

The Anatomy of a Legal Opinion
by Herrick K. Lidstone, Jr.¹
Burns, Figa & Will, P.C.
Greenwood Village, CO

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Introduction

At some point during their years of practice, most corporate or transactional lawyers will be asked to work on a legal opinion for the closing of a deal in progress in their law firm or legal department. Their assignment is to prepare the first draft of a closing opinion letter, which will be reviewed and revised by a partner or other more experienced lawyers, perhaps including a formal opinion committee. The letter is to be addressed and delivered to the other side at the closing – and is therefore called a “third-party” opinion letter.²

Lawyers tend to have one of two basic reactions upon receipt of an opinion drafting assignment. Some view it as merely a rote exercise, requiring nothing more than marking up an old officer’s certificate and a recent opinion letter their firm has delivered. Others cringe a little when they get this assignment. Clearly, third-party opinion letters are legal oddities – giving legal advice to one’s opponents is not normal behavior. It runs against the grain. Furthermore, many lawyers don’t know where to begin because opinions are in an arcane niche category cloaked in lore and protocol and the source materials are not readily available. Perhaps most distressing, the opinion assignment is often made at the 11th hour and may call for specialized due diligence and legal research, but not allow sufficient time to do it. Finally, opinion letters evoke vague but ominous concerns about professional liability exposure to claims by an indeterminate number of “people out there” who may receive the letter and claim reliance.

Looking at the last point, the riskiest opinions given are those given for unworthy clients. When a lawyer’s opinion letter furthers an unworthy client’s wrongdoing, plaintiffs have asserted the lawyer “should have known” of the client’s bad actions and seek to hold the lawyer liable for damages even when the legal opinions given are accurate as stated.³

¹ Nothing contained herein shall be construed to provide legal, tax, or accounting advice. The author reserves the right to assert positions contrary to those expressed herein. Available through the Social Science Research Network at <http://ssrn.com/abstract=2261767>.

² While legal opinions have been written since at least 1899 (*see Glazer*, Ch. 1, § 1.1 at note 5), James J. Fuld wrote the seminal article on the subject in 1973: “*Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Some Chaos*,” 28 *Bus. Law.* (ABA) 915 (1973).

³ Issuing a legal opinion including “incomplete and misleading opinions” that the lawyer knows will be given to prospective investors and used “for the purpose of falsely promoting the plan as a tax-saving device to

In some cases, opinion givers have been held liable to the opinion recipient for legal opinions that have proven to be wrong under the claim of negligent misrepresentation. In *Allen v. Steele*,⁴ the Colorado Supreme Court defined the tort of negligent misrepresentation as follows:

- (1) when one in the course of his or her business, profession or employment;
- (2) makes a misrepresentation of a material fact, without reasonable care;
- (3) for the guidance of others in their business transactions;
- (4) with knowledge that his or her representations will be relied upon by the injured party; and
- (5) the injured party justifiably relied on the misrepresentation to his or her detriment.⁵

While one would think that an opinion letter constitutes “opinion” rather than “fact” as required by paragraph (2), in both *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*⁶ and *Zimmerman v. Dan Kamphausen Co.*,⁷ the courts held that attorneys’ opinions based on the

potential investors” will likely lead to liability, and in *Ouwinga v. Benistar 419 Plan Services, Inc.*, 2012 WL 4096145 (6th Cir. 9/19/2012), to claims against the prominent law firm issuing the opinion under the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, *et seq.* While the opinions in that case were tax opinions, the analysis applies to all opinions.

In perhaps a more extreme case relating to the Enron bankruptcy, Vinson & Elkins settled litigation over a number of things, including its opinion letters used to facilitate certain Enron transactions, for \$30 million. In a June 1, 2006 *Wall Street Journal* story (<http://blogs.wsj.com/law/2006/06/01/the-vinson-elkins-enron-connection-the-plot-thickens/>), the author notes that court-appointed bankruptcy examiner Neal Batson said that obtaining V&E's opinion letters was "crucial to Enron's ability to complete" these transactions. The article goes on to note that “even as V&E provided important opinion letters to Enron, the firm appeared uneasy about its role. In notes made in preparation for a meeting with Enron General Counsel James V. Derrick Jr., V&E partner Dilg wrote, "We [are] unsure of how opinion rendered satisfies requirements of [the Financial Accounting Standards Board]." Language that V&E included in a March, 1998, opinion letter seemed to undermine the whole point of the document, which is to assure that the transactions actually involved a true transfer of the assets. Dilg seemed aware of how critical these deals were to the financial picture that Enron was presenting to investors. "Large transactions with significant earnings impact," he wrote in the same set of notes, adding further down: "Don't want deal to blow up at last moment and cause earnings surprise."”

⁴ 252 P.3d 476 (Colo. 2011). See a discussion of this case in Moutz and Schnee, *Attorney Liability to Non-Clients: Avoiding the Traps*, 42 *The Colorado Lawyer* (CBA) (April 2013) at 73.

⁵ *Mehaffy*, 892 P.2d at 236-238.

⁶ 892 P.2d 230 (Colo. 1995).

⁷ 971 P.2d 236 (Colo.App. 1998).

attorneys' application of facts to the law can themselves be facts forming the basis for a negligent misrepresentation claim.

The other elements of a claim of negligent misrepresentation are usually apparent when an opinion giver, in the course of his or her representation of a client, provides a legal opinion for the guidance of the opinion recipient in a business transaction with the expectation that the opinion recipient will rely on the opinion letter. The opinion giver must have justifiably relied on the delivered opinion to its detriment.

Rules of Professional Conduct are Applicable

Drafting an opinion letter invokes a number of the Colorado Rules of Professional Conduct ("C.R.C.P.") that govern the practice of law in Colorado:

- **Rule 2.3** – An attorney may undertake an evaluation of a matter affecting a client for use by a person other than the client if the attorney believes that such evaluation is consistent with his or her duties to the client, and if requested by the client.
- **Rule 1.1** – The lawyer must be competent in the facts, law, and customary practice to render the opinion.
- **Rule 1.6** – The lawyer must preserve the confidentiality of client information and only make disclosure of confidential information with client consent.
- **Rules 1.2, 2.1, and 4.1** – The lawyer's conduct must conform to the requirements of the law and must be characterized by independent judgment and truthfulness in statements to others.

There is an underlying principal that is extremely important in the legal opinion context: "An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given."⁸ This prohibition against "misleading opinions" is found in the 1998 Tribar report when it cautions that "opinion preparers may rely on information provided by an appropriate source . . . unless reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion preparers to be false."⁹

⁸ *Guidelines for the Preparation of Closing Opinions*, ABA Business Law Section Committee on Legal Opinions, 57 The Bus. L. (ABA) 875 (Feb. 2002) at ¶1.5.

⁹ "Third-Party 'Closing' Opinions: A Report of the TriBar Opinion Committee," 53 The Bus. L. (ABA) 591 (1998) at ¶ 2.1.4.

Why Should Lawyers Be Asked to Give Legal Opinions?

This was the subject of a panel discussion held at the 2010 ABA Meeting held in August, and is often asked but seldom satisfactorily answered. One of the reasons commonly given for requesting legal opinions – “they are traditionally given in these transactions” -- is clearly unacceptable. This may or, in fact, may not be the case. For example, one would think that opinions would be frequently given in merger or acquisition transactions. That is not the case.

In the public company context, according to ABA studies published from 2009 through 2012, only 1 percent of the public transactions announced in 2008 required a legal opinion from the target’s counsel.¹⁰ This compares to 2 percent for deals announced in 2007 and 4 percent for deals announced in 2005-2006. The 2011 study announced that there were no legal opinions as a condition of closing the transactions and the 2012 study did not even address the point.

Opinions were more frequently required in transactions whereby public companies acquired private companies. According to a different ABA study addressing transactions with a private target, 27 percent of the private company deals completed in 2010 required a legal opinion as a condition to closing, while in 2008 the comparable number was 58 percent as compared to 70 percent for deals in 2006 and 73 percent for deals that closed in 2004.¹¹

In questioning the appropriateness of giving a legal opinion, one should distinguish between

- (i) Third-party opinions where a lawyer might appropriately be asked to give an opinion on subjects he or she was more familiar with or where the lawyer was in a better position to obtain information about the subject than the lawyer for the recipient, such as opinions on corporate authorization, and
- (ii) Opinions requested of borrower’s counsel where counsel is not in a better position to give the opinion, such as on the enforceability of a loan agreement, which was drafted by the opinion recipient’s lawyer based on a form commonly used by the recipient.

The ABA’s *Model Stock Purchase Agreement* contemplates counsel to both parties issuing legal opinions to each other.¹² It goes on to point out, however, that the “parties should consider whether the benefit of an opinion of counsel justifies the cost before requesting an

¹⁰ The studies are available to Committee members at <http://www.abanet.org/dch/committee.cfm?com=CL560003>.

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¹² See *Model Stock Purchase Agreement with Commentary* (Second Ed. 2010) at §§ 8.6(a) and 9.5(a).

opinion. Opinions have become less common, particularly in larger acquisitions.”¹³ The commentary to the exhibits goes on to state that “[c]ounsel for buyers in acquisitions deliver opinion letters even less frequently than counsel for sellers and targets, and rarely when the buyer is paying all cash at the closing.”¹⁴

One party may view that, if an attorney issues a legal opinion respecting a transaction in question, that attorney may be, as a practical if not legal matter, “estopped” from representing its client in any subsequent disagreement or lawsuit that might arise concerning the agreement. Clearly there are ethical implications in an effort to deprive a party of its choice of counsel.

Another view is that by making the attorney go through the work of preparing the legal opinion and performing the required due diligence, the attorney is more attuned to the requirements before his or her client can consider the transaction documents “legal, valid and binding.” This offers a rather jaded view of the practice of law, where the attorney only dots the “I’s” and crosses the “T’s” when his or her liability is at risk. In a more discrete manner of expressing this, John Hay of Gust Rosenfeld said:

“I was once told by a lawyer to whom I was giving an opinion that he regarded the purpose of the opinion to be not that he get something on which he might sue later, but rather to get confidence that the lawyer giving the opinion had in good faith done such diligence as was necessary to ensure that the transaction was as it was supposed to be. The theory was that a lawyer’s opinion might be so qualified as to be unenforceable, but at least the lawyer had done enough work that he had reasonably decided there was nothing wrong with the documents he was opining about.”¹⁵

It appears that legal opinions are being offered less frequently in real estate transactions as well. ALI-ABA held a five day course on November 15-19, 2010, entitled *Modern Real Estate Transactions: Practical Strategies for Real Estate Acquisition, Disposition, and Ownership*. Over the course of five days of classes, not a single presentation was devoted to legal opinions.¹⁶

In summary, legal opinions are still given when required, but there is no reason that the opinion giver and its client cannot question the need for undertaking the cost and additional time requirements required for preparing, completing the due diligence for, and giving the legal

¹³ Comment to § 8.6(a) to *Model Stock Purchase Agreement with Commentary* (ABA Second Ed. 2010). Exhibits 8.6(a) and 9.5(a) in Volume II of the *Model Stock Purchase Agreement* provide forms of opinion letters from counsel to the seller and counsel to the buyer, respectively. See, also, §§ 7.4(a) and 8.4(a) of the *Model Asset Purchase Agreement with Commentary* (ABA 2001).

¹⁴ *Model Stock Purchase Agreement with Commentary* (ABA Second Ed. 2010), Volume II at 37.

¹⁵ Email from John L. Hay, Gust Rosenfeld P.L.C. dated June 22, 2011.

¹⁶ http://www.ali-aba.org/index.cfm?fuseaction=courses.course&course_code=CS505.

opinion. Performing a cost-benefit analysis for both sides before agreeing on the form of any opinion is a very useful exercise.¹⁷

Opinions Should Be Considered Well Before the 11th Hour

In drafting the third party opinion, any opinion that arises at the eleventh hour is too late. There are always issues to be resolved with respect to legal opinions, due diligence will always need to be performed, and, frequently, legal issues arise that require research or consultation with a more knowledgeable attorney. If the lawyer on either side of the transaction leaves the negotiation of the opinion for the end of the transaction, clients on both sides of the transaction are likely to be irritated. Address opinion issues as soon as one is identified as being needed. If you are receiving a draft agreement that contemplates your firm giving an opinion, the time to start considering the opinion, due diligence, and other requirements is early in the transaction. Where specific opinion language is given, an experienced lawyer should analyze the language and determine whether it is appropriate. This is not a job for a lawyer not experienced in legal opinions, although it frequently ends up there.

Procedures to Consider Before Drafting or Reviewing the Opinion Letter

Regardless of whether the request is long or short or delivered early or at the 11th hour, your first thought typically will be to find a precedent opinion letter. The time-honored approach to an opinion drafting assignment is to search out a precedent – an opinion letter given in a reputedly similar prior deal – and use it as your base document. If the other side provides a form of the entire letter (everything from the addressees' names to the signature block) you may be tempted to use the other side's ready-made draft for your convenience. In that case, you would use your internal precedent or firm form for comparison. Frequently using forms or precedent without further inquiry is bad practice as each opinion letter is based on the facts of the specific deal at hand. The opinion recipient will frequently want to impose more obligations on the opinion giver than the recipient, herself, would give (a violation of the "Golden Rule" of opinion giving, but frequently occurring).¹⁸ Any precedent or proffered opinion must be reviewed carefully against the facts of the transaction, applicable law, and the opinion literature. Any

¹⁷ See Lipson, "Cost-Benefit Analysis and Third Party Legal Opinion Practice," 63 *The Bus. L.* (ABA) 1187 (Aug. 2008).

¹⁸ The "Golden Rule" is set forth in the "Guidelines for the Preparation of Closing Opinions," 57 *The Bus. L.* (ABA) 875 (Feb. 2002) (ABA Guidelines) at § 3.1, as follows:

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

precedential or proffered opinion is not a “change the names and dates” template; at best it is a guide which the opinion giver may (or may not) be able to follow. In order to make these determinations, however, the attorney preparing and reviewing the opinion letter must:

- Understand the business transaction at hand.
- Understand the relationship between the client and your firm---how long has the client used your firm, and for what range of services? If a new or recent client, how did it come to the firm? Was the client recommended by trusted friends of the firm? Was the client vetted? Any background check? If you are working in the Company's inside law department, what is the history and relationship of the law department with the Company business person who is driving the deal?
- Understand customary practice in drafting, issuing and receiving legal opinions.
- Identify the opinions requested in order to spot issues.
- Review applicable law and literature and identify problems that may arise and the due diligence requirements for the opinions requested.
- Draft the opinion letter for review by the other side, or draft comments and issues with respect to any proffered opinion letter as clearly as possible.

The Opinion Letter is the Attorney's Risk – Not the Client's

It is very important to note that no matter how important the transaction is to the client, the opinion letter is the attorney's, not the client's, risk. As described in “Courting the Suicide King; Closing Opinions and Lawyer Liability,”¹⁹ third-party closing opinions require that the practitioner bet his or her net worth and ultimately, if not sufficiently careful, the practitioner will lose. As the article states:

The knowledge that someone is struck by lightning every year does not keep golfers off the golf course. Although the consequences are dire, the perceived risk is too small. Similarly, the knowledge that lawyers are now sued on opinions and that the damages sought can be catastrophic has not kept lawyers who work on financial transactions from giving third-party legal opinions.

¹⁹ Glazer and Lipson, “Courting the Suicide King; Closing Opinions and Lawyer Liability,” *Bus. L. Today* (March/April 2008), available at www.abanet.org/buslaw/blt/2008-03-04/lipson.shtml.

Drafting Considerations

Topics that are likely to be included in any opinion letter generally include the following:

- The corporate existence and good-standing of your client, the Company, in its home state and other jurisdictions.
- The Company's legal ability under its charter, bylaws and organic law to do the deal at hand.
- Have all corporate formalities been completed (board approval or shareholder approval), and have the signatories been authorized to sign the transaction documents?
- When signed and delivered, will the transaction documents be "legal, valid, and binding" against the Company?
- What additional legal considerations should be considered?

When drafting the legal opinion or reviewing the proffered draft, keep the following in mind:

- Only consider matters that are consistent with the scope of your firm's engagement. If your firm is local counsel, why would you be offering antitrust or securities law opinions? If your firm is regulatory counsel, why would you offer broader opinions?
- Can you identify and limit the opinion to matters that do not require extraordinary due diligence? If not, are the due diligence costs for the requested opinions disproportionate to the benefit of the transaction to your client?
- Are the matters requested for the opinion relevant to the transaction in question?
- What due diligence must be established for the opinions to be given?
- Is there any concern that the transaction, no matter how legal on its face, will be used to cause or perpetuate a fraud? Auditors have to ask this question each quarter when permitting their public company clients to issue audited or unaudited financial statements under Statement of Accounting Standards No. 99 – *Consideration of Fraud in a Financial Statement Audit*. Under C.R.P.C. Rules 1.2 and 4.1, lawyers have similar obligations.
- Does the opinion disclose (or to be complete should it disclose) client confidences and, if so, will the client consent to such disclosure?
- Does the requested opinion include a request for confirmation of facts that are disguised as an opinion?

Opinions under Article 9 of the Uniform Commercial Code

At a closing for a transaction involving a security interest in personal property, the lender may require the borrower's counsel to deliver an opinion under the Uniform Commercial Code ("UCC") that the security interest has been created, attached, and perfected. Rarely will an attorney be willing to give an opinion as to priority, and when they give such an opinion, it will be highly qualified.

- A security interest "attaches" (or is "created") to specific collateral when a debtor and a secured party satisfy the requirements of the UCC for providing a consensual interest in personal property in the favor of a lender that secures payment or performance of an obligation.
- "Perfection" affords the secured party statutory protections against the claims of most third parties against the collateral in question.
- "Priority" is the ranking of one person's security interest in collateral against competing security interests of other people in the same collateral.

Where a control agreement is used for perfection of the security interest, there are a number of issues which may impact the effectiveness of the control agreement, but perhaps not the remedies opinion (which provides that the agreement is "enforceable in accordance with its terms). The control agreement must give the creditor "present control" over the assets, and the right to take action with respect to the assets without debtor or court involvement. Control may exist even if the debtor has the power to substitute or deal with the collateral (C.R.S. § 4-8-106(f) and § 4-9-104(b)). Control will not exist if the debtor's consent is required for any future action or if the debtor has a right to file an interpleader action. "Control" does not exist if (for example) the debtor has to confirm the existence of a default before the creditor can act. There are different requirements for control of:

- Certificated securities (C.R.S. § 4-8-106(b));
- Uncertificated securities (C.R.S. § 4-8-106(c));
- Securities entitlements (C.R.S. § 4-8-106(d)); and
- Deposit accounts (C.R.S. § 4-9-104(a)).

Where perfection of a security interest in an LLC or partnership is required, the membership or partnership interest should be treated as a general intangible.²⁰ If the transfer of

²⁰ C.R.S. § 4-9-102(a)(42) defines "general intangible" to mean "any personal property" or a payment intangible "under which the account debtor's principal obligation is a monetary obligation." § 4-9-109(a)(3). Alternatively, the operating agreement or partnership agreement can make an election to be treated as a "security" for the purposes of Article 8 as permitted by § 4-8-103(c). Unless that election is made, § -103(c) specifically states that "an interest in a partnership or limited liability company is not a security" for the purposes of Article 8.

an interest in an unincorporated business entity (such as an LLC) is within Article 9, then an analysis of § 4-9-406 and § 4-9-408 is necessary to determine the effectiveness of any contractual restriction on transferability.²¹ Section 4-9-406(d) provides that except in certain specified circumstances, an agreement between the account debtor²² (the LLC, for example) and the assignor that restricts transferability of an agreement or promissory note is ineffective against an assignee of the account debtor (that is, its creditor). Generally § 4-9-406 is not an issue for LLC membership interests or interests in a partnership, because:

- In many cases, the entity is not a party to the agreement in question, or even when a party, is only an incidental party.
- § 4-9-406(d) applies to payment intangibles and not to general intangibles.
- § 4-9-406(d)(1) applies to transfer restrictions that run to the benefit of the account debtor; in most cases, the transfer restrictions found in an operating agreement or partnership agreement run for the benefit of the other members or partners.
- § 4-9-406(d)(2) does not impact the rights of the other parties to the agreement to require that the assignor comply with the terms of the agreement.

Section 4-9-408(a) generally provides that a term in an agreement that constitutes a general intangible that impairs the creation of a security interest or restricts transferability is “ineffective.” However, even to the extent applicable (and similar arguments to those made under § 4-9-406 are available), § 4-9-408(d)(6) retains as effective restrictions against the secured party enforcing the security interest in the general intangible. Furthermore, in the case of both Sections -406 and -408, they are only arguably applicable to the extent that the entity itself is party to the operating agreement or partnership agreement and in no case do they restrict the rights of the other owners to enforce the terms of the agreement against the assignor/member.

Because of the complexities of Article 9 as it applies to partnerships and limited liability companies, control agreements (including the secured party, the debtor, and the entity as parties) should be used to secure an interest in LLC membership interests or partnership interests. Even if the LLC or partnership makes the Article 8 election, the secured party can only be assured of compliance through a control agreement. In that case, it would be subject to the general remedies opinion that the control agreement is “enforceable in accordance with its terms.”

Article 9 contains complex rules that make rendering opinions regarding Article 9 a trap for the unwary. Note that Article 9 of the UCC cannot be fully understood without

²¹ If the interest is “investment property,” then Article 8 would apply. “Investment property” is defined in § 4-9-102(a)(49) as certificated or uncertificated securities, securities entitlements, securities accounts, commodity contracts or commodity accounts.

²² “Account debtor” is defined in § 4-9-102(a)(3) as “a person obligated on . . . [a] general intangible.” In the LLC context where the membership interest is a general intangible, it would be the LLC since both the economic rights (the rights to receive distributions) and the governance rights flow from the LLC to the members. While the members of an LLC (and partners of a partnership) may also owe duties to each other, that would not change the meaning of “account debtor” in the context of the membership or partnership interest.

understanding other laws, such as the other articles of the UCC and the Bankruptcy Code. Article 9 is outside the scope of work of most attorneys who prepare third party closing opinions in the merger and acquisition context and in the context of other business transactions. Experts in Article 9 are frequently not familiar with customary practice in drafting legal opinions. Thus, properly drafting the legal opinion in the Article 9 context will likely require the association of attorneys with both skills.

Opinions in Real Estate Transactions

There are similarities between opinions given by attorneys in real estate transactions and those given in other transactions. There are many differences, however, deriving from the fact that real estate law is primarily local. States have different recording requirements, race-notice or notice-only statutes, mortgage (or deed of trust) requirements, public and private trustee issues, foreclosure and other remedies, common interest ownership acts, statutory notice requirements, and others. In recognition of these differences, a Special Committee of the CBA Real Estate Law and Titles Section published a two-part report in *The Colorado Lawyer* in December 1989 and January 1990 entitled “*A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions*.”²³

The American College of Real Estate Lawyers (ACREL) has also brought real estate opinion practice forward.²⁴ The ACREL Report includes:

Chapter I: “An Introduction to the Real Estate Finance Opinion Report,” including a discussion of professional responsibility, customary practice, real estate opinion guidelines, local counsel, and the relationship of the report to other bar reports.

Chapter II: “A Practitioner’s Guide to the Real Estate Financing Opinion Letter,” commenting in detail on the legal opinion.

Chapter III: “Illustrative Language of a Real Estate Finance Opinion Letter,” offering draft language to be considered as discussed in the commentary.

A number of state reports have brought legal opinion practice forward with respect to practice in their respective states, as well. In February 2010, the Real Property, Trusts and Estate

²³ Edward N. Barad, Chairman, published in *The Colorado Lawyer* (December 1989) at pg. 2283 (part I) and (January 1990) at pg 1 (part II).

²⁴ See *Real Estate Finance Opinion Report of 2012*, a report of the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers, Attorneys’ Opinion Committee, and the American College of Mortgage Attorneys, Opinions Committee, 47 RPTE Journal (ABA) 213 (Fall 2012) (the “ACREL Report”), successor to *Inclusive Real Estate Secured Transaction Opinion* (1999), and the more recent *Real Estate Opinion Letter Guidelines* (January 15, 2003), both available at www.acrel.org. This is discussed in detail in *Probate & Property* (ABA RPTE Section), January/February 2013 at page 52, *et seq.*

Section of the ABA held a program entitled: “*Should Legal Opinion Letters in Real Estate Transactions Differ from Opinions in Other Business Transactions?*” The program reached the conclusion, “yes, but...” Among the principal differences identified is the likelihood of the real estate bar to use a generic qualification or a practical realization exception to the remedies opinion.

As stated in *Danger Ahead*, “practical realization” is a further limitation on the remedies opinion, but one with benefit to the opinion recipient. This frequently is used in real estate transactions when the transaction documents contain numerous specific remedies for breach of the agreement, but which may be inconsistent or even unenforceable as written. In giving a practical realization qualification, the opinion giver avoids the time and cost necessary to analyze each of the many remedies and to further analyze the interrelationship among the various provisions. One example of a practical realization opinion is as follows:

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.²⁵

When “practical realization” is offered in an opinion, the remedies opinion should be understood to mean that, where inconsistent or legally defective remedies are set forth in an agreement, the remedies provisions (taken as a whole) will provide the opinion recipient the benefits of its bargain following a breach by the opinion giver’s client.

As an alternative to the practical realization qualification, the New York Report²⁶ suggests the use of a “material default comfort” provision, which is intended to avoid the “ambiguity inherent in the practical realization approach.”²⁷ The New York Report provides a form of “material default comfort” provision as follows:

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.²⁸

²⁵ In Section 4.3(g) of the March 2012 Interim Working Draft from ACREL, the practical realization opinion is written as follows: “such unenforceability does not make the Transaction Documents legally inadequate for the practical realization of the principal benefits or security intended to be provided thereby, subject to the economic consequences of any delay which may result from applicable laws.”

²⁶ Association of the Bar of the City of New York, Comm. Of Real Prop. Law, Subcomm. On Mortgage Loan Opinions, and New York State Bar Ass’n, Real Prop. Section, Attorney Opinion Letters Comm., Mortgage Loan Opinion Report, 54 *The Bus. L.* 119 (1998) (New York Report).

²⁷ *Id.* at 158, n.39.

²⁸ *Id.* at 129.

This alternative focuses on the remedies actually considered important to the lender. After setting forth the normal exceptions, the opinion letter goes on to provide that “nonetheless, the lender will have the right to acceleration of the debt and the foreclosure of collateral” in the event of a “material breach of a **material payment** covenant.” According to those materials, this version is becoming increasingly standard in opinion letters given in real estate transactions and reflects the fact that collection of the debt and/or foreclosure of real estate collateral is the primary, if not exclusive, objective of the lender.

Both the practical realization qualification and the material default comfort provision recognize that the core of an opinion on a secured real estate transaction is the need for the creditor to be able to foreclose on the collateral to collect principal and interest following a default. The opinion with the practical realization qualification or a material default comfort provision provides this comfort to the opinion recipient. Anything beyond this should be specifically requested.²⁹

There is another consideration which, while not unique to real estate transactions, frequently arises in that context. Where real estate developers are dealing with an out-of-state lender, the lender may want the documents enforced in accordance with the lender’s local law (say, North Carolina), while the property may be in another jurisdiction (say, Colorado). The Colorado lawyer cannot render the typical enforceability opinion³⁰ except by reference to Colorado law. One can wonder why the lender, whose counsel prepared the loan documents, needs a Colorado lawyer to opinion on the enforceability of the documents under North Carolina law. Generally, the answer is that the lender should not need that opinion. In fact, ACREL has stated:

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. The benefit of an opinion to the recipient should warrant the time and expense required to prepare it. **In particular, opinions from borrower’s counsel in intrastate transactions (or in a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.**³¹

²⁹ See generally Ezell *et al.*, “The Remedies Opinion and Custom and Diligence—the Real Estate Secured Transaction Approach: Is It Consistent with Custom and Non-Real Estate Legal Opinion Practice?” 48 *Real Property, Trust and Estate Law J.* 1 (Spring 2008).

³⁰ The remedies opinion is that the agreement is enforceable in accordance with its terms.

³¹ [Emphasis supplied.] **Real Estate Opinion Letter Guidelines** by the American College of Real Estate Lawyers Attorneys’ Opinion Committee and the American Bar Association Section of Real Property Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, 38 *Real Prop. Prob. & Tr. J.* 241 (2003) at 1.2 (Coverage).

Other ways to get around this issue is for the opinion giver to give the opinion as though local law (to the opinion giver) applies even though the documents state to the contrary, or to assume that the chosen law is equivalent to the opinion giver's local law.³²

Limited Liability Company Opinions

Although limited liability companies ("LLCs") are the entity of choice in many situations, until recently little was written about legal opinions on LLCs and many looked at legal opinions regarding limited liability companies by analogy to corporate opinions. This changed in 2006 when the TriBar Opinion Committee ("TriBar") issued its report on LLC opinions ("TriBar 2006 Report")³³ and changed further in 2011 when TriBar issued its supplemental report on opinions on LLC Interests ("TriBar LLC Interests Report").³⁴ These reports analyze the nature of LLC opinions, their difference from corporate opinions and the reasons for those differences. They also deal with the problems faced by lawyers who do not practice in the state where the LLC was formed in giving these opinions because of the contract-based nature of LLCs.

The TriBar reports examine the nature of LLCs as entities and how the difference between LLCs and other forms of entities, such as corporations, affect the nature of the opinion and the diligence required. LLCs are like corporations in some ways and like partnerships in other ways, but they are neither, and their nature can change depending upon the form of the LLC.

The TriBar reports also focus on the ability of lawyers to give opinions on LLCs formed in states in which they do not practice, for example, by non-Delaware lawyers on an LLC formed in Delaware. The difficulty arises because, unlike a corporation, an LLC is primarily a creature of contract and, while an out-of-state lawyer may be comfortable with the entity law, such as Delaware's General Corporation Law or Limited Liability Company Act, of states where entities are regularly formed, they rarely are comfortable with out-of-state contract law. The TriBar reports observe that many lawyers are comfortable giving routine opinions on the status, power and authorizing actions of a Delaware LLC and opinions on LLC interests, but do not typically give opinions on the enforceability of the LLC agreement (known as the "operating agreement" under the Colorado Limited Liability Company Act³⁵ and the acts of many other states³⁶).

³² See line item 11b, below.

³³ *Third Party Closing Opinions: Limited Liability Companies*, TriBar Opinion Committee, 61 Bus. Law. 679 (2006).

³⁴ *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, TriBar Opinion Committee, 66 Bus. Law. 1065 (Aug. 2011).

³⁵ C.R.S. § 7-80-101, *et seq.*

³⁶ See, e.g., § 18-1101(b) of the Delaware Limited Liability Company Act.

Because “freedom of contract” is the basis of an LLC in Colorado³⁷ and elsewhere, when providing an opinion with respect to LLCs, it is important to understand and be competent³⁸ with respect to the law of contracts of the jurisdiction of formation.

Customary Practice

Attorneys drafting opinion letters must understand “customary practice” among those giving and receiving legal opinions. Whether desired or not, customary practice among lawyers is incorporated into closing opinions. The American Law Institute’s *Restatement (Third) of the Law Governing Lawyers* § 95 (Reporter’s Note to Comment c) states:

In giving “closing” opinions, lawyers typically use 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.

The Reporter’s Note adds that custom and practice covers the “meaning of the opinion letter including all such assumptions, limitations, and diligence standards.” Customary practice includes specific Colorado guidance and more broadly applicable national literature. The Executive Councils of the Business Law (November 2008) and Real Estate (February 2009) sections of the Colorado Bar Association have adopted the ABA’s *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*.³⁹ Any attorney not familiar with customary practice who is issuing a closing opinion in a business transaction is entering dangerous territory. Of course, there is the question in a state like Colorado whether customary practice is Colorado-centric (even though Colorado has not issued an opinion report), or whether customary practice in Colorado takes guidance from national reports or from reports issued by other states.

Because there is no clear definition of what “customary practice” means, it may make sense for an opinion letter to define customary practice by reference to a report, such as the TriBar reports, or to a specific state report. On the other hand, where a state has issued a report, lawyers subject to that state’s jurisdiction incorporate that state’s report whether or not expressly stated.⁴⁰ If, as a Colorado lawyer you do not want to have a specific opinion interpreted in accordance with the opinion giver’s customary practice, the opinion should disclaim that state’s opinion report and the parties should agree on an acceptable basis for interpretation of the opinion.

³⁷ C.R.S. § 7-80-108(4).

³⁸ Colo. R.P.C. Rule 1.1.

³⁹ 63 The Bus. L. (ABA) 1277 (Aug. 2008).

⁴⁰ See, Florida Report, Introduction, Part A which states that the report is “for use by lawyers who represent client’s receiving third-party legal opinions from Florida counsel.”

The ACREL Report criticizes the “customary practice” approach by pointing out its lack of precision and the related concern that there may be regional, practice area, and other differences in customary practice across the country.⁴¹ The Report goes on to note that it may not be possible to eliminate the lack of precision and it may not be possible to eliminate completely regional differences in customary practice. Nevertheless, published reports of bar associations and other professional groups provide some guidance as to the meaning of customary practice for different practice areas and geographical regions. While noting that the Customary Practice Statement⁴² provides a brief summary of the context of customary practice in which opinion letters are prepared and interpreted, much of the model opinion in Chapter III of the interim working draft strays away from customary practice and the shortened opinion to including extensive qualifications and assumptions.

As set forth in Chapter I, Part I of the ACREL Report, the committees that proposed the report rejected the shortened opinion approach suggested by customary practice and the *Legal Opinion Accord* because it required “the parties to an opinion letter . . . to look outside the text of such an ‘Accord’ opinion letter . . . to understand such an ‘Accord’ opinion letter.” Instead, the opinion model proposed by the ACREL Report “was to provide a form of an opinion letter that included within its four corners all of the principal opinion letter concepts in the Accord Opinion Reports. The Inclusive Opinion referred to this as “one-stop shopping” because there was no need to look (or shop) outside the Inclusive Opinion to see the sources on which it was based.”

Nevertheless, as the ACREL Report itself notes,⁴³ use of somewhat longer opinion letters result in a different danger: that a lengthy opinion letter might give false comfort that it is completely comprehensive. The *Customary Practice Statement* does not specify how long an opinion letter should be. The shorter opinion letter, such as that proposed by the Boston Bar Association,⁴⁴ leaves much to interpretation and customary practice (although expressly incorporating the ABA Principles), while the lengthier opinion letter proposed in the ACREL Report leave less to interpretation, but is still not all-inclusive.

⁴¹ ACREL Report, Ch. I, § V, 47 RPTE Journal at 222-223.

⁴² *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008) (the “**Customary Practice Statement**”). For a discussion of certain aspects of customary practice from the standpoint of a business lawyer, see Committee on Legal Opinions of the Section of Business Law, American Bar Association, *Legal Opinion Principles* 53 BUS. LAW. 831 (1998) (the “**Business Opinion Principles**”). The Working Group on Legal Opinions and the Committee on Legal Opinions of the American Bar Association Business Law Section have begun a project that will work with other bar associations and professional groups to identify the extent of consensus as to various statements in the Business Opinion Principles and other aspects of customary practice. Some members of the Committees are participating in that project.

⁴³ Chapter I, Part V.

⁴⁴ Glazer & Keller, “A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles,” 61 Bus. Law. 389 (2005) (“Streamlined Closing Opinion”) (Boston Bar Assn).

This was also the point made in a column written by Donald Glazer and Stanley Keller⁴⁵ which discussed the *Fortress Credit Corp. v. Dechert LLP* decision.⁴⁶ In that decision, the court dismissed a case against the opinion giver when it had based its opinion on forged documents. The opinion itself contained an expressed “genuineness of signatures” assumption, an assumption mentioned by the Court in the dismissal. Messrs. Glazer and Keller, both proponents of customary practice and the shortened opinion commented as follows:

A number of years ago we wrote an article proposing, on behalf of the Boston Bar Association's Business Law Section, a streamlined form of legal opinion letter that stripped out much of the boilerplate, including assumptions regarding the genuineness of signatures and the authenticity of documents, that appeared then and still often appear in opinion letters.⁴⁷ The *Fortress* decision has prompted us to ask ourselves whether the proposal to streamline opinion letters was ill-considered and whether in light of *Fortress* law firms would do well to state those assumptions and others expressly in their opinion letters. We have concluded, after much discussion, that the approach the Boston Bar proposed continues to be the right one.

Opinions can be challenged in many ways, and only with hindsight can one know which express qualification will be helpful in litigation. Thus, the logical alternative to streamlining is to throw the kitchen sink into opinion letters in an effort to assure that every possible limitation is expressly stated. The problem with that approach, however, is that it so over-qualifies an opinion letter that it exposes the opinion giver to the risk that a court, concluding that the opinion letter must mean *something*, will disregard the qualifications. That, in fact, is what the trial judge did in *Dean Foods* when he refused to give effect to the “without investigation” limitation in the opinion letter in that case.⁴⁸ Moreover, no recitation of limitations can be complete, and an opinion giver may well have hanged itself by negative implication if the limitation it needed is not stated. For example, many opinion letters do not recite an assumption that the board has complied with its fiduciary duties even though a failure of the board to fulfill those duties can result in the invalidation of a transaction and in at least one case resulted in the liability of an opinion giver.⁴⁹ Streamlining opinion letters also has the important benefit of focusing

⁴⁵ Glazer and Keller, *Opinion Practice Implications of the Fortress Decision* at page 8 of the *Legal Opinions Newsletter*, v. 11, no. 3 (Spring 2012) published by the Committee on Legal Opinions of the ABA's Business Law Section, available to section members at www.abanet.org.

⁴⁶ 89 A.D.3d 615, 934 N.Y.S.2d 119, 2011 WL 5922969 (2011).

⁴⁷ Glazer & Keller, “A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles,” 61 Bus. Law. 389 (2005) (“Streamlined Closing Opinion”).

⁴⁸ *Dean Foods Co. v. Pappathanasi*, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004).

⁴⁹ *Reich Family Limited Partnership v. McDermott Will & Emery*, No. 101921/03, N.Y. Sup. Ct., 230 N.Y.L.J. 20 (2003).

the opinion letter on the issues that matter. Rather than becoming buried in an overabundance of limitations, the streamlined form underscores exceptions and assumptions that are unique to the transaction by omitting those that are not.

Thus, it prevents misunderstanding and assures that issues of importance receive the attention they deserve. The streamlined form, therefore, furthers the utility of an opinion letter as a device for communicating information the recipient has identified as important.

On the negligence point, the streamlined opinion, in its reliance on customary practice, covers the same territory as the *Dechert* opinion letter and therefore provides a court the same basis for granting a motion to dismiss as did the *Dechert* opinion letter.⁵⁰

As noted in both the ACREL Report and by Messrs. Glazer and Keller, while an opinion letter might on the surface seem to be comprehensive, an opinion letter cannot express all of the gloss that customary practice will add to understanding an opinion letter. That being the case, there may be as much risk with a longer, purportedly complete, legal opinion than the shorter opinion contemplated by customary practice. Each opinion giver will have to determine his or her comfort level.

Customary practice is extensively analyzed and explained in the leading treatises on opinion practice:

- Holderness and Wunnicke, *Legal Opinion Letters Form Book* (3d ed., Aspen Law & Business, 2010).
- *Glazer and Fitzgibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in Business Transactions* (3d ed., Aspen Law & Business, 2008).
- Field and Smith, *Legal Opinions In Business Transactions* (2d ed. PLI 2008).
- Lidstone and Belak, “Danger Ahead! Legal Opinions for Colorado Lawyers,”⁵¹ discusses customary practice as it applies to Colorado lawyers, and includes, as an attachment, the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions. See, also, the 1989-1990 two-part article by a Special

⁵⁰ It should be noted that another case also turned on an express exclusion from an opinion letter. *See In re National Century Financial Enterprises, Inc. Investment Litigation*, 2008 WL 1995216 (S.D. Ohio 2008), where the transaction failed because of a securities law issue. The opinion giver was able to avoid liability because the opinion had specifically incorporated the *Accord* which specifically excluded securities laws from its coverage. It may be that a court would apply customary practice and §III.D of the *Principles* to achieve the same result had the opinion not expressly incorporated the *Accord*.

⁵¹ 38 *The Colorado Lawyer* (CBA) No. 4 at 25 (April 2009).

Committee of the CBA Real Estate Law and Titles Section, entitled “A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions.”⁵²

Finally, there is a plethora of materials available at the American Bar Association’s *Legal Opinion Resource Center*,⁵³ at <http://apps.americanbar.org/buslaw/tribar/home.shtml>.

The Anatomy of a Legal Opinion

There follows a table setting forth the anatomy of a legal opinion – sometimes referred to as an annotated opinion. There are errors in the opinion that are discussed in the commentary.

The next document is a form of opinion that follows along the lines of the opinion set forth in the table, but with the errors corrected.

References

The following table uses shorthand references to refer to the following sources:

National Bar Reports

- *Accord* – “Third Party Legal Opinion Report of the Section of Business Law, American Bar Association,” 47 *The Bus. L. (ABA)* 167 at § 14 (Nov. 1991).
- *Negative Assurance in Securities Offerings (2008 Revision)*, 64 *The Bus. L. (ABA)* 395 (Feb. 2009), by the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law.
- *Special Report on the Preparation of Substantive Consolidation Opinions* by the Committee on Structured Finance and the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, 64 *The Bus. L. (ABA)* 411 (Feb. 2009).
- *Guidelines* – ABA Business Law Section Committee on Legal Opinions, “*Guidelines for the Preparation of Legal Opinions*” 57 *The Bus. L. (ABA)* 875 (Feb. 2002).
- *Principles* – ABA Business Law Section Committee on Legal Opinions, “*Legal Opinion Principles*,” 53 *The Bus. L. (ABA)* 831 (1998), also included as an addendum to the *Guidelines*.

⁵² Edward N. Barad, Chairman, published in *The Colorado Lawyer* (December 1989) at pg. 2283 (part I) and (January 1990) at pg 1 (part II).

⁵³ Co-sponsored by the Legal Opinions Committee of the ABA’s Business Law Section and the Tri-Bar Opinions Committee.

- *Statement of Customary Practice* – American Bar Association (ABA), “Statement on the Role of Custom and Practice in the Preparation and Understanding of Third-Party Legal Opinions,” 63 The Bus. L. (ABA) 1277 (Aug. 2008). The *Statement of Customary Practice* has been formally adopted by the Business Law Section of the Colorado Bar Association (the “CBA”) (Nov. 2008) and by the Real Estate Section of the CBA (Feb. 2009).
- *TriBar Remedies Report* – “Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumption,” 59 The Bus. L. (ABA) 1483 (2004).
- *1998 TriBar Report* – “Third-Party ‘Closing’ Opinions: A Report of the TriBar Opinion Committee,” 53 The Bus. L. (ABA) 591 (1998).
- *TriBar UCC Report* – “Special Report by the TriBar Opinion Committee: U.C.C. Security Interest Opinions – Revised Article 9,” 58 The Bus. L. (ABA) 1449 (2003).
- *TriBar LLC Report* – “Third Party Closing Opinions: Limited Liability Companies,” 61 The Bus. L. (ABA) 679 (2006) and “Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests,” 66 The Bus. L. (ABA) 1065 (Aug. 2011).
- *Real Estate Secured Transaction Opinion* (1999), and the more recent *Real Estate Opinion Letter Guidelines* (January 15, 2003), both available at www.acrel.org.
- The *Real Estate Finance Opinion Report of 2012*, a report of the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers, Attorneys’ Opinion Committee, and the American College of Mortgage Attorneys, Opinions Committee, 47 RPTE Journal (ABA) 213 (Fall 2012) (the “ACREL Report”).

State Bar Reports

- *California Report* – The Opinions Committee of the California State Bar Association Business Law Section, “*Toward a National Legal Opinion Practice: The California Remedies Opinion Report*,” 60 The Bus. L. (ABA) 907 (2005).
- *Venture Capital Report* – *Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions*, by the Opinions Committee, Business Law Section of the State Bar of California, 65 The Bus. L. (ABA) 161 (Nov. 2009).
- *Third Party Legal Opinion Customary Practice in Florida*, Report of the Legal Opinion Standards Committee of the Florida Bar Business Law Section and the Legal Opinions Committee of the Florida Bar Real Property, Probate and Trust Section (December 3,

2011) available at

http://flabizlaw.org/index.php?option=com_groupjive&task=showgroup&groupid=43&Itemid=12.

- *Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association: Third-Party Legal Opinions in Business Transactions, Second Edition*, March 30, 2004 (corrected as of August 16, 2004), available at <http://businesslaw.ncbar.org/media/1110909/reportofthirdpartylegalopinions.pdf>.
- *Supplement to Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association: Third-Party Legal Opinions in Business Transactions, Second Edition*, (undated) available at <http://businesslaw.ncbar.org/media/1110913/supplementtothirdpartylegalopinions.pdf>.
- *Texas Report* – Report of the Legal Opinions Committee of the Business Law Section of the State Bar of Texas Regarding Legal Opinions in Business Transactions (6/1/1992), available (with four supplements) at <http://www.texasbusinesslaw.org/committees/legal-opinions>.
- *Texas Statement* – Legal Opinions Committee of the Business Law Section of the State Bar of Texas, “*Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law*,” 41 Texas Journal of Bus. L. No. 3 at 271 (Winter 2006) available at <http://www.texasbusinesslaw.org/committees/legal-opinions/FINAL%20PUBLISHED%20Indemnity%20Statement.DOC/view>.

Literature

- *Danger Ahead!* – Lidstone and Belak, *Danger Ahead! Legal Opinions for Colorado Lawyers*, 38 The Colorado Lawyer (CBA) No. 4 at 25 (April 2009).
- Glazer – *Glazer and Fitzgibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in Business Transactions* (3d ed., Aspen Law & Business, 2008).
- Holderness and Wunnicke, *Legal Opinion Letters Form Book* (3d ed., Aspen Law & Business, 2010).
- Lipson, *Cost-Benefit Analysis and Third Party Opinion Practice*, 63 The. Bus. L. (ABA) 1187 (Aug. 2008).
- Glazer & Keller, “A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles,” 61 Bus. Law. 389 (2005) (“Streamlined Closing Opinion”) (Boston Bar Assn).

A table setting forth the anatomy of a legal opinion – sometimes referred to as an annotated opinion.

This is an opinion for a transaction by which the Company (represented by the Opinion Giver) is purchasing assets from the Seller Group (the Opinion Recipient) in a transaction defined by an Asset Purchase Agreement (the APA). The Company is purchasing the assets in part for cash, in part for shares of the Company's common stock, and in part through a carry-back obligation to the Seller, which obligation is secured by the assets being conveyed. This is a simple transaction involving only Colorado law and the Company is a Colorado corporation.

There are errors in the opinion that are discussed in the commentary.

	Opinion Letter Language	Discussion
1	<p>Seller Group Limited c/o Seller Attorneys LLP Downtown Street Denver, CO 80202</p> <p>Re: ABC Corporation</p> <p>Ladies and Gentlemen:</p>	<p>To whom is the opinion letter addressed? Who is entitled to rely on the opinions? This is tied to the last paragraph of the opinion letter which states (immediately before the signature – see Row 61): “<i>The opinions expressed herein are given to you solely for your use in connection with the Transaction and may not be relied upon by any other person or entity or for any purpose whatsoever without our prior written consent.</i>” In some cases, such as structured financing or in some bond offerings, the initial purchaser wants subsequent purchasers to be able to rely on the opinion. When this is the case, it should be specifically negotiated.</p> <p>The recipient of a closing opinion has a right to rely on the opinions expressed without a duty to verify the opinions given. Nevertheless, under customary practice, permission for a recipient to rely on an opinion does not indicate that the recipient’s reliance is justifiable; proof of justifiable reliance should be a separate matter. An opinion recipient should not be entitled to rely on an opinion if the recipient or its counsel has knowledge that the opinion is incorrect or if the recipient’s reliance is otherwise unreasonable under the circumstances. <i>See 1998 TriBar Report</i> at §1.6. For a practical application of this issue under Colorado law, see the statement contained in Row 62, below, responding to the <i>Mehaffy</i> decision.</p>
2	<p>We have acted as counsel to ABC Corporation, a corporation incorporated under the laws of the State of Colorado (the “Company”),</p>	<p>What is the role of the opinion giver? General counsel, inside counsel, special counsel, local counsel?</p> <p>Under customary practice, it is questionable whether any limitation on the role as counsel reduces the attorney’s responsibility for the opinions given in the context of the opinion letter. <i>Glazer</i>, §2.5.2.</p> <p>There is no consensus whether the opinion giver must disclose other relationships that may exist between the attorney and client, and in any event the existence of other relationships does not reduce the responsibility of the opinion giver for the opinions given. <i>Guidelines</i>, §2.3.</p>

3	<p>in connection with (i) the Asset Purchase Agreement, dated as of _____, 201x (the “APA”), by and between the Company and Seller Group (“Seller”), (ii) the other agreements and documents being delivered today by the Company at the closing held today under the APA and listed on Annex 1 hereto (which documents, collectively with the APA, are sometimes collectively referred to herein as the “Transaction Documents”), and (iii) the completion of the transactions described in the APA and the other Transaction Documents (collectively, the “Transaction”) by which the Company is today purchasing from Seller the assets described in the APA (the “Seller Assets”).</p>	<p>This describes the transaction in question and further defines the documents as to which opinions are being given.</p>
4	<p>This Opinion Letter is provided to you at the request of the Company pursuant to Section 8.4.1 of the APA.</p>	<p>Note the reference to the Company’s direction. This is required by the Colorado Rules of Professional Conduct (Rules 1.6 (confidentiality) and 2.3 (evaluation for use by a third party)), and the <i>ABA Guidelines</i> at §2.4. Consent may be implied by the client execution of the transaction documents that require delivery of the opinion.</p> <p>If the opinion letter results in disclosure of client confidences that the client may not reasonably expect to be disclosed (threatened litigation, regulatory issues, or other issues that the attorney is not comfortable withholding), the opinion giver should seek specific client consent. In discussing the advisability of making disclosure, the opinion giver must remember <i>Dean Foods Co. v. Pappathanasi</i>, 18 Mass. L. Rep. 598, 2004 Mass. Super. LEXIS 571 (Dec. 3, 2004). There the opinion giver, at the client’s request, chose not to disclose a governmental investigation the lawyer and client thought had been targeted at another person and was no longer active. When the investigation revived after the opinion was given and targeted the opinion giver’s client, the opinion giver’s law firm was found to be liable for the non-disclosure. <i>See Danger Ahead!</i>, 38 The Colo. L. at 31. Where the opinion giver and client disagree on disclosure, the opinion giver’s response is simple: “no disclosure, no opinion.”</p>
5	<p>Except as otherwise indicated herein, capitalized terms used in this Opinion Letter are defined as set forth in the APA.</p>	<p>Definitional.</p>

6	<p>This letter and the opinions contained herein shall be interpreted in accordance with customary practice. "Customary practice" shall be interpreted consistently with the reports published by the TriBar Opinion Committee which reports are available at the Legal Opinion Resource Center found at http://apps.americanbar.org/buslaw/tribar/home.shtml.</p>	<p>As set forth in the <i>Statement of Customary Practice</i>, "Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies." "Customary practice evolves to reflect changes in law and practice." Customary practice covers the "meaning of the opinion letter including all such assumptions, limitations, and diligence standards." Customary practice includes specific Colorado guidance and more broadly applicable national literature, and is extensively analyzed and explained in the leading treatises on opinion practice.</p> <p>As described in § 95 (Reporter's Note to Comment c) of ALI's <i>Restatement (Third) of the Law Governing Lawyers</i>: "In giving "closing" opinions, lawyers typically use 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." Any attorney not familiar with customary practice and issuing a closing opinion in a business transaction is entering dangerous territory.</p> <p>On the other hand, as this "anatomy" points out, customary practice is an amorphous, undefined, concept. Rather than merely stating "interpreted in accordance with customary practice," it may be preferable to define customary practice more specifically, such as "as set forth in the reports published by the TriBar Opinion Committee." The Boston Bar Association form legal opinion contains a specific reference to customary practice and the ABA Legal Opinion Principles.</p> <p>The importance of this kind of a cross reference is that the cross reference requires the court, if interpreting a legal opinion, to go beyond the four corners of the opinion and consider customary practice as set forth in the published reports (TriBar, in this instance). This may make defending a legal opinion easier or will allow the court to grant a motion to dismiss where, for example, a signatory to a material agreement on which the opinion giver is opinion is not legally competent. Section 2.3(a) of the 1998 TriBar Report contemplates that the opinion giver to assume the legal capacity of individuals. This is an assumption seldom included in opinion letters, but is clearly contemplated within customary practice by TriBar. Would this cross reference be sufficient to allow a court to dismiss a complaint based on that issue? While there can be no assurance, the goal would be that a court use the cross reference included within the opinion and recognize the assumptions included in customary practice. <i>See In re National Century Financial Enterprises, Inc. Investment Litigation</i>, 2008 WL 1995216 (S.D. Ohio 2008), where the transaction failed because of a securities law issue. The opinion giver was able to avoid liability because the opinion had specifically incorporated the <i>Accord</i> which specifically excluded securities laws from its coverage.</p>
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7	<p>In connection with rendering the opinions set forth herein, we have examined the Transaction Documents, the Company’s Articles of Incorporation and its Bylaws, each as amended to date, the minutes of a special meeting of the Company’s Board of Directors dated _____, 201x, and such other documents, agreements and records as we deemed necessary to render the opinions set forth below.</p>	<p>Note the description of the documents reviewed. As stated in the last clause, a listing of documents reviewed does not, under customary practice, excuse the opinion giver from reviewing other documents, agreements, and records necessary to render the necessary opinions. If an opinion giver wants such a limitation, it must be stated specifically (“we have reviewed only the following documents”).</p>
8	<p>For all purposes of this opinion we have assumed that the Transaction Documents to which the Company is a party have been duly executed and delivered by all parties thereto substantially in the respective forms in which we most recently reviewed them [(being the drafts thereof bearing draft date of _____, 201x)].</p>	<p>Where the closing is taking place across a closing table and the opinion giver is present or where the opinion giver has been involved in each draft, this sentence may be eliminated or modified. If neither circumstance is present, the opinion giver most likely would require that the assumptions be made.</p> <p>Execution and delivery are, at the heart, factual matters. “Due execution” is partially a legal question and partially factual. It requires both legal authorization and the fact of execution by the legally authorized persons. It is important to note that customary practice provides that the Opinion Giver may assume that signatures presented are genuine. Nevertheless, as set forth is the <i>Fortress Credit Corp. v. Dechert LLP</i> opinion (2011 WL 5922969, N.Y.A.D.), a motion for summary judgment was granted when the opinion included an express assumption as to the validity of signatures.</p> <p>As a legal matter, execution and delivery are required for the formation of a contract. Thus, where not stated, execution and delivery are implicit in the remedies opinion and should be specifically assumed if not witnessed by the opinion giver.</p>
9	<p>We express no opinion as to the laws of any jurisdiction other than (i) the laws of the State of Colorado, and (ii) the laws of the United States of America.</p>	<p>This is a limitation of the opinions given. As defined in the <i>Principles</i>, §II.B, even though the statement of the law coverage is broad, an opinion letter only covers the law that a lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates. Even when generally recognized as being applicable, some laws (e.g., securities, tax and insolvency) are understood as a matter of customary practice to be covered only when expressly addressed. <i>Principles</i>, §II.D. The Florida report has a list of 19 laws that are not included unless expressly addressed; California 11. In addition, unless specifically addressed, local law is not included in an opinion. <i>Principles</i>, §II.C.</p>

10		<p>Many corporations are formed under Delaware law, and in many cases business lawyers are comfortable giving limited Delaware corporate opinions (and in some cases, Delaware limited liability company opinions). Note the applicability, however, of CRPC Rule 1.1 (competence). Issuing such an opinion generally does not implicate unauthorized practice of law concerns. Where Delaware corporate law is an issue and the opinion giver is competent to render such an opinion, the following statement is frequently made:</p> <p>“(iii) the General Corporation Law of the State of Delaware (the “DGCL”) (as the same appear on the date hereof at http://www.delcode.state.de.us/). Without limiting the foregoing, we express no opinion herein as to any body of law of the State of Delaware other than the DGCL.” Note that this would include an opinion not only as to the DGCL, but it would also include the Delaware Constitution and decisional law of the State of Delaware. <i>See 1998 Tribar Report</i> at §4.1. <i>Glazer</i>, at § 2.7. If a UCC opinion were to be given under Delaware law and the attorneys (a) felt competent in the subject, (b) but desired to interpret the Delaware statute only without regard to decisional law, they would have to so state. <i>See Holderness</i>, §7.10 at 223.</p>
11	<p>We advise you that we are licensed to practice law only in the State of Colorado. When any opinion is given herein with respect to an issue where any law other than the laws of the State of Colorado may apply, the opinion assumes that consideration of the laws of such jurisdiction would lead to the same result as consideration of the laws of the State of Colorado.</p>	<p>The foregoing is a limitation on the liability of the opinion giver. It also ties the interpretation to Colorado law – a provision that may not be acceptable in all contexts.</p>

12	<p>We call your attention to the fact that the Transaction Documents provide that they are to be governed by and construed in accordance with the laws of the State of [New York]. For purposes of our opinions, we have disregarded the choice of law provision in the Agreement and, instead, have assumed that the Agreement is governed exclusively by the internal, substantive laws and judicial interpretations of the State of Colorado.</p>	<p>Many documents (especially in financing transactions) provide for a choice of law other than the home state of the opinion giver. Many opinion recipients will accept a limitation as described to avoid the cost of the client retaining local counsel in the chosen jurisdiction. This also avoids unauthorized practice of law concerns. <i>Accord</i>, § 10(b); <i>1998 Tribar Report</i>, §4.3-§4.6. While chosen law provisions usually specify only the law of a state as being applicable, relevant federal law (such as securities law, bankruptcy law, tax and antitrust law), may apply as well. However, as a matter of customary practice, an opinion letter is not understood to cover federal law unless the opinion expressly states that it does. <i>Guidelines</i> at II.D; <i>1998 TriBar Report</i> at §4.1; and further discussion at Row 28.</p> <p>Where there is a choice of law provision, the opinion recipient may request an opinion as to the specific enforceability of the choice of law opinion. Whether or not specifically requested, an “enforceability” opinion includes choice of law unless specifically excluded. In <i>Wood Bros. Homes, Inc. v. Walker Adjustment Bureau</i>, 601 P.2d 1369 (Colo. 1979), the Colorado Supreme Court adopted the Restatement (Second) Conflict of Laws §§ 6, 187, 188 & 196 (1971) with regard to contractual choice of law provisions. Other Colorado cases considering contractual choice of law questions include: <i>State Farm Mutual Auto. v. Mendiola</i>, 865 P.2d 909 (Colo. App. 1993); <i>Hansen v. GAB Business Services, Inc.</i>, 876 P.2d 112 (Colo. App. 1994); <i>FBS AG Credit, Inc. v. Estate of Walker</i>, 906 F. Supp. 1427 (D. Colo. 1995). The following language is frequently used to opine regarding choice of law provisions, and is based on the Restatement (Second):</p> <p>“Based on the provision in the Agreement providing that the laws of that State of [New York] will govern the enforcement and interpretation of the Agreement, we believe that a Colorado court, if properly presented with the question, would apply the internal laws of the State of [New York] as the laws governing the Agreement, unless (a) the court finds that the State of [New York] has no substantial relationship to the parties or the Transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the laws of the State of [New York] would be contrary to a fundamental policy of the State of Colorado. We note, however, that choice-of-law issues are decided on a case-by-case basis, depending on the facts of a particular transaction, and we are thus unable to conclude with certainty that a Colorado court would give effect to such provisions.”</p>
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		<p>As a mid-point, some opinion recipients require an opinion that the Transaction Documents would be enforceable under local (Colorado) law even if the choice of law provision were disregarded.</p>
12		<p>An example of the challenges confronting opinion givers who are asked to render such opinions is the 2010 opinion of the Ninth Circuit in <i>Pokarny v. Quixtar, Inc.</i>, 601 F.3d 987. Before the Ninth Circuit was an appeal by Amway (now called Quixtar) challenging the district court's decision that Amway's mediation/arbitration scheme for its so-called "independent business owners" ("<u>IBOs</u>") is unenforceable by reason of its procedural and substantive unconscionability. Notwithstanding the IBOs' agreement to dispute resolution procedures stipulating Michigan law as controlling their enforcement and interpretation, the district court, affirmed by the Ninth Circuit, applied California law to determine the unconscionability of such provisions (plaintiffs were California residents).</p> <p>In the course of its opinion, the Ninth Circuit also concurred with the district court in concluding that the fee-shifting clause whereby the prevailing party is entitled to reimbursement of its legal fees and expenses from the non-prevailing party, was also unconscionable:</p> <p style="padding-left: 40px;">"We agree that because the fee-shifting clause puts IBOs who demand arbitration at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court, the district court properly held that the clause is substantively unconscionable." 601 F.3d at 1004.</p> <p>The Ninth Circuit did not limit its ruling to agreements with consumers or individuals. If not understood in that context, the holding, and the Ninth Circuit's reasoning, could call into question many standard fee-shifting agreements. Understood in context, the ruling should not apply to fee-shifting agreements between commercial parties.</p>

13	<p>We express no opinion with respect to agreements to submit to the jurisdiction of any particular court or other governmental authority (either as to personal jurisdiction or subject matter jurisdiction); waiver of service of process requirements which would otherwise be applicable; and provisions otherwise relating to jurisdiction, service of process, or venue of courts.</p>	<p>Historically, most states have taken the position that, whatever the agreement might specify, courts should be free to determine for themselves whether to accept cases brought before them based on such factors as the sufficiency of contacts, the burden on the court, convenience and availability of other forums. <i>See TriBar Remedies Report at III.F</i> (59 Bus. L. (ABA) at 1499 (Aug. 2004). While some courts have taken a more contractarian view, sufficient uncertainty remains such that opinion givers commonly take this sort of qualification.</p> <p>In 2013, the Colorado Supreme Court approved a forum selection provision applying the U.S. Supreme Court’s analysis in <i>M/S Bremen v. Zapata Off-Shore Co.</i>, 407 U.S. 1 (1972). The Colorado Court held, as in <i>Bremen</i>, that a forum selection clause “is presumptively valid unless it is unreasonable, fraudulently induced, or against public policy.” <i>Cagle v. Mathers Family Trust</i>, 2013 CO 7 (Feb. 4, 2013) at ¶18. The Colorado Supreme Court did not find that the choice of forum for a securities action in Texas violated Colorado public policy even though the Colorado Securities Act contained an “anti-waiver” provision in C.R.S. § 11-51-604(11). As a result, the Court upheld the forum selection provision in the joint venture agreement at issue.</p>
14	<p>[<i>Alternative where local counsel is involved</i>] For matters of [New York] law with respect to the opinions so specified, we have relied with your permission on the opinion of local law firm without further investigation or analysis, and we express no opinion with respect to those matters.</p>	<p>Where the transaction merits the additional expense associated with local counsel, local counsel may give its opinion to the lawyer rendering the principal opinion (as assumed here), or may give the opinion directly to the receiving party. In either case, the nature of the relationship between the lawyers should be specified.</p>

15	<p>In offering the opinions expressed above, we have accepted as true and without investigation all of the factual assumptions which are contemplated by customary practice or set forth elsewhere herein, the factual representations and warranties made by the Parties (including, without limitation, the Company) in the Transaction Documents,</p>	<p>The reference to customary practice in the first clause allows the elimination of much boilerplate. (<i>See</i> Row 20, <i>below</i>). While redundant with the more general reference to “customary practice” in Row 6, <i>above</i>, it is helpful to add the redundancy in this circumstance.</p> <p>An opinion giver is entitled to rely on factual representations of his/her client and the other parties to the Transaction Documents. An opinion giver is not (under customary practice or ethical rules) entitled to rely on factual representations that the opinion giver knows, or should know, to be erroneous. <i>1998 TriBar</i>, ¶2.1.4 and ¶1.4(d); <i>Guidelines</i>, ¶ 1.5. This is the general mandate against issuing “misleading opinions.”</p> <p>The opinion giver may rely, however, without additional investigation, on information provided by others, including public authority documents and factual confirmations provided in client certificates and in transaction documents, unless the opinion giver has actual knowledge that the information is false or the opinion giver does not reasonably believe that the source is appropriate. Although such reliance would be within customary practice, the <i>Real Estate Finance Opinion Report of 2012</i> (Chapter II, § 1.5(a)) suggests that “a statement of such reliance is recommended.”</p>
16	<p>upon other factual representations made to us by the Company,</p>	<p>Most opinion givers will require that the client’s officers sign a factual (“back-up”) certificate setting forth the underlying facts that are predicate to the legal opinion. As stated in § 2.5.4 of the <i>1998 TriBar Report</i>, an officer’s signature to the certificate usually identifies the officer by his or her title. The <i>1998 TriBar Report</i> notes that the individual should execute the certificate as an individual, and not on behalf of the company, explaining: “This practice is followed because a certificate by the Company would merely restate a Company representation made in the agreement or another transaction document. By signing as an individual, the officer takes personal responsibility for the representations made in the certificate.”</p> <p>As discussed above, the opinion giver is not entitled to rely on factual representations that are tantamount to the legal conclusions being offered (§III.C of the <i>Principles</i>) or that the opinion preparer knows to be false (<i>1998 TriBar Report</i> § 2.1.4).</p>

17	information received from governmental agencies,	It is appropriate to rely on certificates of good standing, certificates of taxes due, certified articles of incorporation, and other certificates from public agencies unless, of course, the attorney has actual knowledge to the contrary. This should go without saying, but many opinion letters do state this assumption and frequently specify the governmental agency documents on which reliance is given.
18	and upon other information known to us.	Customary practice generally limits the opinion giver’s knowledge of facts to those “actually known” by the persons actively involved in the transaction. Especially in larger firms with multiple offices, it may not be possible to garner every attorney’s knowledge of a particular client in relevant context. See, however, <i>Dean Foods Co. v. Pappathanasi</i> , 18 Mass.L.Rep. 598, 2004 Mass. Super. LEXIS 571 (Dec. 3, 2004).
19	When used herein, the phrase “known to us” or “to our knowledge” or words of similar import limits the statements it qualifies to the actual knowledge of the lawyers in this firm who have had active involvement in negotiating the Transaction, preparing the Transaction Documents, or preparing this Opinion Letter without further independent investigation.	<p>The definition of “knowledge” or “actual knowledge” frequently requires some negotiation because the opinion recipient may desire that the opining lawyer perform further investigation. The <i>Guidelines</i>, §3.4, suggest that, “[t]o avoid a possible misunderstanding over the meaning of ‘knowledge,’ the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted . . .”</p> <p>Whether or not defined in the opinion letter, “knowledge” is customarily understood to mean the actual knowledge of the opinion giver and others from the opinion giver’s law firm who have been involved in the transaction. See <i>Accord</i>, §6-A, and <i>1998 TriBar Report</i> at §2.6.1. Importantly, “As a matter of customary practice, the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm files.” §III.B of the <i>Principles</i>. Where a lawyer is known to have relevant information, inquiry should be made. This is “customary diligence.” See <i>1998 TriBar Report</i> at §1.4(c) and §2.2(b). Unless specifically requested, it does not involve a docket search (assuming you know the correct dockets to search), and it does not involve even review of the firm’s files.</p> <p>This knowledge qualification introduces the concept of “primary lawyer group” – being those lawyers in the opinion giver’s firm who are actively involved in the transaction. It is not intended to include all lawyers in the opinion giver’s firm.</p>

<p>20</p>	<p>In rendering the opinions expressed below, we have assumed: (i) the legal capacity of all natural persons executing documents; (ii) the genuineness of all signatures; (iii) the authenticity of all documents submitted to us as originals and the conformity to authentic original documents of all documents submitted to us as certified, conformed or reproduction copies; (iv) except to the extent set forth in our opinion in paragraph 1 with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), each party to each Transaction Document is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization; (v) except to the extent set forth in our opinions in paragraphs 1, 3 and 4 with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), each party to each Transaction Document has full power, authority and legal right, and has obtained all requisite corporate, third party and governmental authorizations, consents and approvals and made all requisite filings and registrations, necessary in connection with the execution and delivery of, and incurrence and performance of such party's obligations under, or for the validity of, such documents; (vi) except with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), each Transaction Document has been duly authorized, executed and delivered by or on behalf of all parties thereto (and all signatories to the Transaction Documents have been duly authorized); (vii) except to the extent set forth in our opinion in paragraph 3(ii) with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), the Transaction Documents are legal, valid and binding obligations of all parties thereto, enforceable in accordance with their respective terms; (viii) there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence and the conduct of the parties has complied with any requirement of good faith, fair dealing, and conscionability and all parties have complied with applicable fiduciary duty requirements in connection with the decisions made with respect to the Transaction</p>	<p>Some opinion givers include a laundry-list of other assumptions in the opinion letter. These are generally considered to be subsumed in customary practice whether or not stated. <i>See 1998 TriBar Report</i>, §2.3, <i>Accord</i>, §4, and <i>Glazer</i>, §4.3.3. Similarly, the <i>Principles</i> provide that some factual assumptions ordinarily do not need to be stated expressly; these are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. <i>Principles</i>, § III(D), <i>1998 TriBar Report</i>, §1.2(d) and §2.3(a). <i>See, also</i>, ACREL Report, Ch. II at §2.1(f).</p> <p>The dividing point between factual assumptions that should be stated and those that are implicit in every opinion under customary practice is imprecise, but generally whether the factual assumptions are those of general application or are assumptions that specifically apply to the transaction in question. It is suggested that the assumptions set forth in clauses (i) through (xvi) are, in each case, of general application and should be considered implicit assumptions in any opinion under customary practice.</p> <p>The <i>Real Estate Finance Opinion Report of 2012</i> discusses this in §2.1(c) and also suggests that these assumptions (in paragraph 2(a)-(o) of the Illustrative Opinion Letter) are implied from customary practice “whether or not expressly stated.” It goes on to state that, although certain assumptions may be implicit, “recitation of them avoids misunderstanding and serves evidentiary purpose. An example of this is from the <i>Fortress Credit Corp. v. Dechert LLP</i>, decision (89 A.D.3d 615, 934 N.Y.S.2d 119, 2011 WL 5922969 (2011)). The court dismissed a case against the opinion giver when it had based its opinion on forged documents. The opinion itself contained a “genuineness of signatures” assumption.</p> <p>The difficulty in preparing a list such as this is that there may be an issue not included in the list that becomes problematic. Would the fact that an assumption of general application is not included in the list lead a court to determine it was not meant to be included even where, without such a list customary practice would require its inclusion? Remember the old legal principle, <i>inclusio unius est exclusio alterius</i>. Where the opinion giver insists on including a lengthy list of assumptions that would be considered implicit under customary practice, opinion recipients generally do not object to their inclusion where relevant.</p> <p>Customary practice suggests that specific assumptions that go beyond or modify assumptions that are generally accepted in practice or otherwise deemed implicit should be explicitly set out in the opinion. Stated assumptions generally should be reserved</p>
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<p>20</p>	<p>and the Transaction Documents; (ix) there are no agreements or understandings among the parties, written or oral, relating to the Transaction except those set forth in the Transaction Documents, and there is no usage of trade or course of prior dealing among the parties that would define, supplement, or qualify the terms of the Transaction Documents; (x) the parties to the Transaction Documents will not, in the future, take any discretionary action (including a decision not to act) that is inconsistent with the requirements of the Transaction Documents or that would result in a violation of law or constitute a breach or default under any agreement to which such person is a party or a violation of an order of any Governmental Authority, writ, judgment, or decree to which such party is subject or by which its property is bound; (xi) all conditions precedent to the effectiveness of the Transaction Documents have been properly satisfied or waived; (xii) each document submitted to us for review is accurate and complete, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine; (xiii) the Company has received consideration sufficient to support formation of a contract for execution and delivery of, and undertaking its obligations under, the Transaction Documents to which it is a party; (xiv) the constitutionality or validity of a relevant statute, rule, regulation, or agency action is not in issue unless a reported decision binding upon Colorado courts has specifically established its unconstitutionality or invalidity; (xv) contracts, other than the Transaction Documents, to which the Company is a party or by which it is bound and any court or administrative orders, writs, judgments, and decrees that name the Company and are specifically directed to it or to its property will be enforced as written; and (xvi) the Company will obtain all permits and government approvals required in the future and take all actions similarly required, relevant to subsequent completion of the Transaction or performance under the Transaction Documents.</p>	<p>for matters that are (a) not of general application, (b) contravened, (c) require explanation or clarification, or (d) might give rise to a misunderstanding if not expressly addressed. If the opinion giver knows that any of the assumptions that would otherwise be implicit are untrue, then the opinion giver should not rely on such assumptions and should consider an appropriate disclaimer in the opinion letter.</p> <p>Whether general assumptions are set forth, or only some specific assumptions are included, the assumptions must be meaningful to the transaction. Frequently the list is just cut and pasted from the last opinion letter without critical thought. This is inappropriate.</p>

21	We have no knowledge that any of the factual assumptions on which the opinions given herein are based, are false. We have no knowledge that, under the circumstances, would make our reliance on the foregoing assumptions unreasonable.	Under customary practice and Rules 1.2, 2.1, and 4.1 of the Colorado Rules of Professional Conduct, this exists whether or not stated in the opinion letter. If the opinion giver has actual knowledge to the contrary, customary practice and ethical requirements dictate that reliance would be unreasonable and should be disclosed to the opinion recipient with (of course) the client's consent (CRPC Rule 1.6) or the opinions should not be given. <i>See Dean Foods</i> . Nevertheless, some opinion recipients desire the comfort that this express statement provides.
22	Based upon and subject to the foregoing, and subject also to the other qualifications and limitations hereinbelow set forth, we are of the opinion that:	<p>This is the statement of opinion, and puts the opinion giver at risk.</p> <p>Note, however, that the opinions are intended to be expressions of professional judgment – they are not guarantees that a court will reach any particular result. §I.D of the <i>Principles</i>.</p> <p>Nevertheless, as reflected in Colorado courts and elsewhere, opinions can result in professional liability to the opinion giver for negligent misrepresentation and under other theories. Even where opinions are wholly-accurate, there is a risk that an opinion may mislead the recipient in the context of the transaction; where the opinion giver is participating in the transaction and knows (or should know) of that risk, providing the opinion is inconsistent with customary practice (<i>Guidelines</i> at §1.5 and <i>1998 TriBar Report</i> at §1.4(d)) and may result in significant liability to the opinion giver. <i>See Danger Ahead!</i></p> <p>See Row 62 below for a qualification intended to avoid a claim of negligent misrepresentation sustained by Colorado courts against attorneys for damages resulting from our opinion giver. <i>See Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.</i>, 892 P.2d 230, 237 (Colo. 1995).</p>

<p>23</p>	<p>1. The Company is a corporation duly incorporated, organized, validly existing and in good standing under the laws of the state of Colorado, with corporate power to own its properties, to conduct its business as now conducted and to execute and deliver, and to incur and perform its obligations under, the Transaction Documents to which it is a party.</p>	<p>This seemingly innocuous opinion request is the first item on almost every request list for third-party opinion letters. For the most part, the requested opinion is customary and appropriate.</p> <p>However, the “due organization” opinion goes beyond that which is customary or appropriate – it may require the holding of one or more meetings, the actual payment of a minimum sum of money as the minimum capital to permit the corporation to commence business, and so on, under the laws of the state of organization as of the date of organization. <i>See</i> C.R.S. § 7-102-105 for the current requirements of due organization of a corporation under Colorado law.</p> <p>As stated in §6.1.2 of the <i>1998 TriBar Report</i>, “an inquiry into organizational matters following incorporation can be onerous or even impossible if the actions were taken long ago.”</p> <p>Due organization seldom is material to an opinion whether the Company can engage in a current transaction.</p> <p>Unless you or your firm organized a Company within the last few months, it is unlikely you should even try to provide a “duly organized” opinion (unless the requestor establishes a sound case for needing it and your client fully appreciates the effort and cost).</p>
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24	<p>2. The Company is qualified to do business in all states where the nature of its business requires such qualification.</p>	<p>As stated in §4.1 of the <i>Guidelines</i>, “an opinion giver should not be asked for an opinion that the opinion giver’s client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification...” The <i>Accord</i> refers to this as an “inappropriate opinion request.” See also §6.1.6 of the <i>1998 TriBar Report</i>.</p> <p>The due diligence involved in determining the accuracy of the opinion is extremely fact intensive, and the Company’s actual operations in each state must be compared to the respective state laws – an almost impossible task for outside counsel. Moreover, the required interpretation of foreign states’ laws would raise possible UPL concerns.</p> <p>The better opinion (if requested, material to the issues, and supported by due diligence) is either: (i) “The Company is not required to be qualified as a foreign corporation in [New York] for the purposes of this transaction” (subject to local law issues) or (ii) “Based solely on a certificate of good standing issued by the state of [New York] dated ____, 201x, the Company is qualified to do business in [New York].”</p> <p>In any event, customary practice allows the opinion giver to rely on the appropriate certificate of good standing without further investigation. Consequently, the foreign state qualification opinion does not provide significant value to the opinion recipient and generally is the equivalent of a factual statement.</p>

25	<p>3. The APA and the other Transaction Documents (i) have been duly authorized by all requisite corporate action by the Company, and (ii) constitute the legal, valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms.</p>	<p>Clause (ii) is what is commonly referred to as the “remedies opinion” or the enforceability opinion. The phrases “legal, valid and binding” and “enforceable” are frequently used together, although careful consideration indicates they are redundant. The formulation of the remedies opinion in part III of the <i>1998 TriBar Report</i> is: “The Agreement is a valid and binding obligation of the Company enforceable against the Company in accordance with its terms.” The <i>Accord</i> stated it more simply: “The Agreement is enforceable against the Corporation.” They both mean the same thing, as does the formulation offered. See also, the <i>TriBar Remedies Report</i> and the <i>California Report</i>.</p> <p>The remedies opinion covers “each and every contractual undertaking of a party to the contract.” Where appropriate (such as with respect to a provision waiving jury trials under the law of certain states), an exception should be taken. See the <i>TriBar Remedies Report</i>.</p> <p>Other contractual issues should be considered or excepted. For example,</p> <ul style="list-style-type: none">• in a debt instrument where interest includes both a percentage amount, fees, and perhaps an equity instrument, it may not be possible to calculate whether the interest exceeds a usury limitation. Usury should, then, be specifically excepted. See Row 54, below.• Many contracts contain indemnification and exculpation provisions. In some cases, indemnification or exculpation may be considered to be against public policy. Especially if the provision purports to indemnify or exculpate a party from its own negligence (or even gross negligence), it should be excepted. See Row 43 and the <i>Texas Statement</i>.• Many debt instruments contain pre-payment penalties designed to compensate the lender for interest lost as a result of the payment of a debt before its due date. The Colorado Court of Appeals recently noted that “a borrower may not compel a lender to accept early payment unless there is a specific provision for prepayment in the contract.” As long as the prepayment penalty is not “so large, or a lender’s behavior so egregious, as to render the enforcement of a prepayment penalty unconscionable,” a prepayment penalty is enforceable. <i>Planned Pethood Plus, Inc. v. KeyCorp, Inc.</i>, 09CA0459 (Colo. App. 1/21/2010) at pgs 6, 11-12.
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25	25 continued	<ul style="list-style-type: none">• Many agreements contain liquidated damages provision which under Colorado law are enforceable if they are “reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.” <i>Planned Pethood Plus, Inc. v. KeyCorp, Inc.</i>, 09CA0459 (Colo. App. 1/21/2010) at pgs 4-5.• Choice of law and forum clauses raise issues as discussed in Rows 12 and 13, above. <p>Documents relating to real estate transactions may have a number of other statutes to consider for assurance as to enforceability. Operative documents will include deeds and deeds of trust. Consequently, customary practice would include the real estate laws within the scope of the opinion, whether or not set forth. These would include (in Colorado) compliance with common interest ownership acts (C.R.S. § 38-33.3-101 <i>et seq.</i>), disclosures required in connection with the conveyance of residential property (C.R.S. § 38-35.7-101 <i>et seq.</i>), ensuring that the deed is in the form required by the conveyancing act (C.R.S. § 38-35-101 <i>et seq.</i>), ensuring that the foreclosure and redemption provisions of the deed of trust or other document are consistent with the obligations imposed by C.R.S. § 38-38-100.3 <i>et seq.</i> and (if applicable) § 38-39-100.5 <i>et seq.</i>, mortgage brokers involved have met the obligations of C.R.S. § 38-0-101 <i>et seq.</i> and the Mortgage Loan Originator Act (C.R.S. § 12-61-901 <i>et seq.</i>), and perhaps the Colorado Consumer Protection Act (C.R.S. § 6-1-101 <i>et seq.</i>) which is referenced in the Mortgage Loan Originator Act (C.R.S. § 12-61-905.5(1)(d)).</p> <p><i>See</i> the exceptions set forth in Row 42 <i>below</i> which provide an exception for “general principles of equity.” If the opinion giver does not believe that is broad enough to include indemnification, prepayment penalties, and liquidated damages, a specific exception should be added to Row 30 <i>below</i>. After all, like usury, reasonableness of these provisions is dependent largely on a factual determination of reasonableness rather than a legal analysis.</p> <p>Under customary practice, a remedies opinion with respect to a security agreement means that the security agreement itself is enforceable in accordance with its terms, but does not include any opinion on the creation, attachment, perfection, or priority of the security interest that the security agreement purports to create. These opinions must be stated separately and directly. <i>See the TriBar UCC Report at §2.2.</i></p>
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25	25 continued	Where powers of attorney are involved (such as those granted in LLC operating agreements or other contracts), they must comply with C.R.S. §15-14-701, <i>et seq.</i> – including a requirement that, if executed in Colorado, it must meet the requirements of §706(1) (if executed after January 1, 2010) or, if executed outside of Colorado it meet the requirements of §706(3) – requiring that it must be valid under the laws of the jurisdiction in which it is executed.
26	4. None of (i) the execution and delivery by the Company of the Transaction Documents, or (ii) the incurrence or performance by the Company of its obligations under such Transaction Documents, each in accordance with its terms	These are appropriate opinions but may require a significant amount of due diligence on the part of the opinion giver.
27	(a) constituted, constitutes or will constitute a violation of any of the articles of incorporation or by-laws of the Company, or	This opinion requires a review of the client's organic documents.

28	(b) resulted, results or will result in any violation of (i) the laws of the State of Colorado, (ii) the laws of the United States of America,	<p>With respect to 4(b)(i) and 4(b)(ii), note that customary practice includes in this opinion only laws (including published rules and regulations) that, given the nature of the transaction and the parties, a lawyer in the relevant jurisdiction exercising customary diligence would reasonably recognize as being applicable. This would not include local or municipal law unless specifically addressed. The opinion would also not include the effect of certain specialized laws even if a lawyer would recognize the applicability of those laws to the transaction – such as securities, tax and anti-trust laws, Federal Reserve Board margin regulations, ERISA and other pension and benefit laws, fraudulent transfer laws, patent and copyright laws, federal racketeering laws and regulations, anti-terrorism and money-laundering laws and regulations, federal and state labor laws and regulations, and federal and state health and safety laws and regulations. §II.D of the <i>Principles</i> describes this as follows:</p> <p>“Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.”</p> <p>If the opinion recipient desires that the opinion address the effect of securities laws or one of the other specialized laws, the opinion recipient should ask that they be specifically addressed. <i>See 1998 Tribar Report</i>, § 6.6; <i>Accord</i>, § 19; and <i>Principles</i>, §II.B and §II.D.</p> <p>If usury may be an issue, the Opinion Giver should consider an exception. <i>See Row 54.</i></p> <p><i>See In re National Century Financial Enterprises, Inc. Investment Litigation</i>, 2008 WL 1995216 (S.D. Ohio 2008), where the transaction failed because of a securities law issue. The opinion giver was able to avoid liability because the opinion had specifically incorporated the <i>Accord</i> which specifically excluded securities laws from its coverage. Hopefully a court would apply customary practice to achieve the same result had the opinion not expressly incorporated the <i>Accord</i> as a result of §III.D of the <i>Principles</i>.</p>
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29	<p>Or (iii) any of those agreements or instruments to which the Company, as the case may be, is a party or to which its properties or assets is or may be subject which agreements are described in Annex 2.</p>	<p>With respect to 4(b)(iii), it is important to identify the contracts as to which the opinion is given. The author recommends against a broad opinion as to “all contracts to which the Company is a party” or “all material agreements.” Where the Company files reports under sections 13(d) or 15(g) of the Securities Exchange Act of 1934 (15 U.S.C. §78m(a) and §o(d)), it is appropriate to refer to those contracts filed as exhibits to the Company’s most recent annual report on Form 10-K and subsequently filed reports. Where the Company is not subject to the 1934 Act reporting requirements, the contracts included in this opinion should be listed in a schedule and the opinion limited to the contracts in that schedule.</p>
30	<p>5. No governmental approval, which has not been obtained or taken and is not in full force and effect, is required to authorize, or is required for</p> <p>(a) the validity of the execution and delivery by the Company of each of the Transaction Documents to which they are, respectively, parties, or</p> <p>(b) the incurrence or performance by the Company of its obligations under such Transaction Documents, each in accordance with its terms, or the enforceability of any of the Transaction Documents against the Company.</p>	<p>This opinion is especially important with respect to companies that are subject to regulatory oversight, such as banks, insurance companies, and companies subject to FINRA or FCC regulation. This gets back to the definition of applicable laws, above.</p> <p>On the other hand, it may require a significant amount of due diligence by the opinion giver, or reliance on regulatory counsel.</p>

31	<p>6. The authorized capital stock of the Company consists of [_____] shares of Common Stock, par value \$[_____] per share, [_____] of which are issued and outstanding of record prior to the Closing.</p>	<p>This is at best a mixed opinion of law and fact, and in part difficult (if not impossible) for the opinion giver where the Company has been operating for a period of time.</p> <p>Authorized capital and par value (a meaningless concept in Colorado – see C.R.S. § 7-102-102(2)(b)(IV)) is derived directly from the articles of incorporation for a Colorado corporation and can be stated as a factual confirmation.</p> <p>Issued and outstanding is a factual confirmation that requires the opinion giver to delve back into the Company’s archives – or simply to rely on an officer’s certificate or the financial statements. For that reason, the opinion recipient should rely on the Company’s representations in the back-up certificate or financial statements – not on a lawyer’s confirmation. The <i>Venture Capital Report</i> (at § IV.A.1) notes that many venture based companies are newly formed and have had consistent counsel through their existence, and few have transfer agents. In those cases, the <i>Venture Capital Report</i> considers an opinion as to outstanding capitalization “a basic and often appropriate, component of third-party opinions in Venture Financings.” Where this opinion is qualified by knowledge, the <i>Venture Capital Report</i> suggests that the opinion giver specify the level of due diligence undertaken. (§IV.A.2)</p>
32	<p>All of such issued and outstanding shares are duly authorized and validly issued, fully paid and non-assessable.</p>	<p>Duly authorized, validly issued, fully-paid and non-assessable opinion with respect to issued and outstanding stock are difficult to impossible to give under Colorado law and the laws of most other states and such an opinion is seldom necessary in connection with a transaction. To give such an opinion, the opinion giver would need to review the board resolutions issuing the shares, the deposit slips, bills of sale or other documentation defining receipt of consideration, and ensure that the board of directors made a determination as to the adequacy of the consideration “before the issuance of the shares.” A board determination after issuance is not in accordance with the statute. See C.R.S. § 7-106-202.</p> <p>Even a knowledge qualifier would not make this appropriate as an opinion, although it may assist as a factual confirmation – but it only should be considered where the issue is in fact material to the transaction in question. The <i>Guidelines</i> at §4.2 suggest that “[c]onsideration should be given to whether the benefit of the opinion to the opinion recipient justifies the cost and time required to support it.”</p>

33	<p>7. The shares of the Company's \$[____] par value common stock issued to the Seller have been legally and validly issued, and are fully-paid and non-assessable.</p>	<p>Under Colorado law, this is an appropriate legal determination, but is based on a number of facts that must be established by the board of directors in the minutes pursuant to which the shares were issued.</p> <p>First of all, there must be sufficient authorized capital to support the issuance of the shares. Although that is a factual determination (see Row 31, above), it is a necessary component of this opinion.</p> <p>“Legally and validly issued” requires a consideration of whether pre-emptive rights may exist (C.R.S. §7-106-301) and whether the board, in approving the issuance of the shares, complied with its obligations in C.R.S. §7-106-202. The “fully-paid and non-assessable component of the opinion derives directly from C.R.S. §7-106-202(4), but also depends on whether the articles of incorporation contain any provision for assessment of shares (C.R.S. §7-102-102(2)(b)(V) and C.R.S. §7-106-203).</p> <p>Note as written, the opinion is that the shares “have been legally and validly issued, and are fully-paid and non-assessable.” If, in fact, the opinion giver is not present at the closing or if the exchange of consideration is occurring elsewhere, it would be preferable to draft the opinion differently: “Upon receipt of the consideration as defined in, and issuance of the shares as set forth in, the Transaction Documents, the shares will be”</p>
34	<p>The certificates representing the shares comply as to form with Applicable Law.</p>	<p>While this appears to be a factual question, it is appropriate for an attorney to confirm that the certificate representing the shares complies as to form with the statutory requirements (found in C.R.S. §7-106-206 for Colorado corporations).</p>

35	The shares of the Company's outstanding common stock have been issued in compliance with the registration requirements of the Securities Act of 1933.	<p>This is an inappropriate opinion and likely impossible to give. First of all, this is not generally included in the "no violation of laws" opinion in Opinion 4(b) because that relates to the transaction documents, and securities law issues are (pursuant to customary practice) not included in the laws covered in an opinion unless specifically identified.</p> <p>More importantly, however, the facts necessary to establish this opinion are probably impossible to set forth, especially if the Company has a duration of more than a brief period of time. In order to determine the availability of an exemption for previously-issued shares, the facts behind each issuance must be discovered and compared to the laws existing at the time of the issuance. Was there a general solicitation? Were the investors accredited or sophisticated?</p> <p>Finally, whether previously-issued shares were issued in compliance with the Securities Act of 1933 (or state law) frequently has no bearing on the current transaction. In many cases, the statute of limitations may have run on claims.</p> <p>Where there is a legitimate question as to whether a recently-completed transaction was in accordance with securities requirements and the issue is material to the transaction, that transaction can be looked at specifically. The risk may be that the purchaser has a rescissionary right or a fraud claim. Any such possibility should be investigated because those claims may impact the transaction. Nevertheless, whether that is a risk that the opinion giver is willing to accept without significant qualifications is questionable.</p>
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36	The shares of the Series A preferred stock being issued to the purchasers as contemplated in the Agreement, when issued pursuant thereto, will have been issued in compliance with the registration requirements of the Securities Act of 1933.	<p>This, too, is a difficult opinion to give, although more often than not requested when the transaction in question involves the issuance of securities. When given, though, the factual assumptions generally define the opinion. When properly drafted, a stock purchase agreement for a private placement will include representations and warranties with respect to:</p> <ol style="list-style-type: none">1. By the purchaser:<ol style="list-style-type: none">(a) The sophisticated and accredited nature of the purchaser(s).(b) The purchaser's investment intent.(c) The purchaser's investigation.2. By the Company:<ol style="list-style-type: none">(a) The accuracy and completeness of the Company's disclosure.(b) The lack of any general solicitation.(c) The transferability restrictions being imposed.(d) That there have been no prior offerings that must be integrated with the current offering.3. By the placement agent, its concurrence with the foregoing. <p>Even utilizing the assumptions does not end the opinion giver's investigation. The opinion giver must still make an investigation to ensure that he/she is not providing a misleading opinion.</p> <p>An opinion such as this in a Rule 144A context includes some other considerations (such as, the purchaser is a qualified institutional buyer, the securities offered are not of a 1934 Act registered class and that the issuer is not an investment company).</p> <p>The JOBS Act will result in some different considerations, depending on the final nature of the rules for general solicitation of accredited investors and crowd-funding (among others).</p>
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37	<p>Based on our review of the disclosure documents and our participation in the preparation of the disclosure documents and the agreements, and without further independent investigation, nothing has come to our attention that has caused us to believe that the disclosure documents provided to the purchasers contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided, however, we do not assume any responsible for the accuracy, completeness, or fairness of the statements contained in the disclosure documents, and we do not express any belief with respect to the financial statements or other financial, statistical or other expertised information contained in the disclosure documents.</p>	<p>This is a “negative assurance” as to facts and is not an opinion. When given, it should not appear in the opinion paragraphs but with other factual confirmations (such as the no litigation confirmation). When the opinion giver has not been involved in the disclosure process or has not represented the Company generally, this is an inadvisable confirmation and in any event should be considered based on the costs and benefits. <i>See, generally</i>, Special Report of Task Force on Securities Law Opinions, <i>Negative Assurance in Securities Offerings</i>,” 59 The Bus. L. (ABA) no. 4 (August 2004).</p>
38	<p>8(a) The security agreement (included within the Transaction Documents) is effective to attach a security interest in favor of the Seller as security for the repayment of the Secured Liabilities (as defined therein) under the Uniform Commercial Code as in effect in the State of Colorado (the “UCC”) in all right, title and interest of the Company in that portion of the Collateral (as defined in and described as being covered by such security agreement) constituting UCC Collateral, as defined below. For purposes of this opinion, the term “UCC Collateral” means such portion of the Collateral in which a security interest may be created under Article 9 of the UCC.</p>	<p>By limiting the opinion to “UCC Collateral” as described, the opinion giver is easing his or her burden, but a large range of collateral may not be included, including real property, Article 8 securities, and patent rights (among other things).</p> <p>It may be appropriate to consider and offer an opinion that the security agreement is effective to grant a security interest in proceeds, a consideration governed by C.R.S. §4-9-315. There would have to be a number of exceptions to such an opinion as identified in that section and the comments thereto.</p> <p>With respect to after-acquired property, see C.R.S. §4-9-204 which provides that a security agreement can, in fact, grant a security interest in (and therefore the security interest attaches to) after-acquired property (with some exceptions set forth in C.R.S. §4-9-204(b)), but perfection and priority are governed by the rules in parts 3 and 4, including the rules governing purchase money security interests in C.R.S. §4-9-324.</p> <p>With respect to future advances, see C.R.S. §4-9-323 which provides generally that a security agreement may provide for such perfection, but with numerous exceptions.</p>

<p>39</p>	<p>(b) Upon the proper filing of the UCC Financing Statement with and acceptance by the Colorado Secretary of State, the Seller will have a perfected security interest in such portion of the UCC Collateral in which, and only to the extent that, a security interest therein may be perfected by filing a financing statement under Article 9 of the UCC.</p>	<p>Perfection of a security interest goes beyond the creditor-debtor relationship and provides notice to the world that the creditor is claiming a security interest in the described collateral. There are other means of perfection not included within this opinion, such as perfection by possession (a pledge) or a control agreement.</p> <p>C.R.S. §4-9-302(a) provides that (with some exceptions) “a security interest is perfected if it has attached and all of the applicable requirements for perfection in sections 4-9-310 to 4-9-316 have been satisfied.” Depending on the nature of the collateral, filing of a financing statement in the office specified in C.R.S. §4-9-501, control (C.R.S. §4-9-314), or possession (C.R.S. §4-9-313) may be required. <i>See, generally, TriBar UCC Report</i> at §4.</p> <p>This opinion limits the collateral to that which can be perfected by filing in the office of the Colorado Secretary of State as set forth in C.R.S. §4-9-501(a)(2). If an opinion regarding other forms of perfection is required (such as a pledge, a deposit account control agreement, or Article 8 securities), it should be specifically requested.</p> <p>If the security agreement grants a security interest in after-acquired property (which is within the definition of UCC Collateral and permitted under Article 9 – <i>see</i> C.R.S. §4-9-204), a perfection by filing opinion such as the example includes an opinion that upon the attachment of the secured party’s Article 9 security interest in the after-acquired property, such security interest will be perfected (subject, of course, to the limitations, assumptions, and qualifications set forth in the opinion or included within customary practice.</p> <p>Under 11 U.S.C. §544, a trustee has the power to avoid a security interest that is voidable at the commencement of the case by a judgment lien creditor. Thus a bankruptcy trustee may use §544 to set aside most unperfected security interests, but not a perfected security interest. An opinion as to perfection necessarily concludes that the trustee cannot use §544 to avoid the security interest.</p> <p>Apart from the §544 opinion, under customary practice a security interest opinion is not an opinion on the effect of bankruptcy, fraudulent transfer, or other insolvency laws, or equitable principles. <i>See TriBar UCC Report</i> at §2.3.</p>
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	<i>39 continued</i>	<p>As set forth in note 47 of the <i>TriBar UCC Report</i>, bankruptcy law may still impact perfected security interests in a manner that is not addressed by an opinion as to creation, attachment or perfection. These include the automatic stay provided in §363, the potential imposition of a super-priority lien under §364, voiding preferential transfers under §547, and fraudulent conveyances under §§ 544(b) and 548. So limited under customary practice, a security interest opinion with a bankruptcy qualification serves no purpose and has no effect on the meaning of the opinion.</p>
40	<p>The UCC Financing Statement is in satisfactory form for filing in the office specified with respect thereto.</p>	<p>C.R.S. §4-9-502 provides the requirements for a financing statement. However, where the filing is being accomplished electronically, this would not be an appropriate opinion.</p> <p>This opinion, if given, is not intended to imply that the description of the collateral is adequate or accurate. This is an assumption. See Row 53.</p>

41	(c) The security interest in the UCC Collateral constitutes a first lien and security interest against the UCC Collateral.	<p>This is an opinion discussing the third leg of the UCC scheme – attachment, perfection, and now priority. Although contemplated in the <i>TriBar UCC Report</i> at §5, generally lawyers will refuse to give priority opinions because this is factually based on the timing of the filing of the financing statement or other document, and the filing office is frequently not up-to-the-second with respect to reporting filings. Thus there could be an intervening financing statement filed even while the secured party is preparing the financing statement for electronic filing. Any such opinion, if given, will be stated to be based on a UCC search at a specified time.</p> <p>Furthermore, consideration of this opinion would include claims of judgment creditors, tax liens, and others who may not have filed with the Secretary of State’s office.</p> <p>Where perfection is based on possession or control of the collateral, a priority opinion would be easier to give. <i>See TriBar UCC Report</i> at §5.3 and §8.2.</p> <p>Where a filing priority opinion is required, the <i>TriBar UCC Report</i> recommends the following language: “The UCC Search Report sets forth the proper filing office and the proper name of the debtor necessary to identify those persons who under the Colorado UCC have, as of [date], financing statements on file against the debtor, indicating any of the collateral described in the UCC Financing Statement as of [date]. Except for _____, the UCC Search report identifies no still-effective financing statement naming debtor as the debtor and indicating any of the collateral described in the UCC Financing Statement filed in the filing office prior to the effective date of the Transaction.”</p> <p>This truly is for the most part a factual statement rather than a legal opinion and one can question whether its value to the creditor/secured party is worth the time and expense of giving.</p>
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42	<p>A. Our opinions are subject to and may be limited by (i) bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance, fraudulent transfer, or other similar laws relating to or affecting the rights of creditors generally, (ii) general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation (a) the possible unavailability of specific performance, injunctive relief or any other equitable remedy, and (b) concepts of materiality, reasonableness, good faith and fair dealing.</p>	<p>This is an inappropriate qualification because all of the opinions are not subject to or limited by the bankruptcy (<i>et cetera</i>) qualifications. Only the remedies opinion in 3(ii), above, is so limited.</p> <p>Bankruptcy and equitable principles commonly are permitted as exceptions, and are understood by customary practice to apply to all remedies opinions, even if not expressly stated in the opinion; they are however always stated. <i>1998 TriBar Report</i> at § 3.3.1.</p> <p>Many of the other exclusions are duplicated from the implicit assumptions set forth in Row 20, above. Nevertheless, they are frequently stated in opinions, especially in opinions where the implicit assumptions are omitted based on customary practice.</p> <p>Although, as discussed above, bankruptcy issues potentially impact opinions regarding security interests, under customary practice, a remedies opinion on a contract such as a security agreement does not include any opinion on the creation, attachment, perfection, or priority of the security interest that the contract purports to create. <i>See the TriBar UCC Report</i> at §2.2.</p>
43	<p>B. We express no opinion herein with respect to the enforceability of any term or provision of any Transaction Document that (i) relates to rights of setoff or subrogation rights (or the waiver thereof); (ii) purports to establish particular notice periods as “reasonable,” to establish evidentiary standards for suits or proceedings to enforce such documents or otherwise, or to waive a right to a jury trial or service of process or rights to notice; (iii) relates to marshaling of assets, or rights of redemption (or the waiver thereof); (iv) relates to indemnification or reimbursement obligations to the extent any such provision would purport to require any person to provide indemnification or reimbursement in respect of the gross negligence, willful misconduct or unlawful behavior of any person or otherwise in violation of public policy; (v) purports to appoint attorneys-in-fact or other representatives or to limit the liability of or exculpate any person other than the Company;</p>	<p>As discussed above, these limitations must be tailored to the transaction, and not merely cut and pasted from the previous opinion letter. For example, if the Transaction Documents do not establish any notice periods, why would an opinion include B(ii)? If there are no indemnification provisions, B(iv) needs to be reconsidered. If the transaction does not involve secured financing with personal property as part of the collateral, B(iii), B(ix), B(xii) and B(xiii) may not be relevant. Similar analysis should be made for each of the provisions in the context of the opinion letter.</p> <p>With respect to the setoff question, many loan agreements attempt to involve affiliates and other bank deposits within the setoff right. While common law generally permits a bank to set off a debtor’s deposits against matured obligations, an expansion of this right may not be enforceable.</p>

<p>43</p>	<p>(vi) purports to require that all amendments, waivers and terminations be in writing or to require disregard of any course of dealing between the parties; (vii) purports to confer subject matter jurisdiction in respect of bringing suit, enforcement of judgments or otherwise on any federal court; (viii) purports to restrict access to legal or equitable remedies, or to waive any defenses or rights to notice; (ix) purports to authorize or permit the application of any proceeds of the foreclosure sale of any personal property covered by either Security Agreement, or the taking of any other remedial or procedural action, in a manner contrary to Part 5 of Article 9 of the Uniform Commercial Code of any applicable jurisdiction; (x) purports to commit any determination to the “sole discretion” of any party; (xi) purports to waive the right to assert the doctrine of laches or any similar defenses; (xii) relates to enforceability of non-judicial foreclosure and self-help remedies provided for in either Security Agreement other than those remedies available pursuant to and exercised in accordance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code of any applicable jurisdiction; (xiii) in the case of any Security Agreement, purports to entitle the Seller to appoint a receiver to the extent that the appointment of a receiver is governed by applicable statutory requirements and to the extent that such provisions are not in compliance with such statutory requirements; (xiv) in the case of the APA or any Employment Agreement, purports to impose obligations not to compete; or (xv) establishes the enforceability of any choice of law provision.</p>	<p>With respect to an exception for indemnification provisions, see the <i>Texas Statement</i> at §I, which notes that “Texas case law does, however, impose restrictions on the ability of the parties to enter into certain contractual indemnification and exculpation provisions.” Annex 1 to the <i>Texas Statement</i> contains a detailed analysis of Texas law on point, and Annex 2 contains a discussion of the subject from other states.</p> <p>On the other hand, public policy in other states or federal law may limit or eliminate a party to a contract seeking indemnification for that party’s negligence, gross negligence, recklessness or willful misconduct. In California, although a party can agree to indemnify against the other party’s simple negligence, such an agreement ‘must be clear and explicit and is strictly construed against the indemnitee, <i>Rossmoor Sanitation, Inc. v. Pylon, Inc.</i>, 13 Cal.3d 622, 627-28 (1975). <i>See also</i>, Item 510 of Securities and Exchange Commission Regulation S-K which says:</p> <p>“Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers, or persons controlling the registrant . . ., in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is therefore unenforceable.”</p>
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44	<p>C. Further, we express no opinion herein as to any term or provision of any Transaction Document that (i) purports to release any party from liability for its own negligence, willful misconduct or unlawful acts; (ii) relates to severability or separability; (iii) relates to survival of obligations; (iv) relates to the appointment of attorneys in fact; or (v) purports to waive the right to assert defenses, counterclaims, cross-claims, or the right to object to venue or to assert <i>forum non conveniens</i>.</p>	
45	<p>D. The opinions expressed in paragraphs 8(a) and 8(b) above are limited to Article 9 of the UCC as adopted in Colorado (found at C.R.S. §4-9-101 <i>et seq.</i>) and also subject to the following:</p>	<p>The following assumptions only apply to the UCC opinions regarding attachment and perfection. (They would also apply to a filing priority opinion if given.)</p>
46	<p>(1) We have made no examination of, and express no opinion as to the existence of, any liens on any of the collateral securing the Secured Liabilities. We express no opinion herein as to the priority or, except as expressly set forth in said paragraphs 8(a) and 8(b), as to the attachment, creation or perfection, of any lien upon or security interest in any of such collateral.</p>	<p>This is a statement of customary practice and does not need to be stated. The <i>Accord</i> at §18 states that an “Opinion deals only with the specific legal issues it explicitly addresses.” See Row 58, below.</p>

<p>47</p>	<p>(2) We call your attention to and our opinions are limited by the fact that (i) the continuation of any security interest in any UCC Collateral, consisting of “proceeds”, and the perfection of any such security interest, are limited to the extent set forth in C.R.S. §4-9-315 of the UCC and (ii) continuation statements complying with the UCC must be filed in the Office of the Secretary of State of the State of Colorado not more than six months prior to the lapse of five years from the filing of the original UCC Financing Statement, and not more than six months prior to the end of each subsequent five-year period, and amendments or supplements of the applicable UCC Financing Statement or additional financing statements may be required to be filed (a) in the event of a change of name, identity or organizational structure of either of the Company, or (b) if the Company changes the jurisdiction of its organization.</p>	<p>The passage of time and changes in facts after the date of a perfection opinion can result in the partial or complete loss of perfection unless additional steps are taken. Since these are subsequent events, they do not affect the accuracy of the opinion as of its date. (<i>See</i> Row 63.) For example, C.R.S. § 4-9-315(d) requires certain filings to perfect an interest in proceeds.</p> <p>The requirement to file continuation statements (clause (ii)) is a statement of the law as set forth in C.R.S. §4-9-515(c).</p> <p><i>See, also, the TriBar UCC Report at §5.4.</i></p>
<p>48</p>	<p>(3) We have assumed that (i) the Company is “located” in the State of Colorado within the meaning of §4-9-307 of the UCC, (ii) value has been given by the Seller within the meaning of §4-9-203(b)(1) of the UCC, and (iii) the Company has rights in the UCC Collateral within the meaning of §4-9-203(b)(2) of the UCC. We have assumed the UCC Collateral exists.</p>	<p>These are the predicate factual assumptions underlying the “attachment” opinion in paragraph 8(a). The legal judgment is as to the adequacy of the Security Agreement, a necessary predicate under C.R.S. §4-9-203(b)(3)(A).</p> <p>Clause (iii) refers to the Company having “rights in the UCC Collateral.” Some opinion givers will refer to “title to the UCC Collateral.” Note that Article 9 does not require that the borrower have “title” to the collateral, but merely rights in the collateral.</p>

49	<p>(4) We have assumed that no part of the UCC Collateral consists of (i) “<i>fixtures</i>” (as defined in §4-9-102(a)(41) of the UCC), (ii) “<i>as-extracted collateral</i>” (as defined in §4-9-102(a)(6) of the UCC), (iii) property subject to a United States statute or treaty providing for a national or international recordation, registration, or certificate or title, or specifying a place for filing different from that specified in Article 9 of the UCC.</p>	<p>If any of the collateral fits into these categories, filing a financing statement in the office of the Colorado Secretary of State would not be adequate for perfection. Nevertheless, by defining “UCC Collateral” as in Row 38 above to include only those subject to attachment under Article 9 and the perfection opinion being limited to that which can be perfected by filing in Row 39, this assumption is unnecessary.</p>
50	<p>(5) We note that the effectiveness or perfection of the security interests in the UCC Collateral may be impaired, lost or adversely affected as to such property, or portions thereof, that (i) lose its or their identity or become part of a product or mass, (ii) are goods purchased by a buyer in the ordinary course of business or (iii) are goods purchased by a buyer other than in the ordinary course of business as provided in §4-9-320 of the UCC. We note that security interests in the UCC Collateral, other than with respect to identifiable proceeds, if any, received in exchange therefor, will be lost to the extent that the Bankruptcy Trustee authorizes the sale, exchange or other disposition of any part thereof.</p>	<p>With respect to clause (i), see C.R.S. §4-9-336, <i>commingled goods</i>. With respect to clause (ii), see C.R.S. §4-9-320, <i>buyer of goods</i>.</p> <p>Nevertheless, since these are events that would occur following the date of the opinion, they do not need to be stated within the opinion which speaks as of its date (<i>see</i> Row 63).</p>
51	<p>(6) The security interests granted by the Security Agreement in any portion of the UCC Collateral in which the Company acquires rights after the commencement of a case under the Bankruptcy Code in respect of the Company, as the case may be, may be limited by Section 552 of the Bankruptcy Code.</p>	<p>Bankruptcy changes various issues with respect to any opinion, and an interest in after-acquired property may be void following a bankruptcy filing. Nevertheless, since these are actions that will occur after the date of the opinion and do not impact attachment or perfection, this is an unnecessary qualification.</p>

52	<p>(7) We have assumed that each UCC Financing Statement will be filed in the office of the Secretary of State of the State of Colorado no later than the date that the Company receives value. We also wish to point out that the acquisition by the Company after such date of any interest in any property that becomes subject to the security interest of the Security Agreement may constitute a voidable preference under Section 547 of the Bankruptcy Code.</p>	<p>Section 547 of the Bankruptcy Code (11 U.S.C. §547) provides that the trustee may avoid transfers that constitute preferences. Nevertheless, this statement is only relevant with respect to a priority opinion and addresses facts that may occur after the date of the opinion. It is, therefore, not necessary in the context of most opinion letters.</p>
53	<p>(8) The description of the Collateral is accurate and is sufficient under law (a) to provide notice to third parties of the liens and security interests provided in the Security Documents and (b) to create an effective contractual obligation under law.</p>	<p>This assumption is clearly necessary for a valid contract, and the adequacy of the description of the Collateral is a factual question more than it is a legal question.</p>
54	<p>E. The financing charges are not usurious under Applicable Law.</p>	<p>One of the principal issues to consider where the transaction includes financing documents is usury. Where financing includes equity based compensation or high rates of interest, payment of fees, or other factors that may cause a transaction to be usurious under Colorado law (or laws of other states applicable to the transaction), the remedies opinion may prove to be inaccurate. Usury, which combines legal analysis with a mathematical calculation, can usually be excepted from the remedies opinion. Where it is relevant to the opinion recipient, it should be specifically requested after being specifically excepted. If the opinion does not contain a specific statement that usury is excepted, an opinion that the loan documents are “enforceable” means that the financing charges are not usurious under applicable law (in Colorado, <i>see</i> C.R.S. § 5-2-201 (establishing the maximum finance charge for consumer credit transactions), § 5-12-103 (defining civil usury for non-consumer credit transactions), and § 18-15-104 (defining criminal usury)). <i>See Kendall, Venture Capital Lending: Usury and Fiduciary Duty Concerns</i>, 33 The Colo. L. (CBA) No. 4, 49 (Apr. 2004); Flynn, <i>Colorado Usury: The Sequel – Part I</i>, 23 The Colo. L. 565 (Mar. 1994) and – <i>Part II</i>, 23 The Colo. L. 565 (Apr. 1994).</p> <p>Usury not only impacts enforceability, but also the no violation of law opinion. (<i>See</i> Row 28, above.)</p> <p>The ACREL Report discusses the usury opinion at length in §3.10.</p>

55	F. To the extent that any license, franchise, lease or other contract constituting the Collateral requires by its terms the consent of another party for its assignment or the creation of an encumbrance, such consent has been obtained.	Where leases, permits, or other contracts are involved in a secured financing transaction that require consent of a third party, this factual assumption would be appropriate.
56	G. Any funds received from sources other than banks and financial institutions located in the United States comply with the requirements of the <i>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001</i> (Pub. L. No. 107-56) (“USA PATRIOT Act”) and other terrorism and anti-money laundering laws and other similar laws.	<p>In a transaction where funds derive from U.S. banks, a USA PATRIOT Act assumption would not be necessary.</p> <p>Where the Transaction Documents include a “clean funds” or “good funds” representation on which the opinion giver can rely, a USA PATRIOT Act assumption would be redundant.</p> <p>One of the remedies for violating the USA PATRIOT Act or the other anti-money laundering and anti-terrorism laws is forfeiture – and the recipient of the funds have an equal obligation to determine that the funds are “clean.” USA PATRIOT Act and other terrorism/money laundering issues are raised, as discussed in Friedberg and Cole, “<i>Do You Know Who Your Borrower Is?</i>” 17 Bus. L. Today (ABA) No. 5 (May/June 2008), avail. at http://www.abanet.org/buslaw/blt/2008-05-06/cole.shtml.</p>
57	H. <i>Other factual assumptions specific to the transaction in question</i>	<p>Unlike the factual assumptions in Row 20 above, the foregoing factual assumptions are more closely associated with the nature of this particular transaction (to the extent relevant) and customary practice suggests they should be explicitly set forth. For example, where title is relevant, it is appropriate to assume that good title is involved in the transaction unless the opinion recipient specifically requests, and the opinion giver is willing to give, an opinion as to title.</p> <p>For all of the foregoing assumptions, note the requirement that the opinion giver’s reliance be justifiable (Row 21 above).</p>
58	I. None of the foregoing opinions include any implied opinion.	This is a statement of customary practice – if an opinion is desired, it should be expressly stated, not implied or inferred. The <i>Accord</i> at §18 states that an “Opinion deals only with the specific legal issues it explicitly addresses.”

59	<p>We advise you that we do not represent the Company in any action, suit or proceeding now pending at law or in equity or by or before any government instrumentality or agency or arbitral body, or overtly threatened in writing against the Company by a potential claimant that challenges the validity or enforceability of or seeks to enjoin the performance of the Transaction Documents except _____.</p>	<p>Customary practice does contemplate that attorneys will offer some form of no litigation statement as a factual confirmation (not a legal opinion), although (as in the <i>Accord</i> and in the <i>1998 Tribar Report</i> and other models) it may be included in the opinion letter. Factual confirmations such as this should be set apart from the legal opinions so they cannot be confused with legal opinions, and they should be clearly identified as not a legal opinion. See <i>Accord</i> § 17, <i>1998 Tribar Report</i> §6.8; <i>Glazer at §17.1.3</i>. Some opinion givers prefer to deliver two letters simultaneously – one with legal opinions, the other containing factual confirmations.</p> <p>Any broader scope of this confirmation would require a knowledge qualifier and should only be given if counsel has regularly been engaged by the Company. For example, consider the following (from Section 14 of the Supplemental North Carolina report):</p> <p>“We advise you that, to our knowledge, there is no action, suit or proceeding now pending at law or in equity or by or before any government instrumentality or agency or arbitral body, or overtly threatened in writing against the Company by a potential claimant except _____.”</p> <p>Even with the statement as suggested (“We do not represent . . .”), if the opinion giver is aware of litigation being handled by others that should be disclosed, customary practice would require disclosure – with, of course, the Company’s consent.</p>
60	<p>To our knowledge, the Company’s representations and warranties contained in Article 4 of the APA are accurate and complete in all material respects.</p>	<p>This is an extremely dangerous factual confirmation, even qualified by “knowledge” unless the opinion giver has a much broader knowledge about the Company, its business, financial condition, management, and operations than is typically the case.</p> <p>This confirmation is appropriate in the Company’s bring-down certificates which are generally delivered at the Closing. Including this in an opinion request is an effort to pass the Company’s liability for a breach of a warranty to the opinion giver’s malpractice insurance policy and should be resisted.</p>

61	<p>The opinions expressed herein are given to you solely for your use in connection with the Transaction and may not be relied upon by any other person or entity or for any purpose whatsoever without our prior written consent.</p>	<p>This is in accordance with customary practice. If there is a contemplation that others will be entitled to rely on the opinion letter, they should be specifically identified.</p> <p>In some syndicated lending transactions, the ultimate purchasers of the loan syndications may not be identified at the time of the closing, and in other cases, there may be a desire for transferability of the loan syndications under Rule 144A or other exemption from registration under the securities laws. If the transferee can automatically rely on the legal opinion, the transferability of the loan syndications is enhanced, and some lenders require that the attorney permit “successors and permitted assignees” to rely on the opinion. Ultimately this will be a point of negotiation between the lawyer and the opinion recipient, and shows once again how important it is to start these negotiations early in the process. Language that is frequently accepted by large lenders meeting this need is found in <i>Glazer</i>, §2.3.1 in note 3.</p> <p>Some private transactions also require assignability and the ability of assignees of the debt to rely on the opinion. The following can be used in those circumstances:</p> <p>The opinions expressed herein are given to you solely for your use in connection with the Transaction and may not be relied upon by any other person or entity for any purpose whatsoever without our prior written consent, except any future assignee of your interest (all or partial) in the Loans pursuant to an assignment that is made in accordance with the provisions of Section ___ of the Credit Agreement on the condition and understanding that (a) this letter speaks only as of the date hereof, (b) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to any person other than the addressee, or to take into account change in law, facts or any other developments of which we may later become aware, (c) such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment and at the time of such reliance, including any change in law, facts or other developments known to or reasonably knowable by the assignee at such time, and (d) such assignee provides us notice of such assignment and such assignee’s reliance on our opinions within 60 days of the date of this letter.</p>

62	The opinions herein are provided as legal opinions only, and not as representations of fact. We understand that the addressee has made such independent investigations of the facts as the addressee deemed necessary, and that the determination of the extent of those investigations of fact that are necessary has been made independent of this opinion letter.	<p>This statement is derived from the holdings in <i>Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver</i> 892 P.2d 230 (Colo. 1995) and <i>Zimmerman v. Dan Kamphausen Co.</i>, 971 P.2d 236 (Colo.App. 1998) which held that attorneys' opinions based on the attorneys' application of facts to the law can themselves be facts forming the basis for a negligent misrepresentation claim. The effectiveness of this statement to avoid a negligent misrepresentation claim has not been judicially tested. <i>See Danger Ahead!</i> at notes 40-50.</p> <p>To some extent, this <i>caveat</i> relates back to <i>1998 TriBar Report</i> at §1.6 which provides (as discussed in Row 1, above) that the opinion recipient is entitled to rely on the opinion letter without further investigation, but also requiring that such reliance be justifiable. <i>See</i> commentary at Row 1 <i>above</i>.</p>
63	The opinions expressed herein are as of the date of this letter and we have no obligation to update these opinions for any period following the date of this letter.	Whether or not stated in the opinion letter, this statement is consistent with customary practice. <i>See</i> §1.2(b) of the <i>1998 TriBar Report</i> and §IV of the <i>Principles</i> .
64	Sincerely yours Opinion Giver's Law Firm	Customary practice indicates that the opinion is that of the law firm – not of the individual signing the opinion letter on behalf of the law firm.
65	Annex 1 – Agreements and documents being delivered at the Closing (the “Transaction Documents”).	<i>See</i> Row 3 <i>above</i> .
66	Annex 2 – Agreements subject to the “no breach” opinion.	<i>See</i> Row 42 <i>above</i> .

**A form of opinion that follows along the
lines of the opinion set forth in the table,
but with the errors corrected.**

DATE

Seller Group Limited
c/o Seller Attorneys LLP
Downtown Street
Denver, CO 80202

Re: ABC Corporation

Ladies and Gentlemen:

We have acted as counsel to ABC Corporation, a corporation incorporated under the laws of the State of Colorado (the “Company”), in connection with (i) the Asset Purchase Agreement, dated as of _____, 201x (the “APA”), by and between the Company and Seller Group (“Seller”), (ii) the other agreements and documents being delivered today by the Company at the closing held today under the APA and listed on Annex 1 hereto (which documents, collectively with the APA, are sometimes collectively referred to herein as the “Transaction Documents”), and (iii) the completion of the transactions described in the APA and the other Transaction Documents (collectively, the “Transaction”) by which the Company is today purchasing from Seller the assets described in the APA (the “Seller Assets”). This Opinion Letter is provided to you at the request of the Company pursuant to Section 8.4.1 of the APA. Except as otherwise indicated herein, capitalized terms used in this Opinion Letter are defined as set forth in the APA. This letter and the opinions contained herein shall be interpreted in accordance with customary practice. “Customary practice” shall be interpreted consistently with the reports published by the TriBar Opinion Committee which reports are available at the Legal Opinion Resource Center found at <http://apps.americanbar.org/buslaw/tribar/home.shtml>.

In connection with rendering the opinions set forth herein, we have examined the Transaction Documents, the Company’s Articles of Incorporation and its Bylaws, each as amended to date, the minutes of a special meeting of the Company’s Board of Directors dated _____, 201x, and such other documents, agreements and records as we deemed necessary to render the opinions set forth below. For all purposes of this opinion we have assumed that the Transaction Documents to which the Company is a party have been duly executed and delivered substantially in the respective forms in which we most recently reviewed them [(being the drafts thereof bearing draft date of _____, 201x)].

We express no opinion as to the laws of any jurisdiction other than (i) the applicable laws of the State of Colorado, and (ii) the applicable laws of the United States of America. We express no opinion concerning any matters respecting or affected by any laws other than laws that a lawyer in Colorado exercising customary professional diligence would reasonably recognize as being directly applicable to the Company, the Transaction, or both. We advise you that we are licensed to practice law only in the State of Colorado. When any opinion is given herein with respect to an issue where any law other than the Laws of the State of Colorado may apply, the opinion assumes that consideration of the laws of such jurisdiction would lead to the same result as consideration of the laws of the State of Colorado. We call your attention to the fact that the Transaction Documents provide that they are to be governed by and construed in accordance with the laws of the State of [New York]. For purposes of our opinions, we have disregarded the choice of law provision in the Agreement and, instead, have assumed that the Agreement is governed exclusively by the internal, substantive laws and judicial interpretations of the State of Colorado.

We express no opinion with respect to agreements to submit to the jurisdiction of any particular court or other governmental authority (either as to personal jurisdiction or subject matter jurisdiction); waiver of service of process requirements which would otherwise be applicable; and provisions otherwise relating to jurisdiction, service of process, or venue of courts.

In rendering the opinions included herein, we have relied without investigation upon the factual assumptions contemplated under customary practice or set forth elsewhere herein, the factual representations and warranties made by the Parties (including, without limitation, the Company) in the Transaction Documents, information received from governmental agencies, and upon other factual representations made to us by the Company. When used herein, the phrase “known to us” or “to our knowledge” or words of similar import limits the statements it qualifies to the actual knowledge of the lawyers in this firm responsible or who have had active involvement in negotiating the Transaction, preparing the Transaction Documents, or preparing this Opinion Letter without further independent investigation.

~~In rendering the opinions expressed below, we have assumed:~~

~~(i) the legal capacity of all natural persons executing documents;~~

~~(ii) the genuineness of all signatures;~~

~~(iii) the authenticity of all documents submitted to us as originals and the conformity to authentic original documents of all documents submitted to us as certified, conformed or reproduction copies;~~

~~(iv) except to the extent set forth in our opinion in paragraph 1 with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), each party to each Transaction Document is duly organized, validly existing and in good standing under the laws of its jurisdiction of organization;~~

~~(v) except to the extent set forth in our opinions in paragraphs 1, 3 and 4 with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), each party to each Transaction Document has full power, authority and legal right, and has obtained all requisite corporate, third party and governmental authorizations, consents and approvals and made all requisite filings and registrations, necessary in connection with the execution and delivery of, and incurrence and performance of such party's obligations under, or for the validity of, such documents;~~

~~(vi) except with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), each Transaction Document has been duly authorized, executed and delivered by or on behalf of all parties thereto (and all signatories to the Transaction Documents have been duly authorized);~~

~~(vii) except to the extent set forth in our opinion in paragraph 3(ii) with respect to the Company (and subject to all assumptions, qualifications and limitations applicable thereto and herein set forth), the Transaction Documents are legal, valid and binding obligations of all parties thereto, enforceable in accordance with their respective terms;~~

~~(viii) there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence and the conduct of the parties has complied with any requirement of good faith, fair dealing, and conscionability and all parties have complied with applicable fiduciary duty requirements in connection with the decisions made with respect to the Transaction and the Transaction Documents;~~

~~(ix) there are no agreements or understandings among the parties, written or oral, relating to the Transaction except those set forth in the Transaction Documents, and there is no usage of trade or course of prior dealing among the parties that would define, supplement, or qualify the terms of the Transaction Documents;~~

- ~~(x) the parties to the Transaction Documents will not, in the future, take any discretionary action (including a decision not to act) that is inconsistent with the requirements of the Transaction Documents or that would result in a violation of law or constitute a breach or default under any agreement to which such person is a party or a violation of an order of any Governmental Authority, writ, judgment, or decree to which such party is subject or by which its property is bound;~~
- ~~(xi) all conditions precedent to the effectiveness of the Transaction Documents have been properly satisfied or waived;~~
- ~~(xii) each document submitted to us for review is accurate and complete, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine;~~
- ~~(xiii) the Company has received consideration sufficient to support formation of a contract for execution and delivery of, and undertaking its obligations under, the Transaction Documents to which it is a party;~~
- ~~(xiv) the constitutionality or validity of a relevant statute, rule, regulation, or agency action is not in issue unless a reported decision binding upon Colorado courts has specifically established its unconstitutionality or invalidity;~~
- ~~(xv) contracts, other than the Transaction Documents, to which the Company is a party or by which it is bound and any court or administrative orders, writs, judgments, and decrees that name the Company and are specifically directed to it or to its property will be enforced as written; and~~
- ~~(xvi) the Company will obtain all permits and government approvals required in the future and take all actions similarly required, relevant to subsequent completion of the Transaction or performance under the Transaction Documents.~~

We have no knowledge that any of the assumptions of fact on which the opinions given herein are based, are false. We have no knowledge that, under the circumstances, would make our reliance on the foregoing assumptions unreasonable.

Based upon and subject to the foregoing, and subject also to the other qualifications and limitations hereinbelow set forth, we are of the opinion that:

1. The Company is a corporation duly incorporated, ~~organized,~~ validly existing and in good standing under the laws of the state of Colorado, with corporate power to own its properties, to conduct its business as now conducted and to execute and deliver, and to incur and perform its obligations under, the Transaction Documents to which it is a party.

~~2. The Company is qualified to do business in all states where the nature of its business requires such qualification.~~

3. The APA and the other Transaction Documents to which they are, respectively, parties (i) have been duly authorized by all requisite corporate action by the Company, and (ii) constitute the legal, valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms.

4. None of (i) the execution and delivery by the Company of the Transaction Documents to which they are, respectively, parties, or (ii) the incurrence or performance by the Company of its obligations under such Transaction Documents, each in accordance with its terms

(a) constituted, constitutes or will constitute a violation of any of the articles of incorporation or by-laws of the Company, or

(b) resulted, results or will result in any violation of (i) the Applicable Laws of the State of Colorado, (ii) the Applicable Laws of the United States of America, or (iii) any of those agreements or instruments to which the Company, as the case may be, is a party or to which its properties or assets is or may be subject which agreements are described in Annex 2.

5. No Governmental Approval, which has not been obtained or taken and is not in full force and effect, is required to authorize, or is required for

(a) the validity of the execution and delivery by the Company of each of the Transaction Documents to which they are, respectively, parties, or

(b) the incurrence or performance by the Company of its obligations under such Transaction Documents, each in accordance with its terms, or the enforceability of any of the Transaction Documents against the Company.

~~6. The authorized capital stock of the Company consists of [] shares of Common Stock, par value \$[] per share, [] of which are issued and outstanding of record prior to the Closing. All of such issued and outstanding shares are duly authorized and validly issued, fully paid and non-assessable.~~

7. The shares of the Company's \$[] par value common stock issued to the Seller have been legally and validly issued, and are fully-paid and non-assessable. The certificates representing the shares comply as to form with Applicable Law. ~~The shares of the Company's outstanding common stock have been issued in compliance with the registration requirements of the Securities Act of 1933.~~ The shares of the Series A preferred stock being issued to the purchasers as contemplated in the Agreement, when issued pursuant thereto, will have been issued in compliance with the registration requirements of the Securities Act of 1933.

8(a) The security agreement (included within the Transaction Documents) is effective to attach a security interest in favor of the Seller, as security for the repayment of the Secured Liabilities (as defined therein), under the Uniform Commercial Code as in effect in the State of Colorado (the "UCC") in all right, title and interest of the Company in that portion of the Collateral (as defined in and described as being covered by such security agreement) constituting UCC Collateral, as defined below. For purposes of this opinion, the term "UCC Collateral" means the Collateral, but only to the extent the Collateral constitutes property as to which a security interest under the UCC can be attached under the UCC.

(b) Upon the proper filing of the UCC Financing Statement with and acceptance by the Colorado Secretary of State, the Seller will have a perfected security interest in such portion of the UCC Collateral in which, and only to the extent that, a security interest therein may be perfected by filing a financing statement under Article 9 of the UCC. ~~The UCC Financing Statement is in satisfactory form for filing in the office specified with respect thereto.~~

~~(c) The security interest in the UCC Collateral constitutes a first lien and security interest against the UCC Collateral.~~

A. Our opinions in 3(ii), above, are subject to and may be limited by (1) bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance, fraudulent transfer, or other similar laws relating to or affecting the rights of creditors generally, (2) general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation (a) the possible unavailability of specific performance, injunctive relief or any other equitable remedy, and (b) concepts of materiality, reasonableness, good faith and fair dealing. Without limiting the generality of our qualifications set forth directly above, we express no opinion as to the applicability to, or effect upon the opinions expressed herein with respect to, the obligations of the Company under the Guaranty or the Company Security Agreement, of Section 548 of the Bankruptcy Code or any other law dealing with fraudulent transfers and conveyances.

B. We express no opinion herein with respect to the enforceability of any term or provision of any Transaction Document that (i) relates to rights of set-off or subrogation rights (or the waiver thereof); (ii) purports to establish particular notice periods as “reasonable,” to establish evidentiary standards for suits or proceedings to enforce such documents or otherwise, or to waive a right to a jury trial or service of process or rights to notice; (iii) relates to marshaling of assets, or rights of redemption (or the waiver thereof); (iv) relates to indemnification or reimbursement obligations to the extent any such provision would purport to require any person to provide indemnification or reimbursement in respect of the gross negligence, willful misconduct or unlawful behavior of any person or otherwise in violation of public policy; (v) purports to appoint attorneys-in-fact or other representatives or to limit the liability of or exculpate any person other than the Company; (vi) purports to require that all amendments, waivers and terminations be in writing or to require disregard of any course of dealing between the parties; (vii) purports to confer subject matter jurisdiction in respect of bringing suit, enforcement of judgments or otherwise on any federal court; (viii) purports to restrict access to legal or equitable remedies, or to waive any defenses or rights to notice; (ix) purports to authorize or permit the application of any proceeds of the foreclosure sale of any personal property covered by either Security Agreement, or the taking of any other remedial or procedural action, in a manner contrary to Part 5 of Article 9 of the Uniform Commercial Code of any applicable jurisdiction; (x) purports to commit any determination to the “sole discretion” of any party; (xi) purports to waive the right to assert the doctrine of laches or any similar defenses; (xii) relates to enforceability of non-judicial foreclosure and self-help remedies provided for in either Security Agreement other than those remedies available pursuant to and exercised in accordance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code of any applicable jurisdiction; (xiii) in the case of either Security Agreement, purports to entitle the Seller to appoint a receiver to the extent that the appointment of a receiver is governed by applicable statutory requirements and to the extent that such provisions are not in compliance with such statutory requirements; (xiv) in the case of the APA or any Employment Agreement, purports to impose obligations not to compete; or (xv) establishes the enforceability of any choice of law provision.

C. Further, we express no opinion herein as to any term or provision of any Transaction Document that (i) purports to release any party from liability for its own negligence, willful misconduct or unlawful acts; (ii) relates to severability or separability; (iii) relates to survival of obligations; (iv) relates to the appointment of attorneys-in-fact; or (v) purports to waive the right to assert defenses, counterclaims, cross-claims, or the right to object to venue or to assert *forum non conveniens*.

D. The opinions expressed in paragraphs 8(a) and 8(b) above are also subject to the following:

~~(1) We have made no examination of, and express no opinion as to the existence of, any liens on any of the collateral securing the Secured Liabilities. We express no opinion herein as to the priority~~

~~or, except as expressly set forth in said paragraphs 8(a) and 8(b), as to the attachment, creation or perfection, of any lien upon or security interest in any of such collateral.~~

~~(2) — We call your attention to, and our opinions are limited by, the fact that (i) the continuation of any security interest in any UCC Collateral, consisting of “proceeds”, and the perfection of any such security interest, are limited to the extent set forth in §4-9-315 of the UCC and (ii) continuation statements complying with the UCC must be filed in the Office of the Secretary of State of the State of Colorado not more than six months prior to the lapse of five years from the filing of the original UCC Financing Statement, and not more than six months prior to the end of each subsequent five year period, and amendments or supplements of the applicable UCC Financing Statement or additional financing statements may be required to be filed (a) in the event of a change of name, identity or organizational structure of either of the Company, or (b) if the Company changes the jurisdiction of its organization.~~

(3) We have assumed that (i) the Company is “located” in the State of Colorado within the meaning of §4-9-307 of the UCC, (ii) value has been given by the Seller within the meaning of §4-9-203(b)(1) of the UCC, and (iii) the Company has rights in the UCC Collateral within the meaning of §4-9-203(b)(2) of the UCC. We have assumed the UCC Collateral exists.

~~(4) — We have assumed that no part of the UCC Collateral consists of (i) “fixtures” (as defined in §4-9-102(a)(41) of the UCC), (ii) “as extracted collateral” (as defined in §4-9-102(a)(6) of the UCC), (iii) property subject to a United States statute or treaty providing for a national or international recordation, registration, or certificate or title, or specifying a place for filing different from that specified in Article 9 of the UCC.~~

~~(5) — We note that the effectiveness or perfection of the security interests in the UCC Collateral may be impaired, lost or adversely affected as to such property, or portions thereof, that (i) lose its or their identity or become part of a product or mass, (ii) are goods purchased by a buyer in the ordinary course of business or (iii) are goods purchased by a buyer other than in the ordinary course of business as provided in §4-9-320 of the UCC. We note that security interests in the UCC Collateral, other than with respect to identifiable proceeds, if any, received in exchange therefor, will be lost to the extent that the Bankruptcy Trustee authorizes the sale, exchange or other disposition of any part thereof.~~

(6) The security interests granted by the Security Agreement in any portion of the UCC Collateral in which the Company acquires rights after the commencement of a case under the Bankruptcy Code in respect of the Company, as the case may be, may be limited by Section 552 of the Bankruptcy Code.

~~(7) — We have assumed that each UCC Financing Statement will be filed in the office of the Secretary of State of the State of Colorado no later than the date that the Company receives value. We also wish to point out that the acquisition by the Company after such date of any interest in any property that becomes subject to the security interest of the Security Agreement may constitute a voidable preference under Section 547 of the Bankruptcy Code.~~

(8) The description of the Collateral is accurate and is sufficient under law (a) to provide notice to third parties of the liens and security interests provided in the Security Documents and (b) to create an effective contractual obligation under law.

E. The financing charges are not usurious under Applicable Law.

F. To the extent that any license, franchise, lease or other contract constituting the Collateral requires by its terms the consent of another party for its assignment or the creation of an encumbrance, such consent has been obtained.

G. Any funds received from sources other than banks and financial institutions located in the United States comply with the requirements of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (Pub. L. No. 107-56) (“USA PATRIOT Act”) and other terrorism and anti-money laundering laws and other similar laws.

H. ***Other factual assumptions specific to the transaction in question***

I. None of the foregoing opinions include any implied opinion.

We advise you that we do not represent the Company in any action, suit or proceeding now pending at law or in equity or by or before any government instrumentality or agency or arbitral body, or overtly threatened in writing against the Company by a potential claimant that challenges the validity or enforceability of or seeks to enjoin the performance of the Transaction Documents except _____.

~~To our knowledge, the Company’s representations and warranties contained in Article 4 of the APA are accurate and complete in all material respects.~~

Based on our review of the disclosure documents and our participation in the preparation of the disclosure documents and the agreements, and without further independent investigation, nothing has come to our attention that has caused us to believe that the disclosure documents provided to the purchasers contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided, however, we do not assume any responsible for the accuracy, completeness, or fairness of the statements contained in the disclosure documents, and we do not express any belief with respect to the financial statements or other financial, statistical or other expertised information contained in the disclosure documents.

The opinions expressed herein are given to you solely for your use in connection with the Transaction and may not be relied upon by any other person or entity or for any purpose whatsoever without our prior written consent. The opinions herein are provided as legal opinions only, and not as representations of fact. We understand that the addressee has made such independent investigations of the facts as the addressee deemed necessary, and that the determination of the extent of those investigations of fact that are necessary has been made independent of this opinion letter. The opinions expressed herein are as of the date of this letter and we have no obligation to update these opinions for any period following the date of this letter.

Sincerely yours

Opinion Giver’s Law Firm

Annex 1 – Agreements and documents being delivered at the Closing (the “Transaction Documents”)

Annex 2 – Agreements subject to the “no breach” opinion.