigation Opinion is a factual confirmation that should not be the responsibility of the opinion giver. The opinion giver is typically engaged to opine that certain aspects of the transaction are in compliance with Applicable Law, not to give factual confirmations. Lenders are able to perform independent docket searches, zoning investigations, and “know your customer” searches that generally do not require the legal expertise of the borrower’s counsel.

Opinion givers are acutely sensitive to the risk of liability presented by No Litigation Opinions, because a mere allegation of error can result in significant litigation cost, and if counsel has knowledge of a threat of litigation to its client, the attorney–client privilege and work product doctrine are implicated. Disclosing to third parties “threatened” claims or negotiations with respect to disputed matters may adversely affect the interests of the client and should be done only with the client’s knowledge and consent.

An error in an opinion regarding the merits of pending litigation may give rise to a claim of

negligent misrepresentation. (See the *Mehaffey* discussion above.) An opinion regarding the absence of pending or threatened claims may also give rise to liability for negligent misrepresentations. In *Dean Foods Co. v. Pappathanasi*,⁶³ the Massachusetts Superior Court held a law firm liable for negligent misrepresentation due to the firm's failure to disclose a matter in a No Litigation Opinion. In this case, the firm stated that its client was not the subject of any continuing investigation and that the firm had no knowledge that its client's representations upon which the firm was relying were untrue. The opinion letter expressly stated that the opinion giver had no duty to investigate. However, the lawyer writing the opinion had been informed by his litigation partner of a previous tax fraud investigation that had probably gone away. Three months later the client pleaded guilty to tax fraud and paid a \$7.2 million fine. The court held that irrespective of the provisions of the opinion letter, the attorney had a duty to investigate and his investigation was inadequate. This case demonstrates the risk of giving opinions that are confirmations of factual matters based in part on subjective words and concepts such as "knowledge," "threatened," and "material adverse effect." The No Litigation Opinion subjects the opinion giver to uncertain and often uncontrollable risk and should not be requested or given.

The No Violation of Law and No Governmental Approvals Opinions

A form of a "No Violation of Law Opinion" is set forth in Section 3.8 of the 2012 Report:

The execution and delivery by the Borrower of, and the performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of Law comprising statutes or regulations duly enacted or promulgated by the State ("**Statutes or Regulations**") nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations.⁶⁴

However, the accompanying text of the 2012 Report notes that neither the purpose

nor the practical effect of this opinion on the Enforceability Opinion is obvious. Most likely, it is a relic from opinions in corporate transactions such as mergers, acquisitions, or securities transactions that has been pulled "off the shelf" and routinely included in opinion requests without much thought. A No Violation of Law Opinion relates to the borrower in the context of its general business activities. This may pose a problem for a lawyer acting only as local counsel who may not be familiar with or expected to review the scope of the borrower's business. The due diligence required to issue such an opinion may exceed both the budget for and the benefit of the opinion. In a typical real estate secured loan transaction where an Enforceability Opinion is being given with respect to a deed of trust and other loan documents, it is redundant and generally should not be requested or given.

Nevertheless, if a No Violation of Law Opinion is to be given, several important limitations should be noted:

1. An opinion letter speaks only as of its date and is not intended to cover matters arising after its delivery.⁶⁵ Some opinion requests include the performance by the borrower of all of its obligations under the loan documents within the scope of the No Violation of Law Opinion. Such performance may include future obligations of the borrower, such as development, construction, repair, maintenance, land use requirements, environmental requirements, and other actions that may require permits, licenses, or other governmental approvals. Requesting an opinion with respect to all of these future activities is unreasonable. Customary practice has therefore established that the opinion giver should be allowed to control the risk of this opinion by narrowing its scope to items relating only to (1) the execution and delivery of the loan documents and (2) the payment obligations of the borrower. The opinion should not include the performance by borrower of all of its other obligations under the loan documents.⁶⁶
2. The law covered by the opinion letter is generally defined as the Applicable

Law (see discussion of Applicable Law above). However, the law covered by the No Violation of Law Opinion is a narrower definition; the 2012 Report states that it includes only relevant statutes and regulations and excludes local law (e.g., permits, building codes, and zoning laws) and common law.⁶⁷

3. A No Violation of Law Opinion, by implication, would include usury. If no opinion with respect to usury is intended, it should be specifically excluded.
4. If the borrower is a unique entity (e.g., a public, non-profit, or regulated entity) or is engaged in a unique or regulated business or the transaction involves unique or regulated collateral, the term "law" in the opinion should be narrowed to include only those identified laws that are relevant to the parties or the transaction. In such a case, additional diligence and legal analysis may be required, and the parties should agree with respect to the scope of the opinion giver's responsibility.

Whatever benefit a No Violation of Law Opinion may have in a corporate transaction, it is of little benefit in a real estate secured loan transaction. If it is given, it should apply only to execution and delivery and payment obligations of the loan documents.

In conjunction with the No Violation of Law Opinion, certain opinion recipients may request a "No Governmental Approvals Opinion" to the effect that:

No authorization, approval, or consent by or from, filing, or registration with, any applicable governmental authority is required to be obtained by borrower for the execution and delivery by borrower of the loan documents, the performance of the payment obligations of borrower thereunder, nor the consummation of the transactions contemplated by the loan documents.

Such an opinion is subsumed in the Enforceability Opinion and should not be necessary. However, if it is required, the following should be used to modify it:

... except for those: (i) that may be required in the ordinary course of business in connection with the performance by borrower of its obligations under any covenants contained in the loan documents, (ii) that are required for the perfection of liens and security interests in the collateral described in the loan documents, (iii) that are permitted or required under the loan documents, or (iv) that are required pursuant to securities laws.

The 2016 Report notes that this opinion “is unnecessary and should not be requested unless the Borrower is engaged in business activity recognized as being subject to specific government regulation, such as being in a regulated industry or subject to a government program, and if so, there is some regulatory requirement for encumbering assets as security or for borrowing money.”⁶⁸

If the No Governmental Approvals Opinion is given, the same considerations and limitations discussed above with respect to the No Violation of Law Opinion should be applied.

The No Breach or Violation Opinion

Opinion recipients sometimes request an opinion that the execution and delivery of the loan documents and the performance of the borrower’s obligations thereunder do not violate internal organization documents, existing obligations of the borrower, or orders affecting the borrower (the No Breach or Violation Opinion).

Such a request seems to be a relic of corporate transactions and often is overly broad in scope. Although there may be instances where the borrower’s compliance with a specific agreement is relevant to the transaction, the opinion is unnecessary in most real estate transactions and should be resisted. If given, it should be narrow in scope and tailored to address the specific issues relevant to the transaction. If the opinion giver is acting only as local counsel and does not regularly represent the borrower, such an opinion is inappropriate. A form of a No Breach or Violation Opinion is set forth in Section 3.7 of the 2012 Report:

The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Borrower Transaction Documents, do not: (i) violate the Borrower Organizational Documents, (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment [] hereto, or (iii) violate any existing obligation of the Borrower under any orders, if any, which are identified as such in Attachment [] hereto, which the Borrower has confirmed to us are the only court and administrative orders that name the Borrower and are specifically directed to it or its property.

This form of opinion conforms to the following principles of customary practice:

1. The opinion should only apply to execution and delivery and payment obligations. It should not be extended to the performance of other obligations of the borrower. These are the same principles used in giving the No Violation of Law Opinion and the No Governmental Approvals Opinion discussed above.
2. The opinion should be limited to specifically described instruments. The opinion giver should be expected to know neither all of the agreements that have been entered into by borrower nor all orders affecting borrower. Accordingly, the scope of responsibility should be agreed upon in advance so that the opinion giver and the opinion recipient each have an understanding of the scope of the opinion request.

The No Breach or Violation Opinion is often overly broad and inappropriate in most real estate transactions. If given, it should be narrowly tailored as described above.

The Form-of-Documents Opinion

An additional opinion often requested is that the deed of trust creates a lien or security interest.⁶⁹ This opinion should not be the responsibility of the opining lawyer because title insurance covers it, and matters relating to priority and the effect of title matters are uniformly disclaimed

by the opinion giver. The 2016 Report states:

By customary practice in real estate security interest opinion letters, a responsive opinion addresses only the sufficiency of the form of the Mortgage to grant a lien or security interest As a corollary, it is not customary practice to provide an opinion that the Mortgage creates a lien or security interest, as that conclusion is insured by title insurance in most commercial real estate financing transactions.⁷⁰

A creation of lien opinion is in effect a title opinion and if given, is almost always based on assumptions that effectively assume away the opinion. Such assumptions usually include statements that the borrower has requisite title of record to and rights in the real property, the legal description sufficiently and accurately describes the real property intended to be encumbered by the deed of trust, and the deed of trust has been properly recorded and indexed. Other assumptions may include matters related to the borrower’s existence, power and authority, execution, and delivery (unless such matters are covered by express opinions). A creation of lien opinion is thus unnecessary, is of little value to the opinion recipient, and is uniformly disclaimed.⁷¹

The more acceptable version of this opinion is that the deed of trust is in a form “sufficient to create” a lien or security interest. This opinion is customarily accepted, although it is also covered by title insurance.

Reliance

An opinion letter is customarily addressed to the lender, who ordinarily is not the lawyer’s client. Thus, a threshold question is whether the client must consent to the delivery of the opinion. The Colorado Rules of Professional Conduct permit a lawyer to undertake an evaluation of a matter affecting a client for the benefit of a third party, and they also permit disclosure of otherwise confidential information if such disclosure is impliedly authorized to carry out the representation.⁷² With respect to the delivery of a closing opinion, the client’s consent usually can be inferred from the circumstances of the transaction, such as a provision in the loan

agreement making the delivery of a closing opinion a condition to closing. Many lawyers include in the opinion an express statement to the effect that the opinion is being delivered pursuant to the closing requirements set forth in the loan documents. However, if an opinion would require disclosure of information that the opinion giver recognizes the client would wish to keep confidential, the opinion should not be given unless after discussion with the client, the client consents.⁷³

The discussion at the beginning of this article outlined the basis for reliance on the opinion by the named addressee and negligent misrepresentation as the basis for liability. Only the named addressee should have the right to make a claim under the opinion letter against the opinion giver. In addition to the named addressee, the 2016 Report suggests that the following parties may customarily be expressly allowed to rely on the opinion:

1. the addressees, who may be the lender, an agent for lenders, or other loan parties holding an interest in the note;
2. successors in interest to the addressees; and
3. assignees for value in good faith.⁷⁴

It is inappropriate to provide that counsel for the addressee has the right to rely on the opinion letter.⁷⁵

If parties other than the original addressee are permitted to rely on the opinion, there are several issues to consider. First, the opinion is deemed issued and effective as of its date, usually the closing date.⁷⁶ Circumstances and Applicable Law may change after the closing date. The opinion giver has no duty to update the opinion or to notify the recipient of any changes in Applicable Law or other circumstances that may affect the conclusions in the opinion.⁷⁷ Second, reasonable reliance is based on the context in which the opinion is given. The addressee's identity, its knowledge, and its counsel's knowledge of Applicable Law, concepts of customary practice, the parties, and the transaction may all affect whether the reliance is justifiable. Third, the opinion giver is not expected to anticipate or address issues that may turn on the identity of the addressee, such as whether the loan is a legal investment,

whether the addressee is required to qualify to do business to enter into the transaction or exercise its remedies with respect to the collateral, or whether the parties or the transaction is subject to other regulatory requirements. Expanding the list of persons who may rely on the opinion may unintentionally expand the Applicable Law and the scope of responsibility of the opinion giver.

The demands of the marketplace usually require that some parties in addition to the original addressee be permitted to rely on the opinion. These typically include successors in interest and assignees for value and in good faith, as noted above in the 2016 Report. Protection should be allowed against claims by assignees who acquire an interest in the note solely for the purpose of pursuing litigation against the opinion giver. The 2016 Report therefore recommends that the opinion should restrict reliance so that the assignees must have acquired the note for value and in good faith, assignment of the note does not cause the opinion letter to be deemed to be reissued so as to extend the statute of limitations, and the assignee has no greater rights than the addressees.⁷⁸

The securitization of commercial mortgage loans has created another issue: Are rating agencies and other regulatory agencies able to rely on the opinion? Although some opinion recipients seek to include rating agencies as reliance parties, most rating agencies have confirmed that they do not require such rights and that an express right to receive a copy for review is sufficient.⁷⁹ Thus, it has become customary practice to include in the opinion letter a provision substantially as set forth in the 2016 Report:

Use. The opinions expressed in this Opinion Letter are solely for the [Lender's] [addressee's] use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by the [Lender][addressee] for any other purpose whatsoever or relied on by any other person[, except that this Opinion Letter may be delivered by the [Lender] [addressee] to an assignee from time to time

for value in good faith of all right, title, and interest in and to the [Note] [Transaction Documents], and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof]. Nothing in the preceding sentences, however, shall give any person entitled to rely upon this Opinion Letter any greater rights with respect to this Opinion Letter than those of the [Lender][addressee] as of the date hereof, or shall provide or imply any opinion being given with respect to an assignee that depends on the identity or characteristics of the named assignee or circumstances other than those at the date of this Opinion Letter. This Opinion Letter may be delivered (i) to a regulatory agency having supervisory authority over the [Lender][addressee] for the purpose of confirming the existence of this Opinion Letter; (ii) to the court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary; (iii) to nationally recognized statistical rating organizations rating an issuance involving [the Loan] or otherwise entitled to access under Rule 17g-5 under the Securities and Exchange Act of 1934, as amended (or any successor provision to such subsection) by providing a copy of this Opinion Letter to the appropriate 17g-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the applicable pooling and servicing agreement or trust and servicing agreement, as the case may be; and (iv) to other parties as required by the order of a court of competent jurisdiction in the United States.

The foregoing reliance provision is customary for real estate loans that are intended to be securitized. However, it need not be offered in other transactions. The identity of the opinion recipient, its legal status, and its familiarity (and that of its counsel) with customary practice can affect the scope of responsibility and the issues covered by the opinion. The Reliance

paragraph should not be overlooked and treated as boilerplate.

Conclusion

We have come a long way since Fuld's original article. There are now a substantial number of scholarly reports and law review articles discussing the topic of legal opinions. While there are not yet "generally accepted principles" for issuing opinions, the concept of customary practice is growing. It is not clear how the concept of customary practice meshes with traditional tort concepts of negligent misrepresentation, but the standard of care and the scope of due diligence will likely be measured in whole or in part by the commentary set forth in the reports and articles.

Opinion practice is becoming increasingly national in scope and standardized in content and format. Customary practice narrows the focus of many opinions and provides greater certainty regarding the meaning of the words used, but it may also raise the bar of expertise required to give the opinion. For Colorado lawyers, knowledge of the opinion literature is important to understand the issues, resolve unreasonable opinion requests, and provide fair outcomes in opinion language. Opinion givers and recipients should rely on customary practice as described in the literature to provide language that is reasonable and acceptable to both parties.

Perhaps even Humpty Dumpty would agree. ^{CL}



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NOTES

1. Carroll, *Through the Looking Glass, and What Alice Found There* 94 (Random House, Inc., spec. ed., 1946).
2. Fuld, "Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos," 28 *Bus. Law.* 915 (1972–Apr. 1973).
3. See, e.g., ABA Section of Real Property, Probate and Trust Law, <http://apps.americanbar.org/dch/committee.cfm?com=RP213000>. See also ABA Business Law Section, www.americanbar.org/groups/business_law/migrated/tribar.html.
4. Barad, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions," 18 *Colorado Lawyer* 2283 (Dec. 1989); Barad, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions—Part II," 19 *Colorado Lawyer* 1 (Jan. 1990).
5. See generally Lidstone, Jr., "The Anatomy of a Legal Opinion" (May 8, 2013; rev'd Oct. 5, 2017), <https://ssrn.com/abstract=2261767> (hereinafter Lidstone); Garfield, "Third-Party Opinion Letters: Limiting the Liability of Opinion Givers," 42 *Colorado Lawyer* 93 (Nov. 2013); and Lidstone, Jr. and Belak, "Danger Ahead! Legal Opinions for Colorado Lawyers," 38 *Colorado Lawyer* 25 (Apr. 2009). Garfield proposes limitations on damages for the opinion giver and exculpation for the individual writing the opinion. Though limitations on liability are sometimes requested by opinion givers, such concepts have not yet gained wide acceptance.
6. Joint Drafting Committee, "Real Estate Finance Opinion Report of 2012," 47 *Real Prop. Tr. & Est. L.J.* 213 (2012) (2012 Report), www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/v47/02/2012_aba_rpte_journal_v47_no2_fall_real_estate_finance_opinion_report.authcheckdam.pdf.
7. Dunn et al., "Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012," 51 *Real Prop. Tr. & Est. L. J.* 167 (Fall 2016) (2016 Report).
8. The authors of this article were members of the Joint Drafting Committees. The views expressed by the authors in this article do not necessarily reflect the views of the Joint Drafting Committees or the views and policies of their respective law firms.
9. Committee on Legal Opinions, "Guidelines for the Preparation of Closing Opinions," 57 *Bus. Law.* 875 (2002) (Guidelines), www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/20050120000001.authcheckdam.pdf. The Guidelines have been adapted for real estate transactions by a joint committee comprising the Opinions Committee of the American College of Real Estate Lawyers and the ABA Section of Real Property, Probate and Trust Law. See "Real Estate Opinion Letter Guidelines," 38 *Real. Prop. Prob. & Tr. J.* 241 (2003).
10. "Statement of Customary Practice in the

- Preparation and Understanding of Third-Party Legal Opinions," 63 *Bus. Law.* 1277 (Aug. 2008) (Statement of Customary Practice), www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/20081013000000.authcheckdam.pdf.
11. The "Statement of Opinion Practices" and "Core Opinion Principles" are in the final stages of review, approval, and publication. It is expected that these reports, when published, will supersede portions of the Guidelines and the Statement of Customary Practice. Nevertheless, while lawyers are debating the fine points of the words in the proposed updates, the thrust and scope of customary practice as the standard for requesting and issuing legal opinions is likely to remain substantially the same.
 12. Statement of Customary Practice, *supra* note 10 at 1277.
 13. *Id.* at 1278 (citing the *Restatement (Third) of the Law Governing Lawyers* (Am. Law Inst. 2000)).
 14. Colo. RPC 2.3.
 15. See Lidstone, *supra* note 5 at 3 (citing Fotenos and Philpot, "In Our Opinion," 14 *Am. Bar. Ass'n Bus. L.*, no. 2 at 16 (2014) (citing Keller, "Federal Court Finds Opinion Giver Can Be Liable For Malpractice" at 16 of "In Our Opinion" v. 14, no. 2 (ABA Business Law Section Winter 2014)).
 16. In *Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011), the Colorado Supreme Court defined the elements of the tort of negligent misrepresentation as when "(i) one in the course of his or her business, profession or employment; (ii) makes a misrepresentation of a material fact, without reasonable care; (iii) for the guidance of others in their business transactions; (iv) with knowledge that his or her representations will be relied upon by the injured party; and (v) the injured party justifiably relied on the misrepresentation to his or her detriment."
 17. *Mehaffey v. Central Bank Denver, N.A.*, 892 P.2d 230, 236 (Colo. 1995).
 18. *Id.* at 236.
 19. See *Prudential Ins. Co. of America v. Dewey*, 605 N.E.2d 318, 320–21 (N.Y. 1992).
 20. *Mehaffey*, 892 P.2d at 236 (citing *Burman v. Richmond Homes, Ltd.*, 821 P.2d 913, 919 (Colo. App. 1991)).
 21. *Zimmerman v. Dan Kamphausen Co. and Isaacson*, 971 P.2d 236 (Colo.App. 1998).
 22. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Colo. RPC 1.1.
 23. Mere expressions of opinion, by themselves, cannot support a claim of misrepresentation. See *Van Leeuwen v. Nuzzi*, 810 F.Supp 1120, 1124 (D.Colo. 1993). A lawyer should not be liable for an erroneous opinion of law unless he is negligent in exercising the requisite degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession.

See *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985). An error in judgment does not establish negligence as a matter of law; the question is whether reasonably prudent attorneys should have foreseen the likely result. See *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F.Supp. 300, 304 (D.Colo. 1995).

24. That does not mean these opinions are not important. They require appropriate due diligence and analysis—especially if the entity is an unusual or regulated entity or is engaged in an unusual or regulated business. The 2012 Report and the 2016 Report address the issues involved in giving entity opinions. We have also not covered every opinion issue discussed in the 2012 Report and the 2016 Report. The Reports contain extensive discussions of many important opinion issues, and Colorado lawyers giving opinions should consult the Reports for further information and guidance.

25. Lidstone, *supra* note 5 at 22-25.

26. For a comprehensive list, see Dunn et al., *supra* note 7 at Addendum-Illustrative Opinion Letter § 4.6.

27. See 2012 Report, *supra* note 6 at 229 § 1.3(b).

28. *Id.* at 231 § 1.3(e).

29. *Id.* at 244 § 1.3; Dunn et al., *supra* note 7 at Addendum-Illustrative Opinion Letter § 1.3.

30. 2012 Report, *supra* note 6 at 234 § 2.1(c).

31. Guidelines, *supra* note 9 at Appendix, Legal Opinion Principles, § III D.

32. *Fortress Credit Corp. v. Dechert LLP*, 2011 NY Slip Op. 08626 (N.Y. App. Div. 1st Dept.) (Nov. 29, 2011). For an excellent discussion of *Dechert*, see Levin, “New York Court Dismisses Lawsuit Against Law Firm That Rendered Opinion Letter in Fraudulent Transaction,” ABA (June 8, 2017), www.americanbar.org/content/dam/aba/publishing/rp/ereport/2012/1_february/rp_levin.authcheckdam.pdf.

33. *Fortress* tried to appeal the decision of the Supreme Court, but leave to appeal was denied. *Fortress Credit Corp. v. Dechert LLP*, 972 N.E.2d 508 (N.Y. 2012).

34. Guidelines, *supra* note 9 at Appendix, Legal Opinion Principles, § III A.

35. *Id.* at § III B.

36. 2012 Report, *supra* note 6 at 234 § 2.1(b).

37. Guidelines, *supra* note 9 at § 1.5.

38. For a general discussion of the Remedies opinion in real estate transactions, see Preble, “The Remedies Opinion Revisited: A Primer for Real Estate Lawyers,” 33 *Real Prop. Prob. & Tr. J.* 63 (Spring 1998).

39. 2012 Report, *supra* note 6 at 241 § 3.5, n. 28.

40. *Id.* at 241 § 3.5(a).

41. Tribar Opinion Committee, “Third Party ‘Closing’ Opinions,” 53 *Bus. Law.* 591, 619 (1998), www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/20050303000003.authcheckdam.pdf.

42. 2012 Report, *supra* note 6 at 268 §§ 4.1-4.2.

43. See, e.g., *id.* at 268 § 4.3.

44. If the debt instrument is governed by the law of another state, this opinion should be excluded. Instead, the enforceability of the underlying obligations should be included in an assumption. See Dunn et al., *supra* note 7 at 230 § 4.3.

45. See 2012 Report, *supra* note 6 at 253 § 4.3.

46. See *Restatement (Second) of Contracts* § 237 (Am. Law Inst. 1981). In Colorado, it illustrates the circumstance where enforcement may not be permitted notwithstanding a material default.

48. 2012 Report, *supra* note 6 at 254 § 4.3(g).

49. *Id.* at 241 § 3.5(b).

50. The 2016 Report contains 41 additional qualifications and exclusions, and many of these are broadly stated to cover many different issues and areas of law. See, e.g., Dunn et al., *supra* note 8 at 231-34 §§ 4.5 and 4.6. Most of these qualifications and exclusions have no plausible relevance to the transaction covered by the opinion. Many simply restate the law of secured transactions and have no unique relevance to the parties or the loan documents. Some lawyers seem to relish the challenge of finding additional obscure exceptions, but there is a danger to this approach. First, the length of the list invites the interpretation that what is not excluded must be included, thereby unintentionally reducing the scope of many of the broad and general exceptions. Second, and more importantly, the lengthy list tends to be viewed as “boilerplate”—a circumstance that tends to cause the mind to shut down and avoid critical analysis. While most of these exceptions and qualifications will not apply to customary commercial loan transactions secured by Colorado real property, there may be some circumstances when they do. Transactions involving special or unique parties (e.g., public, non-profit, foreign, or regulated entities), businesses or transactions (e.g., healthcare facilities, casinos, or regulated businesses), or collateral may require additional analysis. It is precisely these transactions where the mind of the opining lawyer must be awake with the ability to identify and focus on the issues important to the transaction. The Laundry List, however extensive, is not a substitute for careful analysis.

51. See 2012 Report, *supra* note 6 at 239, n. 24.

52. *Id.*

53. See generally Preble, “Choice of Law Opinions: Making the Right Choice,” 11 *Prob. & Prop.* 13 (July/Aug. 1997) (discussing choice of law options).

54. 2012 Report, *supra* note 6 at 246-47 § 3.9(c).

55. As a practical matter, the forum court does not directly apply the law of the Chosen State. It has no jurisdiction or legal power to do so. Instead, it applies the conflicts of law rules and policies of the forum state that enable it to incorporate by reference certain portions of the law of the Chosen State. The law of the Chosen State is a matter of fact that must be included in the pleadings of the party wishing to apply the law of the Chosen State. Even in such

circumstances, the incorporation by reference is never complete and may not include all of the relevant common law of the Chosen State or ancillary procedural and jurisdictional issues.

56. See *Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P.*, 222 So.3d 647 (Fla. Dist. Ct. App. 2017) (where the choice-of-law provision was bifurcated, the court applied the law of the forum state with respect to deficiency law as a continuation of the foreclosure (Florida) and did not apply the law of the Chosen State (Texas) as sought by lender).

57. See Dunn et al., *supra* note 7 at 253, n.144.

58. 2012 Report, *supra* note 6 at 257 § 4.7(a).

59. Guidelines, *supra* note 9 at § 4.4.

60. 2012 Report, *supra* note 6 at 257 § 4.7(c).

61. Guidelines, *supra* note 9 at § 3.4.

62. 2012 Report, *supra* note 6 at 249 § 3.11(a).

63. *Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rptr. 598 (Mass. Super. Ct. 2004).

64. 2012 Report, *supra* note 6 at 267 § 3.8 (emphasis in original).

65. *Id.* at 259 § 5.2.

66. See “Report on Adaptation of the Legal Opinion Accord,” 29 *Real Prop. Prob. & Tr. J.* 569 at § 14 and § 15 (1993).

67. 2012 Report, *supra* note 6 at 245 § 3.8.

68. Dunn et al., *supra* note 7 at 221 § 3.13.

69. This article does not analyze the customs and requirements of perfection opinions under the Uniform Commercial Code.

70. See Dunn et al., *supra* note 7 at 205 § 3.6.

71. *Id.* at 206 § 3.6, n.80.

72. Colo. RPC §§ 1.6, 2.3.

73. 2012 Report, *supra* note 6 at 219.

74. Dunn et al., *supra* note 7 at 263-64 § 5.1.

75. 2012 Report, *supra* note 6 at 258 § 5.1(c).

76. *Id.* at 259 § 5.2(a).

77. *Id.* at 259 § 5.2(b).

78. Dunn et al., *supra* note 7 at 234-37 § 5.1.

79. Forte and Dunn, “Loan Closing Opinions and Rating Agencies: Disclosure Not Reliance,” *CRE Finance World* (Jan. 10, 2016), <https://crefc.wordpress.com/2016/01/10/loan-closing-legal-opinions-and-rating-agencies-disclosure-not-reliance>.