



Legal Opinions in Colorado

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Identifying Legal Opinions

- Informal and formal advice to client
- Oral or written
- Third party legal opinions
 - Formal
 - Closing of a transaction
 - Required by the operative agreement

Guidance for Opinions

- Understanding client's business
- Understanding attendant law
- Understanding customary practice as applicable to specific situation
- Applying Colorado guidance

Customary Practice *Restatement*

- Custom and practice to provide abbreviated opinions that facilitate the closing.
- Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.

Customary Practice

- Includes national literature
- Includes Colorado Guidance
- Statement on the Role of Customary Practice in the Preparation and Understanding of Third Party Legal Opinions

ABA Statement

- “Customary practice evolves to reflect changes in law and practice.”
- Customary practice applies whether or not the opinion specifically “refer[s] to the application of customary practice.”
- When interpreting an opinion, the recipient or judge must go beyond the four corners of the opinion

Going Beyond the Four Corners

examples

- Signatories are competent
- Ability to rely on accuracy of agreement's representations and warranties
- Ability to rely on factual certificates from officers
- Assume agreements are enforceable against the other parties
- Assume regularity of corporate records
- Inability to assume any of the foregoing if knowledge (or reasonably should know) of inaccuracy

Colorado Guidance

Rules of Professional Conduct

- Rule 2.3 – an attorney may undertake an evaluation of a client’s matter for a third party
 - The attorney must believe that the evaluation is consistent with his or her duties to the client
 - The evaluation must have been requested by the client
 - Request is usually contained in the transactional agreement signed by the client

Colorado Guidance

Rules of Professional Conduct

- Rule 1.1 – competence
 - Facts
 - Law
 - Customary Practice
- Colorado has no reports or other documents setting forth customary practice
- There is a significant amount of information regarding customary practice available nationally by which Colorado lawyers will be judged

Colorado Guidance

Rules of Professional Conduct – Rule 1.1 (cont'd)

- Customary usage of terms:
- The remedies opinion
 - Meaning – each provision of the contract is enforceable as written
 - Includes contract, usury, general corporate, employment and intellectual property laws
 - Exceptions include bankruptcy, equitable principals
- Other appropriate exceptions?

Alternatives to Remedies Opinion

- Practical Realization

Certain of the provisions of the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits intended to be provided.

- Material Default Comfort Provision

In addition, we advise you that certain provisions of the Loan Documents may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not render the Loan Documents invalid as a whole or substantially interfere with the realization of the principal benefits and/or security provided thereby.

Colorado Guidance

Rules of Professional Conduct – Rule 1.1 (cont'd)

- Customary due diligence
- What facts are necessary to support the opinions given?
- What facts can be assumed versus determined
- Opinion giver's responsibility for determining facts

Colorado Guidance

Rules of Professional Conduct – Rule 1.1 (cont'd)

- Inappropriate opinion requests
- Golden rule
- Examples
 - All outstanding shares are legally and validly issued, fully-paid and non-assessable
 - The Company is in compliance with all of its contractual obligations
 - The Company is qualified to do business in each jurisdiction where the conduct of its business requires such qualification

Colorado Guidance

Rules of Professional Conduct

- Rule 1.6 –
 - Preserve the confidentiality of client information
 - Disclose client confidences only with client consent
- *Dean Foods* case
 - Client did not want opinion giver to disclose an investigation all thought was “closed”
 - Lawyers agreed not to disclose it, the investigation resurfaced, resulted in liability, and the opinion giver was held liable.

Colorado Guidance

Rules of Professional Conduct

- Rule 1.2(d) – lawyer’s conduct must conform to the requirements of the law
- A lawyer cannot assist a client in fraudulent conduct
- A lawyer cannot deliver an opinion, even if wholly accurate, where the lawyer knows that it will be used to further a fraudulent scheme
- SEC Rule 10b-5(c) and Enron
- Rule 1.0(f) – knowledge of lawyer may be inferred from circumstances

Colorado Guidance

Rules of Professional Conduct

- Rule 2.1 – lawyer’s conduct must be characterized by independent judgment
- Where the client prefers that the lawyer not disclose certain matters in the legal opinion, the choice is simple
- Disclose or no opinion
- *Dean Foods*

Colorado Guidance

Rules of Professional Conduct

- Rule 4.1 – truthfulness in statements to others
- *National Student Marketing*
 - Opinion given notwithstanding knowledge that proxy statement was materially misleading

Colorado Guidance

Rules of Professional Conduct

- Understand customary practice
- Negotiate the opinion early in the process
- Identify factual confirmations required and ensure that appropriate “knowledge” qualification is used
- Perform the necessary due diligence for opinions and factual confirmations
- Work issues out with client

Colorado Guidance

- *Mehaffy, Rider* (Colo. Sup. Ct. 1995)
- *Zimmerman* (Colo. App. 1998)
- The delivery by an attorney of a legal opinion may constitute negligent misrepresentation of a material fact

Colorado Guidance

- Understand customary practice before rendering legal opinions
- Identify legal opinions separately from factual confirmations
- Attempt to avoid *Mehaffy* and *Zimmerman* by stating that opinions are “opinions only, not statements of fact”
- Factual representations should be qualified by “knowledge” where appropriate
- Factual assumptions should be clearly set forth

Available Resources

- <http://www.abanet.org/buslaw/tribar/home.shtml>
- <http://www.acrel.org>
- Holderness and Wunnicke's Legal Opinion Letters Form Book
- Glazer and Fitzgibbon on Legal Opinions
- Lidstone, *Danger Ahead! Legal Opinions for Colorado Lawyers*, The Colo. L. (April 2009)

Thank you very much