REPORT

OF

THE SPECIAL JOINT COMMITTEE

ON

LAWYERS' OPINION IN COMMERCIAL TRANSACTIONS

OF THE

MARYLAND STATE BAR ASSOCIATION, INC.

AND

THE BAR ASSOCIATION OF BALTIMORE CITY

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REPORT OF THE SPECIAL JOINT COMMITTEE ON LAWYERS' OPINIONS IN COMMERCIAL TRANSACTIONS OF THE MARYLAND STATE BAR ASSOCIATION, INC. AND THE BAR ASSOCIATION OF BALTIMORE CITY

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A. INTRODUCTION AND HISTORY OF THE PROJECT

The Special Joint Committee on Lawyers' Opinions in Commercial Transactions was formed by the Section of Business Law (formerly the Section of Corporations, Banking and Business) and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. and the Banking, Bankruptcy and Business Law Committee of The Bar Association of Baltimore City in response to a perceived need for an in-depth review of practice considerations in connection with the rendering of opinions by attorneys in commercial transactions in Maryland. The Committee was given a broad mandate to study the area and make whatever recommendations it deemed necessary and appropriate.

There was a consensus among the members of the Committee that the quality of lawyers' opinions and their value to their recipients could be significantly improved by the compilation of certain guidelines to assist practitioners in this area. Prior to this Report there were no clear sources of guidance available to aid a lawyer in Maryland in rendering an opinion or to assist the party receiving an opinion in interpreting its meaning and in understanding what steps were taken to reach the opinion that was rendered. Similar projects have been undertaken by bar associations in other states.[1]

The Committee was composed of 20 lawyers from Baltimore City and various counties in Maryland. Bennett Gilbert Gaines, Edward J. Levin, and S. Nelson Weeks served as Co-Chairmen of the Committee. Susan J. Mathias, an Assistant Attorney General, served as the Reporter for the Committee. In order to subject each aspect of the legal opinion to careful scrutiny, and to involve more lawyers in the process of preparing this Report, 18 separate subcommittees were formed. Each subcommittee was charged with examining a distinct issue in the opinion process. The membership of each subcommittee was expanded in many cases to include lawyers who were not members of the Committee, and a balance between lenders' counsel and borrowers' counsel was sought on each subcommittee. A total of 44 lawyers were

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[1] *See, e.g.*, Joint Committee of The Real Property Law Section of the State Bar of California and The Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate, Transactions*, 22 Real Prop., Prob. & Trust J. 373 (1987) (a slightly revised version is also printed in 42 Bus. Law. 1139 (1987)) [hereinafter *California Real Estate Report*]; Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *Legal Opinions to Third Parties: An Easier Path*, 34 Bus. Law. 1891 (1979); Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *An Addendum -- Legal Opinions to Third Parties: An Easier Path*, 36 Bus. Law. 429 (1981); State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, *Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 23 St. B. Newsletter, Real Estate Probate and Trust Law No. 2, 20 (Jan. 1985) [hereinafter *Texas Statement of Policy*]; and Committee on Corporations of the Business Law Section of the State Bar of California, *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions*, 14 Pac. L. J. 1001 (1983). The Committee acknowledges with appreciation the work of the foregoing bar committees. The Committee has studied the above cited reports carefully and has examined many of the same issues as the above reports.

involved in the initial preparation of this Report, as members of the various subcommittees and the full Committee.

This Report is the product of a period of study and discussion by the various subcommittees and the full Committee which began in January, 1987.

A draft of this Report was presented in connection with a continuing legal education seminar at the June, 1988 meeting of the Maryland State Bar Association. The Committee solicited comments on the June, 1988 draft of this Report from members of the bar in Maryland and outside of the state and also from other interested persons, including lenders and borrowers. Drafts of this Report were widely circulated and generated comments from persons representing a wide range of interests. Both the Board of Governors of the Maryland State Bar Association and the Executive Council of The Bar Association of Baltimore City passed resolutions approving this Report.

The Committee determined that it would not narrow the focus of its Report to study only loan transactions or only real estate transactions, but instead has sought to address issues that are confronted in rendering legal opinions in all types of commercial transactions. However, the primary focus of this Report and the Illustrative Opinion Letters is on opinions given by lawyers to third parties in commercial and real estate loan transactions, typically by borrowers' lawyers to lenders. The Committee developed two "Illustrative Opinion Letters" to illustrate the issues discussed in this Report. The first opinion assumes a commercial loan transaction where the borrower is a corporation (the "Illustrative Commercial Loan Opinion Letter"). The second opinion assumes that the borrower is a limited partnership and that the loan is secured primarily by real estate (the "Illustrative Real Estate Loan Opinion Letter"). This Report does not generally address a lawyer's advice to his own client.

B. STATEMENT OF POLICY

The Committee concluded that lawyers and clients would benefit from more uniform and better understood assumptions, qualifications, guidelines, and procedures for lawyers' opinions in commercial transactions in Maryland, modified as appropriate to meet the unique circumstances of each transaction, the needs of the parties involved, and the relationship of the opining lawyer to the parties and the transaction. Therefore, the following considerations, assumptions, qualifications, guidelines, procedures, and interpretations as well as the Illustrative Opinion Letters have been prepared by the Committee and are recommended for the assistance and guidance of lawyers requesting or rendering legal opinions in commercial transactions in Maryland.

C. PRELIMINARY CONSIDERATIONS

1. Purposes of Opinion Letters

The proper purpose of a legal opinion given in a commercial transaction is to provide the recipient with comfort regarding specified legal aspects of the transaction. If the lawyer is unable to give such an opinion, the recipient may be alerted to the existence of potential problems in the transaction or the need to seek comfort from other sources.[2]

Although legal opinions are given in a variety of commercial contexts, they are commonly requested as part of the due diligence process of the lender.[3] The size, nature, and scope of the transaction and the relationship of significant legal issues to the transaction may well affect the scope of the opinion requested. Primarily, legal opinions in the context of a loan transaction provide assurance that the documents are valid, binding, and enforceable, subject to certain qualifications, based on the opining lawyer's adherence to certain due diligence procedures and standards of care.[4] Legal opinions in this context may also reveal defenses to enforcement which may exist at the outset, as well as point out potential problems to enforcement which may arise later.[5] In addition, legal opinions in loan transactions may help to characterize the loan transaction as an arm's-length agreement which should be upheld.[6]

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[2] *See* Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. Law. 915, 916 (1973).

[3] *California Real Estate Report*, *supra* note 1, at 373, 378. For a discussion of different opinion letter settings, see Freeman, *Opinion Letters and Professionalism*, 1973 Duke L.J. 371 (1973). For a discussion of legal opinions in corporate transactions, including loan transactions, see *Opinion Letters of Counsel 1985*, Practising Law Institute, Course Handbook Series (Dec. 1985 - Jan. 1986).

[4] *California Real Estate Report*, *supra* note 1, at 377. *See also Texas Statement of Policy*, *supra* note 1, at Section B.1., which identifies the purposes of opinion letters in the mortgage loan context as:

> (i) to assist the Lender in attempting to assure that the loan transaction is valid and that the rights and duties expressed in the Loan Documents are enforceable (or, if exceptions or qualifications exist, to describe those exceptions or qualifications); and
>
> (ii) to assist the Lender and the Borrower in attempting to assure that conditions to the loan which are to be satisfied by the Borrower have in fact been satisfied.

On due diligence and standards of care, see Schwenke, *Standards of Care in Rendering an Opinion: How Much Investigation is Needed?* in W. Dunn, B. Lane, M. Levin, N. Nellis and R. Schwenke, *Attorney Opinions in Real Estate Transactions* (American College of Real Estate Lawyers, Nov. 8, 1982).

[5] *California Real Estate Report*, *supra* note 1, at 378.

[6] "[T]he opinion becomes a part of the legal analysis because it is evidence of the parties' mutual intent and informed consent with respect to the character and purpose of the transaction." *Id.* at 379.

In giving an opinion, a lawyer is not and should not be thought to be providing a guaranty of the transaction or an insurance policy against loss to the party which has requested the opinion.[7]

An opinion does not deal with law in the abstract, but rather with specific laws as they are applied to the particular facts of the transaction. A lawyer should not be asked to be an additional warrantor of facts; however, the distinction between questions of law and questions of fact may at times be difficult to separate in certain areas which are commonly treated by an opinion.

The lender's lawyer will be held to a standard of reasonable care in determining whether he may rely on a borrower's lawyer's opinion letter in lieu of conducting his own due diligence investigation, as appropriate, or in lieu of taking all reasonable steps necessary to assure himself, and the lender, that the loan documents are valid, binding, and enforceable, subject to the normal caveats, and that otherwise, the legal comfort desired by the lender has been obtained, or, if not, that the lender is aware of the related risks. A lawyer should not request an opinion from another lawyer that he would not be willing to issue in similar circumstances.[8] Gamesmanship has no place in the relationship between the lawyers representing the various parties to a commercial transaction.

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[7] *See Lucas v. Hamm*, 56 Cal. 2d 583, 591-92, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961):

> The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers . . . . These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract

[8] *Texas Statement of Policy*, *supra* note 1, at 20.

2. Ethical Considerations

The subject of lawyers' opinions in commercial transactions was not treated (or even mentioned) in the 1969 ABA Model Code of Professional Responsibility. The 1983 ABA Model Rules of Professional Conduct, adopted by the Court of Appeals of Maryland in substantially the same form as the ABA Model Rules (the "Rules"),[9] discuss written opinions under the oblique title "Evaluation For Use By Third Persons."

Rule 2.3 of both the ABA and Maryland versions of the Rules provides as follows:

> ***Rule 2.3 Evaluation For Use By Third Persons***
>
> (a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:
>
> (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
>
> (2) the client consents after consultation.
>
> (b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6 [confidentiality].

An "opinion letter" is included within the term "report of an evaluation" in Rule 2.3; the former term is the one customarily used by the legal community and those who request and rely on opinion letters.[10]

Every lawyer drafting opinion letters should be familiar with the "Comment" following Rule 2.3 which is intended to aid lawyers in adhering to the Rule.[11] Although the Comment omits any cross-reference to Rule 1.6 on confidentiality and Rule 4.1 on truthfulness and misrepresentation, both of these Rules are important for a lawyer to consider in representing a party in a commercial transaction.

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[9] Md. R. 1230. The Maryland Rules of Professional Conduct are printed in an Appendix in the Maryland Rules, Volume 2 of the Annotated Code of Maryland.

[10] It should be noted that there was no counterpart to Rule 2.3 in the prior 1969 ABA Code of Professional Responsibility.

[11] The Court of Appeals of Maryland has instructed Maryland lawyers that the Comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." "Scope" section, Md. R. of Prof. Conduct.

It is essential that lawyers be familiar with Rules 1.6, 2.3, and 4.1 and their respective Comments.[12] The Committee also recommends that a lawyer issuing an opinion letter familiarize himself with the relevant portions of the ABA/BNA Lawyers' Manual on Professional Conduct.[13] No attempt will be made here to condense or duplicate that material, which is invaluable to a lawyer who wishes to gain a full understanding of the subject.

a. Compatibility With Other Aspects of Lawyer-Client Relationship

The threshold inquiry for the lawyer undertaking to render an opinion is to determine whether the giving of the required opinion would be compatible with his relationship with this particular client as required by Rule 2.3(a)(1). The lawyer may have been retained by his client solely to obtain certain zoning variances for the project, and, consequently, the lawyer might have inadequate knowledge to give the usual opinions required in a real estate loan transaction. On the other hand, the lawyer may have represented the client for a number of years, but may have limited his representation to corporate law and may not have extensive knowledge of real estate and financing matters. In either case, the lawyer may not be in a position, absent substantial additional inquiry, to render some or all of the required opinions due to the limited nature of his representation of this client.

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[12] Rule 1.6 of the Maryland Rules of Professional Conduct provides as follows:

> Rule 1.6 *Confidentiality of Information*
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another;
>
> (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceedings concerning the lawyer's representation of the client;
>
> (4) to comply with these Rules, a court order or other law.

[13] In 1984, the American Bar Association and the Bureau of National Affairs, Inc. published the *ABA/BNA Lawyers' Manual on Professional Conduct* (the "Manual"). The Manual contains extensive references to prior material, articles, cases, and other information relating to many of the Rules. The editorial material with respect to legal opinions and evaluations is found at 71:701-706 of the Manual.

Similarly, the opining lawyer should consider all material aspects of the lawyer's relationship with this particular client which might impair the independence of his judgment. If in the lawyer's judgment he is unable to render an objective opinion, the lawyer should decline to render the opinion.

A lawyer should opine only as to matters within his area of legal knowledge and competence. No lawyer (or firm) is expected to be expert in every area of substantive law, or to know the law of every state. A commercial transaction may involve substantive areas of law beyond the competence of the lawyer rendering the primary opinion, or may involve the laws of another jurisdiction. In such cases, special or local counsel may be engaged to render opinions on aspects of the transaction beyond the competence of the counsel rendering the primary opinion. If the opinions of other lawyers are relied on by the lawyer rendering the primary opinion, this fact should be disclosed in the primary opinion. Lender's lawyer should have no reasonable objection to reliance by a borrower's lawyer on the opinions of special or local counsel, where lender's lawyer is requiring that an opinion on such matters be included in the primary opinion.

b. Client Consent

Assuming the lawyer has the requisite knowledge of applicable law and that his representation of this client has been such that he either has or can readily obtain adequate knowledge of the relevant facts, he must next consider whether or not his client has consented to giving the required opinions within the meaning of Rules 1.6 and 2.3.

If the borrower has signed and returned to the lender a written commitment letter which contains an express requirement for appropriate opinions from the borrower's counsel, one may assume that the client has acknowledged the need for and consented to, or at least impliedly authorized, the preparation of the required opinions. In a commercial loan transaction where there is no formal loan commitment, the lawyer must determine the nature and extent of the client consent which is required by the Rules. Regardless of whether there is a signed commitment letter, the lawyer must satisfy himself, after consulting with the client, that the client understands the purpose and scope of the opinion and has consented to its issuance.

Any confidential matters required to be disclosed in the opinion should be expressly pointed out to the client. It would appear that the Rules contemplate giving the client the opportunity to impose limitations on the lawyer's authority, if the client so desires. Consequently, the opinion must be consistent with any limitations placed on the lawyer by his client.[14]

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[14] The Rhode Island Supreme Court's Ethics Advisory Panel stated in its Advisory Opinion 88-1 that it is a violation of Ethical Considerations 5-1 and 5-21 and a violation of DR 5-105(A) of the Rhode Island Code of Professional Responsibility for a lawyer representing a borrower to opine to a lender that the loan documents are legal, valid, binding, and enforceable. *See* 9 R.I. Law. Weekly 89, Apr. 25, 1988. The Supreme Court of Rhode Island stayed the effectiveness of that opinion with its order dated July 28, 1988 in the proceeding entitled *In re: Ethics Advisory Panel Opinion No. 88-1* (No. 88-336-M.P.). For

c. Truthfulness in Statements to Others

The proposed opinion must next be reviewed in light of the requirements of Rule 4.1, the first of which is that the opinion cannot contain any false statement of material fact or law. Rule 4.1 of the Maryland Rules of Professional Conduct is set forth below:

> ***Rule 4.1 Truthfulness in Statements to Others***
>
> (a) In the course of representing a client a lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a third person; or
>
> (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
>
> (b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The most troublesome ethical consideration in the rendering of the opinion arises out of the second requirement of Rule 4.1: Rule 4.1(a)(2) provides that a lawyer must disclose a material fact when disclosure is necessary to avoid assisting a fraudulent act by the client.

To illustrate a lawyer's dilemma, the following situation is presented. Assume a lawyer represents a real estate developer and has been asked by an institutional lender to give a written opinion as a condition precedent to the making of a loan by the lender to his client for the construction of an office building which is planned to have retail space located on the ground level.

In the particular example described above, the lender might require an opinion as to compliance with zoning laws. If the lawyer has personal knowledge that the parking ratios required under the applicable zoning will not be maintained due to the fact that certain offices are being leased for medical purposes or that a portion of the retail premises is being leased for a restaurant use, disclosure of such facts would appear to be required by Rule 4.1. However, consider the following other possibilities:

(i) If an opinion as to zoning is not requested, it would appear that such disclosure is not required in light of the instruction contained in the Comment to Rule 4.1 that there is no affirmative duty to inform the opposing party of relevant facts.

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a contrary ethics opinion see Opinion No. 195 of the New Jersey Supreme Court Advisory Committee on Professional Ethics, 94 N.J.L.J. 12, Jan. 21, 1971. The Committee believes that the conclusion reached by the Rhode Island Ethics Advisory Panel does not follow from the decisions cited or from other decisions, practices, and opinions known to the Committee, and the Committee does not agree with the decision.

(ii) If the requested zoning opinion is limited to merely a description of the general use to be made of the property (e.g., an office building with retail facilities in a commercial zone), the lawyer may be able to avoid the issue because the scope of the opinion language used does not extend to parking.

(iii) If the requested opinion further requires a statement that the use is in compliance with all zoning and subdivision laws, rules, and regulations, the lawyer could not give such an opinion, unless he discloses the parking problem and includes appropriate qualifications in the opinion.

(iv) If the client informs the lawyer that the lawyer's knowledge of the anticipated leasing plans for the proposed office/retail facility is privileged information which is not to be disclosed to *any* third parties, Rule 1.6 would appear to prohibit disclosure of such information. On the other hand, if an opinion as to full zoning compliance is requested by the lender, the lawyer cannot deal with the disclosure/confidentiality dilemma by attempting to restrict the language of the opinion so as not to be required to opine as to the parking ratios. Simply stated, Rule 4.1 mandates that the requirement of truthfulness by the lawyer overrides the rule of confidentiality. The lawyer must either obtain the consent of his client to qualify his opinion appropriately for the purpose of disclosing the troublesome information, or the lawyer must withdraw from this representation.

A related problem arises where the client gives a certificate as to factual matters and the certificate is false or incomplete in certain material respects known to the lawyer, but the opinion request allows the lawyer to opine on such matters based *solely* upon the certificate of his client. It would not be ethical to give the opinion knowing that it is incorrect in material respects due to the false or incomplete factual certificate of the client upon which the opinion is based. Such an opinion would probably violate Rule 4.1(a)(2) because the lawyer, by failing to disclose a material fact, might be assisting the client in a fraudulent act.

3. Procedures

This section sets forth certain suggested procedures which may be followed by lawyers issuing opinions in commercial and real estate loan transactions. Along with the procedures (the "Procedures") that are hereinafter set forth, there are also "Suggested Guidelines" for assistance in implementing the Procedures.

a. Procedure: Client Consent

Most opinions in commercial transactions are opinions addressed to a party not the client of the opining lawyer. There must be client consent to giving an opinion to a third party after consultation reasonably sufficient to permit the client to appreciate the significance of the matter in question.[15]

b. Procedure: Consideration of Conflicts

All material facts in the lawyer/client relationship that might impair independence of judgment of the lawyer issuing the opinion must be considered. If the lawyer believes he is unable to render an objective opinion, he should decline to render the opinion.

c. Procedure: Timing

The opining lawyer should negotiate the text of the opinion at the earliest possible time. If there is a loan commitment, he should endeavor to negotiate the opinion at the time the commitment is negotiated.[16]

d. Procedure: Review by Second Lawyer

Except in the case of a sole practitioner, the lawyer should have the text of the proposed opinion reviewed by at least one other lawyer in his firm, perhaps one having no relationship to the matter.[17]

Suggested Guideline. "All opinion letters subject to these procedures should be reviewed by a partner able to make an evaluation of the soundness of the conclusions reached and their consistency with similar positions taken by the firm in comparable situations."[18]

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[15] See discussion of client consent in Section C.2, "Ethical Considerations," *supra* and the definition of "consult" or consultation in the Terminology section of the Maryland Rules of Professional Conduct.

[16] *See* Fuld, *supra* note 2, at 917.

[17] *See id.*, at 918.

[18] Freeman, *supra* note 3, at 438.

Suggested Guideline. "It is the responsibility of the partner in charge to insure that the name of the reviewing partner and the scope of the review are noted in the file."[19]

e. Procedure: Execution

The opining lawyer should sign the opinion in accordance with his own firm's procedures.

f. Procedure: Checklists

Checklists for steps that should be taken before opinions are rendered are helpful techniques to establish the facts and law necessary for the opinion and also to demonstrate that "due diligence" was undertaken in the preparation of the opinion.[20]

g. Procedure: "How do I know it?"

The lawyer should always ask the question How do I know it? with respect to each conclusion expressed in the opinion and be comfortable with the answer to that question.

Suggested Guideline. The opinion should generally set forth any qualifications or limitations to the opinion, such as absence of clear legal authority, contrary decisions, possible contrary views of regulatory agencies, limitations as to persons who may rely upon the opinion, assumptions of facts, reliance on other counsel, reliance on officer certificates, etc.[21]

h. Procedure: No Opinion

It is inappropriate to give or to request opinions in the following situations and as to the following matters:

(a) Omnibus terms such as "compliance with *all* federal, state, and local laws, rules, and regulations."

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[19] *Id.*

[20] The subject of due diligence to be undertaken before issuing an opinion is discussed throughout Part D of this Report.

[21] *See infra* Section D.12, "Assumptions, Qualifications, and Other Limitations."

(b) Financial status of the client.[22]

(c) Factual matters (with certain exceptions).[23] Factual matters are not matters on which legal opinions are given, although there are occasions when lawyers are requested to do so. The lawyer should obtain appropriate certificates upon which he may rely as to factual matters.

i. Procedure: Special Counsel

Special counsel should be retained in matters on which the opining lawyer lacks sufficient expertise.

Suggested Guideline. "In the preparation of legal opinions reliance may be placed on opinions issued by other counsel only after satisfactory proof as to the professional reputation and independence of judgment of the other attorney. No reliance may be placed on another attorney's opinion when there exists substantial reason to doubt the conclusions stated therein."[24]

Suggested Guideline. "If it is desired not to assume responsibility for the matters which are the subject of the other counsel's opinion, the opinion letter should make reference to the other opinion letter and should indicate clearly the division of responsibility for matters covered by the opinions."[25] It is sufficient to state in the primary opinion that the lawyer has relied upon the opinion of other counsel with respect to the topics covered therein. Such a statement indicates that the opining lawyer rendering the primary opinion has not investigated independently or otherwise verified the opinion of the other counsel.

j. Procedure: Local Counsel

There are certain questions of foreign law on which some Maryland lawyers render opinions. For example, some lawyers experienced in corporate matters are sufficiently familiar with Delaware corporation law so they feel comfortable opining about matters relating to the incorporation and good standing of a Delaware corporation and certain other routine

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[22] Sometimes a lawyer is asked to include in an opinion the statement that there is no litigation pending that would have a material adverse effect on the financial status of his client. The Committee recommends against making such a statement. *See infra* Section D.6, "Litigation."

[23] One area in which it is customary and appropriate for the lawyer to make representations or certifications as to factual matters is the subject of litigation pending against the client. *See infra* Section D.6, "Litigation."

[24] Freeman, *supra* note 3, at 437.

[25] *Id*.

Delaware corporate matters. In other cases, the parties to a transaction may seek and obtain the opinion of local counsel on questions of foreign law.

Assuming that an opinion of local counsel is required, such opinion may be utilized in numerous fashions. The two most customary uses are as follows:

(i) The opinion of local counsel may be delivered directly to the recipient, with no reference to the opinion of local counsel in the opinion of the Maryland lawyer other than a recognition of such delivery. The following language is suggested as illustrative of such a reference in an opinion: *"We refer you to the opinion of _____ of even date herewith which has been delivered to you with respect to matters of _____ law. We express no opinion as to any of the matters set forth in that opinion."*

(ii) The Maryland lawyer may rely upon the opinion of local counsel in rendering his opinion with respect to certain matters. The following language is suggested for use in such an opinion: *"With respect to matters of _____ law, we have relied exclusively upon the opinion of _____ of even date herewith, a copy of which is attached hereto."*

In the event the opining Maryland lawyer relies upon the opinion of local counsel with respect to the laws of a foreign jurisdiction in rendering his opinion, unless otherwise specifically stated, the opining lawyer is implicitly indicating that in his judgment it is reasonable to do so, regardless of whether a statement to that effect is made. Establishing the reasonableness of such reliance depends upon each circumstance, but generally would include ascertaining the reputation for competence of the local counsel.

Reliance upon or reference to local counsel's opinion does not require the opining lawyer to investigate independently or otherwise verify the opinion of local counsel. The recipient should presume that such local counsel's opinion is the sole basis of knowledge of the opining lawyer as to the substantive matters covered by the local counsel's opinion unless otherwise specifically stated. Any statement in an opinion that the opining lawyer concurs in the opinion of local counsel or that the opinion of local counsel is satisfactory in form and substance implies a broader scope of responsibility of the opining lawyer to conduct his own independent investigation or verification as to the matters covered by the opinion of local counsel; this would not be recommended or appropriate in most circumstances.

k. Procedure: Dating

The opinion should be dated when complete and all matters set forth therein have been consummated (normally the date of closing).

l. Procedure: Adopt Policies

Every law firm and practicing lawyer should adopt policies as to the scope and content of opinions they will render and the procedures to be followed in issuing such opinions.

4. Liability

A lawyer issuing an opinion in Maryland should be mindful of the current state of the law with regard to professional liability to third persons. The most recent case by the Court of Appeals of Maryland discussing the duty owed to a nonclient by a lawyer is *Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618 (1985). After reviewing its prior decisions, the Court of Appeals stated in *Flaherty* that, in legal malpractice, Maryland follows the strict privity rule, but with the "third party beneficiary" exception to that rule. The Court explained the exception as follows:

> Although this exception is "peculiarly applicable" to contract actions, *Clagett v. Dacy*, . . . [47 Md. App. 26, 28, 420 A.2d 1285, 1289 (1980)], its scope has a broader range. In our view, the scope of duty concept in negligence actions may be analogized to the third party beneficiary concept in the context of attorney malpractice cases. Thus, to establish a duty owed by the attorney to the nonclient the latter must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party. If the third party alleges and proves the remaining elements of a negligence cause of action, he can recover against the attorney in negligence.[26]

As discussed in "Ethical Considerations" (*supra* Section C.2), a lawyer may issue an opinion to a third party only after consultation with and consent from his client. While *Flaherty* does not address this point, it would seem to follow that in commercial transactions in which a lawyer renders an opinion to a person who is not his client "the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship."[27] If so, a third party addressee of an opinion letter in a commercial transaction would probably be able to recover against the opining lawyer if the addressee can establish that it reasonably relied on the opinion, that it suffered a loss proximately caused thereby, and that the lawyer was negligent.[28]

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[26] *Flaherty v. Weinberg*, 303 Md. 116, 130-31, 492 A.2d 618, 625. See Note, *Flaherty v. Weinberg*, 16 U. Balt. L. Rev. 354 (1987) for a discussion of the case.

[27] *Flaherty*, 303 Md. at 130-31, 492 A.2d at 625.

[28] In *Kendall v. Rogers*, 181 Md. 606, 611-12, 31 A.2d 312, 315 (1943), the Court of Appeals quoted *Maryland Casualty Co. v. Price*, 231 F. 397, 401 (4th Cir. 1916), in which the Fourth Circuit stated:

> In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.

As to the standard of care required of a lawyer, the Court of Appeals held in *Watson v. Calvert Building and Loan Association of Baltimore City,* 91 Md. 25, 33, 45 A. 879, 881 (1900):

> An attorney at law is liable to his client for the possession of a reasonable degree of skill in his profession as well as for the exercise of a like degree of diligence in the conduct of the transaction about which he is employed. If he fail[s] in either respect he will be responsible to his client for the loss which the latter may sustain therefrom. This responsibility of the attorney, although ordinarily enforced by an action of case for negligence in the discharge of his professional duties, in reality rests upon his employment by the client and is contractual in its nature. Before the attorney can be made liable, it must appear that the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment.

This does not mean that a lawyer warrants the accuracy of all legal conclusions contained in an opinion letter. After all, what a lawyer renders is merely the expression of opinion, based on facts which should be disclosed, in the exercise of his professional judgment.[29]

Further, as noted above, in order to recover in such an action a recipient of an opinion must have reasonably relied thereon. For example, in *City National Bank of Detroit v. Rodgers & Morgenstein*, 399 N.W.2d 505, 507-8 (Mich. App. 1986), the court denied a recovery in part because it noted that the plaintiff bank had its own legal counsel and copies of the applicable legal documents in the subject transaction, and it was charged with, in effect, neglect in failing to determine whether certain partners had the authority to bind the borrowing partnership.

A lawyer should be entitled to presume, without stating the presumption in the opinion letter, that a statute enacted by an official legislative entity is constitutional and valid. However, a reported case challenging the particular statute's constitutionality should be mentioned, as should any widespread concern by commentators with respect to constitutionality as such concern is reflected in articles or other commentaries published in bar journals, law reviews, or the legal periodicals which lawyers in Maryland practicing in the areas of law bearing on the opinion routinely consult ("Recognized Local Periodicals"). Similarly, a lawyer may presume, without stating the presumption in the opinion letter, that a rule or regulation, if issued by an official administrative entity or person pursuant to statutory authority granted to

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See also *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 337, 439 A.2d 534, 539 (1982).

[29] *See City Nat'l Bank of Detroit v. Rodgers & Morgenstein*, 399 N.W.2d 505, 508 (Mich. App. 1986).

such entity or person, is enforceable and valid; however, a reported case challenging such enforceability should be mentioned, and it is likewise recommended that a lawyer mention any widespread concern by commentators (as reflected in Recognized Legal Periodicals) as to the enforceability of the rule or regulation. For purposes of this Report, a decision by a federal or state court shall be deemed to be a "reported case" when: (i) the lawyer rendering the opinion in question has actual knowledge of such decision, or, if earlier, (ii) such decision has been reported for a reasonable period of time in the applicable official reporter service ("Official Report"), including any decisions which are published in any advance sheet service published by such Official Report.[30]

The standard of care expected of a lawyer in discovering cases in an Official Report is to undertake such reasonable research as is necessary to render an informed and intelligent opinion.[31] In conducting such research, the lawyer should examine the reference works which lawyers in Maryland routinely consult. The lawyer should not be held accountable for either unreported cases or rulings or those cases or filings which are reported only in private or specialized reports or publications unless the same are routinely available to, or consulted by, the majority of lawyers in Maryland practicing in areas of law bearing on the opinion.[32]

In order to control the risk associated with rendering an opinion, a lawyer should provide that it may be used only by the addressee and other specified persons. Parties which may desire to use the benefits of an opinion may include participants in a loan transaction and assignees of a promissory note, which parties may not be identified to the opining lawyer. There are several practical reasons for limiting the persons who may rely upon the opinion. First, the lawyer might find himself in a conflict situation with the secondary recipient. Second, the opinion might be deemed to be re-issued as of the date the secondary recipient acquired its interest in the transaction. Third, portions of the opinion could differ depending on the status or identity of the secondary recipient and the addressee (e.g., whether or not exempt from usury issues; whether or not accredited for security issues; whether or not qualified to do business in a particular jurisdiction).[33] Fourth, the secondary recipient may have knowledge of a matter referred to (or not referred to) in an opinion letter which, if disclosed, would cause the lawyer to change his opinion.

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[30] *See Texas Statement of Policy*, *supra* note 1, at 24.

[31] *See Smith v. Lewis*, 118 Cal. Rptr. 621, 627, 530 P.2d 589, 595 (1975).

[32] *See Texas Statement of Policy*, *supra* note 1, at 24.

[33] *See* Seneker, *Land Use and Environmental Opinions - A Practitioner's Perspective*, in Environmental Issues From a Transactional Perspective Tab 12, at 6 (American College of Real Estate Lawyers, Apr. 22, 1988).

D. DISCUSSION OF LEGAL ISSUES IN OPINION LETTERS

1. Existence and Good Standing

Sample Opinion Language:

- *For a Corporation*: *The Borrower is a corporation duly organized and validly existing in good standing under the laws of the State of Maryland.*
- *For a General Partnership*: *The Borrower is a [general] partnership validly existing under the laws of the State of Maryland.*
- *For a Limited Partnership*: *The Borrower is a limited partnership validly existing in good standing under the laws of the State of Maryland.*

***Discussion*:**

a. Commentary on Purpose and Sample Language

The opinion as to existence and good standing of the borrower, as an entity created under Maryland law (a) assures the lender of the legal character of the borrowing entity, which has numerous implications for the liability of the borrower's principals, (b) confirms that the borrower has not been dissolved or terminated or undergone any organic change which would affect a borrower's ability or authority to consummate a transaction, and (c) helps to identify any legal disabilities affecting the borrower as a result of the failure to comply with statutory requirements or other reasons. This opinion has four component parts. Each has a distinct purpose and involves a separate inquiry before the opinion can be given.

A. *(1) "The Borrower is a corporation . . . "*

For an entity to become a Maryland corporation, articles of incorporation must be signed, acknowledged, and filed with the Maryland State Department of Assessments and Taxation (the "SDAT:), and accepted by the SDAT.[34] On the issue of the formation of a corporation, acceptance of articles of incorporation by the SDAT is conclusive evidence, except in a proceeding by the State for forfeiture of the corporation's charter.[35] In rendering an opinion

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[34] "When the Department accepts articles of incorporation for record, the proposed corporation becomes a body corporate . . . ." Md. Corps. & Ass'ns Code Ann. §2-102(b)(1) (1985).

[35] *Id*. §2-102(b)(2).

on this point, a lawyer may reasonably rely upon any of the following as evidence of the SDAT's acceptance of articles of incorporation: (i) the SDAT's receipt given upon the initial filing, indicating acceptance for record; (ii) a copy of the articles of incorporation certified by the SDAT as a true copy of those filed with the SDAT; or (iii) the SDAT's certificate of status/good standing (discussed below).

(2) "The Borrower is a [general] partnership . . ."

A general partnership may be formed under Maryland law by almost any means: by oral or written agreement or by any acts or circumstances sufficient to establish an intention to form a general partnership.[36] There are no filing or registration procedures required in forming a general partnership. As a result, the lawyer must inquire of the persons or entities comprising the borrower to determine whether reasonable evidence of the formation of the partnership exists. If such evidence is not written, it is recommended that the lawyer obtain a written certificate signed by each of the partners confirming the formation and continued existence of the borrower as a Maryland general partnership. Note that a "general partnership" is referred to as simply a "partnership" under the Maryland Uniform Partnership Act, Title 9 of the Corporations and Associations Article of the Maryland Code. Joint ventures are generally understood to be a type of general partnership.[37]

(3) "The Borrower is a limited partnership . . ."

The formation of a limited partnership under Maryland law is accomplished by executing and filing with the SDAT a certificate of limited partnership in substantial compliance with statutory requirements.[38] The SDAT is prohibited from accepting any certificate which does not meet statutory requirements, and is required to issue its own certificates that a certificate of limited partnership has been accepted for record.[39] Although no statute raises such a certificate from the SDAT to the status of "conclusive evidence" of formation, a certificate from the SDAT is a reasonable basis for a legal opinion as to formation, absent knowledge of facts indicating a failure to meet statutory requirements.

The SDAT gives evidence of its "acceptance" of certificates of limited partnership in several ways, any of which is acceptable for determining formation: (i) a receipt given upon filing of the certificate; (ii) a copy of the filed certificate which is certified by the SDAT; or (iii) a certificate of status/good standing (discussed below).

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[36] *See Madison Nat'l Bank v. Newrath*, 261 Md. 321, 275 A.2d 495 (1971).

[37] *See Herring v. Offutt*, 266 Md. 593, 596-97, 295 A.2d 876, 879 (1972). *See also Madison Nat'l Bank v. Newrath*, 261 Md. at 327, 275 A.2d at 498.

[38] Md. Corps & Ass'ns Code Ann. §10-201 (1985 & Supp. 1988).

[39] *Id*. §10-206(a) and (b) (1985).

B. *(1)* "*The Borrower is a corporation* ***duly organized*** *. . . "*

In order for a corporation to be "duly organized" under Maryland law, there are certain organizational procedures required to be taken by the directors and shareholders of a corporation beyond those steps discussed above in connection with the formation of the entity. After the articles have been filed, the law mandates that "the directors shall hold an organization meeting of the board of directors, to adopt bylaws, elect officers, and transact any other business which may come before the meeting."[40] Although there is no authoritative decision on the point, the Maryland Court of Special Appeals has indicated that if no organizational meeting is held, all actions taken by or on behalf of the entity may be void as lacking corporate authority.[41] Lawyers may take a measure of comfort from the subsequent decision of the Court of Appeals to the effect that, in the *absence of any evidence* as to whether an organizational meeting was actually held, the courts will presume that a proper meeting was held. However, the comment by the Court of Special Appeals concerning the effect of a failure to conduct an organizational meeting was not contradicted or modified by the higher court.[42]

The minimum statutory requirements of the organizational meeting are the adoption of bylaws and election of officers. These actions can be taken at any time after the articles are filed and can be taken by informal action by unanimous written consent of the directors.[43] In rendering the opinion that a corporation is duly organized, the lawyer should review the corporation's records and minute books to confirm that an organizational meeting was held. If no such records exist, the shareholders should elect or confirm the election of directors (if not already done), and the adoption of bylaws and election of officers should be confirmed by the directors, at a meeting or by unanimous written consent.[44]

(2) *"The Borrower is a [general] partnership* ***duly organized*** *. . ."*

(3) *"The Borrower is a limited partnership* ***duly organized*** *. . ."*

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[40] *Id*. §2-109(a)(1).

[41] *See Bostetter v. Freestate Land Corp*., 48 Md. App. 142, 150-51, 426 A.2d 404, 409 (1981), *modified*, 292 Md. 570, 440 A.2d 380 (1982).

[42] *See Freestate Land Corp. v. Bostetter*, 292 Md. 570, 578-81, 440 A.2d 380, 385-86 (1982).

[43] Md. Corps. and Ass'ns Code Ann. §2-408(c) (1985 & Supp. 1988).

[44] With respect to the broader topic of corporate authority in general, *see infra* Section D.3, "Power." An opinion that a corporation is "duly organized" does not include an opinion that the corporate stock was properly issued or fully paid. If either of these opinions is required, the recipient thereof should specifically request an opinion on these points.

With respect to general or limited partnerships formed under Maryland law, there are no essential organizational steps required on behalf of the entity other than those steps discussed above which evidence the formation of the entity. Once the issue of formation has been reviewed, no separate investigation or evidence need be obtained by the lawyer opining that a partnership or limited partnership is "duly organized." For these reasons, an opinion on the due organization of a partnership is superfluous and should not be requested.

C. (1) "The Borrower is a corporation . . . ***validly existing*** *. . ."*

The test of whether a corporation is "validly existing" as distinguished from being in "good standing" is whether it has not been voluntarily or involuntarily dissolved or whether any stated term limiting the duration of the corporation has not expired. Both forms of dissolution are evidenced in the corporate records of the SDAT, either by articles of dissolution or by a certification to the SDAT from the clerk of any court entering an order of involuntary dissolution.[45] Any time limit on a corporation's existence will be disclosed in its articles of incorporation.

To assure that a corporation is "validly existing," the lawyer should check all filings with the SDAT subsequent to its incorporation to confirm that it has not been dissolved and that its term of existence, if limited, has not expired. This process has the additional benefit of disclosing any articles of consolidation, merger, transfer of assets, or amendment affecting the present name, character, or business of a validly formed and organized corporate borrower.

(2) *"The Borrower is a [general] partnership . . .* ***validly existing*** *. . ."*

A general partnership may fail to be "validly existing" as a result of the expiration of its term of existence, as a result of any of several causes of dissolution stated in the partnership agreement or by law,[46] or simply by the choice of any partner. In addition, a court may decree a dissolution under certain circumstances.[47] Unlike the case of a corporation, dissolution of a general partnership can occur due to the existence of facts or states of mind which may not be reflected in any central registry such as that maintained by the SDAT for corporations.

Therefore, in giving an opinion that a general partnership is "validly existing," the lawyer should make a reasonable factual inquiry of the partners, similar to that

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[45] As to voluntary dissolution, see Md. Corps. and Ass'ns Code Ann. 3-401 *et seq*.; as to involuntary dissolution, see *id*. 3-413 *et seq*. Technically speaking, a corporation does not cease to exist immediately upon dissolution. However, its powers are circumscribed to such an extent that it is not "validly existing" as a normal non-liquidating corporation.

[46] *Id*. §9-602 (1985) ("Causes of dissolution").

[47] *Id*. 9-603 ("Dissolution by decree of court").

required to conclude that the partnership was initially formed. The most conservative procedure would be to obtain a certificate signed by all of the partners (a) confirming the present existence of the partnership and intention to continue its existence, (b) certifying that neither the partnership nor any partner is bankrupt or involved in a bankruptcy proceeding, and (c) certifying that no judicial proceeding is pending for the dissolution of the partnership.

*(3) "The Borrower is a limited partnership . . . **validly existing** . . ."*

A limited partnership, like a general partnership, can be thrown into dissolution and not be "validly existing" as a result of any of several events or circumstances stated in the Maryland Revised Uniform Limited Partnership Act (the "RULPA"), including the occurrence of an event specified in the limited partnership certificate or the entry of a judicial decree.[48] As distinguished from the case of a general partnership, there is a filing process which is intended to give notice of dissolution of a limited partnership.[49] Nonetheless, the lawyer giving an opinion as to the valid existence of a limited partnership should still make a reasonable factual inquiry to determine whether any circumstances exist which would trigger dissolution under (a) the limited partnership agreement, (b) the certificate of limited partnership, or (c) the events of dissolution set forth in Section 10-801 of the RULPA, including an "event of withdrawal" of a general partner.[50] This inquiry should include a review of all amendments and other filings with the SDAT under the limited partnership's name. This process will disclose whether the certificate was cancelled.

Because the events of dissolution for a limited partnership primarily involve the determination of certain facts, a certificate from a general partner is suggested in rendering the opinion.

*D. (1) "The Borrower is a corporation . . . **in good standing** . . ."*

The phrase "in good standing or" "in good standing under the laws of the State of Maryland" describes a status of compliance with certain State laws and regulations, as set forth in the Code of Maryland Regulations ("COMAR") Section 18.04.03.01 ("Criteria to Maintain Good Standing with the Department"):

> In order to be in good standing with the Department [SDAT] the following shall be accomplished:
>
> A. Domestic Corporations.

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[48] *Id*. §§10-801 and 10-802 (1985 & Supp. 1988).

[49] *Id*. §10-203 (Supp. 1988). A certificate of cancellation is required to be filed with the SDAT upon the dissolution of a limited partnership and the commencement of winding up.

[50] *Id*. §§10-402 and 10-801.

(1) Articles of Incorporation shall be on file with the Department.

(2) The name and address of a resident agent for the corporation shall be on file with the Department.

(3) The corporation shall have filed all annual reports required by Tax-Property Article, §11-101, Annotated Code of Maryland.

(4) The corporation shall have paid all penalties imposed under Tax-Property Article, §14-704, Annotated Code of Maryland.

(5) The charter of the corporation may not be forfeited.

The most frequent basis for a corporation's being found not to be in good standing is the failure to file its annual personal property report, which is due to be submitted to the SDAT by April 15 of each year.[51] Immediately after September 30 of each year, the SDAT and the State Comptroller are required to list every Maryland corporation which has not filed its annual personal property report or paid any State taxes owed, after which the SDAT publishes a "proclamation declaring that the charters of the [listed] corporations are repealed, annulled, and forfeited, and the powers conferred by law on the corporations are inoperative, null, and void as of the date of the first publication of the proclamation, without proceedings of any kind either at law or in equity."[52]

The other basis for forfeiture of a Maryland corporation's charter is a judicial proceeding by the Attorney General, upon the authorization of the SDAT, alleging that a corporation has "abused, misused, or failed to use its powers and franchises in a manner which would make proper the forfeiture of its charter."[53] This is a remote possibility, but would be reflected on the status/good standing certificate issued by the SDAT.

The SDAT will issue a status certificate, upon request and payment of a fee, stating that a Maryland corporation is in good standing (or, if not in good standing, such other status).[54] A status/good standing certificate obtained within the 30 days preceding a

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[51] Md. Tax-Prop. Code Ann. §§11-101, 11-102 (1986 & Supp. 1988).

[52] Md. Corps. and Ass'ns Code Ann. §3-503(c) (Supp. 1988).

[53] *Id*. 3-513(a) (Supp. 1988).

[54] In 1987 the statutory fee schedule for SDAT certificates was amended and the term "certificate of good standing" was changed to "certificate of status." Ch. 62, Laws of Maryland 1987; *see* Md. Corps. and Ass'ns.

transaction, indicating that a corporate borrower is in good standing, is a reasonable basis for rendering the "good standing" opinion, unless the lawyer giving the opinion has actual knowledge of any circumstance inconsistent with such status. In the weeks immediately following April 15 of each year, because of the normal administrative delay at the SDAT in updating its records as to corporate filings, the opining lawyer may consider obtaining a Tax Clearance Certificate from the Maryland Comptroller of the Treasury or asking the corporation's officers for evidence that the corporation has filed its personal property report and paid its taxes. The opining lawyer may consider including a statement that the good standing opinion is deemed given as of the date of the status/good standing certificate, the Tax Clearance Certificate, or any update.

The "good standing" of a corporation in Maryland is generally viewed as a measure of its status in relation to the State of Maryland (acting through the SDAT). Technically, a corporation can satisfy the SDAT's criteria for "good standing" even though the corporation has been dissolved (but is in the process of winding up).

(2) "The Borrower is a [general] partnership . . . ***. in good standing*** *. . . ."*

Because the "good standing" status is understood to refer to an approving view by the State (as it does in the case of corporations and limited partnerships), it has no application to general partnerships. There are no equivalent filing requirements applicable to general partnerships, and the State has no direct way of knowing when such partnerships are formed, dissolved, or terminated. The State does not issue any sort of status or good standing certificate for general partnerships.

The Committee recommends that an opinion given in connection with a general partnership not include the phrase "in good standing."

(3) "The Borrower is a limited partnership . . . ***in good standing*** *. . ."*

The SDAT has established the following criteria for determining whether a Maryland limited partnership is in good standing under Maryland law, in COMAR 18.04.03.01:

> In order to be in good standing with the Department, the following shall be accomplished:
>
> C. Domestic Limited Partnerships

Code Ann. §1-203(6) (Supp. 1988). On June 30, 1987, the SDAT announced that a request for a certificate of good standing would result in issuance of a certificate of status even if the entity is not in good standing.

(1) A certificate of limited partnership shall be on file with the Department.

(2) The name and address of a resident agent shall be on file with the Department.

(3) All required Affirmations of Limited Partnership shall be filed with the Department.

As in the case of a corporation, a lawyer giving a good standing opinion with respect to a limited partnership may reasonably rely upon the certificate issued by the SDAT less than 30 days prior to a transaction, provided that the lawyer has no actual knowledge of facts to the contrary, and provided that the limited partnership, if formed before July 1, 1982, has filed an election to be governed by the RULPA in the original or an amended certificate of limited partnership.[55] The opining lawyer may also consider including a statement that the good standing opinion is deemed given as of the date of the status/good standing certificate or any update. A limited partnership which has not filed an election may be in good standing under SDAT's regulations, but it may not convey or accept title to real or personal property or maintain a suit in State of Maryland courts.[56] Because many commercial transactions involve the conveyance of title to real and/or personal property, whether in fee or as security, the RULPA election by limited partnerships formed before July 1, 1982 should be considered an essential component to the good standing opinion with respect to a limited partnership.

A borrower's lawyer may also be asked to opine that the stated term of existence of the Borrower is beyond the term of the loan documents. Any such opinion should be given with reference to the longest possible term of the loan documents, including any option period contained therein, and the borrower's partnership agreement and certificate of limited partnership.

b. Due Diligence

The following checklists are offered to assist the opining lawyer in preparing to render an opinion as to the existence, due organization, and good standing of an entity under Maryland law.

For a corporation –

1. Order a long form status/good standing certificate from the SDAT and certified copies of the corporation's articles of incorporation and all other documents listed in the certificate.

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[55] *Id*. §10-1104(4).

[56] *Id*. §10-1105(b)(2).

2. Confirm that an organizational meeting of the board of directors was held.

3. Review all filed corporate documents for (a) a time limit on the corporation's existence, and (b) articles of dissolution, merger, or transfer.

4. At the time of closing, be sure to have a status/good standing certificate not more than 30 days old. In the weeks following April 15, consider requesting a Tax Clearance Certificate from the Comptroller of the Treasury or evidence from the corporation's officers that the corporation has filed its annual personal property report and paid any State taxes owed.

- For a general partnership –

1. Determine the existence and terms of the partnership, preferably by obtaining (a) a copy of a written partnership agreement and (b) a certificate signed by all partners confirming the formation and continued existence of the partnership as a Maryland general partnership.

2. Make a reasonable factual inquiry and/or obtain a certificate of all partners to confirm that no event of dissolution has occurred under the terms of the partnership agreement or under the Maryland Uniform Partnership Act. This certificate should confirm that neither the partnership nor any partner is involved in a bankruptcy proceeding and that no judicial proceeding is pending for the dissolution of the partnership.

- For a limited partnership –

1. Obtain a current long form status/good standing certificate and a certified copy of the limited partnership certificate (with all amendments or other filings) from the SDAT. Check to see if the filed certificate of limited partnership conforms to the limited partnership agreement, if handled as a separate document.

2. Make a reasonable factual inquiry (perhaps obtain a certificate of one of the general partners similar to the one described above with respect to general partnerships) to determine whether any circumstances exist which would trigger a dissolution (a) under the certificate of agreement of limited partnership or (b) under the RULPA. Review SDAT filings for a certificate of dissolution or cancellation.

3. Confirm that SDAT filings include a designation of a resident agent and his address and, if the limited partnership was formed before July 1, 1982, an election to be governed by the RULPA.

2. Qualification to Transact Business

***Sample Opinion Language (In Maryland)*:**

The Borrower is qualified [registered] to transact business as a foreign corporation [limited partnership] in the State of Maryland.

***Sample Opinion Language (Foreign Jurisdictions)*:**

- **Alternative 1:** *Based solely upon the certificate(s) of _____, as of the date(s) thereof, the Borrower is qualified to transact business as a foreign _____in the States of _____, and _____.*

- **Alternative 2:** *Based solely upon the certificate of the Borrower and the certificate(s) of _____, as of _____ the Borrower is qualified to transact business as a foreign _____ in those states in which it is required to do so by reason of its ownership or leasing of real property located in the state or its maintaining an office in the state.*

- **Alternative 3:** *Based solely upon the certificate of the Borrower and the certificate(s) of _____, as of _____ the Borrower is qualified to transact business as a foreign _____ in all jurisdictions in which it owns or leases any material properties or conducts any material business. For purposes of this opinion, material means _____.*

***Discussion*:**

a. Commentary on Purpose and Sample Language

The purpose of the opinion as to the borrower's qualification to transact business is to provide assurance to the addressee of the opinion that the borrower is qualified to transact

business in the jurisdiction or jurisdictions discussed in the opinion because of the adverse consequences of a wrongful failure to qualify.[57]

(i) **Qualification to Transact Business in Maryland**

Before doing any *intrastate* business in the State of Maryland, a foreign corporation is required to "qualify" to do intrastate business with the SDAT.[58] Before doing any *interstate* or foreign business in the State of Maryland, a foreign corporation is required to "register" with the SDAT (unless it is already qualified to do business).[59] A foreign corporation that owns income-producing real property or tangible personal property in the State of Maryland is also required to register with the SDAT to do interstate business.[60] Before doing any interstate, intrastate, or foreign business in the State of Maryland, a foreign limited partnership is required to "register" with the SDAT.[61]

An opinion that a corporation or limited partnership organized or created under the laws of a jurisdiction other than the State of Maryland is qualified or registered to transact business in the State of Maryland means that the corporation or limited partnership has received governmental authorization to do business in the State of Maryland, which authorization has not been terminated or, if terminated, has been revived. Such authorization is obtained by the filing of appropriate documents with the SDAT.[62]

Foreign general partnerships and joint ventures are not required to register or qualify with the SDAT to transact interstate, intrastate, or foreign business in the State of Maryland.[63]

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[57] If a foreign corporation or foreign limited partnership fails to register or qualify to do business when required to do so, the corporation or partnership may be prohibited from bringing suit in Maryland courts. Md. Corps. & Ass'ns Code Ann. §§7-301 and 10-907 (1985 & Supp. 1988). In addition, the foreign corporation or foreign limited partnership is subject to fines, and its officers, agents, or general partners are subject to fines and may be charged with a misdemeanor. *Id.*

[58] *Id*. §7-203(a) (1985).

[59] *Id*. §7-202.

[60] *Id*. §7-202.1.

[61] *Id*. § 10-902 (1985 & Supp. 1988).

[62] *Id*. §§7-201, 7-202, 7-202.1, 7-203, 10-901 through 10-911, 10-1104, and 10-1105. See also COMAR 18.04.03.01 with respect to "Criteria to Maintain Good Standing with the Department" for Foreign Corporations and Foreign Limited Partnerships.

[63] The opining lawyer should consider whether a foreign corporation or a foreign limited partnership acting as a general partner of a foreign general partnership or as a joint venturer of a foreign joint venture is

On or before April 15 of each year, a foreign corporation registered or qualified to do business in the State of Maryland and a foreign limited partnership (a) which is doing business, or which in the preceding taxable year, did business, in the State of Maryland and (b) which owns, or which during the preceding calendar year owned, property in the State of Maryland that is subject to property tax must file a report on its personal property with the SDAT.[64] If a foreign corporation fails to file the report on personal property within the time required by law, the SDAT may forfeit a foreign corporation's right to do intrastate business in the State of Maryland.[65] In addition, the SDAT may forfeit a foreign corporation's right to do intrastate business in the State of Maryland if the corporation fails to file with the SDAT any other report or fails to pay any late filing penalties required by law within 30 days after the SDAT makes a written demand for the delinquent report or late filing penalties.[66]

Confirmation as to a foreign corporation's payment of personal property taxes may be accomplished by obtaining a Tax Clearance Certificate from the Maryland Comptroller of the Treasury.

Confirmation as to a foreign corporation's or limited partnership's qualification or registration to transact business in the State of Maryland is accomplished by obtaining a status/good standing certificate from the SDAT. It is customary to rely upon a status/good standing certificate that is dated 30 days or less before the date of the opinion and not to require another certificate or search as of the date of the opinion (sometimes called a "bring-down" certificate). However, as a result of the possible revocation by the SDAT of the qualification of a foreign corporation as discussed above, consideration should be given by the opining lawyer to conducting an inquiry at the SDAT as to the qualification status as of the date of the opinion. The opining lawyer may consider including a statement that the qualification opinion is deemed given as of the date of the status/good standing certificate from the SDAT. Because a foreign limited partnership's right to do intrastate business in the State of Maryland may not be forfeited by the SDAT as a result of such partnership's failure to file any reports required by law, "bring-down" certificates or inquiries are not necessary with respect to foreign limited partnerships.

Unless otherwise specifically stated in the opinion, the recipient should presume that the opining lawyer (a) has no actual knowledge of any circumstances inconsistent with the qualification to transact business, (b) has relied solely upon the status/good standing certificate from the SDAT dated 30 days or less before the date of the opinion, (c) has not investigated any

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required to register or qualify to transact interstate, intrastate, or foreign business in the State of Maryland. There is no Maryland statute directly on this point, and there are divided views as to whether any registration or qualification is required.

[64] Md. Tax-Prop. Code Ann. §11-101 (1986 & Supp. 1988).

[65] Md. Corps. & Ass'ns Code Ann. §7-304(a) (1985 & Supp. 1988).

[66] *Id*.

other factors which may result in the forfeiture of a foreign corporation's right to do intrastate business in the State of Maryland, (d) has not investigated the procedure and documents by which the foreign corporation or limited partnership has qualified or registered to do business in Maryland to determine whether such procedure and documents were in compliance with Maryland law in effect at the time of such qualification or registration, and (e) has not made any additional inquiries or obtained any "bring-down" certificates.

(ii) Qualification to Transact Business in Foreign Jurisdictions

An opinion that a Maryland entity (corporation, limited partnership, or general partnership) is qualified to transact business in a jurisdiction other than the State of Maryland means that the entity has received governmental authorization (as necessary) to do business in that jurisdiction, which authorization has not been terminated or, if terminated, has been revived.

The first issue raised in rendering such an opinion is a determination as to which jurisdictions are to be covered by the opinion. The opining lawyer is frequently faced with a request to opine that the borrower is "qualified to do business in each jurisdiction where such qualification is necessary." If the borrower is a single-purpose real estate limited partnership owning assets and doing business in only one foreign jurisdiction, such an opinion may not be difficult to render. However, when the borrower operates in many states through a variety of methods, such an opinion becomes much more problematic.

If the recipient of the opinion is willing to limit the scope of such an opinion to specific jurisdictions, as in the sample opinion language in "Alternative 1" above, rendering such an opinion should be relatively straightforward. It is far more difficult for the opining lawyer to ascertain that an entity is not required to be qualified in each foreign jurisdiction in which it is in fact not qualified. Various alternative solutions may be considered depending upon the nature of the borrower's business and the nature of the financing transaction.

A certificate from a representative of the borrower and corresponding representations in the loan documents may provide information with respect to where the borrower owns assets, employs individuals on its payroll, leases space, owns real property, or conducts business. This information will help determine the proper scope of the opinion. If the certificate does not indicate some activity or property in, or other connection with, a foreign state on the part of a borrower, the lender should not request an opinion that no qualification is required in such state. "Alternative 2" and "Alternative 3" above present two possible approaches to opinions which are greater in scope than the opinion limited to specific jurisdictions.

Confirmation as to a Maryland entity's qualification to transact business in a foreign jurisdiction should be accomplished by obtaining a certificate to that effect from the appropriate official of that jurisdiction. In certain jurisdictions, it also may be necessary to obtain certifications from other appropriate officials as to the proper filing of certain reports or returns by the Maryland entity.

It is recommended that any opinion given with respect to qualification in a foreign jurisdiction specifically state the certifications or other information upon which the opinion is based and state that the entity is qualified as of the date of such certifications or other information. It is customary not to require an opinion of local counsel with respect to this matter. However, depending on the scope of the requested opinion, engagement of local counsel or an opinion of local counsel may be appropriate.[67]

b. Due Diligence

Before rendering an opinion concerning the qualification to transact business in the State of Maryland of a foreign corporation or a foreign limited partnership, the opining lawyer should obtain a status/good standing certificate from the SDAT which will not be more than 30 days old as of the date of the opinion. Consideration should be given to updating the status certificate or search as of the date of the opinion, or obtaining a Tax Clearance Certificate from the Comptroller of the Treasury, particularly in the period following April 15 each year, when personal property reports are due to be filed.

Before rendering an opinion concerning the qualification to transact business in foreign jurisdictions of a Maryland corporation or a Maryland general or limited partnership, the opining lawyer should obtain certifications from appropriate governmental officials in the relevant foreign jurisdictions. How recent the certifications should be relative to the date of the opinion, and the reasonableness of reliance upon the certifications, will depend upon the specific laws and procedures of the jurisdiction in question. Additional inquiry and action may be required depending upon the scope of the opinion.

3. Power

Sample Opinion Language:

The Borrower has the [corporate] [partnership] power [to own its current properties and conduct its business as now conducted,] to borrow the proceeds of the Loan and to execute and perform its obligations under the Loan Documents.

***Discussion*:**

a. Commentary on Purpose and Sample Language

The purpose of the "power" opinion is to assure one party that the other party is permitted to enter into and perform the particular transaction under its organic organizational documents and the laws defining its basic powers. If appropriate, the opinion may also include assurances that the borrower has the authority to own its properties and conduct its businesses, where those matters are relevant to credit or other pertinent judgments. The related issue of

[67] See discussion of "Local Counsel" in Section C.3, "Procedures," *supra*.

whether a particular transaction has been authorized is discussed below in Section D.4, "Authorization, Execution, Validity, and Enforceability."

As used in the sample opinion language above, "corporate power means that the corporation is authorized by its charter and bylaws and by statute to enter into a particular transaction, to own its properties, or to conduct its business, depending upon the scope of the opinion. In other words it means that the action addressed is not *ultra vires*. In a partnership context, the sample language has a similar import, referring to the relevant partnership documents and law.

The sample opinion language should not be understood to address the corporation's title to its properties, possession of governmental licenses or approvals, shareholder or director authorization,[68] or qualification to do business in foreign jurisdictions. These matters are more properly considered in other paragraphs of the opinion.

Frequently, the phrase "power and authority" is used, implying that the words "power" and "authority" may have different meanings. Some lawyers take the view that reference to the "power" of a corporation means that the corporation is also empowered by whatever other sources are necessary, such as governmental approvals, to authorize the action described in the opinion. The latter issues are more appropriately encompassed in the "consents and approvals" paragraph of the opinion.[69] Some other lawyers view the word "power" when used with the word "authority" to address the ability of the corporation to perform an act even without a legal right to do so.

The Committee concluded that the terms "power" and "authority" are generally synonymous in the context of the power opinion. The Committee has limited the sample opinion language to the word "power" on the premise that the additional word "authority" is unnecessary[70] and, in any event, gives rise to potential confusion with the "Authorization, Execution, Validity, and Enforceability" opinion discussed below in Section D.4. Moreover, the Committee has utilized the phrase "corporate power" in the belief that the phrase is the most descriptive language for an opinion with respect to whether corporate acts are *ultra vires*, which is the generally understood and appropriate function of the "power" opinion.

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[68] *See* Babb, Barnes, Gordon, and Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions*, 32 Bus. Law. 553, 560 (1977). The authors of this article also indicate that the laws of foreign states in which the corporation is (or should be) qualified to do business are relevant to the "*ultra vires*" opinion. The Committee believes that issues of foreign law are generally more appropriately considered under the "Qualification to Transact Business" and "Consents and Approval" provisions of the opinion. On these topics, see Sections D.2 *supra* and D.8 *infra*. In any event the opining lawyer needs to be sensitive to the possibility that foreign law may limit the activities of the corporation or partnership in the particular state and may need to address any such limitation in the opinion.

[69] *See infra* Section D.8, "Consents and Approvals."

[70] *See Texas Statement of Policy*, *supra* note 1, at 22.

In the absence of an unusual restriction in a corporate charter, the breadth of Maryland corporation law with respect to general corporate powers[71] should eliminate most *ultra vires* questions about Maryland corporations. Matters relating to purchase or redemption of corporate stock or matters governed by federal law (such as various federal laws relating to banking) may be exceptions to this rule in a corporate setting. Partnership documents are more likely to be restrictive and give rise to power issues.

As indicated, the sample opinion language needs to be modified appropriately with respect to a borrower that is a partnership, trust, or entity other than a corporation. Similarly, in the case of a partnership, the due diligence suggestions set forth below would involve reviewing the partnership agreement and relevant laws.

b. Due Diligence

When the borrower is a corporation, the power opinion should be supported by the lawyer's examination of the corporation's charter documents and bylaws to verify that the corporation has the authority to borrow money and to execute and perform all of its obligations under the loan documents. If the corporation was not duly organized and the organizational defects cannot be cured,[72] a lawyer should not give the opinion that the borrower has the power to execute and perform its obligations under the loan documents. The opining lawyer should also examine the business corporation laws of the state of incorporation (and any relevant federal law) regarding express and implied corporate power, including any relevant laws dealing with the powers of special purpose corporations such as professional corporations and financial institutions. Special attention should be paid to activities likely to raise particular problems, such as fiduciary or guaranty activities or transactions involving a purchase or redemption by the corporation of its own stock.

Opinions encompassing the redemption or purchase of the corporation's stock should be supported by financial data on which it is reasonable to rely, addressing issues such as the solvency of the corporation and demonstrating that the stock purchase or redemption satisfies the relevant requirements of applicable law.[73]

When the borrower is a partnership, a similar examination of the organic partnership documents and applicable law should be conducted.

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[71] Md. Corps. & Ass'ns Code Ann. §2-103 (1985).

[72] On the topic of due organization, see *supra* Section D.1, "Existence and Good Standing."

[73] *See* Md. Corps. & Ass'ns Code Ann. §§2-301 and 2-311(a) (Supp. 1988).

4. Authorization, Execution, Validity, and Enforceability

Sample Opinion Language:

> *A. All necessary [corporate/partnership] action has been taken to authorize the execution, delivery, and performance of the Loan Documents by the Borrower.*
>
> *B. The Loan Documents have been duly executed and delivered by the Borrower and constitute the valid and legally binding obligations of the Borrower, enforceable against the Borrower in accordance with their terms, subject to the following:*
>
> > *(i) applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally; and*
> >
> > *(ii) the exercise of judicial discretion in accordance with general principles of equity.*

Discussion:

a. Commentary on Purpose and Sample Language

The purpose of opinions concerning authorization, execution, validity, and enforceability is to provide assurance to the addressee of the opinion letter that the borrower, or other entity about which the lawyer is opining, has the legal ability to be bound, has taken the necessary preliminary steps so that it will be bound, has properly executed the documents so that it will be bound, and will, in fact, be bound by the provisions of the documents. The purpose of these opinions is also to advise the lender that it may enforce against the borrower the provisions contained in the loan documents, subject to stated qualifications and assumptions.

The borrower's counsel is in a unique position to consider and opine about matters concerning authorization and execution of the loan documents by the borrower, and he certainly should give such an opinion upon request. There is some controversy, however, about the appropriateness of borrower's counsel opining as to the validity and enforceability of the loan documents, especially when those documents are prepared by a lender's counsel who is admitted to practice in the state or states, the laws of which are to govern the transaction. Implicitly or in writing, lender's counsel should be giving his client an opinion that the loan documents are enforceable, subject to the normal caveats, or he should specifically advise his client to the contrary. The lender and its counsel are entitled to know that borrower's counsel agrees that the documents are enforceable, and the Committee therefore concluded that it is generally appropriate for such an opinion also to be requested from and provided by borrower's counsel. (See also footnote 14 and accompanying text.) In a situation where lender's counsel is of the

opinion that all or part of the loan documents are not enforceable, it is inappropriate to request that borrower's counsel opine that such documents or portions thereof are enforceable.

(i) Commentary on Paragraph A of Sample Opinion Language

The words "corporate" or "partnership" within the brackets in paragraph A are included to make it clear that these opinions concern action of the borrower and/or its partners or shareholders and/or board of directors rather than action of any governmental or regulatory authority. The opinion on governmental and/or regulatory authority is dealt with in "Consents and Approvals" *infra* Section D.8. If the borrower is a trust or other entity which is not a corporation or partnership, a different word or words would be used instead of "corporation" or "partnership." If the borrower is an individual, paragraph A would not be necessary and should be excluded from the opinion.

The opinion set forth in paragraph A is subsumed within the opinion set forth in paragraph B. Therefore, the opinion set forth in paragraph A is not technically necessary if the paragraph B opinion is given. However, the opinion set forth in paragraph A is typically given in loan and other transactions, and the Committee considers it appropriate to be included in the Illustrative Opinion Letters.

(ii) Commentary on Paragraph B of Sample Opinion Language

The word "legally" in paragraph B is sometimes considered to be superfluous since it is not intended to differentiate between "legally binding" and "equitably binding," and it is not intended to contrast with "morally binding." Therefore, "legally" may be deleted without changing the meaning of the opinion.

The word "enforceable" standing by itself has the same meaning as "enforceable in accordance with their terms." The latter is used in the sample opinion language and the Illustrative Opinion Letters to resolve any ambiguity.

There are situations in which the legal relationships of the parties may differ for certain purposes from the relationships which the documents purport to create. For example, what may appear to be a lease may be a financing device, and entities that are really partners may have called themselves "borrower" and "lender" in the documents. The opinion regarding enforceability does not encompass an opinion that the documents will be enforced in all cases in a manner consistent with the legal relationships which they purport to create. However, to the extent that remedies set forth in the documents are dependent upon a characterization of the relationship between the parties, an opinion concerning enforceability of those remedies necessarily includes an opinion that such relationship does exist. It may be necessary in certain instances for the opining lawyer to deal specifically with issues such as these when they are presented in particular transactions.

The Committee concluded that the two stated qualifications to paragraph B are sufficiently broad in scope to include other specific qualifications which are often set forth in

opinion letters. For example, subsumed within subpart (ii) of paragraph B are concerns about the enforceability of self-help or other non-judicial remedies, including the lender's right after the occurrence of an event of default, without judicial process, to enter upon; to take possession of; to collect, retain, use, and enjoy the rents, issues, and profits from; and to manage the property described in the loan documents, as well as concerns about provisions in the loan documents that entitle the lender, as a matter of right, to the appointment of a receiver after the occurrence of an event of default. The sample opinion language of subpart (ii) in paragraph B above is intended to be broad in scope and cover the entire field of non-enforceability due to a court's application of equitable principles. The Committee concluded that, rather than attempt to list all possible equitable, bankruptcy, and insolvency, or constitutional limitations on enforceability, it is more appropriate in an opinion letter to include only the more general qualifications. See also the implied qualifications referred to in Section D.12, "Assumptions, Qualifications, and Other Limitations," *infra*. Of course, there may be particular portions of loan documents which raise additional concerns about enforceability in the context of specific transactions, and in such cases additional qualifications would be in order.

With respect to the specific language of subpart (i) in paragraph B above, the words "reorganization" and "moratorium" are frequently omitted from the formulation, and the words "receivership" and "conservatorship" might be added. All of the words within quotation marks in the prior sentence should be understood to fall within the meaning of the subpart (i) qualification even if those words are not specifically stated.

It is intended that the word "laws" in subpart (i) be interpreted broadly to include constitutional provisions, ordinances, regulations, and rules. The word "similar" has not been included before "laws" because subpart (i) is intended to have a relatively expansive meaning. For example, a lawyer may not want to opine about the enforceability of a waiver of notice clause, because of a constitutional or statutory requirement of notice applicable to creditors generally, and he would not be giving such an opinion by using the sample opinion language above. The use of the word "generally" is not intended to exclude application of the qualification to any law, rule, or regulation which may be applicable to only a limited number of creditors or to specific transactions.

It is intended that by using the general qualification expressed in subpart (i), all specific bankruptcy and insolvency risks, such as preferences, fraudulent conveyances, and automatic stays, are excluded from the scope of the opinion; all such specific qualifications are subsumed within the use of the general qualification set forth in subpart (i). However, the use of the general qualification set forth in subpart (i) does not preclude the opining lawyer from also including a specific reference in the opinion to a situation which is subsumed within the general qualification, if thought to be appropriate under the circumstances.

If the recipient of an opinion is not satisfied to receive an opinion with the general qualification set forth in subpart (i), because it is deemed to include the qualifications as set forth in the preceding paragraphs, then the recipient should specifically request to have included in the opinion such additional language as may be reasonably expected to be given under the circumstances. For example, if the recipient does not believe that there should be a fraudulent

conveyance qualification (which is implicit in the subpart (i) qualification), the recipient may request appropriate alternate language expanding the opinion in this area. However, it must be remembered that it is not reasonable to ask for, or to expect to receive, any opinion in this regard if the recipient or its counsel would not itself render the same opinion.

In some opinions (unlike the language of paragraph B), the bankruptcy and equitable principles qualifications refer only to the "enforceability of the remedies contained in the loan documents." In such opinions, the qualifications would only qualify the remedies set forth in the loan documents, and there would be no qualification about the validity or enforceability of the documents themselves. This approach is not recommended by the Committee. In contrast, the qualifications set forth in subparts (i) and (ii) in the sample opinion language above make no specific reference to the remedies provisions or even to enforceability, and therefore are intended to extend to all aspects of the loan documents, including whether the loan documents may be held to be void or voidable.

An opinion regarding enforceability, as in the case of all other aspects of an opinion, only addresses the facts, law, authorizations, and circumstances existing as of the date of the opinion, regardless of whether this limitation is specifically stated. A change in law after the opinion is given may render a particular part of the loan documents unenforceable. In addition, performance under certain loan documents (such as a credit agreement with a provision for future advances) may specifically require or be subject to future action by the board of directors or other authorizing body. Also, the behavior of the lender, such as the repeated waiver of certain provisions of the loan documents, may prohibit a lender from thereafter availing itself of them.[74] Furthermore, the actions of the parties, their future course of conduct, and their oral agreements may alter other portions of the loan documents, notwithstanding a clause to the contrary in the loan documents. The opining lawyer typically does not undertake to keep the addressee advised as to changes in law or the effect of the parties' subsequent actions on the loan documents. Assumptions, qualifications, or other specific reference to these matters in an opinion letter is not necessary.

Additionally, it is typically unstated in opinion letters regarding loan documents that the opining lawyer is not able to assure the lender that the lender will be able to enforce the documents according to their terms if a court concludes that a breach is not material, or that a breach does not adversely affect the lender, or that it would be unreasonable or unconscionable to enforce the documents. The Illustrative Opinion Letters do not include language with respect to these matters as they are deemed to be understood in all transactions.[75]

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[74] *See, e.g., Gould v. Transamerican Assoc.*, 224 Md. 285, 167 A.2d 905 (1961); *Battista v. Savings Bank of Baltimore*, 67 Md. App. 257, 507 A.2d 203 (1986); and *Walker v. Ford Motor Credit Co.*, 484 So. 2d 61 (Fla. App. 1 Dist. 1986).

[75] See *infra* Section D.12, "Assumptions, Qualifications, and Other Limitations," which lists various qualifications which the Committee deemed to be implicit in the Illustrative Opinion Letters even though not specifically stated therein.

(iii) "Practical Realization" Language

Lenders sometimes request that opinion letters contain "practical realization" language as a limitation on the other qualifications of the opinion letter. Such a provision is intended to provide a measure of comfort to the lender, even as the lender is advised that not every provision of the loan documents will be enforced or that enforceability of the loan documents may be limited in certain circumstances. Many lawyers are justifiably uncomfortable in opining that the lender will be able to obtain the benefits it expects in light of the caveats set forth in the bankruptcy and equitable principles limitations, and the Committee recommends against it.

If a "practical realization" provision must be included in an opinion, it needs to be carefully drafted with sensitivity to such concerns. The following language might be used if a "practical realization" clause is required and if the opining lawyer is satisfied that it can be given:

> *The matters which are the subject of the qualifications set forth above do not render the Loan Documents invalid as a whole, and there exist, in the Loan Documents or pursuant to applicable law, legally adequate remedies for realization of the principal benefits intended to be provided by the Loan Documents, subject to the economic consequences of any delay which may result from applicable law, rules, or judicial decisions.*

As noted above, when using the sample opinion language set forth at the beginning of this section, the lawyer is not opining that the transaction will not be held to be void or voidable. However, use of "practical realization" language implies that, while not identifying which specific remedy or remedies will be available, there does exist in the lawyer's opinion some legally adequate remedy for realization of the principal benefits and/or security intended to be provided by the loan documents, subject to any economic consequences of a delay in enforcement of such remedy. For example, in a real estate loan context the opinion that the remedy of foreclosure as described in the loan documents exists is subsumed within "practical realization" language although such language does not include an opinion that the lender will be repaid any particular amount of money upon exercise of such remedy.

Finally, the sample opinion language above concerns only a typical loan transaction and does not purport to address itself to all possible situations. Accordingly, each transaction must be individually and carefully considered.

b. Due Diligence

The due diligence required with respect to the organization, existence, and good standing portions of the opinion and the general power paragraph of the opinion are all relevant to the opinions concerning authorization, execution, validity, and enforceability. Reference is

made to such other sections of this Report for a description of the suggested due diligence in those areas.

In order to provide the opinions on authorization, execution, validity, and enforceability, the lawyer should review the organic documents of the applicable entity, which generally will be the charter and bylaws of a corporation, the partnership agreement for any partnership, and the certificate of limited partnership for a limited partnership. Copies of these documents as in effect during the relevant periods should be reviewed. The purpose of this review will be to determine what action is necessary under the constituent documents in order for the entity to authorize the execution, delivery, and performance of the loan documents. Consideration also must be given to the law governing the type of entity, whether it be general corporate law, the law governing partnerships and limited partnerships, or specific statutory provisions governing special purpose entities such as investment companies, banking institutions, insurance companies, or professional corporations. Moreover, careful review of the applicable loan documents and the transactions contemplated thereby is necessary in order to determine whether any special approvals or authorizations are required, as in the case of a transfer of substantially all of the assets of a corporation or a confession of judgment in a document executed by a partnership.

Once the opining lawyer has determined what action is required under the constituent documents and applicable law to authorize the execution, delivery, and performance of the loan documents, the lawyer will need to obtain evidence that such action has been taken and has not been rescinded or revoked in any way. This could involve review of the entity's minute books or other records. In most cases, however, it will be sufficient to rely on a certified copy of the applicable resolutions authorizing the particular transaction, together with a certification that such resolutions have not been modified or rescinded and that there are no other resolutions relating to the transaction in question. Typically, the resolutions will be certified by the secretary of a corporation or a partner of a partnership.

With respect to the opinion that the loan documents have been duly executed and delivered by the borrower, it will be necessary to receive some evidence that the documents have been executed by a person authorized under the applicable authorizing documents. Typically, an incumbency certificate including sample signatures should be provided for this purpose. In some instances, the opining lawyer may have sufficient personal knowledge of the individual officer or partner who signs the loan documents, and of his signature, to eliminate the need for an incumbency certificate.

With respect to the opinion that the loan documents constitute the valid and legally binding obligations of the borrower enforceable against the borrower in accordance with their terms, subject to the stated exceptions, it will be necessary for the lawyer to carefully consider the loan documents to determine all actions which may be required to be performed by the borrower thereunder and all remedies which the lender may have, and also to consider applicable law to determine whether such opinion can be given or whether additional exceptions are necessary. No specific procedures for what may be necessary in this area can be set forth,

and the degree of review required by the opining lawyer will depend upon his knowledge of the various areas of law which could affect the validity and enforceability of the loan documents.

5. Conflicts

Sample Opinion Language:

The execution and delivery of, and the performance of the obligations under, the Loan Documents (i) will not conflict with the Borrower's corporate charter or bylaws [partnership agreement] [organizational documents], (ii) based solely upon our review of the Identified Borrower Contracts and our knowledge, will not violate or result in the material breach of the provisions of, or constitute a material default under, any of the Identified Borrower Contracts, and (iii) based solely upon the certificates of the Borrower, the attached reports by a search firm, and our knowledge, will not conflict with or result in the breach of any court decree or order of any governmental body binding on the Borrower.

Discussion:

a. Commentary on Purpose and Sample Language

The purpose of the "no conflicts" opinion is to assure the lender that the borrower is not legally obligated in some manner that would be inconsistent with the transaction addressed in the opinion. Thus, the lawyer representing the borrower is asked to opine that the borrower's execution and delivery of and performance of the obligations under the loan documents will not violate or constitute a material breach under the borrower's organic documents, under certain agreements, or under specified court or other specified governmental orders or decrees binding on the borrower. The sample opinion language as to (a) "execution and delivery" and (b) "performance" is not intended to address every covenant and every performance requirement of the borrower set forth in the loan documents. The conflicts opinion is intended to cover only "performance" as it relates to the execution and delivery of the loan documents and the payment of the underlying obligation and acts incidental thereto.

The term "knowledge" or "actual knowledge" or "best of knowledge" is meant to apply only to factual statements and is not meant to limit a true legal opinion. If the opining lawyer has obtained certificates from his client as to factual matters, he is stating, by use of the term "knowledge" in the opinion, that he does not have actual knowledge of facts different from those identified by his client in the certificates supporting this opinion. If greater knowledge is required, it should be specified. If the borrower's lawyer has done more, he should so indicate in his opinion.

Because the term "our knowledge" is vague, it is recommended that the term be defined in the opinion to refer only to actual knowledge and only to information which has come to the attention of lawyers in the firm rendering the opinion who have recently worked on matters on behalf of the borrower. If the term "our knowledge" is not defined in the opinion, the Committee believes it should be interpreted in accordance with the preceding sentence. Particularly in the case of a large law firm, it may be impractical to make inquiry of every lawyer in the firm or even every lawyer who has performed legal services for the borrower, or to examine every file with respect to the borrower.

Where the opining lawyer has a limited relationship to the borrower, he must be permitted to qualify his opinion. Thus, when the borrower's lawyer is local counsel or special counsel, a "no conflicts" opinion may be inappropriate or may be limited to transactions actually handled by the lawyer or his firm.

Local and special counsel must also be entitled to rely on an opinion of the borrower's general counsel.[76] The problem which arises in such cases is that general counsel is often unfamiliar with the loan documents or only generally familiar with the transaction. In the event it is impractical for general counsel to review the loan documents and independently familiarize himself with the transaction, general counsel should be permitted to base his opinion upon a description of the transaction. However, any limitation with respect to the general counsel's review of the loan documents or the transaction should be disclosed.

It is not uncommon for a lender's counsel to ask for an opinion that the obligations of the borrower with respect to the loan documents do not conflict with any existing laws or governmental rules and regulations. The ability of a lawyer to effectively render such an opinion in any reasonable fashion is questionable at best. Consequently, such an opinion has little, if any, practical value. The interests of all parties to a transaction are better served if the party requesting the opinion thoughtfully identifies those laws, rules, and regulations or categories of laws, rules, and regulations which are of practical concern in the transaction and asks the opining lawyer to focus his opinion accordingly.

b. Due Diligence

The factual inquiry necessary to support the opinion set forth in the sample opinion language may require the examination of four types of documents:

(i) Organic Documents -- The charter and bylaws of a corporation, a partnership agreement in the case of any partnership, and a certificate of limited partnership in the case of a limited partnership.

(ii) Contracts -- The contracts to which the borrower is a party, including mortgages, deeds of trust, promissory notes, and other instruments binding upon the borrower.

(iii) Court Decrees -- Any ruling or decree of any judicial body which is of record and which:

a) as binding on the borrower as a named party; or

b) is otherwise binding on the borrower.

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[76] With respect to use of another counsel's opinion, see *supra* Section C.3.i and j.

(iv) Orders of governmental bodies -- Any order of any administrative agency or other governmental body which:

a) is binding on the borrower as a named party; or

b) is otherwise binding upon the borrower.

All of the foregoing can be categorized as follows: (a) those items which are of record with respect to the borrower (*e.g.*, the charter, limited partnership agreements, mortgages, and court orders in which the borrower is a named party); (b) those items which are not of record, but to which the borrower is a party (*e.g.*, general partnership agreements, private contracts, and unrecorded orders of governmental bodies with respect to the borrower); and (c) items which (whether of record or not) apply to the borrower as a member of a class and not by name (*e.g.*, an order of the Maryland State Health Department governing the activities of all hospitals, where the borrower is a hospital).

The first category, those items which are of record with respect to the borrower, presents the easiest situation for the opining lawyer. As to the organic documents of the borrower which are of record (*e.g.*, articles of incorporation and certificates of limited partnership) if the opining lawyer has any doubts as to what he should examine to render this opinion, he need only obtain certified copies of the document in question. Other documents of record with respect to the borrower (*e.g.*, mortgages, deeds of trust, financing statements, lawsuits and judgments) raise the question of where to look. In the case of those items, the opining lawyer should be permitted to limit his search to specified jurisdictions. If the lawyer relies on a search firm for any such information, such reliance should be disclosed in the opinion. He may also obtain a certificate from his client to the effect that there are no other items of record with respect to the borrower. The lender's lawyer should not demand that an opining lawyer do more than state his opinion based on his client's certificate, a search of the records of specified jurisdictions, and his knowledge. To ask for more is to ask the opining lawyer to guess.

The second category, those items which are not of record but to which the borrower is a party, requires the opining lawyer to obtain a certificate from his client setting forth "Identified Contracts" and to base his opinion on such certificate and on his knowledge. This may not be a problem in the case of a small business or a single purpose entity which was formed at or immediately prior to closing. However, a large and/or long standing entity may be a party to literally hundreds, if not thousands, of contracts. In this case, it may be impractical to obtain a list of contracts from the client, and it may be impossible in the time allotted to review them for conflicts. Depending on the size and importance of the transaction, the lawyers may wish to dispense with this part of the opinion or it may be even more critical to go through the entire inquiry. The Committee's recommendation in these situations is for the opining lawyer to clearly state, at a relatively early stage of the transaction, what he can and cannot do. The scope of the actual inquiry should be set forth in the opinion.

The third category, items (whether on record or not) which apply to borrower as a member of a class, presents the most difficult dilemma. The lender has a legitimate interest in

knowing that the borrower is not bound by a governmental regulation which would cause a conflict with or prohibit the transaction in question. For example, a hospital may not be able to purchase certain types of equipment or develop certain real estate without the approval of a state agency. On the other hand, the borrower's lawyer simply cannot know of all laws, orders, rules, and regulations applicable to his client. "Too often . . . the requirement for the ["no conflicts"] opinion merely results in an almost endless attempt to 'prove the negative' which produces very little in the way of useful information. Accordingly, in most transactions, some narrowing of the scope of the opinion is appropriate."[77]

The Committee has already stated that it recommends against "all laws" opinions. The Committee recommends that the lender's lawyer narrow his inquiry as much as possible and that the borrower's lawyer be permitted to qualify his opinion by reference to certificates of his client and reports of a search firm (such as the certificates and reports referred to in paragraphs (vi), (vii), and (x) of the Illustrative Commercial Loan Opinion Letter) which will guide him in rendering this opinion.

6. Litigation

Sample Opinion Language:

Based solely upon the certificate of the Borrower [describe extent of inquiry if not relying on certificate] and our knowledge, there is no litigation, arbitration, or mediation pending before any court, arbitrator, mediator, or administrative body, or threatened against the Borrower or its properties, except for the matters described in the certificate of the Borrower.

Discussion:

a. Commentary on Purpose and Sample Language

Although lenders customarily require borrowers to represent and warrant in the loan documents that there is no litigation, arbitration, or mediation pending or threatened, against the borrower or its properties, lenders also seek similar assurances from borrower's lawyer. Because the lender's request for the disclosure of information as to the existence of litigation is factual in nature, the Committee concluded that the litigation certification may be given to the lender either in a separate certification from the lawyer or as a statement in the legal opinion letter.

A request by a lender to a lawyer for a litigation certification requires the lawyer to consider his ethical responsibilities to his client and third parties. This involves weighing the

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[77] *California Real Estate Report*, *supra* note 1, at 423.

duty to preserve a client's confidences and secrets with the duty to deal truthfully with third persons.[78]

In those instances where pending or threatened litigation is disclosed and the lender and the client request an evaluation of the litigation, it is appropriate for the lawyer to respond. Normally, the information the lawyer should provide will include identification of the litigation, the status of the proceedings, the matters in controversy, and the position asserted by the borrower in connection with the proceedings. Except in unusual cases, the lawyer should refrain from offering a judgment as to the probable outcome of the litigation.[79] A lawyer should not, in most circumstances, offer his judgment on whether an unfavorable outcome for the client would have an adverse effect on the client's financial status. This is a determination the client or the recipient of the opinion should make.

The sample language set forth above anticipates that generally the lawyer's litigation certification will not be based upon independent investigations or inquiries, but rather will serve as confirmation that the lawyer does not have actual knowledge of facts involving litigation that is different from the knowledge of the lawyer's client. To the extent that the lawyer has actual knowledge of litigation that is different from the information disclosed by his client, it is misleading and unethical for the lawyer to make a contrary certification.[80]

If an independent investigation or inquiry is made, then the sample language set forth above contemplates that the lawyer will describe the scope of the investigation or inquiry by reference to the specific procedures that the lawyer has performed. For instance, if the lawyer searches court records, then the court should be identified.

The term “litigation” is intended to include any action, suit, arbitration, mediation, or proceeding whether at law or equity. The litigation certification does not include a “materiality” standard. Thus, the lawyer should disclose any matters pertaining to the borrower or its properties, whether or not the amount in controversy is insubstantial, or its potential impact slight. The purpose of the litigation certification is not to weigh or evaluate risks to the client; the party receiving the certification should make that judgment.

“Pending” litigation means any litigation which has been docketed or filed against the client or the client's properties. “Threatened” litigation, on the other hand, is intended to have the same meaning as “overtly threatened” litigation has in the ABA *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, which is that a “potential

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[78] *See supra* Section C.2, “Ethical Considerations.”

[79] *See* American Bar Association, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 Bus. Law. 1709, 1712-14 and 1719-24 (1976).

[80] See discussion of “knowledge” in Section D.5, “Conflicts,” *supra* and Section D.12, “Assumptions, Qualifications, and Other Limitations,” *infra*.

claimant has manifested to the client an awareness of and present intention to assert a possible claim or assessment unless the likelihood of litigation (or of settlement when litigation would normally be avoided) is considered remote."[81]

"Any court or administrative body" includes federal, state, or local courts, and administrative departments, commissions, boards, bureaus, agencies, or instrumentalities.

In addition to the information disclosed in the sample opinion language above, the recipient of the opinion may want the opining lawyer to state whether there are any pending proceedings "affecting" the borrower. Because the outcome of many proceedings, including those in which the borrower is not a party, may affect the borrower, such a request is overly broad. The parties may agree to expand the sample language to include reference to proceedings having as named parties persons or entities to which the borrower has a particular relationship (*e.g.*, as a partner or guarantor).

b. Due Diligence

The scope of a due diligence inquiry is limited by the time and cost a lender is prepared to require and a client is prepared to accept. The potential extent of the investigation made by the lawyer involves weighing the expense and expenditure of time with the likelihood of ascertaining facts contrary to what is disclosed by the client to the lender. In the interest of cost and time, a lawyer will ordinarily be permitted to rely on his client's certificate as to litigation. Where the lawyer relies upon a certificate of his client, the lawyer is presumed not to have made an independent inquiry or investigation of the facts, but is presumed to have checked with the lawyer in the firm in charge of that client's account and with those lawyers in the firm who have recently worked on matters on behalf of the client, in order to determine what matters, if any, are pending or threatened against the client.

There may exist, however, legitimate instances when a lawyer may be instructed to expand the nature of his inquiry. In those instances, if a lender expects the borrower's counsel to conduct an independent inquiry or investigation, then the nature and extent of the investigation should be specifically identified during the process of negotiating the loan commitment. Similarly, if the lender wishes to know about pending or threatened litigation against any party other than the borrower (*e.g.*, a general partner, a majority stockholder, or a related entity), the lender should specifically identify the other party. It is unreasonable for a lender to expect or require an independent investigation by a lawyer when the loan commitment fails to identify with particularity the investigation expected of the lawyer.

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[81] American Bar Association, *supra* note 79, at 1712.

7. Perfection and Priority of Liens

Sample Opinion Language:

> *With respect to all property*
>
> *(a) in which the Borrower currently has rights within the meaning of Section 9-203(1)(c) of the Maryland Uniform Commercial Code,*
>
> *(b) in which a security interest subject to Article 9 of the Maryland Uniform Commercial Code is granted under the Loan Documents which may be perfected by the filing of financing statements, and*
>
> *(c) as to which one or more financing statements naming "ABC Corporation" as debtor are required to be on file at the time of the filing of the Perfecting Financing Statements, hereinafter defined, among the financing statement records of _____ (the "Filing Offices") in order that any security interest in such property granted pursuant to Article 9 of the Maryland Uniform Commercial Code be perfected at such time by filing,*

upon the due filing in each of the Filing Offices of a financing statement, duly completed and executed, in the form attached hereto as Exhibit _____ (collectively the "Perfecting Financing Statements"), the security interests in such property created under the Loan Documents will have been perfected and will have priority, at the time of such filing of the Perfecting Financing Statements, over any other security interests in such property perfected by filing at such time [except for the security interests publicized by some or all of the Reported Financing Statements].

Discussion:

a. Liens on Real Property

The availability of real property title insurance obviates legal opinions concerning the due recordation or priority of liens on real property created in commercial transactions. The grantee or beneficiary of the real property lien may elect to purchase, or to require that another party to the transaction purchase for its benefit, title insurance insuring the validity and priority of the lien. Further, a lawyer should not issue a legal opinion concerning the validity and priority of a real property lien which relies entirely upon a title insurance commitment or policy issued to insure the lien. Such an opinion is not, in reality, a legal opinion at all and adds no additional value or protection to the recipient of the opinion beyond the title insurance documentation.

b. Liens on Personal Property

There is no consistent practice relating to requiring or giving legal opinions concerning the perfection or priority of security interests or other liens on personal property created in commercial transactions. In practice, whether such opinions are given is determined by the parties and lawyers involved on a transaction-by-transaction basis. Such opinions should not, as a general rule, be required or issued in all commercial transactions. Therefore, the opinion language appearing above should be considered optional and should not be considered a standard part of an opinion given in a commercial transaction.

In order to issue a broad opinion on the perfection and priority of a security interest in personal property, particularly if the security interest covers all or most of the assets of a commercial debtor, a lawyer must expend an extraordinary amount of time, at the client's expense, in preparing to give such an opinion. The lawyer must investigate and evaluate the following factors: the nature and extent of the debtor's rights in all of the collateral; the availability of, and the secured party's compliance or intended compliance with, means of perfection; the availability of means and facts necessary to determine the existence and relative priority of other security interests in the collateral; and the potential impact of security interests or other liens upon the collateral which may be granted or arise in the future. Because of the myriad of potentially applicable federal and state statutes and rules of law, in addition to the Uniform Commercial Code, such an investigation and evaluation typically results in the lawyer's having to include in the opinion letter numerous qualifications and assumptions relating to facts and circumstances about which the lawyer is not in a position to know or which relate to possible future events. Also, these assumptions and qualifications typically are, in effect, simply restatements of applicable or potentially applicable rules of law which might have an impact upon perfection or priority. The legal opinion which is the end result of these processes is usually no more valuable to the secured party than a more narrowed opinion such as the sample opinion paragraph appearing above.

Legal opinion letters in commercial transactions typically include an opinion that the transaction documents are valid, binding, and enforceable.[82] An opinion that the documents creating liens on real or personal property are valid, binding, and enforceable necessarily comprehends an opinion that those conditions have been satisfied that are necessary under applicable law in order for the liens to come into legal existence and to be binding between the parties. This is true even if the opinion letter expressly disclaims any opinion concerning the perfection or priority of the liens. Such an opinion does not, however, comprehend or imply an opinion concerning the perfection or priority of the liens. Conversely, an opinion that liens are perfected does subsume an opinion that the liens are valid, binding, and enforceable.

An opinion that documents creating liens or security interests on real or personal property are enforceable, or an opinion opining to the perfection or priority of liens or security interests on real or personal property, may imply or subsume an opinion concerning the debtor's title to the property. Therefore, the lawyer giving such an opinion should either assume in the

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[82] *See supra* Section D.4, "Authorization, Execution, Validity, and Enforceability."

opinion letter that the debtor has title to the property or include a specific qualification in the opinion letter that he is not opining to the debtor's title to the property.

(i) Perfection Of Liens On Personal Property

In any transaction in which an opinion is issued opining to the perfection of a security interest in personal property which is governed by Article 9 of the Maryland Uniform Commercial Code, the opining lawyer must be satisfied, or must be allowed to assume, that (1) all of the personal property is either in the possession of the secured party pursuant to agreement or is reasonably identified in a security agreement signed by the debtor (and which contains a description of the land concerned if the security interest covers crops growing or to be grown or timber to be cut), (2) the secured party has given value (as "value" is defined in Section 1-201 of the Maryland Uniform Commercial Code) in consideration of the security interest, (3) the debtor has rights in all of the personal property, (4) there is no explicit agreement between the secured party and the debtor postponing the time of attachment of the security interest to a point in time after issuance of the opinion, and (5) with respect to each item of the personal property collateral for which one or more means of perfection is prescribed by the Maryland Uniform Commercial Code or by other provisions of law, the security interest in such item of personal property has been perfected in accordance with the means, or one of the means, prescribed.[83]

Conditions (1), (2), (3), and (4) above are the elements which must exist in order for a security interest to come into legal existence or, in the parlance of the Uniform Commercial Code, to "attach" to the personal property collateral. A security interest cannot be perfected until it has attached.[84] These four elements must also exist in order for a security interest to be valid, binding, and enforceable. When condition (5) above is also satisfied, the security interest will be perfected, as well as attached and enforceable.

Condition (1) rarely presents issues for the opining lawyer. Typically, the debtor will sign a security agreement describing the collateral. An issue with regard to the sufficiency of the collateral description is most likely to arise if the collateral description is too general. Collateral descriptions such as "all goods of the debtor" or "all property in which the debtor has or may acquire any interest," without further specification of the particular types or categories of collateral recognized by the Uniform Commercial Code, have been challenged and invalidated on the basis that the description did not reasonably identify the collateral. In any transaction in which there is no written security agreement and satisfaction of condition (1) depends on the secured party's possession of the collateral, the lawyer should expressly assume, and not opine to, the fact of the secured party's possession.

With respect to condition (2), under the Maryland Uniform Commercial Code "value" includes any consideration sufficient to support a contract, including the funding of a

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[83] *See* Md. Com. Law Code Ann. §§9-203 and 9-303 (1975 & Supp. 1988).

[84] *Id*. §9-303 (1975).

loan, a binding commitment to extend credit, or the extension of immediately available credit.[85] If the lawyer cannot independently determine whether value has been given, or will have been given, by the lender prior to issuance of the opinion, the value issue can be resolved, for purposes of the opinion letter, with an express assumption of value in the opinion letter. A sample form of such an assumption is presented below. (See *infra* Section D.7.d(v)). An issue as to the existence of value can also arise in a commercial loan transaction involving the extension by a lender of what is commonly known as a "discretionary line of credit," under which the borrower may request advances from time to time but under which the lender has no obligation to lend--all advances are within the discretion of the lender. If a security interest is created at the inception of such a line of credit and before any advances are made, the line of credit may not qualify as "value" because of the lack of extension of credit and lack of a binding commitment to extend credit. A value issue could also arise if, for example, a debtor executes and delivers a security agreement to a lender in contemplation of a loan which is to be funded subsequently but for which no binding commitment has been issued by the lender. In cases such as these, when the lawyer knows or has reason to believe that value will not have been given by the lender at the time the opinion is issued, it may not be appropriate to assume that value has been given. In these instances, language should be included in the opinion to the effect that the opinion is conditioned upon the giving of value by the lender.

With regard to condition (3), a security interest cannot attach to property and, therefore, a security interest cannot be perfected in property, until the debtor has rights in that property.[86] It is common in commercial transactions for the description of personal property collateral to include "floating liens," that is, security interests in types of property presently owned by the debtor or to be acquired by the debtor in the future. The collateral description might include, for example, "all inventory, accounts, general intangibles, and equipment of the debtor, both now owned and hereafter acquired." A lawyer cannot opine that the security interest in all such collateral has been perfected because the security interest cannot attach to property in which the debtor has not yet acquired any rights.

Because the Maryland Uniform Commercial Code does not define when a debtor has sufficient rights in property so that a security interest can attach, a lawyer who is requested to issue an opinion concerning perfection should not generally be burdened with the responsibility to determine, as of the date of the opinion, the extent or sufficiency of the debtor's interest in each item of property that is subject to the security interest. This is particularly true in transactions involving "blanket security interests," or security interests encumbering virtually all of the debtor's present and future personal property. The sample opinion language appearing above addresses this issue.

In connection with condition (4), the Maryland Uniform Commercial Code expressly contemplates that the secured party and the debtor may agree that a security interest

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[85] *Id*. §1-201(44)(1975 & Supp. 1988).

[86] *Id*. §9-203(1)(c).

which otherwise would have attached will not attach until a later time.[87] A lawyer should not opine to perfection if he is aware of an agreement or provision postponing the time of attachment of the security interest. Although it is not possible for the lawyer to know as a matter of fact whether any such agreement exists apart from the transaction documents reviewed by him, the Committee believes that an assumption that no such agreement exists is implicit and an express assumption should generally not be necessary. If postponement of attachment becomes an issue, an express assumption addressing the point may be included in the opinion letter. A sample form of such an assumption is presented below. (See *infra* Section D.7.d(iii)).

To evaluate condition (5), the lawyer must be able to characterize, or categorize, the collateral in the terminology of Article 9 of the Maryland Uniform Commercial Code in order to determine whether means for perfection are prescribed by the Maryland Uniform Commercial Code or other applicable law and, if so, whether the means prescribed have been satisfied. The existence of means to perfect, and what those means are, depend upon the type of collateral involved.[88] In the case of certain types of collateral (for example, assignments of beneficial interests in trusts or decedents' estates), no means of perfection is prescribed by the Maryland Uniform Commercial Code or other applicable law. A lawyer should not opine that security interests in such collateral are "perfected."

In the case of certain other types of collateral (such as negotiable documents of title and certain instruments), the Maryland Uniform Commercial Code provides that a security interest that attaches to the collateral is automatically perfected for a period of time if certain conditions are met. Because such security interests are deemed "perfected," a lawyer can opine to the perfection of such security interests, subject to the conditions prescribed.

In the case of other types of collateral, the Maryland Uniform Commercial Code prescribes a single or alternative means of perfection, including the filing of financing statements, taking possession of the collateral, notification to third parties in the possession of tangible collateral, and, in the case of securities, effecting a transfer of the securities from the debtor to the secured party in accordance with the provisions of Article 8 of the Maryland Uniform Commercial Code. In some cases, collateral characterization alone is not sufficient and other factors must be considered. For example, a security interest in a promissory note can be perfected, generally, only by taking possession. If the promissory note constitutes part of chattel paper, however, the security interest can be perfected by taking possession or by the filing of financing statements.

In the case of certain types of collateral, means of perfection are prescribed by provisions of Maryland law not included in the Maryland Uniform Commercial Code. For example, the Transportation Article of the Annotated Code of Maryland provides that a security interest in a vehicle for which a certificate of title is required under Maryland law, other than a

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[87] *Id*. §9-203(2).

[88] *See id*. §§9-104, 9-302, 9-304, and 9-305.

security interest created by a manufacturer or dealer who holds the vehicle for sale, must be perfected by following certain filing and certificate of title procedures prescribed by the Maryland Motor Vehicle Administration.[89] The Natural Resources Article of the Annotated Code of Maryland contains similar provisions with respect to boats for which a certificate of title is required.[90]

The Real Property Article of the Annotated Code of Maryland prescribes that a security interest in the rights of a mortgagee under a mortgage must be perfected by filing an assignment of the mortgage in the land records where the mortgage is recorded.[91] This requirement does not apply to deeds of trust.

Federal statutes prescribe the means of perfection for certain types of collateral. Article 9 of the Maryland Uniform Commercial Code provides, in effect, that Article 9 does not apply to the creation or perfection of security interests to the extent that a federal statute governs the rights of the parties.[92] In the case of some types of collateral, such as aircraft subject to the Federal Aviation Act and ships subject to the Federal Ship Mortgage Act, it is clear that security interests must be perfected by the means provided in those Acts.[93]

In the case of patents, federally-registered copyrights, and federally-registered trademarks, there is some confusion as to whether perfection is accomplished pursuant to the Maryland Uniform Commercial Code or pursuant to the provisions of the applicable federal statutes relating to the assignment of rights in that type of property. The confusion has arisen primarily because the federal statutes do not contain sufficiently specific language relating to the perfection of liens or security interests to make clear that those statutes should displace the perfection provisions of Article 9 of the Uniform Commercial Code. In transactions in which collateral of this type is to be perfected, secured party's counsel will typically take steps to comply with the federal statute and also take steps to perfect in accordance with Article 9 of the Uniform Commercial Code.

The foregoing discussion exemplifies some of the complexities associated with determinations of perfection. A thorough understanding of the categorizations of collateral employed by the Maryland Uniform Commercial Code and the perfection rules associated with each is necessary to enable the lawyer to determine whether a security interest in collateral has been perfected. In any case involving the grant of a security interest in property governed by

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[89] Md. Transp. Code Ann. §§13-201 to 13-207 (1987).

[90] Md. Nat. Res. Code Ann. §§8-728 to 8-736 (1983 & Supp. 1988).

[91] Md. Real Prop. Code Ann. §7-101(b) (1988).

[92] Md. Com. Law Code Ann. §9-302(3)(a) (1975 & Supp. 1988).

[93] Federal Aviation Act, 49 U.S.C. §1403 (1981); Federal Ship Mortgage Act, 46 U.S.C. §§921 and 922 (1987).

Article 9 of the Maryland Uniform Commercial Code, in order to render an unqualified perfection opinion, the lawyer must identify and characterize all assets and rights of the debtor which fall within any of the collateral categories, determine the extent and sufficiency of the debtor's rights in each item of collateral, determine whether Article 9 of the Maryland Uniform Commercial Code or other applicable law prescribes one or more means of perfection for that type of collateral, and, if one or more means of perfection is prescribed, determine whether the security interest in such item of collateral has been properly perfected in accordance with the means, or one of the means, prescribed. A lawyer should not opine unqualifiedly to the perfection of a security interest in any item of collateral to the extent he has not, or cannot, make each of these determinations, either legally or factually, with respect to the collateral.

If a security interest subject to the provisions of Article 9 of the Maryland Uniform Commercial Code is granted in only one specific item of personal property or in a limited number of specific items of personal property, it may be a reasonable undertaking for the borrower's lawyer to characterize the collateral for perfection purposes, to determine whether the borrower has sufficient rights in the collateral, and to determine whether the security interest has been properly perfected.

As previously mentioned, however, it is common in commercial transactions, particularly loan transactions, for the borrower to grant the secured party a blanket security interest under a collateral description such as the following:

> All of debtor's present and future equipment, vehicles, fixtures, inventory, materials and supplies, documents of title, accounts, instruments, uncertificated securities, chattel paper, tax refunds, contract rights, general intangibles, goodwill, judgments, causes of action, other rights to the payment of money, interests under trusts, mortgages, deeds of trust, and insurance policies, licenses, patents, copyrights, franchises, trade names, trademarks, and books and records.

In a transaction involving a blanket lien of this sort, it is not reasonable for the debtor's lawyer to be required to determine the existence of any property of the debtor which falls within any of the collateral categories, the nature and sufficiency of the debtor's rights in each item of collateral, whether any means of perfection is prescribed by applicable law, and, if so, whether the security interest has been properly perfected in accordance with such means. Even where a security interest is granted in only one specific item of personal property, the lawyer often will have to rely on certifications from the debtor in order to establish the debtor's ownership of the collateral or to establish the authenticity of documents that delineate the debtor's rights in the collateral.

It is not unusual in transactions involving blanket security interests of this type that the secured party and the lawyer for the secured party have not taken, and do not intend to take, the steps necessary to perfect the security interest in each type or item of collateral. For example, the secured party may be relying, for collateral purposes, only on the debtor's accounts,

inventory, and equipment and will be content simply to file financing statements perfecting its security interest in those assets which may be perfected by filing. Yet the debtor may, for example, be the holder of promissory notes or mortgages or may own motor vehicles, uncertificated securities, or other collateral requiring action for perfection other than the filing of financing statements. In such cases, it is inappropriate to request the lawyer for the debtor to opine that the secured party's security interest in all of the collateral has been properly perfected.

(ii) Priority Of Liens On Personal Property

A priority opinion is an opinion that a lien on property is legally superior to other liens on the property. In the context of security interests in personal property that are governed by Article 9 of the Maryland Uniform Commercial Code, a priority opinion is typically requested only in conjunction with a perfection opinion because, under the Uniform Commercial Code, a perfected security interest generally has priority over unperfected security interests in the same collateral and also has priority over other security interests in the same collateral that are subsequently perfected, unless the subsequently perfected security interest is perfected by virtue of previously filed financing statements.[94] Therefore, to the extent the opining lawyer can determine that the secured party's security interest is perfected and, by analysis of the collateral and review of public records, whether other security interests in the same collateral have been previously perfected or may subsequently be perfected with priority as a result of previously filed financing statements, the lawyer can, subject to certain limitations discussed below, establish the priority of the security interest over unperfected security interests and identify any security interests which must be recited or referred to in the priority opinion as security interests which have, or might have, priority over the security interest as to which the lawyer is opining.

A lawyer should avoid opining on the priority of a security interest for which one or more means of perfection is prescribed in the Maryland Uniform Commercial Code or other provisions of law (a) if the security interest has not been perfected (unless the lawyer expressly assumes in the opinion letter that the perfection steps will be taken) or (b) even if the security interest has been perfected or perfection is assumed, if there is no public record which can be searched and relied upon to determine the existence of previously perfected security interests in the collateral. If the security interest is unperfected, it will be inferior not only to all previously perfected security interests in the same collateral, but also to all unperfected security interests which have previously attached to the collateral and to all judicial liens on the collateral arising prior to perfection.[95] (An unperfected security interest will also be inferior to unperfected security interests which are subsequently perfected, even if such security interests also attached subsequently,[96] although opinion letters typically do not speak to events occurring subsequent to

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[94] Md. Com. Law Code Ann. §9-312(5)(a) (1975 & Supp. 1988). See also *infra* Section D.7.e (iii) for a discussion of circumstances where priority may be lost to subsequently filed financing statements.

[95] *Id*. §§9-312(5) and 9-301(1)(b).

[96] *Id*. §9-312(5)(a).

issuance of the opinion letter.) Therefore, a meaningful priority opinion cannot be given with respect to an unperfected security interest, especially since a lawyer cannot reasonably be expected to opine that the debtor has not previously granted security interests in the collateral.

A meaningful priority opinion cannot be given with respect to a perfected security interest if the existence of previously perfected security interests or other prior liens cannot be determined by the lawyer by a review of public records, such as financing statement records, motor vehicle records, federal patent records, federal tax lien records,[97] and the like. In such cases, the lawyer simply cannot independently determine whether prior perfected security interests exist. In the case, however, of security interests in collateral that can only be perfected by taking possession of the collateral, although there would be no public records which would disclose the existence of previously perfected security interests, the lawyer may be able to render a limited priority opinion if it can be established (or appropriately assumed) that the secured party has exclusive possession of the collateral and that the collateral is not subject to any temporarily perfected non-possessory security interests that could retain priority. Such non-possessory security interests could include, for example, security interests in collateral that constitutes proceeds of other collateral,[98] security interests in collateral that has been temporarily surrendered to the debtor by a prior secured party,[99] and temporarily perfected security interests in instruments and securities.[100]

Even in the case of perfected security interests in collateral with respect to which the existence of previously perfected security interests can be determined by a review of public records, other security interests and liens upon the collateral which would not be disclosed in such public records can take priority. (Of course, such security interests and liens would also take priority over unperfected security interests.) For example, a security interest of another secured party in property of the debtor which has been perfected by possession will have priority over a security interest in the same collateral which is subsequently perfected by filing or other available means.[101] The liens of artisans in possession of goods of the debtor for the costs of repairs or other work performed by the artisan will have priority over any previously or subsequently perfected security interests in the goods.[102] A perfected security interest of another secured party in negotiable documents of title covering goods of the debtor which are in the possession of the issuer of the document of title will have priority as to the goods over any

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[97] *See generally* I.R.C. §6321 *et seq*. (1986); Md. Real Prop. Code Ann. §3-401 *et seq*. (1988 & Supp. 1988).

[98] *See* Md. Com. Law Code Ann. §9-306(3) (1975 & Supp. 1988).

[99] *See, e.g., id*. §§9-304(5) and 8-321(4).

[100] *See, e.g., id*. §§9-304(4) and 8-321(2).

[101] *Id*. §9-312(5)(a).

[102] *Id*. §9-310 (1975).

security interest otherwise perfected in the goods while in the possession of the issuer of the document of title.[103] A security interest of another secured party in negotiable documents of title of the debtor or instruments of the debtor (except certificated securities) is automatically perfected without taking possession of the documents or instruments for 21 days without filing or possession to the extent of new value given and will have priority over a subsequently perfected security interest in the same collateral.[104]

In addition to the examples cited above, there are other instances of security interests and liens that would not be disclosed by public records and that might have priority over a perfected security interest. It is, however, neither useful nor economical for debtor's counsel to research, identify, and describe every possible such instance in a priority opinion. Even if the opining lawyer is very familiar with this area of the law, such an undertaking is very time-consuming, and the priority opinion itself would simply restate potentially applicable rules of law. A lawyer generally should not opine on matters that so depend upon facts not readily ascertainable.

The sample opinion language above resolves this issue by limiting the scope of the priority opinion to security interests which would be disclosed by a search of financing statement records. The sample opinion language also addresses other issues raised by perfection and priority opinions, which are discussed in more detail in the commentary below. Assumptions and qualifications relating to the sample opinion are also discussed below.

c. Commentary on Sample Opinion Language

The sample perfection and priority opinion language appearing above assumes, as is usually the case, that the collateral upon which the secured party is primarily relying is collateral in which a security interest may be perfected by filing financing statements. A similar opinion can be designed with respect to other types of collateral in which security interests may be perfected by other means. The sample opinion also assumes that the debtor's name is "ABC Corporation."

By limiting the collateral addressed by the sample opinion language to "property in which the Borrower currently has rights within the meaning of Section 9-203(1)(c) of the Maryland Uniform Commercial Code," the sample opinion language avoids opining to the perfection or priority of security interests in later-acquired property of the borrower or in later-generated proceeds of the collateral, which is a technically difficult aspect of the Uniform Commercial Code. This limitation also relieves the opining lawyer of responsibility for determining whether the borrower has sufficient rights in existing property for a security interest to attach to such property. If such a limitation is not included in an opinion, an assumption should be made that the debtor has rights in the collateral.

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[103] *Id*. §9-304(2) (1975 & Supp. 1988).

[104] *Id*. §9-304(4).

The sample opinion language limits the collateral addressed to property "in which a security interest subject to Article 9 of the Maryland Uniform Commercial Code is granted under the Loan Documents which may be perfected by the filing of financing statements," in order to avoid opining to the "perfection" of any security interests which are not subject to the perfection rules of the Maryland Uniform Commercial Code or which cannot be perfected by the filing of financing statements.

By limiting the collateral addressed by the sample opinion language to property with respect to which "one or more financing statements naming 'ABC Corporation' as debtor are required to be on file at the time of the filing of the Perfecting Financing Statements, hereinafter defined, among the financing statement records of _____ (the 'Filing Offices') in order that any security interest in such property granted pursuant to Article 9 of the Maryland Uniform Commercial Code be perfected at such time by filing," the sample opinion language affirmatively opines that the financing statements, if and when completed and executed and filed in the "Filing Offices," properly perfect the security interests.

The sample opinion specifically identifies the name of the debtor ("ABC Corporation") to avoid issues that might arise with respect to the opinion if a prior secured party filed a financing statement under an incorrect name of the debtor or if, unbeknownst to the opining lawyer, the debtor's name was changed in the past or the debtor is the survivor of a prior merger. In any of those events, there could be financing statements on file perfecting security interests in property of the debtor which would not be disclosed by financing statement searches under the correct name of the debtor or of the current name of the debtor. If the opining lawyer is aware that the debtor has changed its name or is the survivor of a merger, the opining lawyer should cause financing statement searches also to be conducted in appropriate jurisdictions under the debtor's prior name or names or under the name or names of the other constituent corporations in the merger.

In an actual transaction, the blank in the sample opinion paragraph relating to the Filing Offices would be replaced with the names of the record offices searched, which would also be the offices in which the secured party in the transaction is to file its financing statements perfecting its security interest (defined subsequently in the sample opinion paragraph as the "Perfecting Financing Statements"). For example, if the debtor maintains a place of business only in Baltimore City, then under the financing statement filing rules of the Maryland Uniform Commercial Code, the secured party should file a financing statement in the financing statement records of the Maryland State Department of Assessments and Taxation and the Circuit Court for Baltimore City (and, if the collateral includes fixtures, in the land records of the county [or Baltimore City] in which the real property is located).[105] Searches for financing statements against the debtor would be conducted in these offices, and the blank in the opinion would be replaced with "the Maryland State Department of Assessments and Taxation and the Circuit

[105] *Id*. §9-401(1)(c).

Court for Baltimore City" (and, if the collateral includes fixtures situate on real property located in Baltimore City, followed by the language "and among the land records of Baltimore City").

As indicated by the qualifying language "upon the due filing in each of the Filing Offices of a financing statement, duly completed and executed, in the form attached hereto as Exhibit ____," the sample opinion assumes, as is often the case, that the opinion will be issued prior to the filing of the secured party's perfecting financing statements. In such cases, the opinion must depend upon the due filing of the perfecting financing statements. Because the opining lawyer will often not be involved in the filing process, it is preferable for the lawyer to attach to the opinion letter, as an exhibit or exhibits, forms of the perfecting financing statements which he knows to be sufficient. This procedure will avoid any implication that the lawyer has opined to the sufficiency of any financing statements that he has not reviewed.[106] In cases in which the secured party's perfecting financing statements are to be filed subsequently to issuance of the opinion, the perfection and priority opinion should expressly speak only as of the time of the filing of the perfecting financing statements, as indicated in the sample opinion language.

Because the priority created by a filed financing statement can be lost in certain cases to a subsequently filed financing statement, the sample opinion states that the security interests created under the loan documents will have priority "at the time of such filing." This language, together with the qualification set forth at Section D.7.e (iii) *infra* is intended to exclude from the sample opinion any opinion regarding the effect of subsequently filed financing statements.

Finally, the bracketed language appearing at the end of the sample opinion is to indicate that the opining lawyer should identify those existing financing statements on file against the debtor in the Filing Offices (referred to as the "Reported Financing Statements") that publicize security interests in collateral that might take priority over the security interest as to which the lawyer is opining. A filed financing statement does not necessarily indicate the existence of a perfected security interest; no security agreement may have been executed yet, the secured debt may not have been incurred yet, or the secured debt may have been paid. Unless the lawyer causes a conflicting financing statement to be terminated or unless he is permitted to rely upon a representation or assumption that a filed financing statement secures no debt or otherwise perfects no security interest, the lawyer should assume that the conflicting financing statement does perfect a security interest, even if it appears that the prior secured party may not have filed in all of the offices necessary to perfect its security interest.

d. Assumptions

A perfection and priority opinion of the type reflected in the sample opinion language above requires that the lawyer set forth certain assumptions in the opinion letter. The following are sample formulations of certain basic assumptions that may be appropriate. The circumstances of the transaction may indicate that other assumptions are also appropriate.

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[106] See generally *id*. §9-402 regarding the formal requisites of financing statements.

(i) Filing Locations

The opining lawyer must assume the facts that are necessary to determine in what filing offices the secured party's perfecting financing statements should be filed and to determine what financing statement filing records must be searched to identify prior perfected security interests. Those facts include the location of goods constituting collateral, the location of the debtor's chief executive office (if the debtor has a place of business in more than one jurisdiction), and the location of the debtor's places of business. Appearing below is a sample form of such an assumption which may be included in an opinion letter:

> *We have assumed that (i) all tangible personal property collateral of the Borrower in which a security interest is granted under the Loan Documents which can be perfected by the filing of one or more financing statements (other than goods of a type normally used in more than one jurisdiction) is located in Maryland, (ii) the Borrower's chief executive office is located in Maryland, and (iii) the Borrower has a place of business in the following Maryland counties (include Baltimore City if applicable):* _____.

(ii) Prior Filings

In order to render a priority opinion, the lawyer must research, or engage a search company to research, the existence of financing statements previously filed against the debtor in the appropriate filing offices. Typically, a search company is engaged to conduct the search, and an assumption such as the following is included in the opinion letter:

> *We have assumed that the financing statements (the "Reported Financing Statements"), copies of which are contained in the financing statement reports, copies of which reports are attached hereto as composite Exhibit ___, constitute the only financing statements on file against the Borrower among the financing statement records identified in such reports as of the date of this opinion and as of the date the Perfecting Financing Statements are duly filed.*

(iii) Time of Attachment

Because the Maryland Uniform Commercial Code expressly provides that the secured party and the debtor may agree that a security interest that otherwise would have attached will not attach until a later time, and because it is not possible for the lawyer to know as a matter of fact whether any such agreement has been entered into, the opining lawyer may consider including an express assumption such as the following:

We have assumed that there is no agreement between the Secured Party and the Borrower postponing the time of attachment of any security interest granted under the Loan Documents.

(iv) Description of Collateral

As discussed previously, the validity or perfection of a security interest may be called into question on the basis that the description of collateral contained in the security agreement or the related financing statements does not sufficiently identify the collateral.[107] The following sample assumption addresses an adequate description problem, and it may be narrowed in order to address a particular type or category of collateral contained in a collateral description:

We have assumed that all descriptions of property in which a security interest subject to the Maryland Uniform Commercial Code is created under the Loan Documents, as contained in the Loan Documents and in all Perfecting Financing Statements, reasonably identify the property described or intended to be described.

(v) Value

In any case in which the lawyer is unable to satisfy himself that value has been given to the debtor in consideration of the security interest, the lawyer should expressly assume in the opinion letter that value has been given (unless the lawyer knows that value has not been given). The following sample assumption addresses the value issue:

We have assumed that value has been given for all security interests and liens created under the Loan Documents.

e. Qualifications

A perfection and priority opinion of the type reflected in the sample opinion language above requires that the lawyer include certain qualifications in the opinion letter, in addition to those qualifications incorporated in the sample opinion language. The circumstances of the transaction may indicate that other qualifications are appropriate.

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[107] *See id*. §§9-203(1)(a), 9-402(1), and 9-110.

(i) Title, Other Liens

Typically, an opining lawyer is not and should not be expected to opine to the debtor's title to property. In the case of real property, as mentioned previously, the availability of real property title insurance obviates such an opinion. In the case of personal property, determining whether the debtor has title, or good title, is very difficult and time consuming, if not impossible, especially where the personal property involved is all or most of the debtor's personal property assets. The sample qualification set forth below may be used to exclude any implication of an opinion concerning title to property in an opinion letter that opines to the enforceability of documents that grant security interests or liens on property or that opines to the perfection or priority of security interests. The sample qualification below is also intended to make clear that, by opining to the enforceability of documents or to the perfection and priority of certain security interests in certain property, the opinion letter does not imply any opinion concerning the validity, perfection, or priority of any other security interests or liens.

> *We express no opinion with respect to title to any property, nor do we express any opinion with respect to the existence of encumbrances upon any property or the attachment, validity, perfection, or priority of any security interests or liens purported to be created under the Loan Documents, except as set forth in paragraphs _____ of this opinion.*

(ii) Future Advances

In a case in which the lawyer is opining to the enforceability of documents or to the perfection or priority of security interests, and the documents contain a grant of a security interest as security for all present and future obligations and liabilities of the debtor to the secured party (commonly called a "dragnet debt clause"), it is appropriate for the lawyer to include a qualification such as the one below in order to avoid opining, in effect, that each and every present and future obligation and liability of the debtor to the secured party will be secured pursuant to the dragnet debt clause. Courts have restricted the scope of application of such dragnet debt clauses on the basis of the parties' perceived probable intent, notwithstanding the future advances provisions of Section 9-204(3) of the Uniform Commercial Code.[108]

> *We express no opinion with respect to any security interest created under the Loan Documents which purports to secure any present or future obligations or liabilities of the Borrower to the Lender*

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[108] An extreme example of an instance in which a court might limit the scope of a dragnet debt clause so as to exclude a liability of the debtor to the secured party that would otherwise be included would be an instance in which, sometime after execution and delivery of the documents, an employee of the debtor negligently rams the secured party's local branch office with his automobile while discharging the duties of his employment, resulting in respondeat superior liability of the debtor to the secured party.

(other than the obligations and liabilities of the Borrower to the Lender created or arising under the Loan Documents) that are determined, in the case of obligations or liabilities of the Borrower to the Lender created in the future, not to constitute "future advances" within the meaning of Section 9-204(3) of the Maryland Uniform Commercial Code, are determined not to have been within the contemplation of the Borrower and the Lender at the time the Loan Documents were executed, or are determined not to be of the same character or class as the obligations and liabilities of the Borrower to the Lender created or arising under the Loan Documents.

(iii) Subsequently Filed Financing Statements

Under certain circumstances, a financing statement filed subsequently to the financing statement in favor of the lender can give another secured party priority. For example, a purchase money security interest could take priority over a previously perfected security interest pursuant to Section 9-312(3) and (4) of the Maryland Uniform Commercial Code. Similarly, under Section 9-103 of the Maryland Uniform Commercial Code, if a security interest was previously perfected under the laws of another jurisdiction, then that security interest would obtain priority over a security interest perfected by a financing statement filed in Maryland if the security interest perfected under the law of the other jurisdiction was re-perfected in Maryland within four months after the collateral was brought into Maryland or the borrower changed its location to Maryland. To exclude these and other potential issues, it is recommended that the following qualification be added:

We express no opinion with respect to the effect of subsequently filed financing statements on the priority of any security interest perfected by the filing of the Perfecting Financing Statements.

(iv) Status of Filing Records

Unfortunately, the financing statement records at the SDAT and the various clerks' offices are not always accurate and current, and financing statements are not always correctly indexed and filed. Therefore, it may be appropriate for the opining lawyer to assume in his opinion that all public records reviewed are accurate and complete or to add an express qualification such as the following:

The undersigned neither assumes nor accepts any liability for any inaccuracy herein due to the state of such records absent proof of a failure to conduct such search in a careful and prudent manner.

8. Consents and Approvals

Sample Opinion Language:

Based solely upon the certificates of the Borrower and our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Borrower of the Loan Documents, or if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken.

Discussion:

a. Commentary on Purpose and Sample Language

In commercial loan transactions, both secured and unsecured, the lender frequently asks the borrower's lawyer for an opinion to the effect that the transaction contemplated by the loan documents does not require the consent or approval of any governmental entity.[109] The purpose of this opinion is to give the lender some assurance that there is no required governmental approval or consent which the borrower has not obtained that could cause a legal impediment to the execution and delivery of the loan documents. The lender's concern is that the lack of some required consent, approval, or filing could make the entire transaction either void or voidable.[110]

The Committee concluded that it is not appropriate for a lawyer to give an opinion that encompasses all consents or approvals to which a borrower's property or business may be subject. The sample opinion language covers only governmental consents and approvals needed to enter into the loan documents, and does not cover consents and approvals necessary to run the borrower's business or operate the property used as security for the loan, which are often called "activity approvals."

The Committee determined that by rendering the sample opinion above, the opining lawyer is not giving an opinion concerning governmental consents or approvals necessary to operate the borrower's property or business. Although the Committee concluded that it is unnecessary to do so, if the opining lawyer desires to include an express statement in his opinion to this effect, the following language may be added at the end of the "consents and approvals" paragraph in the opinion letter:

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[109] Consents and approvals relating to (i) authorization, execution, and validity; (ii) zoning and subdivision approval; and (iii) environmental matters are treated elsewhere in this Report.

[110] Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *supra* note 1, at 1920.

This opinion does not address any consent, approval, or authorization necessary for the ongoing operation of the [Security or the Borrower's business].

This exclusion, whether express or implied, would exclude from the opinion such matters as the issuance of all permits necessary to operate borrower's property or business, the issuance of all necessary permits needed to commence construction under a construction loan, as well as zoning, subdivision, and environmental compliance. If an opinion on any of these matters is required, it should be specifically requested and addressed in the opinion, if appropriate.

One potential area of confusion with regard to the opinion is the meaning of the word "execution." In certain usages, the word "execution" encompasses the concept of performance. It is the view of the Committee that, for purposes of opinions discussed in this Report, the word "execution" should be deemed to mean "the act of signing, sealing, and delivering a legal instrument or giving it the form required to make it valid" and should not include the "performance" of the loan documents.

b. Due Diligence

The Committee recommends that certain threshold questions be posed to the borrower by its lawyer in order to determine whether there are any regulatory concerns. These questions are as follows:

(i) Is the borrower subject to any governmental programs which require governmental consent prior to entering into commercial loan transactions?

(ii) Is the borrower subject to any court orders or decrees?

(iii) Does the borrower operate in a regulated industry?

An affirmative answer to any of these questions should alert the lawyer to the need for further research into the borrower's business.

If the borrower is subject to a governmental program requiring consent, the appropriate statutes should be reviewed in order to determine if specific approval is required and whether it has been obtained. If the borrower is subject to a court order or decree, including a bankruptcy order for relief, court approval may be required before the loan transaction can be completed.

If the borrower is engaged in a regulated industry, specific regulatory approval may be required for the borrower to enter into the transaction. Examples of this include a regulated utility which may require Public Service Commission approval to secure financing and a company issuing securities requiring approval of or filing with the Securities Exchange Commission or state securities commissioners.

The Committee recommends that the opining lawyer obtain from his client certificates that cover the above questions and that he base his opinion on such certificates. In the case of an interstate transaction, Maryland counsel may deem it necessary to rely on an opinion from out-of-state counsel regarding the lack of necessity for regulatory approval from out-of-state authorities.

The consents and approvals opinion should be specifically limited to consents and approvals from governmental authorities which are necessary for the borrower to execute and deliver the loan documents. A proper due diligence examination should be performed, using the threshold questions set forth in this section, in order to rule out questions of regulatory approval that may not be obvious on their face. Lawyers should, however, avoid expanding this opinion to encompass matters which constitute approval of the activity the borrower plans to undertake rather than the approval of the loan transaction itself.

Activity approvals are more properly dealt with by specific rather than general opinion language.[111] When a borrower is subject to particular regulatory authorities affecting its operations, a lender may consider requesting assurances (in the form of an opinion or other evidence) that such operations have received approvals from such authorities.

[111] For further discussion of certain types of activity approvals see Section D.9, "Zoning," and Section D.10, "Environmental Matters," *infra*.

9. Zoning

Sample Opinion Language (Alternative language is indicated in brackets):

We have received a letter from the zoning office of _____ City/County, Maryland (the "Zoning Letter"), a copy of which is attached hereto and stating that the subject property is shown on the zoning maps of _____ City/County as being located in a _____ zone. [We have examined the zoning maps of _____ City/County, Maryland, revised and current through _____, 19__ (the "Zoning Maps"), and find that the subject property as shown on the survey dated _____, 19__ and prepared by _____, a certified surveyor (the "Surveyor"), and also identified thereon as _____ City/County parcel number _____, is shown on such maps as being located in a _____ zone.] According to Section _____ of the zoning ordinance of _____ City/County, "business and professional offices" are a permitted use in such zone. The Borrower has represented to us that [it intends to construct] [the subject property is presently improved by] an office building for sole use as business and professional offices upon the subject property. Accordingly, in reliance solely upon the Zoning Letter [based upon our review of the Zoning Maps] and the zoning ordinance of _____ City/County, Maryland, we are of the opinion that [the construction of an office building upon the subject property constitutes] [the improvements which presently exist upon the subject property constitute] a permitted use of such property, subject to compliance with the other requirements of the zoning ordinance and the subject property's [proposed] [continued] exclusive use for business and professional offices. No further subdivision is necessary for the conveyance of the subject property because the property [is a properly subdivided parcel] [is not subject to subdivision requirements since _____]. [Based upon and in sole reliance upon the certification of the Surveyor,] the subject property is carried on the tax rolls as a separate lot or lots.

Discussion:

a. Commentary on Purpose and Sample Language

In commercial transactions involving real property, the recipient of the legal opinion, whether a purchaser of the property or a lender to the property owner, may want assurance that the property and the improvements which exist or are to be constructed upon it have been designed and exist or will exist in accordance with all applicable zoning, subdivision, and other land use laws and regulations. Frequently, this assurance is sought in part from the lawyer representing the purchaser or developer of the property, who is asked to render an opinion regarding compliance with "zoning" laws.

Technically, however, the word "zoning" refers to only one of three parts of land use planning, the other two being the master plan and the subdivision regulations.[112] By contrast, in popular commercial usage the term is often used loosely to connote all aspects of land use. As a result, in the context of the legal opinion given in a commercial transaction, the opining lawyer

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[112] *See Board of County Comm'rs of Cecil County v. Gaster*, 285 Md. 233, 246, 401 A.2d 666, 672 (1979).

and the recipient of the opinion may have very different understandings of the word "zoning." The recipient may intend that an opinion dealing with "zoning" provide comfort in all areas of project planning, design, and construction, while the opining lawyer may intend to speak only to the question of whether the project and its intended use, in general terms, are permitted on the property. Similarly, if an opinion is requested with respect to "land use," the recipient may intend that such opinion cover environmental as well as zoning laws.

To avoid this problem, the opining lawyer should make the limits of the opinion clear, either by refraining from use of all-encompassing terms like "zoning" or "land use" and specifying what his opinion covers; or, if such terms are used, by carefully stating all assumptions he has made, reliances on the work or representations of others, and other qualifications to the opinion.

The opining lawyer should not be required to be an additional warrantor of facts; however, particularly in the area of zoning, the assurances which the recipient of the opinion appropriately desires will involve inseparably mixed questions of law and fact. To the extent that the existence of certain facts is necessary to the opinion to be given, those facts should be stated in the opinion as assumptions. Where appropriate, certificates from appropriate professionals (*e.g.*, architect, engineer, or surveyor) or other persons with accurate knowledge of such facts should be cited as the source of such facts. Both the scope and the degree of the assurances requested by the recipient should be considered carefully during the initial stages of the commercial transaction (*e.g.*, when negotiating the commitment letter), in light of the size and complexity of the transaction, so that the opining lawyer and his client are not required to undertake work and incur expenses which are unduly burdensome in the context of the particular transaction.

The sample opinion language set forth above is appropriate for use in a typical loan transaction secured by real property and involving no special or unusual land use concerns.

In rendering the first opinion included in the sample opinion language above (that the construction or existence of an office building and its use solely for business and professional offices will constitute a permitted use of such property), the lawyer is opining only that office buildings, in the generic sense, may be constructed in such a zone. This opinion does not address compliance with other "zoning" requirements, such as bulk regulations, height and floor area ratio limitations, parking, and sign limitations. If the opining lawyer is relying upon the work of any other person, such as a statement from the local zoning authority, the lawyer should expressly state this reliance. Each recipient of the opinion is presumed to be aware that information given in error by a local government in such zoning information letters is not likely later to estop the local government.[113]

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[113] Although government entities are not exempt from application of the doctrine of equitable estoppel in Maryland, the Maryland Court of Appeals has applied the doctrine more narrowly to governmental entities than to natural persons or business entities. *See Inlet Assocs. v. Assateague House Condominium Ass'n*, 313 Md. 413, 435, 545 A.2d 1296, 1307 (1988) (citing *Permanent Fin. Corp. v. Montgomery County*, 308 Md. 239, 249, 518 A.2d 123, 128 (1986)). *Compare Inlet Assocs.*, 313 Md. at 436-37, 545 A.2d at 1308

In opining that no further subdivision is necessary for the conveyance of the subject property, the lawyer is implicitly stating either that the property is located on a recorded plat of subdivision, that the present boundaries of the property predate the subdivision requirements of the local jurisdiction, or that subdivision has already been accomplished as a matter of law. To give this opinion, the lawyer will need either to obtain and review a copy of the record plat of or affecting the subdivision, to determine that the description of the property contained in the deed to his client predates the establishment of the local subdivision ordinance, or to otherwise ascertain the facts which accomplish the subdivision. It should be noted that additional levels of consideration regarding subdivision may be necessary. For example, in Montgomery County properties not affirmatively approved since 1982 may be subject to additional review before development will be permitted. It may therefore be appropriate for an interested person to obtain an opinion or other evidence of such approval.

In order to give the required comfort that the property is carried on the tax rolls as a separate lot or lots, a check should be made of the identification of the property on the real property tax bill with the description of the property in the local tax assessment office. This function can often be undertaken by the title company involved in a transaction.

The Committee recognizes that the sample opinion language above regarding subdivision and the status of the tax rolls may be viewed as statements of fact rather than legal opinions. However, the Committee also recognizes the need for comfort in these areas. In a particular transaction, it may be more appropriate for the project architect, engineer, surveyor, or other professional to answer these questions. If not, the opining lawyer can, it is believed, obtain this information and so render these opinions without undue difficulty. The lawyer should be aware that the standard American Land Title Association (ALTA) title insurance policy does not cover matters of zoning or subdivision, unless such matters are addressed by an affirmative endorsement.

In some transactions, opinions such as the following are requested (hereinafter referred to as the "Omnibus Zoning Opinion"):

> *The improvements and the occupancy and use thereof comply fully with applicable zoning, subdivision, and other land use laws [other than environmental laws], ordinances, rules, and regulations. The plans, drawings, and specifications for the project have been submitted to the appropriate public authorities in connection with application for all authorizations, approvals, and permits (federal, state, and local) necessary for the construction of the project in*

(holding that a municipality was not bound by the erroneous actions of its city council, which acted by resolution "in clear violation of a fundamental charter requirement that it act by ordinance") *with Permanent Fin. Corp.*, 308 Md. at 251-53, 518 A.2d at 129-30 (concluding that a county would be estopped from rescinding a building permit that had been issued by county officials on the basis of their reasonable, consistently applied, yet incorrect interpretation of an ambiguous regulation).

accordance with said drawings and specifications; and all such permits have been issued by the appropriate public authority.

The Committee does not endorse a broad zoning opinion such as the Omnibus Zoning Opinion.

Unlike the sample "zoning" opinion language set forth at the beginning of this section of the Report, the Omnibus Zoning Opinion set forth above may be understood to cover all aspects of "zoning" law, because it purports to opine as to "applicable zoning, subdivision, and other land use laws." Lawyers lack the expertise to render the Omnibus Zoning Opinion without expressly relying upon a statement of facts supplied by others (*e.g.*, architects, engineers, or surveyors) with regard to those aspects of zoning law which pertain to design and construction. Additionally, unless the bracketed words are included, the opinion would cover all environmental laws. The Committee concluded that the recipient of the opinion will receive greater comfort, and often at less expense, if those portions of the opinion relating to technical matters (*e.g*., compliance with local building codes and those aspects of zoning law that deal with project design and construction) are given directly by the architect or engineer who prepared the plans and specifications and followed them through the applicable approval process. The Committee also questions whether a lawyer's opinion which is broad enough to encompass these technical matters, but which expressly relies upon the opinion of another professional (*e.g.*, an architect, engineer, or surveyor) with respect to such technical matters, adds anything of value to the transaction.

Further, lawyers should pay particular attention to assure that Omnibus Zoning Opinions are not, in substance, included in other typical opinion language which is less direct in that it may be obscured with other opinion provisions directed at corporate or partnership authority or regulated industry issues. Examples are:

(A) *. . . the performance by Borrower of each of its obligations under the Loan Documents will not violate any applicable laws or regulations of any governmental authority . . . .*

or

(B) *. . . no consent or approval of, filing with, or other action by any governmental authority is required in connection with the execution and delivery of and performance by Borrower of its obligations under the Loan Documents . . . .*

Use of the word "performance" in these examples may expand the scope of the opinion beyond the question of the borrower's basic authority to enter into and carry out the transaction at hand. Frequently, transaction documents contemplate or require the construction of improvements or the use of existing improvements for the conduct of a business. Because such "performance" may generate the need for a permit or license which has not yet been obtained and because contemplated or actual construction or operations may violate some applicable zoning law or regulation, an opinion in this form should not be given by a lawyer.

Lawyers have at times sought to soften or limit the scope of an “all laws” or “all permits” statement by a general “knowledge” qualification. Phrases such as “to my knowledge,” “to the best of my knowledge,” or “to the best of my knowledge and belief,” and the like, have been used for this purpose. A general “knowledge” qualification, in and of itself, does not resolve the difficulties presented by the “all laws” or “all permits” language. The Committee concluded that knowledge qualifications are appropriate in connection with statements of fact only; they should not be used to define the scope of the opining lawyer's knowledge of the law. When used with broad opinion language such as the “all laws” or “all permits” opinion, the knowledge qualification at best leaves ambiguity as to the limits of the lawyer's responsibility. The lawyer might be accountable if, having given an “all permits” opinion generally qualified by “knowledge,” it is later determined that the lawyer was aware of facts which would indicate that a permit was required, but the lawyer's experience and knowledge of the law were not sufficient to lead him to that conclusion. The Committee is of the view that the opining lawyer should not give an omnibus opinion on compliance with “all laws,” “all permits,” or “all consents,” even if the opinion is modified with a “knowledge” qualifier.

In any case, the scope of the zoning opinion should be addressed and agreed upon in the early stages of the transaction. The opining lawyer and his client should discuss with the recipient of the opinion and its lawyer the particular areas in which the recipient needs comfort and any possible alternative means of providing some comfort, such as a certification from the project architect or engineer, evidence afforded by permits and certificates from the local zoning, planning and/or building authorities, or affirmative title insurance endorsements which do not require supporting opinions from a lawyer.

The Committee recognizes that unusual situations may arise where comfort on zoning matters cannot feasibly be obtained from any other sources, as in the case of the refinancing of an existing building where the architect or engineer involved in the construction is either unable or unwilling to give an opinion, or the case of a small construction project on which no architect or engineer has been employed. In such an event, if the lawyer is required to give a broad zoning opinion, he should obtain an explanation of the facts from the best available source -- usually the client -- and review those facts in light of the relevant zoning ordinances. The lawyer should expressly state all such facts upon which he is relying, and he should state which of the facts are based solely on certificates prepared for the transaction. If a broad zoning opinion is given, these facts would include representations, based upon the best existing records, of “zoning” matters such as parking and floor area ratios, height and density requirements, and the like. The lawyer should also expressly state any parts of the relevant zoning ordinance with respect to which the lawyer is not rendering an opinion.

In summary, opinions concerning zoning and other land use matters should be tailored closely to the specifics of the commercial transaction in which they are given. Certain areas of zoning and land use law and regulation may, or may not, be of real concern to the recipient of the opinion, depending upon the nature, size, and complexity of the transaction; the difficulty of performing the work necessary to render an opinion with respect to such matters; and the existence of other collateral or guaranties. In any commercial transaction in which an opinion dealing with zoning law is to be given, the opining lawyer should take care to define any

general terms used in the opinion, such as "zoning" or "land use"; to state expressly any areas of zoning or land use law and regulation with respect to which the lawyer does not intend to opine, if such terms are used; and to state expressly any assumptions which the lawyer is making or any work of a third party upon which the lawyer is relying in rendering the opinion.

b. Due Diligence

The following checklist is offered to assist the opining lawyer in preparing to render a zoning opinion using the sample language set forth above. This checklist should *not* be considered to be, or used as, a complete review of all matters which may bear on a zoning opinion to be given in a particular transaction.

1. The opining lawyer should forward a written request to the appropriate zoning offices, or the engineer for the project, requesting written confirmation that:

(a) the subject property is located in a particular zoning district (identifying such district);

(b) the subject property is not affected by any special exceptions, variances, conditional uses or planned unit developments (or if it is, identifying and describing the effect of each such item);

(c) the use of the subject property as presently made or as contemplated by the borrower in the specified zoning district either constitutes a permitted use as a matter of right under the applicable zoning code (specifying the relevant section of the code) or constitutes a permitted use because of the special exception, variance, conditional use, or planned unit development applicable to the property (specifying the reason);

(d) there are no outstanding zoning violations against the subject property;

(e) the subject property complies with applicable subdivision regulations; and

(f) the subject property is carried on the local tax rolls as a separate lot or lots.

2. It may be necessary to check with county offices other than zoning offices in order to obtain the information requested under items 1(e) and (f).

3. If the foregoing confirmation is not available or is incomplete or if the opining lawyer desires further support for the zoning opinion, the opining lawyer should examine a current copy of the official zoning map, showing the location of the subject property, and a

current copy of the official zoning regulations which set forth the permitted uses for the zoning district in which the subject property is located.

4. The opining lawyer should obtain a certification from the borrower describing all uses or intended uses of the subject property.

5. The opining lawyer should request that the title company involved in the transaction supply a copy of the deed by which the borrower has or will acquire title to the subject property; a copy of all record plats of subdivision describing the subject property on or after the date of such conveyance; and a copy of the applicable local tax maps showing the subject property.

6. The opining lawyer should review a current copy of the applicable subdivision regulations for the subject property (and, if necessary, any superseded versions of such regulations which were in effect at the time the borrower acquired the subject property).

7. The opining lawyer should obtain copies of the current tax bills for the subject property and compare the identification given thereon to the tax maps.

10. Environmental Matters

a. General Discussion

A request for an opinion that a project complies with environmental laws presents most Maryland lawyers with one of the most difficult issues in a real property transaction. The many factual and technical determinations which must be made in order to render this opinion may be beyond the lawyer's expertise or beyond the scope of his representation of the client. Notwithstanding this, the fact that an opinion may be difficult to give or will require extensive investigation by a lawyer does not necessarily mean that the lender is unreasonable in asking for it.[114] The lender has a legitimate interest in determining that all material environmental requirements have been or will be satisfied. In a nonrecourse loan, in particular, the lender bears the risk that the collateral will be impaired. In addition, if the lender forecloses on property which is contaminated, the lender may be in certain circumstances subject to liability as an owner with respect to cleanup costs.[115] For these reasons, assurances on environmental matters are often an essential part of the lender's underwriting decisions with respect to the loan.

Controversy with respect to environmental opinions may be minimized if the parties focus on this issue at the inception of the transaction, for example, when the loan commitment is negotiated. Often an environmental opinion will not be required, especially in those instances in which the legal and engineering costs needed to provide such an opinion would be disproportionate to the amount of the loan involved. In many instances, lender "comfort" may be obtained by including specific representations and warranties in transactional documents and by requiring the delivery of appropriate certificates as a condition of closing.

Sometimes a lender will request from borrower's lawyer a sweeping opinion that the property or the project complies with all environmental laws (unspecified), or that no contamination (undefined) exists on the site. More so than opinions in other areas, environmental opinions are inextricably linked with complex technical facts and frequently involve judgments better made by environmental engineers. Such opinions often involve mixed questions of law, fact, and scientific judgment which are not susceptible to legal conclusions of the type normally expressed in opinions, or they are so plainly statements of fact that repeating them in the guise of a legal opinion adds nothing of value.

An example of a statute raising mixed questions of law, fact, and scientific judgment is the federal Comprehensive Environmental Response, Compensation and Liability

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[114] A buyer and a lender will each have similar concerns as to environmental issues. For an example of the liability of a buyer of an on-going business, see *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*,611 F. Supp. 1542 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded*, _____ U.S. _____, 108 S. Ct. 376 (1987).

[115] *United States v. Maryland Bank and Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

Act, commonly called "Superfund."[116] The lender may request an opinion that seems specific with respect to the Superfund statute, such as the following:

> *Materials and conditions at the Project do not justify the initiation by any governmental agency of remedial activities or procedures that would require the Borrower to initiate or pay for remedial activities at or near the Project under the authority of the Comprehensive Environmental Response, Compensation and Liability Act.*

The Superfund statute, however, appears to authorize the governmental agency to initiate remedial activities whenever there is "a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare."[117] Administrative guidance and judicial interpretation of the meaning of these phrases continue to evolve. Neither a lawyer nor an environmental engineer can be sure what such phrases mean, nor whether a particular site poses such a risk.

An opinion that there is "no contamination" at a property could, in addition, require a lawyer to second-guess a prior agency decision. For example, consider the case of an acquisition of a farm or other site with an underground fuel storage tank. Such underground tanks sometimes leak product, which may float on the groundwater table and slowly dissolve into the groundwater. Some time ago, the agency charged with supervising the cleanup of such underground leaks may have allowed the cleanup to terminate when no more product could be recovered even though contaminated groundwater remained. Assume that cleanup standards are more stringent now, but that the agency does not routinely reopen closed cases. How can the lawyer answer the difficult question of whether a prior cleanup in such closed cases will now be sufficient?

On the other hand, some questions are entirely factual. For example, the issue may be whether an existing facility complies with a water discharge permit which imposes numerical limitations on the amount of a pollutant in wastewater. These permits, issued pursuant to the federal Clean Water Act, typically require self-monitoring and reporting of data on Discharge Monitoring Reports.[118] Anyone can compare the reported data to the stated permit limits. Nothing is added by the lawyer's statement that the Discharge Monitoring Reports show compliance with the permit.

Other purely factual questions may be much more complex. Asbestos is a naturally occurring mineral which may be present in extremely low levels in many materials.

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[116] 42 U.S.C. §9601 *et seq.* (1982 & Supp. 1985).

[117] *Id.* §9604(a).

[118] 33 U.S.C. §1281 *et seq.* (1982 & Supp. 1986).

Moreover, there are varying definitions of asbestos and different analytical techniques for quantifying the amount of asbestos. Some techniques will fail to identify certain asbestos fibers, whereas other techniques will count fibers which are not, in fact, asbestos at all. To further complicate matters, the ambient air in most cities contains small, but detectable, amounts of asbestos from sources such as automobiles with asbestos brake linings. Thus, an unqualified opinion that the project or property contains no asbestos should never be given, either by an environmental engineer or a lawyer. Even assuming the environmental engineer properly limits his statement, the lawyer's opinion based upon such a report adds nothing.

(i) Avoid Omnibus Opinions

The Committee emphatically recommends that a lawyer should not give an opinion which directly, or by generality of terms, encompasses an unspecified array of environmental matters and other regulatory issues. Examples of opinion language of this type are:

(A) *. . . the Project is in compliance with all applicable laws and regulations . . .* .

or

(B) *. . . all permits and approvals of any governmental authority required for the construction, occupancy, and use of the Project have been obtained . . . .*

In the case of opinion (A) above, the language flatly covers every conceivable compliance issue. If the "Project" involves land and improvements to be constructed, for example, the language implies that the opining lawyer has reviewed and understands all aspects of the plans and specifications for the improvements, is familiar with all existing and proposed site conditions, and is qualified to analyze and apply the assembled facts and all relevant laws and regulations. Most lawyers are not qualified to analyze all of these factors together effectively.

The language of opinion (B) above specifically addresses occupancy and use. In the case of a construction loan, this would mean expanding the scope of the opinion beyond existing conditions and into anticipated project operations, a speculative venture. On the other hand, the second example is silent on those matters of environmental compliance that do not involve permits or approvals, and in this regard opinion (B) is narrower than opinion (A).[119]

[119] For example, transformers containing polychlorinated biphenyls (PCBs) can be used under many circumstances without any environmental permits or approvals, but the applicable environmental regulations impose marking and inspection requirements with respect to the operation of such transformers.

Other typical opinion language is less direct in that it may be obscured with other opinion provisions directed at corporate or partnership authority or regulated industry issues. Examples are:

> *(C) . . . the performance by Borrower of each of its obligations under the Loan Documents will not violate any applicable laws or regulations of any governmental authority . . . .*
>
> or
>
> *(D) . . . no consent or approval of, filing with, or other action by any governmental authority is required in connection with the execution and delivery of and performance by Borrower of its obligations under the Loan Documents . . . .*

Use of the word "performance" in these examples may expand the scope of the opinion beyond the question of the borrower's basic authority to enter into and carry out the transaction at hand. Most transaction documents will contemplate or require the construction of improvements or the use of existing improvements for the conduct of a business. Because such "performance" may generate the need for a permit or license which has not yet been obtained and contemplated operations may violate some applicable environmental law or regulation, an opinion in this form should not be given by a lawyer.[120]

Lawyers have at times sought to soften or limit the scope of an "all laws" or "all permits" statement by a general "knowledge" qualification. However, a general "knowledge" qualification, in and of itself, does not resolve the difficulties presented by the "all laws" or "all permits" language. The Committee is of the view that the opining lawyer should not give an omnibus opinion on compliance with "all laws," "all permits," or "all consents," even if the opinion is modified with a "knowledge" qualifier.[121]

(ii) Opinions On Specific Legal Issues Are Proper

Environmental inquiries are appropriate in most transactions, but broad environmental opinions by lawyers are not. However, if as a result of factual investigations, particular environmental questions arise and are important to the transaction, specific environmental issues may properly be the subject of legal opinions. For example, an opinion as to whether a particular project involves any "major federal action significantly affecting the quality of the human environment" may be appropriate in certain situations because such action may trigger a requirement for an environmental impact statement. It would also be appropriate to opine on an issue such as whether a designated permit remains in effect beyond its expiration

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[120] *See supra* Section D.5, "Conflicts," and Section D.8, "Consents and Approvals."

[121] *See supra* Section D.9, "Zoning," for additional discussion.

date because the permittee made timely application for renewal and no final decision has been made on the application. These are areas where a legal conclusion can be drawn without reference to engineering studies or judgments.

Certain statutes may provide standards and criteria sufficiently definitive to permit a lawyer to draw legal conclusions based upon analyses of objective facts. For example, in certain instances, upon completion of certain specific statements of facts prepared by appropriate persons (*e.g.*, an engineer, biologist, surveyor, or architect), an opinion could be rendered regarding the application of certain statutes to those facts, such as with the National Pollution Discharge Elimination System ("NPDES") permit pursuant to the Clean Water Act, the U.S. Army Corps of Engineers Dredge and Fill permit pursuant to the Clean Water Act and the Rivers and Harbors Act, and the Maryland Chesapeake Bay Critical Areas legislation. Specifically, to render an opinion as to a NPDES discharge permit, a complete statement of facts regarding the discharge must be generated. This statement must include a description, *inter alia*, of the operation, quantity of materials produced, any treatment, quantity of discharge, constituents of discharge, and method and location of discharge. The statutory criteria are such that, if the lawyer has available such facts or is allowed to assume such facts, the lawyer may opine as to whether a permit is required.

With respect to the requirement of a U.S. Army Corps of Engineers permit to dredge or fill wetlands, the location of the wetlands must be delineated under federal, state, and local law by a biologist. The appropriate criteria (*e.g.*, the prevalence of vegetation adapted for life in saturated soil conditions) to be used in making those delineations are set forth in the regulations. These delineations may normally be confirmed by the enforcing agency. Based upon this information and knowledge of the structure and location of the subject property and accompanying infrastructure (*e.g.*, access roads), the lawyer may then opine, based upon the available regulations and rulings, as to whether the activity would require a permit.

Finally, to render an opinion with respect to Maryland Chesapeake Bay Critical Areas, the lawyer must first assess the status of the local jurisdiction's Critical Area Plan. The engineer would then consult the maps prepared by the local jurisdiction to determine (a) if the project is within the Critical Area and, therefore, subject to the legislation and (b) if so, the Critical Area designation of the property. Given this information, the development requirements are such that the lawyer may then opine as to what standards, if any, are required of a project under that statute.

b. Procedures for Approaching Environmental Issues

The Committee suggests that, with respect to environmental issues, the lawyer should play an important part in monitoring the gathering of relevant factual information, in helping to determine the appropriate scope of the factual inquiry in the particular transaction, and in helping to determine whether and to what extent a legal opinion on environmental issues is necessary. The following are some of the tools available to the lawyer in doing so:

(i) It may be appropriate to have an environmental questionnaire completed by the owner and, to the extent possible, by the owner's predecessor in title. If the completion of the questionnaire raises questions or problems, these questions or problems should be pursued to the extent appropriate. Appearing at the end of this section as *Exhibit A* is an example of an environmental questionnaire. Lawyers are cautioned that the attached questionnaire is supplied for illustrative purposes only; it is not appropriate for all situations. In addition, any questionnaire must be continually updated as applicable laws and interpretations change.

(ii) The lawyer may review, with the parties involved, the feasibility of retaining professional consultants (*e.g.*, architects, engineers, and environmental specialists) to determine the applicable facts and render professional judgments. A number of architectural and engineering firms specialize in environmental issues.

(iii) The lawyer may interview administrative agency staffs and review available records and information which may provide insight into potential environmental liabilities associated with the property involved in the transaction. Many lawyers utilize the federal Freedom of Information Act and the Maryland Public Information Act to obtain such information. With regard to Superfund claims, the Environmental Protection Agency ("EPA") maintains, and will provide upon request, a list of potential problem sites called the "Comprehensive Environmental Response, Compensation and Liability Information System" ("CERCLIS"). A review of CERCLIS would reveal whether the property was presently being considered by the EPA for designation as a Superfund site. A similar listing procedure is also maintained by the State of Maryland under Maryland's equivalent of Superfund.[122] The absence of the subject property from these lists, however, does not guarantee that the property is free from potential environmental liability under Superfund or the Maryland equivalent.

If the property has been the site of industrial operations, agency files would contain information on any permits and the compliance record of the property. The enforcement records should also be reviewed. This information will assist the lawyer in identifying environmental issues and may be set forth in an opinion as a statement of facts.

(iv) The lawyer may perform traditional legal investigation such as obtaining title reports and lien and judgment reports and reviewing court and administrative dockets.

(v) The lawyer should undertake appropriate legal research based upon the facts disclosed by the investigation.

(vi) The lawyer may review compliance with applicable laws and regulations by interviewing the client, particularly the client's responsible agents and employees, and obtaining copies of any existing permits.

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[122] *See* 13 Md. Reg. 1059 (Apr. 25, 1986).

(vii) The lawyer should consider whether and how environmental issues may be addressed in the operative transactional documents, such as in representations and warranties or covenants to execute and deliver environmental questionnaires.

c. Conclusion

The fact that a commitment letter requires an opinion with respect to compliance with environmental laws should not, by itself, create controversy or "gamesmanship" between lender's lawyer and borrower's lawyer. Instead, it should foster a discussion between such lawyers with respect to the environmental issues to be covered and the scope of any opinion. If the opining lawyer has not been directly involved in the development process but must become familiar with the project development in order to render the opinion, this fact should be determined at an early stage in the transaction and not left for last minute negotiations. In addition, if the lawyer believes that he does not have relevant expertise, consideration should be given to the employment of another lawyer to act as special counsel for purposes of giving the required opinion. In this way the interests of both lender and borrower are served, and the transaction may be closed without undue expense or delay.

Because of the complexities and vagueness of applicable laws and standards, in no instance is a broad "compliance with all laws" or "all permits" opinion appropriate. Rather, the lawyer should determine whether there are any issues relevant to the particular transaction that are appropriate for legal conclusions, (as opposed to relying upon party or professional certificates and/or other factual investigations), given the scope and size of the transaction, and he should limit any legal opinion accordingly.

Exhibit A

ENVIRONMENTAL QUESTIONNAIRE AND
DISCLOSURE STATEMENT

LENDER:

_____

_

SELLER/BORROWER:

_____

_

PROPERTY LOCATION:

_____

_

_____

_

_____

_

_____

_

A. ***Current/Former Uses of the Property for the Previous 60 Years***

1. Name of current and all former owner(s):

2. Description of current use(s) of the Property (if other than office use exclusively, provide name(s) of current occupant(s) and date(s) of occupancy):

3. Date of completion of original construction and any substantial renovations (including tenant improvements):

4. Name(s) of previous occupant(s):

5. Description of previous use(s) of the Property:

6. Description of uses of adjacent properties:

B. ***Asbestos***

1. Is there or has there been asbestos in any of the construction materials contained in the building(s)? If so, has it been removed? When and by whom?

2. Was a survey conducted to assess the type, amount, location, and condition of asbestos? (If so, attach a copy of any survey report.)

3. Have asbestos air samples been taken? If so, what are the results?

C. ***Polychlorinated Biphenyls (PCBs)***

1. Have polychlorinated biphenyls (PCBs) been used in electrical transformers, capacitors, or other equipment at the Property?

2. If so, describe the use and quantity of PCBs used on the Property.

D. ***Fuel/Waste/Chemical Storage Tanks, Drums, and Pipelines***

1. Are there any above-ground or underground gasoline, diesel, fuel oil, waste, chemical, or other storage tanks on the Property?

2. If so, describe substances stored and the age, type of construction, and capacity of the tank(s).

3. Have the tanks been inspected or tested for leakage? When was the most recent test? What were the results?

4. Are any other wastes or chemicals stored on the Property in drums or other containers? If so, describe the substances, quantities stored, and types of containers.

5. Are there raw chemical or waste chemical storage areas on the Property? If so, describe the location of all such areas, the type of products or wastes stored in each area, the amount of products or wastes stored in each area, the results of any soil or groundwater samples taken in the vicinity of each area, and the manner in which each area not presently in use was closed.

6. Attach copies of any permits or licenses pertaining to the use, storage, handling, or disposal of wastes and chemicals on the Property.

E. ***Air Emissions***

1. Describe air emissions from each source of air pollutants, including fuel burning equipment (describe type of fuel burned and rated capacity of equipment) on the Property.

2. Describe air pollution control equipment used to reduce emissions for each source of air emissions.

3. Are air emissions monitored? If so, indicate frequency of monitoring.

4. Attach copies of any air permits or licenses pertaining to operations on the Property.

F. ***Water Discharges***

1. List all sources of waste water discharges to public sewer systems:

2. List all sources of other water discharges (e.g., discharges to storm drains, surface waters, septic systems, holding ponds, private sewage treatment plants):

3. For each discharge, list the average daily flow:

4. Attach copies of any pre-treatment permits, water discharge permits, or licenses pertaining to operations on the Property.

G. ***Water Supply***

1. What is the source of drinking water for the Property? What is the source of other water (e.g., industrial water, cooling water, fire fighting water) for the Property?

2. Where is the nearest off-site drinking water well? Where is the nearest other off-site source of drinking water?

H. ***Waste Disposal***

1. Describe the types of liquid wastes (other than waste water described in part F above) and solid wastes which are or have been generated at the Property.

2. Describe how the liquid and solid wastes generated at the Property are and have been disposed.

3. Attach copies of any waste disposal permits or licenses pertaining to operations on the Property.

4. Has the Property been used for disposal of any liquid or solid waste? If so, describe the location of all disposal sites, the type of wastes disposed of at each site, the results of any soil or groundwater samples taken in the vicinity of each site, and the manner in which each site not presently in use was closed.

5. Have evaporation or storage pits, ponds, lagoons, or surface impoundments been located on the Property? If so, describe the location of all units, the type of wastes placed in each, the results of any soil or groundwater samples taken in the vicinity of each, and the manner in which each not presently in use was closed.

6. Have wastewater treatment facilities, such as acid neutralization units, been located on the Property? If so, describe the location of all facilities, the type of wastes treated in each facility, the results of any soil or groundwater samples

taken in the vicinity of each facility, and the manner in which each facility not presently in use was closed.

7. Have there been any spills, leaks, or other releases of wastes or chemicals on the Property? If so, describe the substances and quantities released, any cleanup measures taken, and the results of any soil or groundwater samples performed to detect the presence of the chemicals spilled, leaked, or released on the Property.

I. ***Pesticides, Herbicides, and Other Agricultural Chemicals***

1. Have pesticides, herbicides, or other agricultural chemicals been applied to the Property? If so, describe the locations where such pesticides, herbicides, or chemicals were applied, the type of pesticides, herbicides, or chemicals applied in each area, and the results of any soil or groundwater analyses performed to detect pesticides, herbicides, or chemicals used at the site.

2. Have pesticides, herbicides, or other agricultural chemicals been mixed, formulated, rinsed, or disposed of on the Property? If so, describe the locations where such pesticides, herbicides, or chemicals were mixed, formulated, rinsed, or disposed of, the type of pesticides, herbicides, or chemicals mixed, formulated, rinsed, or disposed of, at each location, and the results of any soil or groundwater analyses performed to detect pesticides, herbicides, or chemicals mixed, formulated, rinsed, or disposed of at the site.

J. ***Wetlands and Fill***

1. Have there been or are there any wetlands on the Property? If so, provide a map showing the location.

2. Has any filling activity taken place on the site? If so, describe the fill (source, characteristics and chemical composition, if known) and state the amount of fill and the locations of the fill.

K. ***Hazardous Chemicals and Releases***

1. Are any hazardous or dangerous chemicals stored or used on the Property? If so, provide copies of all chemical lists and material safety data sheets for those chemicals.

2. Are any hazardous or dangerous chemicals released or emitted at the Property? If so, provide copies of all toxic chemical release forms, inventory forms, and material safety data sheets for those chemicals.

L. ***Notices, Complaints, and Reports***

1. Attach copies of all written governmental environmental reports, citations, or complaints made by you or in your possession or control.

2. Attach copies of all non-governmental environmental reports in your possession or control, except to the extent limited by confidentiality restrictions. For each such report so labeled confidential, state the name of the person or entity who rendered such report and the date thereof.

As the present owner of the Property or as an officer or a general partner of the present owner of the Property (or the duly authorized representative of such owner), I am familiar with all of the operations presently conducted on the Property, have made a diligent inquiry into the former uses of the Property, and hereby certify to and for the benefit of Lender that to the best of my knowledge, information, and belief the information disclosed above is true and correct.

Date: _____ _____

11. Usury

Sample Opinion Language:

Based solely upon the certificate of the Borrower and our knowledge, the Loan does not violate Maryland usury laws.

Discussion:

a. Commentary on Purpose and Sample Language

"Usury" means the charging of interest by a lender which is greater than that allowed by law. Under Maryland law, most commercial lending transactions, unlike consumer transactions, do not raise usury issues.[123]

The purpose of an opinion on usury is to provide a lender with assurance that usury laws have not been violated. If a loan violates Maryland usury laws, there are civil and criminal penalties that may be imposed on a lender ranging from damages equal to three times the amount of interest and charges collected in excess of the interest and charges allowed by law, to conviction of a misdemeanor punishable by a fine or imprisonment or both.[124]

Section 12-103(e)(1)(i) of the Maryland Commercial Law Article allows a lender to charge interest at any rate if the loan is "a loan made to a corporation."[125] The Committee

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[123] The scope of this Report is commercial lending transactions, and this Report does not address usury issues in the consumer context.

[124] Md. Com. Law Code Ann. § 12-114 (1983 & Supp. 1988).

[125] Id. §12-103(e)(1)(i). The "corporate exemption" of Subsection 12-103(e)(1)(i) may not be applicable if the corporation was formed solely to avoid application of usury laws. *See Rabinowich v. Eliasberg*, 159 Md. 655, 152 A. 437 (1930). However, unless the lender has knowingly caused the creation of the borrower's corporation to avoid application of usury laws (in which case the opinion of borrower's lawyer would not provide the lender with protection anyway), the corporate exemption should apply even if the borrower may have incorporated solely for the purpose of facilitating the loan.

It should also be borne in mind that the "corporate exemption" assumes that the loan has been made under Subtitle 1 of Title 12 of the Maryland Commercial Law Article. While not a common practice, commercial loans also may be made under Subtitles 4, 9, and 10 of Title 12. Subtitle 4 of Title 12 governs loans secured by secondary mortgages on Maryland real estate on which a residence is located. Section 12-401(i)(2)(i) of the Maryland Commercial Law Article provides that loans to corporations are exempt from the interest limits of Subtitle 4 "unless the lender required the borrower to incorporate as a condition for obtaining the loan." In the unusual event a lender elected to make a commercial loan under Subtitle 9 (Credit Grantor Revolving Credit Provisions) or Subtitle 10 (Credit Grantor Closed End Credit Provisions) of Title 12 of the Maryland Commercial Law Article, there is no corporate exemption. The lender which has been the unusual election to make a commercial loan under Subtitle 9 or 10 presumably would be aware that there is no corporate exemption.

concluded that if a borrower is a corporation and the transaction is governed by Maryland law, a lawyer's opinion as to Maryland usury laws is superfluous and should not be requested when the lender is represented by a Maryland lawyer.

Likewise, the Committee concluded that if a loan is governed by Maryland law and falls within the parameters of Section 12-103(e)1)(ii) or (iii) of the Maryland Commercial Law Article (a commercial loan in excess of $15,000 not secured by residential real property and a commercial; loan in excess of $75,000 secured by residential real property, respectively), a usury opinion is not necessary and should not be requested when the lender is represented by a Maryland lawyer. A "commercial loan" is defined in Section 12-101(c) of the Maryland commercial Law Article as a loan which is made "(1) [s]olely to acquire or carry on a business or commercial enterprise; or (2) [t]o any business or commercial organization." Unfortunately, the term "business or commercial organization" is not defined in the statute or in case law, but it certainly includes general and limited partnerships organized and existing for business or commercial purposes.

A usury opinion may be appropriate if the following circumstances exist: (a) the borrower is an individual or a general partnership which is not a "business or commercial organization," (b) the transaction is governed by Maryland law, and (c) the loan is not clearly a commercial loan with respect to which the lender may charge any rate under the provisions of Section 12-103(e) of the Maryland Commercial Law Article. If a usury opinion is deemed appropriate, borrower's lawyer will often be requested to issue the opinion since the usury determination will usually require some knowledge of the borrower and the borrower's purposes for obtaining the loan.

A usury opinion may also be appropriate if Maryland law is not applicable to a loan transaction. Such an opinion should address the choice of laws question. Of course, in such a case reliance on an out-of-state lawyer may be necessary.

b. Due Diligence

If the loan is governed by Maryland law, a determination should first be made by the lawyer as to the statutory authority for the loan under title 12 of the Maryland Commercial Law Article. As discussed above, the statutory authority will indicate whether usury is an issue and, if it is, the scope of due diligence necessary to support the usury opinion.

The opining lawyer should establish the existence of facts and circumstances necessary to make the usury opinion accurate or, alternatively, should include in the opinion appropriate assumptions and qualifications. Investigation should include a determination of the type of entity making the loan, the type of entity to which the loan is being made, and the

purpose of the loan. For example, copies of the corporate charter or partnership agreement and a status/good standing certificate (if available) should be obtained by the opining lawyer. The lawyer will also want to obtain a certificate of the borrower certifying how the proceeds of the loan are to be used if the reason that the loan is not subject to any interest rate limitation is that it is made solely to acquire or carry on a business or commercial enterprise.

12. Assumptions, Qualifications, and Other Limitations

Among the most important parts of all transactional legal opinions are the assumptions, qualifications, and other limitations. These assumptions, qualifications, and other limitations are often as heavily negotiated as the legal opinions themselves. In some legal opinions an effort is made to group together the assumptions and qualifications set forth in the opinion. In other legal opinions the assumptions and qualifications are scattered throughout the legal opinion. Although it is sometimes difficult to distinguish between statements of fact and legal conclusions, assumptions are generally considered to concern factual matters, and qualifications are generally considered to be legal matters.

While there are certain basic assumptions and qualifications which frequently appear in transactional legal opinions (although the precise language may vary from opinion to opinion), assumptions and qualifications are opinion-specific. Whenever a lawyer is rendering a legal opinion, that lawyer must carefully consider what assumptions and qualifications should be included. This process will vary from opinion to opinion, depending upon the facts of each transaction and the legal opinions being rendered.

Sample assumptions and qualifications are found throughout this Report. Many of the substantive legal issues discussed above in Section D of this Report include various suggested assumptions and qualifications necessary and appropriate to support the suggested legal opinions discussed therein. For example, the same opinion language concerning the enforceability of loan documents found in Section D.4, "Authorization, Execution, Validity, and Enforceability," includes two important qualifications: the so-called "bankruptcy" or "insolvency" qualification and the so-called "equitable principles" or "equity" qualification. Similarly, the discussion of perfection and priority of liens found in Section D.7, "Perfection and Priority of Liens," includes various sample assumptions and qualifications, depending upon the scope of the legal opinion being rendered. This discussion of assumptions and qualifications, and specific language used to express those assumptions and qualifications, are provided to help clarify the intended meaning and scope of assumptions and qualifications generally appearing in transactional legal opinions. It is intended that, by using the sample language for assumptions and qualifications set forth in this Report, those assumptions and qualifications will have the meanings and be interpreted as discussed in this Report. In order to accomplish this goal, the Committee has included as the last paragraph in each of the two Illustrative Opinion Letters a statement that the Opinion Letter is to be interpreted in accordance with this Report.

Rather than attempt to set forth a comprehensive list of assumptions and qualifications and discussion thereof, this section will focus on the assumptions, qualifications, and limitations found in the Illustrative Opinion Letters.

(a) Illustrative Commercial Loan Opinion Letter

Several paragraphs in both Illustrative Opinion Letters are qualified or limited by the words "our knowledge." The intended scope and meaning of those words are defined in an important limitation paragraph. Various opinion letters use phrases such as "to the best of our

knowledge," "to the best of our actual knowledge," "to our knowledge," "to our actual knowledge," "to the best of our knowledge after due and diligent inquiry," and other phrases of similar import. It is not clear whether, for example, "to the best of our knowledge" is intended to be a higher standard of inquiry than "to our knowledge." It is also not clear whether the phrases "to our actual knowledge" and "to our knowledge" include only the knowledge of the lawyer or lawyers working on the matter, the lawyers who have recently worked on matters on behalf of the borrower, or all lawyers in the law firm rendering the opinion. Because of the uncertainty as to these matters, the Illustrative Opinion Letters include a definition of "our knowledge." The Illustrative Opinion Letters state that the knowledge referred to is that of the lawyers in the law firm who have recently worked on matters on behalf of the client. The Committee believes that the term "our knowledge" should be so interpreted unless a contrary definition is included in the opinion.

The reference to "except as otherwise stated herein" in the next to the last sentence of the "our knowledge" paragraph is intended to make it clear that where the words "our knowledge" appear in conjunction with a review of other documents, reports, or matters, the "our knowledge" limitation is not intended to eliminate the opining lawyer's obligation to review such other documents, reports, or matters referred to as having been reviewed.

On page 3 of the Illustrative Commercial Loan Opinion Letter is a list of assumptions made by the opining lawyer in rendering the opinions set forth therein. As noted above, these assumptions may be expressed in other words, will often be the subject of negotiations as part of the opinion drafting process, and will vary from opinion to opinion depending upon the substance of the legal opinions being rendered.[126]

Two important qualifications are found in opinion paragraph 4 on page 4 of the Illustrative Commercial Loan Opinion Letter. These are the so-called "bankruptcy" or "insolvency" and "equitable principles" or "equity" qualifications. These qualifications limit the scope of the opinion that the Loan Documents are enforceable against the borrower and the guarantor in accordance with their terms.[127]

An important limitation appears in paragraph (xii) on page 2 of the Illustrative Commercial Loan Opinion Letter. In that paragraph, the opining lawyer is stating that, in addition to the documents specifically listed in the preceding paragraphs, he has reviewed such other documents and matters as were deemed necessary and appropriate to render the opinions

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[126] General assumptions such as assumption (d) in both Illustrative Opinion Letters cover a wide varity of potential issues. For example, this assumption is broad enough to make it unnecessary to reference specific modifications of amendments to the Loan Documents which could affect the legal opinions being rendered. Thus, it was concluded that the same assumption covering agreements postponing the time of attachment of security interests (*see supra* Section D.7, "Perfection and Priority of Liens") need not be included in the Illustrative Commercial Loan Opinion Letter.

[127] See *supra* Section D.4, "Authorization, Execution, Validity, and Enforceability," for a discussion of a sample "practical realization" clause.

set forth in the letter "subject to the limitations, assumptions, and qualifications noted below." The quoted language is intended to qualify the open-ended reference to other documents and matters. For example, the opinions set forth in paragraphs 5, 6, and 8 of the Illustrative Commercial Loan Opinion Letter are explicitly based solely upon specific certificates, reports, and documents and "our knowledge" (as defined in the letter itself). Therefore, in rendering such opinions, the opining lawyer is limiting the scope of his opinion to the factual bases specifically referenced in each such opinion paragraph. The broad scope of paragraph (xii) is specifically limited in opinion paragraphs that use the words "based solely upon. . . ." In such paragraphs, the opining lawyer is indicating that he has not reviewed any other documents or matters.

Reference should be made to "Conflicts" (*supra* Section D.5), "Litigation" (*supra* Section D.6), and "Consents and Approvals" (*supra* Section D.8) in this Report for a more complete discussion of these opinion paragraphs and the limited bases upon which these opinions are rendered. In some circumstances opinions may be rendered with a broader or narrower basis or scope on these subject matters. This will be part of the opinion letter drafting process. Because broadening the scope of such opinions will usually require significantly more lawyer time and due diligence, a broader scope may only be economically feasible in larger transaction.

The Illustrative Commercial Loan Opinion Letter expresses only a limited perfection and priority opinion with respect to security interests and liens. The opinion in this regard (opinion paragraph 7 on pages s4 and 5 of the Illustrative Commercial Loan Opinion Letter) is limited to an opinion regarding security interests which can be perfected by the filing of financing statements. Furthermore, the Illustrative Commercial Loan Opinion Letter gives no legal opinion on the borrower's title to any real or personal property. The limitations on the scope of the opinion being given are set forth in qualifications (i), (ii), (iii), and (iv) on page 5 of the Illustrative Commercial Loan Opinion Letter. These qualifications are discussed in more detail in Section D.7 of this Report.

In qualification (v) on page 5, the opining lawyer is advising the recipient of the opinion that the opinions expressed in the letter are limited to the laws of the State of Maryland and the United States of America. The Committee recommends this language instead of a statement that the opinions concern only the laws of the jurisdiction in which the lawyer is admitted to practice because many law firms include lawyers who are admitted to practice in multiple jurisdictions or in jurisdictions other than the State of Maryland. The Committee believes that it is unnecessary to add the word "federal" before the words "laws of the Untied States of America" because that description is implicit. The parenthetical phrase "excluding the principles of conflict of laws" is included to indicate that the opinion concerns Maryland substantive law and not the substantive law of another jurisdiction that would be applicable if Maryland law concerning conflicts of law directs that the law of such other jurisdiction controls.

It should also be noted that the qualifications set forth in the Illustrative Opinion Letters may also be expressed in other words, will often be the subject of negotiations as part of

the opinion drafting process, and will vary from opinion to opinion depending upon the facts of each transaction and the nature of the legal opinions being rendered.

The opinion is further qualified by making it clear that the opinions rendered are only based upon the laws and facts in existence as of the date of the opinion and that the opining lawyer assumes no obligation to update or supplement the opinion if either the law or facts change after the date of the opinion. Note should be made that this same limitation is also expressed in the introductory phrase to the opinion portion of the letter. In the paragraph that precedes the numbered opinions beginning on page 3 of the Illustrative Commercial Loan Opinion Letter, the phrase "as of the date of this letter" appears. This phrase is intended to make it clear that the opinions set forth in the immediately following paragraphs of the letter speak only as of the date of the letter. An opinion should be dated the date it is delivered, which is usually the closing date of the transaction, unless there are specific reasons for it to have another date. The Committee concluded that opinions issued in commercial transactions should be understood to address the facts, laws, authorizations, and circumstances existing as of the date of the opinion, regardless of whether this limitation is expressly stated in the opinion. It is the Committee's view that the opining lawyer has no duty to update his opinion after it has been issued or to advise the addressee of the opinion as to subsequent changes in law or the effect of the parties' subsequent actions on the loan documents.

In addition to the qualifications expressly stated in the Illustrative Opinion Letters, the following qualifications, although not expressly set forth in either of the Illustrative Opinion Letters, should be assumed to apply and further qualify the opinions expressed therein:

> *(i) Enforceability may be limited to the extent that remedies are sought with respect to a breach that a court concludes is not material or does not adversely affect the Lender.*
>
> *(ii) Enforceability may be limited by any unconscionable or inequitable conduct on the Lender's part, defenses arising from the Lender's failure to act in accordance with the terms and conditions of the Loan Documents, defenses arising as a consequence of the passage of time, or defenses arising as a result of the Lender's failure to act reasonably or in good faith.*
>
> *(iii) The provisions regarding the remedies available to the Lender on default as set forth in the Loan Documents are subject to certain procedural requirements, which, with regard to several of the remedies, are not reflected in the Loan Documents. These procedural requirements affect and may restrict rights and remedies stated to be available to the Lender.*
>
> *(iv) We express no opinion on the enforceability of the self-help, non-judicial remedies provided to the Lender in certain of the Loan Documents, such as those regarding the Lender's right, without judicial process, upon default, to enter upon; to take possession of; to collect, retain, use, and enjoy the rents,*

issues, and profits from; and to manage the Property subject to the liens created by the Loan Documents.

(v) We express no opinion on the enforceability of any provisions of the Loan Documents that entitle the Lender, as a matter of right, to the appointment of a receiver after the occurrence of a default.

(vi) We express no opinion on the enforceability of any provisions of the Loan Documents imposing increased interest rates and/or late payment charges upon delinquency in payment or the occurrence of a default, liquidated damages, or prepayment premiums, to the extent they are deemed to be penalties or forfeitures.

(vii) We express no opinion on the enforceability of any provisions requiring the Borrower to waive procedural, judicial, or substantive rights, such as rights to notice, right to a jury trial, statutes of limitations, appraisal or valuation rights, and marshaling of assets.

(viii) We express no opinion on the enforceability of any provisions requiring the Borrower to indemnify the Lender or its agents, officers, or directors or of any provisions exculpating the Lender from liability for its actions or inaction to the extent such indemnification or exculpation is contrary to public policy or law.

(ix) We express no opinion on the enforceability of any provisions permitting modifications of the Loan Documents only if in writing.

(x) We express no opinion on the enforceability of any provision stating that the provisions of the Loan Documents are severable.

(xi) Unless otherwise expressly stated in the opinion, we express no opinion on the application of federal or state securities laws to the transactions contemplated in the Loan Documents.

(xii) Unless other expressly stated in the opinion, we express no opinion on the perfection or priority of any lien or security interest provided for in the Loan Documents.

(xiii) Unless otherwise expressly stated in the opinion, we express no opinion on title to any real or personal property.

The Committee determined that, unless expressly negated in the opinion letter, the above listed matters should be assumed to qualify transactional legal opinions even if they are not expressly stated.

Several additional qualifications and limitations are found in the concluding paragraphs of both Illustrative Opinion Letters. The first sentence of the next to the last paragraph of both Illustrative Opinion Letters limits the persons who can rely on the opinion letter. This sentence is intended to expressly limit the use of the opinion letter and the potential scope of liability of the opining lawyer.[128] Similarly, the second sentence in the next to the last paragraph makes it clear that no other opinions are intended to be rendered, except as expressly stated in the opinion letter.

Finally, the last paragraph of each Illustrative Opinion Letter makes it clear that the opinion letters, and the specific language used therein, are to be interpreted in accordance with this Report. Thus, for example, the so-called "bankruptcy" and "equitable principles" qualifications to the enforceability opinion are intended to have the meaning and scope as set forth above in Section D.4, "Authorization, Execution, Validity, and Enforceability."

(b) Illustrative Real Estate Loan Opinion Letter

Rather than repeat the discussion of each assumption, qualification, and limitation appearing in both the Illustrative Commercial Loan Opinion Letter and the Illustrative Real Estate Loan Opinion Letter, only those that are in the latter opinion and not in the former are discussed below.

Opinions 8 and 9 on page 4 of the Illustrative Real Estate Loan Opinion Letter state that the deed of trust and financing statements are in appropriate form for recordation in the land records and filing in the financing statement records, respectively. Opinion 8 also states that the deed of trust is in appropriate form for the creation of the encumbrance and security interest it purports to create on and in the property described therein. These opinions may not be necessary when the lender is represented by a Maryland lawyer.

Opinion 10 on pages 4 and 5 of the Illustrative Real Estate Loan Opinion Letter is an illustrative form of zoning opinion. See *supra* Section D.9, "Zoning" for a more complete discussion of this opinion.

Opinion 11 on page 5 of the Illustrative Real Estate Loan Opinion Letter is an illustrative form of a usury opinion. See *supra* Section D.11, "Usury" for a more complete discussion of this opinion.

The Illustrative Real Estate Loan Opinion Letter assumes that the lender is relying upon title insurance with respect to the issues of the borrower's title and the due recordation, validity, and priority of liens. For purposes of this opinion letter, it is assumed that the principal security for the loan is real property. Thus, q7ualifications (1) and (ii) on page 5 of the Illustrative Real Estate Loan Opinion Letter set forth important qualifications on the scope of the opinions being rendered in transactions where the lender is relying upon title insurance.

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[128] For a more complete discussion of liability, see *supra* Section C.4, "Liability."

E. ILLUSTRATIVE OPINION LETTERS AND CERTIFICATES

1. Use of Illustrative Opinion Letters and Certificates

The Committee considered whether or not to prepare a "model" opinion as part of this Project. After much discussion, it was decided that rather than prescribe a form of legal opinion that could be considered to be a "model," it would be preferable to draft an "illustrative" opinion using the sample opinion language discussed in this Report. In part because of the wide variety of commercial transactions concerning which opinion letters are requested, the Committee concluded that a "model" opinion would be of only limited applicability. Furthermore, a "model" opinion might be used inappropriately, and too much significance might be attached to a form. There is no substitute for a lawyer thinking independently and thoroughly examining each transaction in order to determine what legal opinion can be given and what assumptions, qualifications, and limitations are appropriate.

The Committee concluded that "illustrative" opinions would be helpful to illustrate the issues discussed in this Report. Rather than attempt to draft one "illustrative" legal opinion with various alternative paragraphs, it was thought that an "illustrative" opinion letter concerning a commercial loan transaction and a second "illustrative" opinion letter concerning a real estate loan transaction would be useful. In order to vary not only the nature of the transaction but also the parties, the Committee has used a Maryland corporate borrower in the Illustrative Commercial Loan Opinion Letter and a Maryland limited partnership borrower in the Illustrative Real Estate Loan Opinion Letter. In addition, it has been assumed for purposes of the Illustrative Opinion Letters that there are no multi-state contacts for the borrowing entities. Reference should be made to Section D.2, "Qualification to Transact Business," *supra* for a discussion of issues presented where a borrower has significant contacts outside the State of Maryland.

Also included in this Report are three Illustrative Certificates to be given by officers or partners of borrowers in support of the Illustrative Opinion Letters: one concerning a corporation, one concerning a limited partnership, and one concerning a general partnership. The form and substance of the Certificates should be altered to conform to the actual opinions given in any transaction. Additionally, it may be appropriate for a lawyer to obtain a certificate from a guarantor or other entity involved in a transaction to support his opinions.

It is not required or mandated that a lawyer use the Illustrative Opinion Letters or Certificates. However, the Illustrative Opinion Letters should not be used without reading and understanding this Report.

This Report is intended to provide greater insights into the purpose and role of opinion letters and the meaning of certain terminology appearing in such letters in commercial transactions in Maryland. It is hoped that by virtue of this Report and the Illustrative Opinion Letters lawyers rendering legal opinions in commercial transactions in Maryland the recipients of such opinions will have a better understanding of the meaning and the scope of the legal opinions being rendered. However, each lawyer must in all cases reach a professional judgment

concerning what opinions are appropriate in the particular circumstance. The Illustrative Opinion Letters are intended to assist lawyers in this regard, but they are not intended to be exemplars to which all opinions are to be compared or a required format for opinions delivered in Maryland.

2. Illustrative Commercial Loan Opinion Letter

[Letterhead of Lawyer or Law Firm]

[DATE]

[Lender's name and address]

Re: $_____ Loan from Lender to [Corporate Borrower] Secured by [Real Property] and [Personal Property] and Guaranteed by [Individual Guarantor]

_____:

We have acted as counsel to ABC Corporation, a Maryland corporation (the "Borrower"), and John Doe (the "Guarantor") in connection with the captioned transaction (the "Loan"). This letter is furnished to satisfy [the condition set forth in Section ____ of _____/your request dated _____]. All capitalized terms used in this letter that are not otherwise defined herein shall have the meanings assigned to them in the Loan Documents (as hereinafter defined).

In our capacity as counsel to the Borrower and the Guarantor and for purposes of this opinion, we have examined the following documents:

(i) the [describe credit document] dated _____, between the Borrower and _____, (the "Lender"), the Deed of Trust dated _____ from the Borrower to _____ and _____, as trustees, the Promissory Note dated _____ in the principal amount of $_____ from the Borrower to the order of the Lender, the Assignment of Rents dated _____ from the Borrower to the Lender, the Uniform Commercial Code financing statements signed by the Borrower (the "Financing Statements"), and the Guaranty Agreement dated _____ from the Guarantor for the benefit of the Lender (collectively, the "Loan Documents");

(ii) the charter and bylaws of the Borrower;

(iii) the records of the proceedings and actions of the Board of Directors of the Borrower with respect to the transactions between the Borrower and the Lender contemplated by the Loan Documents;

(iv) a certificate of the Maryland State Department of Assessments and Taxation dated _____ to the effect that the Borrower is duly incorporated and existing under the laws of the State of Maryland and is in good standing and duly authorized to transact business in the State of Maryland;

(v) certificates of each of the Borrower and the Guarantor to the effect that the representations made by or on behalf of the Borrower or the Guarantor (as the case may be) in the Loan Documents are accurate and complete;

(vi) certificates of each of the Borrower and the Guarantor identifying any governmental programs to which the Borrower or the Guarantor is subject and identifying whether the Borrower or the Guarantor is engaged in or operates in a regulated industry;

(vii) certificates of each of the Borrower and the Guarantor identifying all judicial and governmental judgments, orders, injunctions, decrees, and arbitration awards outstanding against the Borrower or the Guarantor (as the case may be) and all judicial and governmental actions, suits, and proceedings, and all arbitrations and mediations, pending or threatened against the Borrower or the Guarantor (as the case may be) or any of their properties;

(viii) certificates of each of the Borrower and the Guarantor identifying all indentures, mortgages, deeds of trust, security agreements, leases, contracts, and other agreements and instruments to which the Borrower or the Guarantor (as the case may be) is a party and the violation, breach, or default of which could have a material adverse effect on the Borrower's or the Guarantor's business or financial condition (the "Identified Borrower Contracts" and the "Identified Guarantor Contracts");

(ix) reports by [search firm] of financing statements filed with respect to the Borrower and the Guarantor in the jurisdictions and as of the dates indicated in such reports (the "Reported Financing Statements");

(x) reports by [search firm] of judgments, orders, and decrees outstanding against, actions, suits, or proceedings pending against, and tax liens filed with respect to the Borrower or the Guarantor in the jurisdictions and as of the dates indicated in such reports;

[(xi) list other documents and certificates relied upon; and]

(xii) such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the limitations, assumptions, and qualifications noted below.

In basing the opinions and other matters set forth herein on "our knowledge", the words "our knowledge" signify that, in the course of our representation of the Borrower or the Guarantor in matters with respect to which we have been engaged by the Borrower and the Guarantor as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language

used herein are intended to be limited to the knowledge of the lawyers within our firm who have recently worked on matters on behalf of the Borrower or the Guarantor.

In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:

(a) each of the parties thereto (other than the Borrower and the Guarantor) has duly and validly executed and delivered each instrument, document, and agreement executed in connection with the Loan to which such party is a signatory, and such party's obligations set forth therein are its legal, valid, and binding obligations, enforceable in accordance with their respective terms;

(b) each person executing any such instrument, document, or agreement on behalf of any such party (other than the Borrower and the Guarantor) is duly authorized to do so;

(c) each natural person executing any such instrument, document, or agreement is legally competent to do so;

(d) there are no oral or written modifications of or amendments to the Loan Documents, and there has been no waiver of any of the provisions of the Loan Documents, by actions or conduct of the parties or otherwise;

(e) all tangible personal property collateral of the Borrower in which a security interest is granted under the Loan Documents which can be perfected by the filing of one or more financing statements (other than goods of a type normally used in more than one jurisdiction) is located in Maryland, the Borrower's chief executive office is located in Maryland, and the Borrower has a place of business in the following Maryland counties (include Baltimore City if applicable);

(f) all documents submitted to us as originals are authentic, all documents submitted to us as certified or photostatic copies conform to the original document, all signatures on all documents submitted to us for examination are genuine, and all public records reviewed are accurate and complete;

(g) the Reported Financing Statements constitute the only financing statements on file against the Borrower among the financing statement records identified in such reports as of the date of this opinion and as of the date the Financing Statements are duly filed;

(h) all descriptions of property in which a security interest subject to the Maryland Uniform Commercial Code is created under the Loan Documents, as contained in the Loan Documents and in all Financing Statements, reasonably identify the property described or intended to be described; and

(i) value has been given for all security interests and liens created under the Loan Documents.

Based on our review of the foregoing and subject to the assumptions and qualifications set forth herein, it is our opinion that, as of the date of this letter:

1. The Borrower is a corporation duly organized and validly existing in good standing under the laws of the State of Maryland.

2. The Borrower has the corporate power [to own its current properties and conduct its business as now conducted,] to borrow the proceeds of the Loan and to execute and perform its obligations under the Loan Documents.

3. All necessary corporate action has been taken to authorize the execution, delivery, and performance of the Loan Documents by the Borrower.

4. The Loan Documents have been duly executed and delivered by the Borrower and the Guarantor (as the case may be) and constitute the valid and legally binding obligations of the Borrower and the Guarantor (as the case may be), enforceable against the Borrower and the Guarantor (as the case may be) in accordance with their terms, subject to the following:

(i) applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally; and

(ii) the exercise of judicial discretion in accordance with general principles of equity.

5. The execution and delivery of, and the performance of the obligations under, the Loan Documents (i) will not conflict with the Borrower's charter or bylaws, (ii) based solely upon our review of the Identified Borrower Contracts, the Identified Guarantor Contracts, and our knowledge, will not violate or result in the material breach of the provisions of, or constitute a material default under, any of the Identified Borrower Contracts or any of the Identified Guarantor Contracts, and (iii) based solely upon the certificates and reports referred to in Paragraphs (vi), (vii), and (x) above and our knowledge, will not conflict with or result in the breach of any court decree or order of any governmental body binding on the Borrower or the Guarantor.

6. Based solely upon the certificates and reports referred to in Paragraphs (vii) and (x) above and our knowledge, there is no litigation, arbitration, or mediation pending before any court, arbitrator, mediator, or administrative body, or threatened, against the Borrower or the Guarantor, or any of their properties [, except as described in _____].

*7. With respect to all property

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*See limitations on the use of this Paragraph 7 in Section D.7, Perfection and Priority of Liens, supra.

(a) in which the Borrower currently has rights within the meaning of Section 9-203(1)(c) of the Maryland Uniform Commercial Code,

(b) in which a security interest subject to Article 9 of the Maryland Uniform Commercial Code is granted under the Loan Documents which may be perfected by the filing of financing statements, and

(c) as to which one or more financing statements naming "ABC Corporation" as debtor are required to be on file at the time of the filing of the Financing Statements among the financing statement records of _____ (the "Filing Offices") in order that any security interest in such property granted pursuant to Article 9 of the Maryland Uniform Commercial Code may be perfected at such time by filing,

upon the due filing in each of the Filing Offices of one of the Financing Statements, duly completed and executed, the security interests in such property created under the Loan Documents will have been perfected and will have priority, at the time of such filing of the Financing Statements, over any other security interests in such property perfected by filing at such time [except for the security interests publicized by some or all of the Reported Financing Statements].

8. Based solely upon the certificates and reports referred to in Paragraphs (vi), (vii), and (x) above and our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Borrower or the Guarantor of the Loan Documents, or if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken.

In addition to the qualifications set forth above, the opinions set forth herein are also subject to the following qualifications:

(i) We express no opinion with respect to title to any property, nor do we express any opinion with respect to the existence of encumbrances upon any property or the attachment, validity, perfection, or priority of any security interests or liens purported to be created under the Loan Documents, except as set forth in Paragraph 7 of this opinion. We understand that, with respect to real property, you are relying exclusively on title insurance with regard to these matters.

(ii) We express no opinion on the perfection of any lien or security interest except as expressly stated herein.

(iii) We express no opinion with respect to any security interest created under the Loan Documents which purports to secure any present or future obligations or liabilities of the Borrower to the Lender (other than the obligations and liabilities of the Borrower to the Lender

created or arising under the Loan Documents) that are determined, in the case of obligations or liabilities of the Borrower to the Lender created in the future, not to constitute "future advances" within the meaning of Section 9-204(3) of the Maryland Uniform Commercial Code, are determined not to have been within the contemplation of the Borrower and the Lender at the time the Loan Documents were executed, or are determined not to be of the same character or class as the obligations and liabilities of the Borrower to the Lender created or arising under the Loan Documents.

(iv) We express no opinion with respect to the effect of subsequently filed financing statements on the priority of any security interest perfected by the filing of the Financing Statements.

(v) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland and the laws of the United States of America. The opinions expressed herein concern only the effect of the laws (excluding the principles of conflict of laws) of the State of Maryland and the United States of America as currently in effect. We assume no obligation to supplement this opinion if any applicable laws change after the date hereof or if we become aware of any facts that might change the opinions expressed herein after the date hereof.

The opinions expressed in this letter are solely for the use of the Lender [and its counsel], and these opinions may not be relied on by any other persons without our prior written approval. The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions should be inferred beyond the matters expressly stated.

This letter is to be interpreted in accordance with the Report of the Special Joint Committee on Lawyers' Opinions in Commercial Transactions of the Maryland State Bar Association, Inc. and The Bar Association of Baltimore City dated January 18, 1989.

Very truly yours,

[Signature of Lawyer/Law Firm
representing Borrower]

3. Illustrative Real Estate Loan Opinion Letter

[Letterhead of Lawyer or Law Firm]

[DATE]

[Lender's name and address]

Re: $_____ Loan from Lender to [Limited Partnership Borrower] Secured by the land and improvements erected and to be erected thereon, located in _____ City/County, Maryland (the :Security") and Guaranteed by [Individual Guarantor]___

_____:

We have acted as counsel to ABC Limited Partnership (the "Borrower") and John Doe (the "Guarantor") in connection with the captioned transaction (the "Loan"). This letter is furnished to satisfy [the condition set forth in Section ____ of _____/your request dated _____]. All capitalized terms used in this letter that are not otherwise defined herein shall have the meanings assigned to them in the Loan Documents (as hereinafter defined).

In our capacity as counsel to the Borrower and the Guarantor and for purposes of this opinion, we have examined the following documents:

(i) the [describe commitment/loan agreement] dated _____, between the Borrower and _____ (the "Lender"), the Deed of Trust and Security Agreement dated _____ from the Borrower to _____ and _____, as trustees (the "Deed of Trust"), the Promissory Note dated _____, in the principal amount of $_____ from the Borrower to the order of the Lender, the Assignment of Rents dated _____ from the Borrower to the Lender (the "Assignment"), the Uniform Commercial Code Financing Statements signed by the Borrower (the "Financing Statements") and the Guaranty Agreement dated _____ from the Guarantor for the benefit of the Lender (collectively the "Loan Documents");

(ii) long form Status Certificate of the Borrower from the Maryland State Department of Assessments and Taxation (the "SDAT") dated _____ to the effect that the Borrower is existing under and by virtue of the laws of the State of Maryland and is in good standing to transact business;

(iii) a certified copy of the Limited Partnership Certificate of the Borrower [and all amendments thereto];

(iv) the Limited Partnership Agreement of the Borrower [and all amendments thereto];

(v) a certificate of the Borrower [that it has elected to be governed by the Maryland Revised Uniform Limited Partnership Act, that it has appointed a resident agent,] that there have been no amendments to the Limited Partnership Agreement other than those reflected on the Status Certificate and that all necessary consents or required votes of the partners of the Borrower have been obtained;

(vi) certificates of each of the Borrower and the Guarantor to the effect that the representations made by or on behalf of the Borrower or the Guarantor (as the case may be) in the Loan Documents are accurate and complete;

(vii) certificates of each of the Borrower and the Guarantor identifying any governmental programs to which the Borrower or the Guarantor is subject and identifying whether the Borrower or the Guarantor is engaged in or operates in a regulated industry;

(viii) certificates of each of the Borrower and the Guarantor identifying all indentures, mortgages, deeds of trust, security agreements, leases, contracts, and other agreements and instruments to which the Borrower or the Guarantor (as the case may be) is a party and the violation, breach, or default of which could have a material adverse effect on the Borrower's or the Guarantor's business or financial condition (the "Identified Borrower Contracts" and the "Identified Guarantor Contracts");

(ix) representations of each of the Borrower and the Guarantor set forth in the Loan Documents that the Loan is a Commercial Loan (as defined in §12-101(c) of the Commercial Law Article of the Annotated Code of Maryland) or that all Loan proceeds are being used for a Commercial Loan purpose;

(x) certificates of each of the Borrower and the Guarantor identifying all judicial and governmental judgments, orders, injunctions, decrees, and arbitration awards outstanding against the Borrower or the Guarantor (as the case may be) and all judicial and governmental actions, suits, and proceedings, and all arbitrations and mediations, pending or threatened against the Borrower or the Guarantor (as the case may be), or any of their properties;

(xi) the commitment for an ALTA lender's policy of title insurance issued to you by _____ (the "Title Company") in the amount of $_____ dated _____;

[(xii) list other documents and certificates relied upon; and]

(xiii) such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the limitations, assumptions, and qualifications noted below.

In basing the opinions and other matters set forth herein on "our knowledge," the words "our knowledge" signify that, in the course of our representation of the Borrower or the

Guarantor in matters with respect to which we have been engaged by the Borrower and the Guarantor as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language used herein are intended to be limited to the knowledge of the lawyers within our firm who have recently worked on matters on behalf of the Borrower or the Guarantor.

In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:

(a) each of the parties thereto (other than the Borrower and the Guarantor) has duly and validly executed and delivered each instrument, document, and agreement executed in connection with the Loan to which such party is a signatory and such party's obligations set forth therein are its legal, valid, and binding obligations, enforceable in accordance with their respective terms;

(b) each person executing any such instrument, document, or agreement on behalf of any such party (other than the Borrower and the Guarantor) is duly authorized to do so;

(c) each natural person executing any such instrument, document, or agreement is legally competent to do so;

(d) there are no oral or written modifications of or amendments to the Loan Documents, and there has been no waiver of any of the provisions of the Loan Documents, by actions or conduct of the parties or otherwise;

(e) the personal property which is part of the Security is located in _____ City/County, Maryland;

(f) as to due recordation of the Deed of Trust and the priority of the Deed of Trust, you are relying upon the Title Company's commitment referred to in Paragraph (xi) above, and as to the due filing of the Financing Statements, you are relying upon the Title Company;

(g) the Borrower owns the Security of record and in fact; and

(h) all documents submitted to us as originals are authentic, all documents submitted to us as certified or photostatic copies conform to the original documents, all signatures on all documents submitted to us for examination are genuine, and all public records reviewed are accurate and complete.

Based on our review of the foregoing and subject to the assumptions and qualifications set forth herein, it is our opinion that, as of the date of this letter:

1. The Borrower is a limited partnership validly existing in good standing under the laws of the State of Maryland.

2. The Borrower has the limited partnership power [to own its current properties and conduct its business as now conducted,] to borrow the proceeds of the Loan and to execute and perform its obligations under the Loan Documents.

3. All necessary partnership action has been taken to authorize the execution, delivery, and performance of the Loan Documents by the Borrower.

4. The Loan Documents have been duly executed and delivered by the Borrower and the Guarantor (as the case may be) and constitute the valid and legally binding obligations of the Borrower and the Guarantor (as the case may be), enforceable against the Borrower and the Guarantor (as the case may be) in accordance with their terms, subject to the following:

(i) applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally; and

(ii) the exercise of judicial discretion in accordance with general principles of equity.

5. The execution and delivery of, and the performance of the obligations under, the Loan Documents (i) will not conflict with the Borrower's partnership agreement, (ii) based solely upon our review of the Identified Borrower Contracts, the Identified Guarantor Contracts, and our knowledge, will not violate or result in the material breach of the provisions of, or constitute a material default under, any of the Identified Borrower Contracts or any of the Identified Guarantor Contracts, and (iii) based solely upon the certificates referred to in Paragraphs (vii) and (x) above, the commitment of the Title Company referred to in Paragraph (xi) above, and our knowledge, will not conflict with or result in the breach of any court decree or order of any governmental body binding on the Borrower or the Guarantor.

6. Based solely upon the certificates referred to in Paragraph (x) above, the commitment of the Title Company referred to in Paragraph (xi) above, and our knowledge, there is no litigation, arbitration, or mediation pending before any court, arbitrator, mediator, or administrative body, or threatened, against the Borrower or the Guarantor, or any of their properties [, except as described in _____].

7. Based solely upon the certificates referred to in Paragraphs (vii) and (x) above and our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Borrower or the Guarantor of the Loan Documents, or if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken.

8. The Deed of Trust is in appropriate form for due recordation among the Land Records of _____ City/County, Maryland and for creation of the encumbrance and security interest it purports to create on the real and personal property constituting the Security.

9. The Financing Statements are in appropriate form for due filing among the financing statement records of the SDAT and the Circuit Court for _____ City/County, Maryland pursuant to the Maryland Uniform Commercial Code.

10. We have received a letter from the zoning office of _____ City/County, Maryland (the "Zoning Letter"), a copy of which is attached hereto and stating that the subject property is shown on the zoning maps of _____ City/County as being located in a _____ zone. [We have examined the zoning maps of _____ City/County, Maryland, revised and current through _____, 19__ (the "Zoning Maps"), and find that the subject property as shown on the survey dated _____, 19__ and prepared by _____, a certified surveyor (the "Surveyor"), and also identified thereon as _____ City/County parcel number ___, is shown on such maps as being located in a ____ zone.] According to Section ____ of the zoning ordinance of _____ City/County, "business and professional offices" are a permitted use in such zone. The Borrower has represented to us that [it intends to construct] [the subject property is presently improved by] an office building for sole use as business and professional offices upon the subject property.

Accordingly, in reliance solely upon the Zoning Letter [based upon our review of the Zoning Maps] and the zoning ordinance of _____ City/County, Maryland, we are of the opinion that [the construction of an office building upon the subject property constitutes] [the improvements which presently exist upon the subject property constitute] a permitted use of such property, subject to compliance with the other requirements of the zoning ordinance and the subject property's [proposed] [continued] exclusive use for business and professional offices. No further subdivision is necessary for the conveyance of the subject property because the property [is a properly subdivided parcel] [is not subject to subdivision requirements since _____]. [Based upon and in sole reliance upon the certification of the Surveyor,] the subject property is carried on the tax rolls as a separate lot or lots.

11. Based solely upon the representations referred to in Paragraph (ix) above and our knowledge, the Loan does not violate Maryland usury laws.

In addition to the qualifications set forth above, the opinions set forth herein are also subject to the following qualifications:

(i) We have not made or undertaken to make any investigation of the state of title to the real property or to the personal property constituting the Security or of the filing or recordation of the Deed of Trust[, the Assignment,] or the Financing Statements, and we express no opinion with respect to the title to such real property or personal property.

(ii) We express no opinion on the perfection or priority of any lien or security interest.

(iii) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland and the laws of the United States of America. The opinions expressed herein concern only the effect of the laws (excluding the principles of conflict of laws) of the State of Maryland and the United States of America as currently in effect. We assume no obligation to supplement this opinion if any applicable laws change after the date hereof or if we become aware of any facts that might change the opinions expressed herein after the date hereof.

The opinions expressed in this letter are solely for the use of the Lender [and its counsel], and these opinions may not be relied on by any other persons without our prior written approval. The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions should be inferred beyond the matters expressly stated.

This letter is to be interpreted in accordance with the Report of the Special Joint Committee on Lawyers' Opinions in Commercial Transactions of the Maryland State Bar Association, Inc. and The Bar Association of Baltimore City dated January 18, 1989.

Very truly yours,

[Signature of Lawyer/Law Firm
representing Borrower]

4. Illustrative Corporate Borrower's Certificate

Re: $_____ Loan from Lender to [Corporate Borrower] Secured by [Real Property] and [Personal Property] and Guaranteed by [Individual Guarantor]

The undersigned, [being the (officer) of the borrower,] ABC Corporation, a Maryland corporation ("ABC"), does hereby certify that, to the best of [his/her/its] knowledge, information, and belief:

1. The representations made by or on behalf of ABC in the following documents (collectively called the "Loan Documents") are accurate and complete:

a. the Loan Agreement dated _____ between ABC and _____ (the "Lender");

b. the Deed of Trust dated _____ from ABC to _____ and _____, as trustees;

c. the Promissory Note dated _____ in the principal amount of $_____ from ABC to the order of the Lender;

d. the Assignment of Rents dated _____ from ABC to the Lender; and

e. _____ dated _____.

2. ABC is subject to the following [federal/state/local] governmental programs and no others [is engaged in an industry which is regulated by the following governmental entities and no others] which require governmental consent prior to entering into commercial loan transactions:

a. _____

b. _____

c. _____

3. Except as set forth on *Schedule 1*, there are no judicial or governmental judgments, orders, injunctions, decrees, or arbitration awards outstanding against ABC, and there are no judicial or governmental actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against ABC or any of its properties.

4. Attached hereto as *Schedule 2* and made a part hereof is an accurate and complete list of all indentures, mortgages, deeds of trust, security agreements, leases, contracts, and other agreements and instruments to which ABC is a party, or which are otherwise binding on ABC as a guarantor, endorser, assignee, or otherwise, and the violation, breach, or default of which could

have a material adverse effect on the business, operations, properties, or assets, or on the condition, financial or otherwise, of ABC.

5. Attached hereto as *Schedule 3* and made a part hereof is an accurate and complete list of all jurisdictions in which ABC owns tangible personal property; owns real property; leases space; employs individuals on ABC's payroll; pays state taxes; maintains advertising, telephone listings, offices, agents, research and development facilities, warehouses, or bank accounts; or performs extensive or pervasive activities, including without limitation management functions, contract execution, distribution, and solicitation.

6. Attached hereto as *Schedule 4* and made a part hereof is an accurate and complete list of all current principal properties owned or leased, and current principal businesses conducted, by ABC, and their locations.

7. The proceeds of the Loan are to be used solely [to acquire/conduct] the [business[es]/commercial enterprise[s]] of _____.

8. [ABC intends to construct] [(the subject property) is presently improved by] an office building for sole use as business and professional offices upon [the subject property].

9. Attached hereto as *Exhibits A* and *B* and made a part hereof are current copies of the charter and bylaws, respectively, of ABC.

10. Attached hereto as *Exhibit C* is an incumbency certificate regarding the officers of ABC signed by the secretary of ABC.

11. Attached hereto as *Exhibit D* and made a part hereof is a certified copy of the corporate resolutions signed by the secretary of ABC authorizing the execution, delivery, and performance of the Loan Documents (the "Corporate Resolutions"). The Corporate Resolutions have not been modified or rescinded, and there are no other corporate resolutions relating to the Loan Documents.

12. As of the date hereof, no judicial proceeding has been instituted by the Attorney General of the State of Maryland alleging that ABC has abused, misused, or failed to use its powers and franchises in a manner which, in the public interest, would make proper the forfeiture of the charter of ABC or the dissolution of ABC; no articles of dissolution have been filed with the Maryland State Department of Assessments and Taxation; and no petition has been filed in any court of competent jurisdiction to dissolve ABC.

13. No proceedings by or against ABC have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has ABC made an assignment for the benefit of creditors, admitted in writing inability to pay debts generally as they become due, or filed or had filed against it any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of ABC.

This Certificate may be relied upon by [Borrower's lawyer/law firm] in [his/her/its] opinions addressed to the Lender in connection with the Loan Documents.

IN WITNESS WHEREOF, the undersigned has executed this Certificate as of the _____ day of _____, 19__.

WITNESS: ABC CORPORATION

_____ By_____
[Officer] of ABC Corporation

_____ _____
[(Officer) of ABC Corporation]

5. Illustrative Limited Partnership Borrower's Certificate

Re: $_____ Loan from Lender to [Limited Partnership Borrower] Secured by the land and improvements erected and to be erected thereon, located in _____ City/County, Maryland (the "Security") and Guaranteed by [Individual Guarantor]

The undersigned, [being (all of the general partners) (the sole general partner) of the borrower,] ABC Limited Partnership, a Maryland limited partnership ("ABC"), [do/does] hereby certify that, to the best of [his/her/its/their] knowledge, information, and belief:

[Paragraphs 1 through 8 hereof repeat paragraphs 1 through 8 of the Illustrative Corporate Borrower's Certificate.]

9. Attached hereto as *Exhibit A* and made a part hereof is a copy of the limited partnership agreement [and all amendments] of ABC.

10. Attached hereto as *Exhibit* B and made a part hereof is a copy of the certificate of limited partnership [and all amendments] of ABC.

11. [(For a limited partnership formed prior to July 1, 1982:) ABC has elected to be governed by the Maryland Revised Uniform Limited Partnership Act and has appointed a resident agent,] there have been no amendments to the limited partnership agreement of ABC other than those reflected on the long form Status Certificate of ABC from the Maryland State Department of Assessments and Taxation dated _____, 19__.

12. All [necessary consents] [required votes] of the partners of ABC have been obtained to approve the captioned transaction.

13. No proceedings by or against ABC or any general partner of ABC have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has ABC or any general partner of ABC made an assignment for the benefit of creditors, admitted in writing inability to pay debts generally as they become due, or filed or had filed against it or him any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of ABC or any such general partner.

14. No judicial proceeding has been filed or is pending for the dissolution of ABC, and no circumstances have occurred or exist which have triggered or will trigger a dissolution of ABC under the Certificate of Limited Partnership of ABC or under the Maryland Revised Uniform Limited Partnership Act.

This Certificate may be relied upon by [Borrower's lawyer/law firm] in [his/her/its] opinions addressed to the Lender in connection with the Loan Documents.

IN WITNESS WHEREOF, the undersigned [have/has] executed this Certificate as of the _____ day of _____, 19__.

WITNESS: ABC LIMITED PARTNERSHIP

_____ By_____
General Partner of ABC Limited Partnership

_____ _____
[General Partner of ABC Limited Partnership]

6. Illustrative General Partnership Borrower's Certificate

Re: $_____ Loan from Lender to [General Partnership Borrower] Secured by the land and improvements erected and to be erected thereon, located in _____ City/County, Maryland (the "Security") and Guaranteed by [Individual Guarantor]

The undersigned, being all of the partners of the borrower, ABC Partnership, a Maryland general partnership ("ABC"), do hereby certify that, to the best of their knowledge, information, and belief:

[Paragraphs 1 through 8 hereof repeat paragraphs 1 through 8 of the Illustrative Corporate Borrower's Certificate.]

9. ABC was formed on _____, 19__ by [oral/written] agreement of the undersigned and exists as of the date hereof, and the undersigned intend to continue ABC's existence. [A complete copy of the partnership agreement of ABC is attached as *Exhibit A*.]

10. The undersigned are the current owners of all of the partnership interests in ABC and hold such interests only for their own accounts.

11. All [necessary consents/required votes] of the partners of ABC have been obtained to approve the captioned transaction.

12. No proceedings by or against ABC or any partner of ABC have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has ABC or any partner of ABC made an assignment for the benefit of creditors, admitted in writing inability to pay debts generally as they become due, or filed or had filed against it or him any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of ABC or any such partner.

13. No judicial proceeding has been filed or is pending for the dissolution of ABC, and no circumstances have occurred or exist which have triggered or will trigger a dissolution of ABC under the Partnership Agreement of ABC or under the Maryland Uniform Partnership Act.

This Certificate may be relied upon by [Borrower's lawyer/law firm] in [his/her/its] opinions addressed to the Lender in connection with the Loan Documents.

IN WITNESS WHEREOF, the undersigned have executed this Certificate as of the _____ day of _____, 19__.

WITNESS:

_____ _____
General Partner of ABC Partnership

_____ _____
General Partner of ABC Partnership

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