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Report of the State Bar of Arizona Corporate, Banking, and Business Law Section Subcommittee on Rendering Legal Opinions in Business Transactions, February 1, 1989

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Report of the State Bar of Arizona
 Corporate, Banking, and Business Law
 Section Subcommittee on Rendering Legal
 Opinions in Business Transactions,*
 February 1, 1989

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I. INTRODUCTORY MATTERS

A. *Purpose of This Statement*

In recent years, lawyers have focused attention on the subject of legal opinions in connection with various commercial transactions. In response, a number of bar association groups and other authors have published articles, statements, and policies, including model opinion letters, in an attempt both to standardize the format of opinion letters and to provide guidance for lawyers preparing opinion letters. The subcommittee on legal opinions (the Committee) was formed as a subcommittee of the Corporate, Banking, and Business Law Section of the State Bar of Arizona (the Section) to prepare a policy statement (this Statement) suggesting standard opinion language and appropriate diligence. In doing so, the Committee has borrowed liberally from other published materials on the subject.¹

Although the content of any legal opinion will vary depending upon the type of transaction and the nature of the parties involved, it is the Committee's hope that providing standardized forms of opinion language will result in more uniform opinions and a less time-consuming and less arduous negotiating process. The beneficiary will be the client, because the time required to consummate the transaction, and the costs involved, will be lessened.

This Statement includes an illustrative opinion (the Illustrative Opinion).² Commentaries in Section III of this Statement generally discuss each section of the Illustrative Opinion and, where appropriate, alternative opinion language and suggested due diligence. In addition, this Statement attempts to ascribe meanings to certain words and phrases typically used in opinions in order to promote uniformity and common understanding. This Statement also addresses ethical considerations involved in rendering legal opinions and discusses circumstances in which requesting an opinion may be inappropriate.

B. *Use of This Statement*

This Statement was approved and adopted by the Section in November, 1988. It has not been approved by the Board of Governors or the membership of the State Bar of Arizona. It is intended as a guide to lawyers and is not intended to articulate standards of care, or to

1. See *infra* Bibliography, app. B.

2. See *infra* Illustrative Opinion, app. A.

prescribe the exclusive procedures and investigation required in order to render opinions. This Statement represents the consensus of the Committee members.

The approaches taken by other bar groups and authors have varied. Some of these approaches were adopted by the Committee, while others were rejected. The Committee recognizes that some issues are unique to Arizona and that Arizona customs and practices may dictate different results.

The Illustrative Opinion is not intended to be used in its entirety for any one transaction. Although some of the opinions addressed in this Statement apply to business transactions generally, many of the opinions are appropriate only under certain circumstances. In addition, this Statement does not address each opinion that might be appropriate in a particular transaction.

Lawyers may incorporate this Statement into their opinions. Some lawyers believe doing so will promote better understanding and interpretation of opinion letters. Other lawyers believe incorporating this Statement might only protract negotiations or create added expense. The Committee takes no position on this issue. If this Statement is to be incorporated, the opinion might reference this Statement as follows:

This opinion incorporates by reference, and is to be interpreted in accordance with, the Report of the State Bar of Arizona Corporate, Banking, and Business Law Section Subcommittee on Rendering Legal Opinions, dated February 1, 1989.

C. Timing and the Role of Counsel

Because the preparation of a legal opinion can be both costly and time consuming, the negotiation of the scope of the opinion and the identity of the lawyer who will render the opinion should begin at the earliest possible stage of the transaction. Negotiation of the opinion too often is left until the last minute. This places the lawyer rendering the opinion in a situation in which the lawyer may have insufficient time to perform the required due diligence. The specific opinions to be provided and, preferably, the precise wording of the opinion, including the assumptions and qualifications, should be determined between counsel at the earliest possible date. A rule of reasonableness should be followed regarding requests for opinions so as to narrow the scope of opinions to those issues that are of legitimate concern to the addressees of the opinions. Keeping the scope of opinions narrow should help to avoid legal bills that are out of proportion to the nature of the transaction and to avoid overly adversarial and time-consuming negotiations between lawyers over insignificant issues.

II. ETHICAL CONSIDERATIONS

A. *Lawyer-Client Relationship*

A lawyer may render an opinion to a third party only in an area of practice in which he or his firm is competent³ and only when the client so requests.⁴

When a lawyer is asked to give a legal opinion to a third party, the lawyer should discuss its major points with the client before rendering the opinion. The lawyer should be satisfied that rendering the opinion is compatible with representing the client. If the opinion might be adverse to the interests of the client, the lawyer should consult with the client and permit the client to decide whether the opinion should be released.

In each opinion the lawyer should identify his client. For example, a lawyer hired by a corporation to analyze its ability to borrow money does not have a lawyer-client relationship with the lender to whom the opinion is addressed. A fundamental requirement of the lawyer-client relationship is that the lawyer maintain confidentiality of information relating to the representation of the client.⁵

If confidential information is to be disclosed in an opinion, the disclosure should be explained to the client before the opinion is rendered to be sure that the client understands the legal consequences of, and consents to, the disclosure. The lawyer should help the client decide whether the lawyer should disclose the client's confidences in the opinion or should instead preserve the client's confidences by declining to deliver the opinion.

3. 17A ARIZ. REV. STAT. ANN., SUP. CT. RULES, RULES OF PROFESSIONAL CONDUCT, Rule 42, ER 1.1 (1988).

4. *Id.* Rule 42, ER 2.3 provides:

(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.

5. ARIZ. REV. STAT. ANN. §§ 12-2234, 13-4062; ARIZ. R. CIV. P. 26(6); ARIZ. R. CRIM. P. 15.4(6). 17A ARIZ. REV. STAT. ANN., SUP. CT. RULES, RULES OF PROFESSIONAL CONDUCT, Rule 42, ER 1.6 provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . .

17A ARIZ. REV. STAT. ANN., SUP. CT. RULES, RULES OF PROFESSIONAL CONDUCT, Rule 42, ER 1.8 provides:

A lawyer shall not use information relating to information of a client to the disadvantage of a client unless a client consents after consultation.

B. Duties to Third Parties

An opinion must accurately state the facts and the law.⁶ Except with full disclosure and the consent of the recipient, a lawyer should not render an opinion based on facts or assumptions the lawyer knows to be incorrect.⁷ In rendering an opinion the lawyer should make whatever investigation is appropriate under the circumstances. Although certain issues or sources may be excluded, or the scope of investigation may be limited, any material exclusion or limitation should be described in the opinion.

C. Disclosure of Special Relationships with Clients or Other Parties to Transactions

The recipient of an opinion is entitled to assume that the lawyer rendering the opinion is exercising independent judgment. If the lawyer rendering an opinion has a special relationship with the client or other parties to the transaction, such as being a member of the client's board of directors, the independence of his judgment may be subject to question. For this reason, any special relationship should be disclosed in the opinion, so the recipient can evaluate whether to accept the opinion.

III. FORM AND ELEMENTS OF OPINION

A. Introduction

1. Description of Role of Counsel

An opinion may state the capacity in which a lawyer has acted in the transaction:

6. 17A ARIZ. REV. STAT. ANN., SUP. CT. RULES, RULES OF PROFESSIONAL CONDUCT, Rule 42, ER 4.1 states that:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

7. See *infra* notes 97-100 and accompanying text. 17A ARIZ. REV. STAT. ANN., SUP. CT. RULES, RULES OF PROFESSIONAL CONDUCT, Rule 42, ER 8.4(c) states that:

It is a professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

We are counsel to the Company; or,

We have acted as local counsel to the Company in connection with the Transaction and do not otherwise represent the Company.

Lawyers often state the capacity in which the lawyer acted in rendering an opinion in order to inform the recipient of the lawyer's familiarity with the client's affairs. A statement that the lawyer rendering an opinion is "in-house" or "general counsel" may imply, among other things, that the lawyer is generally familiar with the client's affairs. A statement that the lawyer rendering the opinion is "special counsel," or specially employed by the client in connection with the transaction, may imply that the lawyer is not generally familiar with the client's affairs.

Based on inferences, an argument might be made that a "general counsel" has a higher duty to know or investigate than one described as "counsel" or "special counsel." An argument also might be made that designating oneself as "special counsel" somehow implies "special" knowledge or expertise.

The Committee does not believe that it is necessary to negate such inferences because the underlying facts rather than the nomenclature used to describe the lawyer's role ought to govern the outcome of the above arguments. References such as "general counsel" or "special counsel" should not affect the scope of the opinions and should not increase or decrease the duty of the lawyer to conduct the investigation necessary to render the opinion.

2. Jurisdictional Limitations

Lawyers usually limit their opinions to the law of certain jurisdictions. The Illustrative Opinion provides:

We are qualified to practice law in the State of Arizona, and we do not purport to be experts on, or to express any opinion concerning, any law other than the law of the State of Arizona and applicable federal law.

3. Statement of Reliance upon Opinions of Other Counsel

If, in rendering an opinion, a lawyer relies on an opinion of other counsel, the reliance should be stated in the opinion. Other opinions should be relied on only with the permission of the lawyers who rendered the other opinions. It is also customary to deliver the opinion on which reliance is placed. The Illustrative Opinion provides:

Insofar as our opinion pertains to matters of ___ law, we have relied upon the opinion of Messrs. [firm name], of [city], [state] dated ___, a copy of which is attached.

By relying on an opinion, a lawyer implies that it is reasonable to do so. If requested, it is appropriate for the lawyer to state that reliance is justified. Generally, to establish the reasonableness of reliance, the lawyer rendering the opinion should ascertain whether the opinion on its face responds to the questions posed and should have no reason to question the competence of the other lawyer. Establishing the reasonableness of reliance may require some inquiry if, for example, the opinion on its face seems incorrect or is not understandable. The lawyer rendering the opinion, merely by relying on an opinion, does not assume responsibility to investigate or otherwise verify the opinion of the other lawyer. Use of terms such as "concurrence in" or "satisfaction with" the opinion of another lawyer may result in broader responsibility than in the reliance situation and may require some independent investigation of law.

Alternatively, a recipient may accept a separate opinion about certain matters not included in the primary opinion. In that case, the primary opinion may assume the correctness of the matters stated in the separate opinion, rely upon the separate opinion, or exclude from its scope the matters stated in the separate opinion.

4. Recitation of Documents and Matters Examined

Lawyers use several methods to refer to documents examined. Some lawyers do not specify the documents examined but merely recite that the lawyer has examined "such documents and made such investigations as we have deemed necessary in rendering the opinion." Other lawyers list documents material to the transaction and also recite the examination of "such other documents as we have deemed necessary." Others list every document examined.

Officers' certificates are frequently used to establish factual matters.⁸ Such certificates are usually not attached to the opinion, but should be furnished if requested by the party receiving the opinion.

B. Standard Provisions

1. Status of Entity

One of the most frequently requested opinions concerns a corporation's or partnership's organization. This section examines the status

8. See *infra* Illustrative Opinion, app. A, paras. 5, 8, 12, 13.

of domestic and foreign corporations, domestic general and limited partnerships, and foreign limited partnerships.

a. Domestic Corporation

An opinion about the status of an Arizona corporation generally addresses organization, existence, and standing. The Illustrative Opinion provides:

The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of Arizona.

Lawyers sometimes receive requests for the additional opinion that a corporation is “duly incorporated.” The doctrine of de facto corporations does not apply in Arizona to entities formed after the effective date of the Arizona Business Corporation Act.⁹ Therefore, the terms “is a corporation” and “duly incorporated” are redundant where applied to such entities.

Due Organization. The opinion that a corporation is duly organized means that the corporation is an Arizona corporation and that its internal organization is consistent with law.

The opinion that an entity is a corporation means that its corporate existence has begun under Arizona law and has not ceased. It is not an opinion that the entity has complied with all conditions precedent or subsequent to incorporation or that such compliance has been confirmed or waived by the Arizona Corporation Commission (ACC).

The opinion should be supported by review of a copy of the articles of incorporation, all amendments thereto, and all articles of merger or consolidation, each bearing a stamp indicating that they have been filed by the ACC. Corporate existence begins upon the earlier of filing of the articles of incorporation by the ACC,¹⁰ or delivery to the ACC of articles of incorporation that are subsequently filed by the ACC.¹¹ Filing is not conclusive evidence as against the State of Arizona (State) in a proceeding by the State to revoke or cancel the filing or for involuntary dissolution, and the opinion should not be read to mean that the State will not succeed in any such action.

9. ARIZ. REV. STAT. ANN. §§ 10-002 to -1099 (1977); see also *T-K Distribs. v. Soldevere*, 146 Ariz. 150, 704 P.2d 280 (Ct. App. 1985).

10. ARIZ. REV. STAT. ANN. § 10-056(A) (1977).

11. *Id.* § 10-056(B); see also *Malisewski v. Singer*, 123 Ariz. 195, 196, 598 P.2d 1014, 1015 (Ct. App. 1979) (specifically noting the distinction between the delivery and filing dates). The statutory publication requirements commence on the filing, not the delivery date. ARIZ. REV. STAT. ANN. § 10-055(C) (1977).

If the corporation was formed under statutes in existence prior to the Arizona Business Corporation Act, the lawyer should confirm that the corporation's term of existence has not expired. The lawyer should not opine that a pre-Arizona Business Corporation Act entity is a de facto corporation, because existing case law acknowledging the statutory abolition of the de facto corporation doctrine does not give sufficient comfort that the doctrine applies to such corporations,¹² and because Arizona Revised Statutes sections 10-147 and 10-149 do not provide clear guidance with respect to the issue.¹³

This Statement does not address the issues involved where technical defects, such as failure to publish the articles of incorporation, failure to file the affidavit of publication, or failure to file an original or an amended certificate of disclosure, occurred in the incorporation process.

The opinion also means that steps following incorporation have been taken to complete the corporate structure as required by law. Because the statutory presumption of Arizona Revised Statutes section 10-056(A) only applies to incorporation and not to completion of corporate structure,¹⁴ the lawyer should confirm that certain matters of organization have been completed.

The lawyer should review the corporate records to confirm the existence of minutes of an organizational meeting or of a unanimous consent of directors in lieu of the meeting. If minutes are used, the corporate minute book should contain a call for the meeting and either evidence of proper notice or written waiver of notice. If a consent in lieu of meeting is used, it must be signed by all directors.

The lawyer should confirm that bylaws were adopted and that a president, one or more vice presidents, a secretary, and a treasurer were elected, either at the organizational meeting or by unanimous written consent of the directors. The lawyer should also confirm that at least one share of stock has been issued and that the corporate records reflect that the corporation has received valid consideration for the stock.

This portion of the "duly organized" opinion does not mean that the corporation's management and capitalization are sufficient to avoid piercing the corporate veil, but only means that the corporation's organization is free from any defects that would leave the corporation without sufficient power and authority to enter into the transaction. Where a defect in structure exists, such as the vacancy of an office

12. T-K Distribs. v. Soldevere, 146 Ariz. 150, 704 P.2d 280 (Ct. App. 1985).

13. ARIZ. REV. STAT. ANN. §§ 10-147, -149 (Supp. 1989).

14. *Id.* § 10-056(A) (1977).

prescribed by statute,¹⁵ the lawyer should consider whether the “duly organized” opinion should be qualified. The lawyer should qualify the opinion and disclose the defect if he believes the defect may be material.

Valid Existence. The opinion that a corporation is validly existing means only that the entity exists in the corporate form as of the date of the opinion. It does not mean that no ground for involuntary dissolution exists or that no proceedings for dissolution (voluntary or involuntary) have been commenced. Nevertheless, if the lawyer knows that dissolution, merger, or consolidation are imminent, that information should be disclosed to the recipient of the opinion.

The lawyer’s review may include searching the ACC’s records and obtaining an officer’s certificate containing representations of fact sufficient to permit the inference that the entity continues to exist in the corporate form. In the case of Arizona corporations whose existence preceded the Arizona Business Corporation Act,¹⁶ the lawyer should confirm that the corporation’s term of existence has not expired.

Good Standing. The Arizona Business Corporation Act neither defines the terms “good standing” nor authorizes procurement of a “certificate of good standing.” An unqualified opinion that a corporation is in good standing under the laws of the State of Arizona generally is understood to mean only that the corporation has filed all instruments and paid all fees required of the corporation by the ACC as a condition precedent to the ACC’s issuance of a written statement commonly referred to as a “certificate of good standing.” Those conditions currently are that the corporation has filed all affidavits and annual reports and paid all filing fees required to date.

To support the opinion, the lawyer may wish to obtain either an executed certificate of good standing or an oral confirmation from the ACC that the corporation is in good standing as of the date of the opinion and that a certificate of good standing will be issued and forwarded to counsel in due course.

The opinion does not mean that the corporation is in compliance in all respects with the Arizona Business Corporation Act or with any other laws applicable to Arizona corporations, or that the corporation has paid applicable taxes or filed required forms or returns relating to taxes.

Tax Clearance. An Arizona income tax statute “suspends” the corporate powers, rights, and privileges of a domestic corporation if certain

15. See *id.* § 10-050.

16. *Id.* § 10-002.

Arizona income taxes, penalties, jeopardy or fraud assessments, or interest are not paid within specified times.¹⁷ The suspension becomes effective immediately upon transmission from the Department of Revenue to the ACC of the name of the delinquent corporation.¹⁸ In practice, the Department of Revenue has rarely commenced proceedings under this statute; when it has commenced proceedings the Department of Revenue has requested that the ACC revoke the delinquent corporation's articles of incorporation. The law provides that contracts made by a suspended corporation are voidable by any party other than the corporation.¹⁹ To date, general Arizona practice has been to give a good standing opinion without qualification because of, or due diligence with respect to, this statute.

A lawyer may expressly disclaim an opinion about this statute in connection with a good standing opinion either by assuming that the corporation has complied with its terms or by qualification of the opinion to exclude the statute. An appropriate assumption could state:

We assume that the corporation has paid all income taxes, fines, jeopardy or fraud assessments and interest due from it and payable to the State of Arizona.

A qualification of the opinion could state:

We express no opinion about the effect on the corporation or the Transaction, if any, of the provisions of Arizona Revised Statutes §§ 43-1152 et seq.

The Committee recommends, in light of the general practice discussed above, that the failure to make an assumption or qualification should not imply that the opinion addresses this statute; however, the Committee recommends that a lawyer who knows that a corporation is in violation of this statute should not render an opinion that the corporation is in good standing.

In order to render an opinion about this statute a lawyer should secure either (i) a certificate from an officer of the corporation as to its payment of taxes, fines, jeopardy or fraud assessments, and interest; or (ii) a tax clearance certificate from the Department of Revenue pursuant to the statute.²⁰

The tax clearance certificate is based on the Department of Revenue's records including the returns filed and certified by the corporation.

17. *Id.* § 43-1152 (Supp. 1988).

18. *Id.* § 43-1153.

19. *Id.* § 43-1155.

20. *See id.* § 43-1151.

Accordingly, a back-up certificate from the corporation is not necessary unless the Department of Revenue's tax clearance certificate is qualified.

General Comments. The opinions relating to due organization, valid existence, and good standing do not mean that the corporation has obtained any particular licenses, registrations, or approvals except any required by the Arizona Business Corporation Act.

b. Domestic Partnership

General Partnership. An opinion about the status of an Arizona general partnership generally addresses formation and continued existence. The Illustrative Opinion provides:

The Company is a validly existing Arizona partnership.

The above opinion means that a general partnership has been formed under Arizona law and continues to exist on the date of the opinion.

Both the specific provisions of the Arizona Partnership Act²¹ and the common law of the State of Arizona, which the Arizona Partnership Act codifies, determine the existence of an Arizona general partnership. No particular formality is required to form an Arizona general partnership, and no particular content is required in an Arizona general partnership agreement. Rather, the Arizona standard is one that takes into account all facts and circumstances, especially the intent of the parties.

Generally, this opinion is given in instances where there is a written partnership agreement. The Committee makes no recommendation about opinions on de facto partnerships, partnerships by estoppel, or other non-written partnership agreements. Further, if a partnership purports to have been formed under the laws of another state, it may be appropriate to consult a lawyer in the state of formation prior to rendering an opinion about its existence.

The opinion should be substantiated by a review of the applicable partnership agreement to determine that two or more persons or entities intended to associate with one another as co-owners of a business for profit²² at the time the partnership was formed. The lawyer should also ascertain that none of the causes of dissolution, including expiration of the stated term of the partnership, set forth in Arizona Revised Statutes section 29-231, has occurred or is in process.²³

21. *Id.* §§ 29-201 to -244 (Supp. 1989).

22. *Id.* §§ 29-206 to -207.

23. *Id.* § 29-213.

Although a certificate of fictitious name may need to be recorded for other purposes, recording of a certificate is not necessary for the formation or existence of a general partnership.

Limited Partnership. An opinion about the status of an Arizona limited partnership generally addresses formation and continued existence. The Illustrative Opinion provides:

The Company is a limited partnership duly organized and validly existing under the Arizona Uniform Limited Partnership Act.

The phrases "duly organized" and "validly existing" are customarily used in rendering a limited partnership status opinion. Unlike the use of these phrases in a corporate status opinion, where each phrase has a separate meaning, the Committee recommends that they be considered as a single unit when used in a limited partnership status opinion. The opinion means that (a) a limited partnership has been formed pursuant to the Arizona Limited Partnership Act, as in effect on the date of formation, for a purpose permitted under Arizona Revised Statutes section 29-306, and (b) the partnership continues to exist on the date of the opinion.²⁴

For partnerships formed after July 24, 1982, this opinion means that a certificate of limited partnership has been filed in the office of the Arizona Secretary of State,²⁵ that the certificate is in substantial compliance with the requirements of the statute,²⁶ that any amendments to the certificate of limited partnership comply with the requirements of the statute,²⁷ and that the limited partnership has not been dissolved.²⁸ It is not an opinion that the certificate of limited partnership actually or completely complies with the statute. In the case of partnerships formed prior to July 24, 1982, the statutes in effect before that date or other legal requirements may apply.²⁹

This opinion should be substantiated by a review of a copy of the certificate of limited partnership and all amendments, showing filing by the Arizona Secretary of State, and the limited partnership agreement, if any, in order to determine whether they substantially comply with the requirements of the Arizona Limited Partnership Act and that dissolution proceedings have not been subsequently undertaken.

24. *Id.* § 29-306.

25. *See id.* § 29-308.

26. *Id.*

27. *Id.* § 29-309.

28. *See id.* §§ 29-344 or 29-345.

29. *Id.* § 29-364 (1988).

In addition, the lawyer should ascertain that no dissolution has occurred that is not reflected in documents of record at the Secretary of State's office. Although the filing of a certificate of cancellation is required upon dissolution, the filing of the certificate is not a prerequisite to the actual occurrence of the dissolution.³⁰

General Comments. A limited partnership formed pursuant to a prior statute and existing on July 24, 1982 was required to file a certificate of amendment on or before December 31, 1984,³¹ containing the information specified in Arizona Revised Statutes section 29-308(a),³² appointing an agent for service of process,³³ and stating the place where the original certificate of limited partnership was filed or recorded. The failure to file such an amendment did not result in dissolution or affect the continued existence of the partnership. However, the partnership cannot maintain an action in an Arizona court after December 31, 1984, until the certificate of amendment is filed. Arizona Revised Statutes section 29-364 contains additional rules concerning existing limited partnerships' names, contributions and distributions, amendments, assignments, and other items.³⁴

Because there is no statutory or regulatory authority for obtaining a "good standing" certificate for a partnership and because none are provided by the state, an opinion that a partnership, general or limited, is in good standing in Arizona is meaningless.

c. Foreign Corporation

An opinion about the status of a corporation formed under the laws of a foreign jurisdiction and doing business in Arizona is frequently requested. The Illustrative Opinion provides:

The Company [is a corporation, duly organized, validly existing, and in good standing under the laws of the State of ___ and] is qualified to do business as a foreign corporation under the laws of the State of Arizona.

Opinions of Arizona lawyers are customarily limited to the laws of the State of Arizona, and a lawyer usually does not render an opinion about the organization, existence, and good standing of a corporation formed under the laws of a jurisdiction in which the lawyer is not

30. *Id.* § 29-310 (Supp. 1989).

31. *Id.* § 29-364(c).

32. *Id.* § 29-308.

33. *Id.* § 29-304(2).

34. *Id.* § 29-364.

licensed to practice. In most cases, that opinion is provided by local counsel in the state of incorporation. The Committee recognizes a general exception to this rule in the case of corporations formed under the laws of Delaware as a result of the common choice of Delaware as the state of incorporation. A lawyer rendering an opinion about the status of a corporation formed under the laws of another jurisdiction, including Delaware, should have sufficient knowledge of the laws of that jurisdiction and conduct the due diligence necessary to render the opinion. For example, terms such as "good standing" may have different meanings in some jurisdictions.

An opinion that a foreign corporation is "qualified to do business as a foreign corporation under the laws of the State of Arizona" means that the corporation has filed an application for authority to transact business as a foreign corporation³⁵ and has published the application,³⁶ and that its authority has not been revoked by the ACC.³⁷ This opinion should be substantiated by review of a copy of the filed application and a good standing certificate from the ACC. The tax clearance statute discussed in connection with domestic corporations is also applicable to foreign corporations and may affect the qualification opinion.³⁸

This opinion does not mean that the lawyer has reviewed corporate records to determine whether defects have occurred in the incorporation or qualification process. Similarly, the opinion should not be read to suggest that the foreign entity complies with all provisions of the Arizona Business Corporation Act or with other laws applicable to Arizona corporations, or that it has paid any applicable taxes in Arizona.

A lawyer may be asked to render an opinion about an Arizona corporation's qualifications to transact business in one or more foreign jurisdictions. A typical form of this request is: "The Company is duly qualified to do business as a foreign corporation and is in good standing" (1) "in the State of _____," or (2) "in each jurisdiction in which it owns or leases property or where the nature of its business requires it to qualify." Opinions in the form of (1) above may be rendered only if the lawyer has sufficient knowledge of the law of the other jurisdiction or relies upon an opinion from appropriate local counsel. Opinions in the form of (2) above are not usually appropriate because, in addition to requiring knowledge of the law of another state,

35. *Id.* § 10-110.

36. *Id.* § 10-111(B) (1977).

37. *Id.* § 10-121.

38. *See supra* notes 9-20 and accompanying text.

they require detailed knowledge of all of a company's business activities and property. Thus, the diligence necessary to render this opinion may be time consuming and expensive.

Occasionally, a lawyer may be asked for an opinion that a corporation's activities in Arizona, including the making of a loan or acquisition, do not require it to qualify to do business as a foreign corporation in Arizona. The concept of "doing business" may depend on a court's interpretation of the level of a corporation's business or contacts in the state and therefore may not be determined with legal certainty. The opinion, if required, is most appropriately provided by the lawyer for the corporation rather than a lawyer for another party to a transaction, because the lawyer for the corporation should be more familiar with the corporation's business and contacts in Arizona.

d. Foreign Limited Partnership

An opinion may be requested about the status of a limited partnership formed under the laws of a foreign jurisdiction and transacting business in Arizona. The Illustrative Opinion provides:

Based solely on the certificate of limited partnership filing dated _____, 19____, issued by the Arizona Secretary of State, the Company is qualified to do business as a foreign limited partnership under the laws of the State of Arizona.

An opinion that a partnership is "qualified to do business as a foreign limited partnership under the laws of the State of Arizona" means that the partnership has submitted to the Arizona Secretary of State a proper application for registration as a foreign limited partnership,³⁹ that the Secretary of State has filed the application and issued a certificate of registration,⁴⁰ and that the registration has not been cancelled.⁴¹ This opinion should be substantiated by review of the application and the registration certificate. The Secretary of State will issue a certificate that an application has been filed and a certificate of registration has been issued, together with copies thereof.

This opinion does not mean that the lawyer has determined whether any defects have occurred other than those appearing on the face of the application or the certificate. It also does not mean that the lawyer has reviewed partnership records to determine whether defects have occurred in the organization process or that the partnership validly

39. ARIZ. REV. STAT. ANN. § 29-349 (Supp. 1989).

40. *Id.* § 29-350.

41. *Id.* § 29-353.

exists under the laws of the foreign jurisdiction. Similarly, the opinion does not mean that the foreign limited partnership complies with all provisions of the Arizona Limited Partnership Act⁴² or other laws applicable to Arizona partnerships, or that it has paid any applicable taxes in Arizona.

The lawyer should further consider whether the general partners of the foreign limited partnership must also qualify to transact business in Arizona.⁴³

2. Capitalization

If shares are transferred or pledged in a transaction, an opinion about the issuer's capitalization may be requested. An opinion about a corporation's capitalization generally addresses due authorization, validity of issuance, and assessability of shares. The Illustrative Opinion provides:

The Company's authorized capital consists of one million common shares, par value \$1.00 per share, of which 100,000 shares are issued and outstanding. The shares issued [pledged] in the Transaction have been duly authorized and are validly issued, fully paid, and nonassessable.

a. Due Authorization

Shares are duly authorized if the corporation (1) has power to issue the shares under applicable law and its articles of incorporation, and (2) has taken all corporate action necessary to authorize issuance of the shares. Necessary corporate action may take place prior to issuance or by ratification.

The authorized number of shares may be verified by a review of the articles of incorporation including all amendments. The number of issued shares may be verified by a review of the stock record book or by reliance upon information provided by the corporation's transfer agent or corporate secretary. The lawyer should determine whether there has been an over-issuance of shares, because shares that are part of an over-issuance are not duly authorized.

An opinion that shares are duly authorized does not include an opinion that a proxy or other solicitation used in connection with a change in the authorized capital of the corporation was not false or

42. *Id.* §§ 29-201 to -244.

43. The Arizona Corporation Commission has declined to answer this question.

misleading in some material respect. Therefore, the lawyer need not qualify the opinion about due authorization on account of potential defects in proxy materials, unless the lawyer is aware of litigation or other specific circumstances that cast doubt on the validity of the change in authorized capital.

b. Validity of Issuance

Shares are validly issued if they are duly authorized, if adequate consideration is paid, and if share certificates are executed and delivered.

In rendering an opinion that shares are validly issued, the lawyer should confirm that the corporation's records indicate the corporation received valid consideration for the shares. This is a factual question, so the lawyer may rely on certificates of the chief financial officer or stock transfer agent.

The validity of issuance of shares is not affected by a failure to comply with federal or Arizona securities laws. These laws do not make share issuance void, although they may give the purchaser a right to rescind the purchase. The laws do not, however, give third parties a similar right to rescind. Accordingly, an opinion about validity of issuance is not an opinion about compliance with federal or state securities laws.

Shares may not be validly issued if they are issued in violation of shareholders' preemptive rights. The existence or nonexistence of preemptive rights should be verified by a review of the articles of incorporation, including all amendments.

c. Assessability

Shares are "fully paid" if (1) the consideration required by the resolutions authorizing or ratifying their issuance has been paid and (2) that consideration was sufficient in kind and amount under the corporation's articles of incorporation and applicable law.

The sufficiency of consideration is governed by Arizona Revised Statutes section 10-019.⁴⁴ This section specifically excludes future services or promissory notes of the purchaser. Shares with a par value must be issued for consideration not less than par value. Shares without par value may be issued for consideration in an amount deemed sufficient by the board of directors. Where consideration is not cash, the board of directors must make a specific finding as to the sufficiency and

44. ARIZ. REV. STAT. ANN. § 10-019 (Supp. 1989).

value of the consideration. In the absence of bad faith, the board of directors' finding as to the value of the consideration is conclusive.

For an Arizona corporation, fully paid shares are nonassessable, except in the case of banking and insurance corporations, which are subject to the provisions of article 14, section 11, of the Arizona Constitution. In addition, the articles of incorporation may provide a procedure for assessments.⁴⁵

Stock dividends may present special problems. Arizona Revised Statutes section 10-018 requires that, upon distribution of authorized shares to shareholders, surplus shall be transferred to stated capital and shall be the consideration for issuance of the shares.⁴⁶ If the required transfer is not authorized or made, or if the surplus is inadequate, sufficient consideration may not be given for the shares.

The Illustrative Opinion covers the validity and nonassessability only of the shares involved in the transaction. If the opinion includes prior issuances, the lawyer should investigate all prior issuances or rely on opinions of other counsel.

3. Power and Authority; Due Authorization, Execution and Delivery

An opinion about corporate or partnership power and authority, rendered in connection with a transaction in which the subject entity is an Arizona corporation, general partnership, or limited partnership, generally addresses (a) the power and authority of the entity to conduct its business generally and to enter into the documents and to carry out the terms of those documents; (b) the action required on the part of the entity to authorize the transaction and to cause the documents to be executed and delivered; and (c) the execution and delivery of the documents.

a. Power and Authority to Conduct Business and to Enter into and Perform the Transaction

With respect to power and authority, the Illustrative Opinion provides:

The Company has the requisite corporate [partnership] power and corporate [partnership] authority (i) to own and operate its properties and assets [the properties and assets described in —]; (ii) to

45. *Id.* § 10-025.

46. *Id.* § 10-018.

carry out its business as such business is currently being conducted [as described in ___]; and (iii) to carry out the terms and conditions applicable to it under the Documents.

The above opinion means, with respect to an Arizona corporation, that the business activities of the corporation are not ultra vires and that the corporation's performance of its obligations under the documents will not cause the corporation's activities to be ultra vires. It means, with respect to either an Arizona general partnership or an Arizona limited partnership, that the partnership is legally authorized to conduct its business activities and to perform its obligations under the documents.

The Committee recommends that, in rendering this opinion, the phrase "corporate power and authority" or "partnership power and authority" be used in order to emphasize that the opinion is based solely on a review of Arizona corporation or partnership law and of the entity's governing documents discussed below, and is not based on a broad review of Arizona, federal, and local authorizations and approvals. Nevertheless, the Committee recommends that all formulations of this opinion, including the phrases "power and authority," "requisite power and requisite authority," or "full power and full authority," be interpreted as having this same meaning.

The terms "power" and "authority" have traditionally been used in combination in the "requisite corporate power and corporate authority" and the "requisite partnership power and partnership authority" opinions. The Committee believes that the words "power and authority" should not have separate meanings when used together in these opinions.

Corporations. This opinion may be substantiated by review of the corporation's articles of incorporation, as amended, and its bylaws. The powers granted to Arizona corporations under the Arizona Business Corporation Act are broad.⁴⁷ Accordingly, if the corporation's articles of incorporation and bylaws do not restrict its corporate powers, this opinion should not be difficult to render under Arizona law.

Corporations that were in existence on the effective date of the Arizona Business Corporation Act may still be governed by articles of incorporation that were adopted under the prior corporate law. If an opinion is requested about such a corporation's power and authority, special attention should be paid to the corporation's articles, for ex-

47. The Arizona Constitution allows corporations to have only those powers expressly granted by law or in their articles of incorporation. ARIZ. CONST. art. XIV, § 4. The Arizona Business Corporation Act expressly provides that corporations may be organized for any lawful purpose which is not specifically prohibited under Arizona law. ARIZ. REV. STAT. ANN. § 10-003 (1977).

ample, debt limitation provisions, in light of Arizona Revised Statutes section 10-147.⁴⁸

Partnerships. If the partnership is an Arizona general or limited partnership, this opinion may be substantiated by review of the applicable partnership agreement. Under both the Arizona Uniform Partnership Act and the Arizona Limited Partnership Act, partnerships have broad powers to engage in business activities,⁴⁹ except that a limited partnership may not engage in the business of banking or insurance.⁵⁰

b. Due Authorization

With respect to due authorization, the Illustrative Opinion provides:

The execution, delivery, and performance of the Documents by the Company have been duly authorized by all requisite corporate [partnership] action on the part of the Company.

This opinion means that any action or consent of the board of directors or shareholders of a corporation or the general or limited partners of a partnership required to authorize the execution, delivery, or performance of the documents has been taken or obtained.

For a corporation, this opinion is often substantiated by a certificate of the corporate secretary about the due adoption of requisite resolutions. The lawyer may instead substantiate the opinion by examining the corporation's articles of incorporation, bylaws, minute books, and other appropriate records to ascertain, among other things, that (i) the mailing of notices of meeting or meetings, if any, was timely, (ii) such notices were sent to the correct addresses, (iii) all waivers of notices were signed if notice was not given, (iv) the directors or shareholders (or both, if necessary) authorized the action, (v) a quorum was present at the time of the vote, (vi) the documents were properly submitted or summarized, (vii) the vote was sufficient, (viii) any directors authorizing the action were duly elected, (ix) the meeting at which the action was authorized was duly convened and held, and (x) all other required actions were properly taken. A third option is to obtain a satisfactory unanimous consent to action in lieu of meeting.

For a partnership, reference should be made to the partnership agreement to determine appropriate substantiation for this opinion.

48. ARIZ. REV. STAT. ANN. § 10-147 (1977).

49. *Id.* § 29-206 (Supp. 1989).

50. *Id.* § 29-306.

The Committee recommends that in rendering this opinion, the phrase “duly authorized by all necessary corporate [partnership] action” be used in lieu of the phrase “duly authorized” to emphasize that the opinion is based solely on a review of the entity’s records and is not based on any consents or approvals of any governmental entity or other third party. Nevertheless the Committee recommends that if the phrase “duly authorized” is used, it be interpreted as having this same meaning.

c. Execution and Delivery

With respect to execution and delivery, the Illustrative Opinion provides:

[T]he Documents have been duly executed and delivered by the Company.

This opinion means that the officers or general partners who have signed the documents on behalf of the corporation or the partnership were authorized to do so, that their signatures were genuine, and that delivery has occurred.

If the company is a corporation, this opinion may be based upon a resolution of the board of directors that authorizes the officers, either generally or by name, to sign the documents. If the company is a partnership, this opinion may be based upon a review of the applicable partnership agreement to determine the general partner’s authorization to sign the documents. If the lawyer does not know the officer or the general partner, or did not witness his signature, the lawyer may assume genuineness of the signature in the opinion.

The lawyer should be present at the delivery of the documents, become satisfied in another manner that the delivery of the documents occurred, or assume delivery in the opinion.

4. Litigation

A “no litigation” statement in an opinion is a factual statement, more in the nature of a representation than a legal opinion. When this opinion is required, a statement such as the following is often used:

We have no knowledge of any [material] pending [or overtly threatened] litigation or other legal proceeding against the Company after _____, 19__ [except ____].

Use of the terms “knowledge” and “material” is discussed below in Section III.C.

The Committee recommends that the phrase "overtly threatened" have the meaning provided in the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests For Information (ABA Policy Statement).⁵¹ Thus, the phrase should mean "[t]hat a potential 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."⁵²

The opinion may include a limitation on the period to which it relates, limiting the lawyer's "knowledge" to a certain time span.

If an opinion is requested reflecting an examination in more depth than reflected in the definition of "knowledge" set forth in Section III.C, the lawyer's statement regarding pending litigation or legal proceedings should include some description of the scope of independent verification efforts, if any. Possible alternatives include:

(a) Based solely upon our knowledge and the representations of the Company [in the Agreement] [in a certificate to us dated _____, 19___]; or

(b) Based solely upon our examinations as of ___, 19___, of the records of the filings in The Superior Court of ___, and United States District Court for the District of Arizona, [and ___] from ___, 19___, through ___, 19___, [our knowledge,] and the representations of the Company

If alternative (b) is used, limitations on the scope of the investigation should be clearly stated with respect to the date of examination and the jurisdictions and records searched. The term "legal proceedings" may encompass nonjudicial administrative actions or arbitration proceedings. Independent discovery may be difficult because such proceedings may not be the subject of a court filing.

The clerks of the superior courts and United States District Court in Arizona will provide affidavits of search for names of parties to litigation. There are also private companies that will undertake these searches.

5. No Consent or Approval

In certain transactions, a lawyer is asked to render an opinion that all consents or approvals of governmental entities necessary to allow

51. *American Bar Ass'n, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 709 (1976).

52. *Id.*

the client to enter into and consummate the transaction, if any are required, have been obtained. The Illustrative Opinion provides:

No consent, approval, authorization, or other action by, or filing with, any federal, state, or local governmental authority is required in connection with the execution and delivery by the Company of the Documents and the consummation of the Transaction [or, if any of the foregoing is required, it has been obtained].

This opinion is frequently requested in corporate and securities transactions. By requesting this opinion, a party seeks assurances that there has been no failure to obtain a regulatory approval that might otherwise render the other party's obligation void or voidable, or the failure of which might subject the other party to legal actions adversely affecting its business or ability to perform its obligations. The need for this opinion in a transaction where the subject entity is a partnership or individual is questionable.

No "knowledge" limitation has been used in connection with this opinion because a limitation or disclaimer as to knowledge in an opinion primarily about legal rather than factual matters is generally inappropriate. Before giving the "no consent or approval" opinion, the lawyer should evaluate the client's business in order to determine which governmental entities, if any, may regulate the client or the transaction. A certificate from a corporate officer about the nature and extent of the client's business may be appropriate.

The Illustrative Opinion includes an opinion only about consents or approvals necessary for the execution and delivery of the closing documents that are required to be obtained before or at the closing of the transaction. The phrase "consummation of the transaction" relates to the transfer of consideration, the imposition of liens, the granting of assignments, or any other event which is a prerequisite to closing the transaction.

A lawyer may be asked to render an opinion about the "performance of the transactions required or contemplated" rather than the "consummation of the transaction." The Committee recommends that opinions be limited to those approvals or consents necessary for the closing of the transaction. If the lawyer is required to render an opinion about "performance," the opinion is appropriately limited to performance as of the date of closing. The lawyer may also include a disclaimer of responsibility for advising the recipient of any changes in the regulation of the client's business or any approvals or consents required in the future. Alternatively, the opinion may state an assumption that the client will obtain consents or approvals required in the future for the performance of its obligations.

6. No Conflicts

The terms and conditions of the documents executed by a party may conflict with the requirements of organizational documents, with other agreements, with judgments, orders, or decrees binding that party, or with applicable law. The party requesting the opinion may seek assurance either that no such conflicts exist or that any potential conflicts are not material to the execution and delivery of the documents and consummation of the transaction. The Illustrative Opinion provides:

(a) The execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of the Company's articles of incorporation or bylaws [partnership agreement].

(b) Based solely upon [our knowledge] [and a review of judgments, orders, and decrees disclosed by the Company in the attached officers' certificate, dated _____, 19____,] [and by a search of the records of the Superior Court of Arizona, the United States District Court for the District of Arizona and ____ for the past ____ years], the execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of any judgment, order, or decree of any court or governmental agency to which the Company is a party or by which it is bound.

(c) Based solely upon [our knowledge] [and a review of those agreements disclosed to us by the Company on the [attached] officer's certificate dated _____, 19____], the execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of any contract, indenture, instrument, or other agreement to which the Company is a party or by which it is bound.

Because the due diligence required to give a full "no conflicts" opinion may be time consuming and expensive, it is appropriate to tailor the scope of this opinion to the needs of the transaction. For example, in a small non-recourse loan transaction, the comfort gained from a "no conflicts" opinion probably does not justify the due diligence required to render the opinion. On the other hand, a full "no conflicts" opinion may be appropriate in a major corporate financing. The Committee therefore recommends that the parties and their lawyers consider whether a "no conflicts" opinion is needed and, if so, in what form.

A lawyer generally does not know the terms of every agreement to which his client is a party or of every judgment, order, or decree affecting the client. The lawyer rendering a "no conflicts" opinion

should be permitted to rely on a certificate of the client to the effect that the client has disclosed all relevant agreements, judgments, orders, and decrees to the lawyer. The opinion should state that the lawyer is relying on the certificate. In most cases, a lawyer may render an opinion that no conflicts exist with documents such as articles of incorporation and bylaws or certificates of partnership and partnership agreements without limiting the opinion to the lawyer's knowledge.

If a lawyer is asked to render an opinion about the performance of a transaction, the same issues arise as are discussed above in the "no consents or approval" section.⁵³

A party may request an opinion that the execution and delivery of the documents and consummation of the transaction will not conflict with or violate any applicable law or rule. This opinion overlaps with the enforceability opinion discussed, *infra*, at III.B.7, and the "no consents or approvals" opinion discussed, *supra*, at III.B.5, as far as the execution and delivery of the documents and the consummation of the transaction are involved. Therefore, if an enforceability or "no consents or approvals" opinion is to be rendered, a "no conflict with laws or rules" opinion may be redundant.

As will be discussed more fully below, the enforceability opinion generally provides that the documents are legal, valid, and binding obligations of the Company and are enforceable in accordance with their terms. To have a valid and enforceable document, the document generally cannot conflict with applicable laws. Similarly, rendering the "no consents or approvals" opinion requires the attorney to determine that the consummation of the transaction will not violate any laws requiring that such consent or approval be obtained.

To the extent that the parties are unable to obtain sufficient comfort through the enforceability and "no consent or approval" opinions, a "no conflict with applicable laws or rules" opinion may be appropriate. The Committee recommends the following form of opinion:

The execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of any applicable law or rule affecting the Company.

Because this opinion calls for a legal, not factual, conclusion, the Committee recommends that the opinion not be limited to the lawyer's knowledge. A statement that the transaction will not violate any law or rule applicable to the Company applies to all federal, state, and local laws and rules. The lawyer rendering the opinion should explicitly

53. See *supra* Section III.B.5.

indicate in the opinion if local laws and rules are to be excluded.

Like the “no consents or approvals” opinion and the “no conflicts with articles of incorporation” opinion discussed above, a “no conflicts with laws” opinion is usually limited to the consummation of the transaction and does not include its performance.⁵⁴ If a performance opinion is rendered, the lawyer may have difficulty in determining which of the applicable laws or rules might conflict with the contemplated transaction. To the extent possible, the scope of this inquiry should be decided when negotiating the form of the opinion. Depending on the circumstances of the transaction, the parties may agree to limit the scope of the opinion to include specified laws or bodies of laws of particular concern to the parties, or to exclude certain bodies of law, such as securities, antitrust, environmental, tax, health, labor or zoning laws.

The limitations on the opinion may be listed in the opinion itself or in the concluding paragraphs of the opinion letter. The limitations on the opinion may be stated:

Our engagement did not extend to, and we render no opinion about, any federal or state [insert bodies of law—e.g. tax, securities, environmental, public health, or labor laws or rules, zoning matters, or applicable building codes or ordinances] or the effect of such matters, if any, on the opinions expressed herein[; however, we are unaware, but have made no independent inquiry, of any facts or circumstances which would materially alter the opinions set forth herein if such laws, rules, matters, codes or ordinances were included in our consideration].

If a lawyer is aware of facts or circumstances that would materially alter the opinion if it were to include such matters, the lawyer may have an ethical obligation to either disclose the problem, with consent of the client, or to refrain from rendering this opinion.⁵⁵

7. Enforceability of Documents

a. The Scope of the Enforceability Opinion

Parties to transactions frequently seek legal opinions about the enforceability of documents. The Illustrative Opinion provides:

The Documents constitute legal, valid, and binding obligations of the Company, enforceable in accordance with their terms.

54. See *supra* Section III.B.5 for a discussion of consummation versus performance.

55. See generally *supra* Section II for a discussion of ethical considerations.

There are variations in the words used for this opinion. For example, some opinions omit the term “legal.” Others eliminate any reference to “enforceable.” Some opinions use “enforceable” but eliminate the expression “in accordance with their terms.”

Arizona lawyers generally consider the words “legal,” “valid,” “binding,” and “enforceable” to be interchangeable and to have a single meaning. The Committee recommends this approach. Whatever the particular form, the enforceability opinion should be understood to mean:

- (1) The documents constitute effective contracts under applicable law, and none of them is invalid by reason of a statute, rule, reported court decision, or “public policy.”
- (2) Absolute contractual defenses to the documents, such as the statute of frauds, are not available to the subject entity.
- (3) The documents are sufficient to create the interests, rights, and obligations they purport to create.
- (4) Except to the extent otherwise qualified in the opinion, each term and provision of the documents is binding upon and may legally be enforced against the subject entity.

b. Exceptions and Limitations to the Enforceability Opinion

The enforceability opinion is generally given subject to certain exceptions, in recognition that certain events, such as bankruptcy, can impair the enforceability of documents, and that certain provisions of documents may be unenforceable in any event. Commonly accepted exceptions include:

Bankruptcy-Insolvency. The most common exception to the enforceability opinion is the bankruptcy-insolvency exception. The Illustrative Opinion provides:

The enforceability of the Documents may be subject to or limited by bankruptcy, insolvency, reorganization, arrangement, moratorium, or other similar laws relating to or affecting the rights of creditors generally.

Some lawyers believe that this exception is implicit and need not be stated. The exception, however, is customarily included in opinions by Arizona lawyers, and the Committee recommends its inclusion in opinions about document enforceability.

Some lawyers believe that, because the exception refers only to “enforceability,” it does not qualify the opinion about “validity.” For example, they believe that the limitation for “bankruptcy” may be

insufficient to disclose the potential voidability in bankruptcy of a guarantee of payment, a deed of trust, or other conveyance on a fraudulent conveyance or preferential transfer theory. This approach, however, is inconsistent with the Arizona practice of reading "legal," "valid," "binding," and "enforceable" interchangeably. Therefore, the Committee recommends that each exception to the enforceability opinion be read to apply to each of the words "legal," "valid," "binding," and "enforceable." In the bankruptcy-insolvency context, then, the exception should be read expansively to exclude any opinion about the effect of bankruptcy-insolvency principles, including fraudulent conveyance and preferential transfer theories.

If the facts of a transaction raise a particular bankruptcy-insolvency issue, such as a fraudulent conveyance or preferential transfer issue in a lending transaction where collateral is provided by a corporation other than the borrower, the lawyer for the party requesting the opinion may request that the opinion specifically address this issue or the lawyer rendering the opinion may elect to address this issue independently.

Equitable Principles. Another common exception to the enforceability opinion is the equitable principles exception. The Illustrative Opinion provides that:

The enforceability of the Documents is subject to general principles of equity.

The availability of certain remedies, such as specific performance and injunctive relief, and the applicability of certain defenses, such as laches, are limited by equitable principles based upon the conduct of the parties. In addition, some contractual provisions may be found to be unconscionable or otherwise unenforceable because of the application of equitable principles. This exception commonly appears in Arizona legal opinions. The Committee recommends its inclusion in opinions, either stated separately as provided in the Illustrative Opinion, or as an addition to the bankruptcy-insolvency exception.

Some opinions add to the exception the phrase "regardless of whether enforceability is considered in a proceeding in equity or at law." Because of the merger of law and equity in Arizona, this addition is unnecessary.

General Limitation. Opinions on enforceability also typically include a general limitation. The Illustrative Opinion provides:

The enforceability of the Documents is further subject to the qualification that certain waivers, procedures, remedies, and other provisions of the Documents may be unenforceable under or limited by the law of the State of Arizona; however, such law does not, in our opinion, substantially prevent the practical realization of the benefits intended by the Documents.

This exception is intended to recognize that although specific provisions of an agreement may not be enforceable, a party may nevertheless pursue recognized legal remedies and enforce the essential purpose of the agreement. Use of this exception eliminates the need for more specific qualifications; however, the language of this limitation has not been the subject of a definitive court decision and is not free from ambiguity. Although the meaning of the phrase “practical realization of the benefits intended by the documents” may depend upon the custom and practice in the particular type of transaction, the exception includes the implicit assumption that the party enforcing its remedies will do so in a manner consistent with, and as limited by, applicable law.

For example, loan documents often contain provisions, such as statute of limitations waivers, that are of questionable enforceability. But the unenforceability of certain provisions does not mean that the documents have not created an obligation to pay the debt, a collateral assignment, or a real property lien. Even if particular provisions are unenforceable, the exception is appropriate if the documents are nonetheless sufficient to permit the lender to pursue recognized legal remedies to enforce payment of the debt, including acceleration of the indebtedness in the event of a material breach of a material covenant or obligation. In the case of loan documents creating liens or security interests, such remedies are foreclosure, trustee’s sale, and UCC sale, as appropriate. In the case of a promissory note, the remedy is an action to enforce the debt. The qualification should not be read, however, to provide assurance to the lender about the borrower’s ability to satisfy the debt, or that the debt will actually be paid when due. Further, the reference to practical realization does not provide assurance that the realization of the benefits of the transaction will not be affected by laws unrelated to the enforceability of the documents.

Although the exception is intended to avoid the need to list specific qualifications, lawyers may comment on provisions with which they have a particular concern even if the unenforceability of those provisions would not prevent the practical realization of the intended benefits. In light of the uncertainty inherent in the concept of “materiality” referred to in the preceding paragraph, lawyers may consider calling attention to specific provisions of questionable enforceability when the provisions are unusual or when it is apparent from the negotiations that such provisions are of special importance in the transaction.

If the documents contain provisions that may be unenforceable and the unenforceability of those provisions would substantially prevent the practical realization of the benefits intended by the documents, the

general limitation will not suffice. In those instances, the potentially unenforceable provisions should be the subject of specific exceptions or limitations.⁵⁶

The language used in the general limitation may vary from the form given above. One variation eliminates the word "practical" and includes "principal" before the word "benefits." Slight differences in the formulation of this general limitation should not alter its purpose or meaning. Some lawyers add the following additional language to the general limitation referred to above: "except for the economic consequences of any procedural delay that may result from such laws." This additional language highlights the fact that the intervention of Arizona law may cost time and money. For example, in a lending transaction, even if a deed of trust provides that real property may be sold by the trustee ten days following a notice of election to sell, the lender will nevertheless be subject to the statutory notice and timing requirements. The additional language simply provides information about the effect of applicable law, which may, in some circumstances, harm a party's economic interests. The additional language should not be read to narrow or expand the basic concept of the general limitation itself, and is not necessary.

Some lawyers who are unfamiliar with the laws of Arizona request a specific listing of the waivers, procedures, remedies, and other provisions that may be unenforceable. The preparation of an exhaustive listing is contrary to Arizona practice and is appropriate only where the scope of the transaction merits the required time and due diligence.

c. Typical Enforceability Issues

Particular areas of law present common problems in connection with the enforceability opinion. The most common problems include:

Usury. Questions arise with respect to usury issues in financing transactions. The Committee recommends that, unless the lawyer expressly excludes the question of usury from the scope of the opinion, an opinion that the financing documents are enforceable be understood to include the opinion that the transaction is not usurious. The lawyer should therefore evaluate the legality of the particular transaction terms.⁵⁷

Choice of Law. Questions occasionally arise whether an opinion that documents are enforceable covers choice of law matters without ex-

56. See *infra* Section III.B.7.c for a discussion of special problems in guaranties.

57. See *Layne v. Transamerica Fin. Serv.*, 146 Ariz. 559, 561-62, 707 P.2d 963, 965-66 (1985).

pressly so stating. The Committee recommends that, unless the lawyer expressly excludes choice of law from the scope of the opinion, an opinion that the documents are enforceable be understood to include the opinion that Arizona courts would uphold the parties' choice of law when the documents recite that they are governed by the law of a particular state.

Guaranties. An enforceability opinion is often requested about a guaranty that purports to waive in advance some or all of the legal protections traditionally granted to sureties and guarantors. Examples of such protections are found in Arizona statutes⁵⁸ and Arizona rules of procedure,⁵⁹ as well as common law. Some protections may be waived in advance⁶⁰ and some may not.⁶¹ Arizona courts construe attempts at such waivers in favor of the guarantor.⁶² The full extent of limitations on such waivers has not been determined under Arizona law.⁶³

Although the general limitation that certain waivers, procedures, remedies, and other provisions may be unenforceable under or limited by the law of Arizona applies to the provisions and waivers often found in guaranties, a lawyer should be cautious about using the "practical realization" opinion with respect to guaranties that contain such provisions or waivers. If particular provisions or waivers are not enforceable, then action by the beneficiary of the guaranty in reliance upon

58. ARIZ. REV. STAT. ANN. §§ 12-1641 to -1646 (1982); *id.* §§ 47-3606, -9105, -9504 (1988).

59. *See, e.g.*, ARIZ. R. CIV. P. 17(f).

60. *McLellan Mortgage v. Storey*, 146 Ariz. 185, 188, 704 P.2d 826, 899 (Ct. App. 1985) (waiver of ARIZ. REV. STAT. ANN. § 12-1641); *Maestro Music v. Rudolph Wurlitzer Co.*, 88 Ariz. 222, 230, 354 P.2d 266, 271 (1960) (waiver of ARIZ. REV. STAT. ANN. §§ 47-520 (amended and renumbered as §§ 47-3601, -3604, -3606, -1107, -3605), 44-524 (amended and renumbered as §§ 47-3407, -8206), 44-525 (amended and renumbered as § 47-3407) (1988)); *United States v. Crain*, 589 F.2d 996, 1001 (9th Cir. 1979); *see also* U.C.C. § 3-606 comment 2 (1987) (governing discharge of a party to an instrument if there is unjustifiable impairment of security without consent of the guarantor). Comment 2 recognizes that "[c]onsent may be given in advance, and is commonly incorporated into the instrument." *Id.*

61. For example, the rights to receive notice of disposition of and to redeem collateral cannot ordinarily be waived. ARIZ. REV. STAT. ANN. § 47-9504 (1988). These protections extend to guarantors because a guarantor is a "debtor" as defined in ARIZ. REV. STAT. ANN. § 47-9105(A)(5). *International Harvester Co. v. Fuoss*, 157 Ariz. 378, 380, 758 P.2d 649, 651 (Ct. App. 1988); *cf.* *Gary Outdoor Advertising v. Sun Lodge*, 133 Ariz. 240, 242, 650 P.2d 1222, 1224 (1982) (advance waivers of statutes of limitation are unenforceable).

62. *See, e.g.*, *D.W. Jaquays & Co. v. First Sec. Bank*, 101 Ariz. 301, 419 P.2d 85 (1966). A guarantor may waive his equitable rights of subrogation and his right to discharge for release, impairment or exchange of security, but only "by the most unequivocal language in the guaranty agreement." *Id.* at 305, 419 P.2d at 89.

63. Cases in other jurisdictions have recognized limitations. *See, e.g.*, *United States v. Willis*, 593 F.2d 247, 255 (6th Cir. 1979).

the provision or waiver may not result in any realization of the benefits intended by the guaranty. The effect of such action could be the full release or discharge of the guarantor.⁶⁴ If the guarantor is released or discharged, then the beneficiary will receive no benefits under the guaranty.

In the opinion, a lawyer may use a variety of ways to resolve the issues raised in the context of guaranties when the "practical realization" opinion is added to the general limitation that certain waivers, procedures, remedies, and other provisions may be unenforceable or limited by Arizona law. The Committee has not found that any particular approach is used consistently in Arizona practice. Two possible approaches are discussed below. One approach is to exclude the guaranty from the "practical realization" opinion by adding the phrase "other than the Guaranty" to the end of that opinion. The effect of doing so is to exclude from the enforceability opinion any opinion with respect to those waivers, procedures, remedies, and other provisions in the guaranty that are subject to limitations contained in Arizona law generally. Another approach is to add the phrase "except that the application of principles of guaranty and suretyship to the Guaranty may prevent the practical realization of the benefits intended by the Guaranty." The effect of this approach is to limit the exceptions to the "practical realization" opinion to exceptions for Arizona law of guaranty and suretyship only. The Illustrative Opinion includes these two approaches as examples of alternatives.

The enforceability of the Documents is further subject to the qualification that certain waivers, procedures, remedies, and other provisions of the Documents may be unenforceable under or limited by the law of the State of Arizona; however, such law does not in our opinion, substantially prevent the practical realization of the benefits intended by the Documents [other than the Guaranty] [except that the application of principles of guaranty and suretyship to the Guaranty may prevent the practical realization of the benefits intended by the Guaranty].

By including the above alternatives in the Illustrative Opinion, the Committee does not intend to recommend one alternative over the other or to exclude other approaches to the issue. Other approaches exclude guaranties from the "Documents" declared to be enforceable or discuss

64. *International Harvester Co. v. Fuoss*, 157 Ariz. 378, 381, 758 P.2d 649, 652 (Ct. App. 1988); *Scottsdale Discount Corp. v. O'Brien*, 25 Ariz. App. 320, 323, 543 P.2d 158, 161 (1975); *Western Surety Co. v. Horall*, 111 Ariz. 486, 487, 533 P.2d 543, 544 (1975). *But see* RESTATEMENT OF SECURITY §§ 129, 132 (1941) (pro tanto, rather than total, discharge of guarantor).

the limitations inherent in the law of guaranty and suretyship. A third alternative is to limit particular provisions of the guaranty “to the extent permitted by law.” Also, if the scope of the transaction merits the required time and due diligence, the lawyer may justifiably be asked to give an opinion discussing the specific enforceable or unenforceable provisions in a guaranty. As discussed above, any opinion should be negotiated as early in the transaction as possible; this is particularly true of opinions about guaranties because of the special issues involved.

d. Special Issues—Perfected Security Interests

An enforceability opinion includes an opinion about the creation of a security interest in personal property whenever the documents purport to create a security interest. In addition, the secured party frequently requests a separate opinion about the status of the security interest so created. The Illustrative Opinion provides:

The Security Agreement creates a valid security interest in the collateral described therein, to the extent that the Company has rights in the collateral, but our opinion is limited to collateral in which a security interest may be granted pursuant to Article 9 of the Uniform Commercial Code as adopted in the State of Arizona. All action necessary to perfect such security interest in collateral in which a security interest may be perfected by filing has been taken. [For your information, it is necessary to file continuation statements within six months prior to [a date six years from the original date of filing].]

This form of opinion assumes that the lawyer rendering the opinion has reviewed and filed in the locations required by law any necessary Uniform Commercial Code (UCC) financing statements. If the filing of the financing statements is not personally handled by the lawyer rendering the opinion, the opinion is appropriately introduced by the phrase: “When UCC-1 financing statement(s) are filed with [identify the filing office(s)].” In any case, the opinion covers the adequacy of the financing statement description of collateral and the conformity of the financing statement to the security agreement.

The opinion is confined to collateral that is subject to the UCC as adopted in Arizona. Special rules apply to security interests in certain personal property, such as automobiles not in inventory, aircraft, insurance policies, deposit accounts, and real estate rentals. Personal property collateral subject to such special rules may be addressed as a separate matter, but care should be taken to ascertain the steps necessary to create a security interest in such collateral. The opinion also excludes collateral located on an Indian reservation or federal enclave.

Certain security interests are perfected by possession. In those cases, the Illustrative Opinion should be modified by referring to perfection by "filing or possession" and the following sentence should be added to the opinion, as applicable: "With respect to any security interest in letters of credit and advices of credit, goods, instruments, money, negotiable documents, securities, or chattel paper, our opinion concerning the perfection of such security interest assumes that, if the security interest is perfected only by possession, the secured party retains possession of such collateral."

The Illustrative Opinion does not address the priority of the security interest or the ownership rights of the debtor. Opinions on the priority of a security interest or ownership rights are rarely appropriate because of (1) the internal priority rules of the U.C.C., (2) the difficulty of searching for conflicting consensual security interests, (3) the complexities arising under state and federal statutory lien provisions, and (4) the difficulty of tracing ownership of personal property.

The last sentence of the Illustrative Opinion about filing continuation statements is not necessary because the opinion does not cover future events. The statement is, however, customary and can be helpful to the recipient of the opinion.

e. Special Issues—Valid Liens

Arizona lawyers rarely are asked to give separate opinions about the validity of liens in real estate, because an enforceability opinion includes an opinion about the validity of liens created in a transaction. In addition, title insurance insuring the validity of the lien is almost always obtained by the lender in connection with a real estate financing transaction. Both the standard and extended coverage lender's policies insure that the lender's lien is valid. Nevertheless, a lawyer may be asked to render such an opinion. The Illustrative Opinion provides:

The Deed of Trust [Mortgage] creates a valid lien upon the Company's interest in the real property described therein [and, upon recordation with the county recorder of the county in which the property is located, shall impart constructive notice of the lien to third parties].

General. In rendering a valid lien opinion, the lawyer should consider the following:

(1) There must be an interest capable of being liened. "Any interest in real property capable of being transferred may be mortgaged."⁶⁵ Fee

65. ARIZ. REV. STAT. ANN. § 33-701(A) (Supp. 1989).

simple interests, leases, easements, beneficial and legal interests under agreements for sale, water rights, assignments of rents, and other interests in real property are capable of being encumbered.

(2) There must be a written instrument. "A mortgage may be created, renewed or extended only by a writing"66

(3) The writing must be subscribed (signed) and acknowledged.⁶⁷ The acknowledgment may be performed in or out of Arizona,⁶⁸ but if done outside Arizona, must comply either with Arizona law⁶⁹ or with the laws of the place where the acknowledgement is taken.⁷⁰ The words "subscribed and sworn to before me" may not comply with statutory requirements and should not be used alone. If the instrument is not acknowledged, it may be valid between the parties but does not give constructive notice to third parties.⁷¹

(4) Although it is not clear under Arizona statutes whether delivery of a document is required, Arizona case law implies that delivery is necessary.⁷² "Recording of a mortgage by the person who executed it is *prima facie* evidence of delivery"73

(5) "A lawyer should either expressly assume the vesting of title when writing the opinion or rely on a title report or policy and describe it in the opinion [A] mortgage gives the mortgagee no greater interest than the mortgagor possesses."⁷⁴ "A mortgage on property in which the mortgagor has no interest at the time the mortgage is executed is void." However, a mortgage may be given in anticipation of ownership.⁷⁵

(6) Arizona's Blind Trust Act requires that certain persons receiving an interest in property in a representative capacity disclose the names and addresses of the beneficiaries, principals, or wards for whom they hold title, and the trust or other agreement under which they act.⁷⁶

(7) If property is held as community property or as a homestead, both the husband and wife must sign the document.⁷⁷ The interest of

66. *Id.* § 33-701(B).

67. *Id.* §§ 33-401, -701(B).

68. *Id.* § 33-501 (1974).

69. *Id.* §§ 33-503 to -506 (Supp. 1989). ARIZ. REV. STAT. ANN. § 33-504(3) provides a safe harbor.

70. *Id.* § 33-504 (1974).

71. *Id.* § 33-411; *see also* Reid v. Kleyensteuber, 7 Ariz. 58, 59, 60 P. 879, 880 (1900); Heller v. Levine, 7 Ariz. App. 231, 437 P.2d 983 (1968).

72. *See, e.g.,* Heller v. Levine, 7 Ariz. App. 231, 237, 437 P.2d 983, 986 (1968).

73. Wixom v. Ingham, 21 Ariz. App. 65, 67, 515 P.2d 606, 608 (1973).

74. Moeur v. City of Tempe, 3 Ariz. App. 196, 199, 412 P.2d 878, 881 (1966).

75. Valley Chevrolet v. O.S. Stapley Co., 50 Ariz. 417, 426, 72 P.2d 945, 949 (1937).

76. *Id.* (citing ARIZ. REV. STAT. ANN. § 33-404 (Supp. 1989)).

77. ARIZ. REV. STAT. ANN. §§ 33-452 to -453 (1974).

a joint tenant may be mortgaged without the consent or concurrence of the co-tenant.⁷⁸

(8) The writing should contain sufficient words of mortgage and a description of the property, minimally: "For the consideration of ___, I hereby convey to ___ the following real property (describing it) to be void upon condition that I pay" ⁷⁹ The description need not be precise.⁸⁰

(9) In consumer situations, proper disclosures and a right to rescind under the Truth in Lending Act must be given.⁸¹ Otherwise, the mortgage may be void.⁸²

(10) It is not necessary to record a mortgage in order to make it enforceable between the parties.⁸³ The enforceability or valid lien opinion, however, often pertains to constructive notice of the lien to third parties as well as its validity between the parties to the transaction. This opinion may be rendered before or after recordation of the document, but the lawyer's diligence and the assumptions in the opinion will vary depending upon the time of delivery of the opinion.

(11) The writing should be recorded in the county in which the property is located,⁸⁴ contain a caption briefly describing the nature of the instrument,⁸⁵ be legible,⁸⁶ and contain original signatures or carbons of signatures.⁸⁷

Deed of Trust Liens. If the writing is a deed of trust and the opinion requires that the deed of trust create a valid deed of trust lien as opposed to a valid lien, additional issues should be considered. Although substantial compliance with the statutory requirements may be sufficient to create a valid lien, strict compliance with the statutory requirements is probably necessary to create a valid deed of trust lien.⁸⁸

78. *In re Garcia*, 11 Bankr. 10, 11 (Bankr. D. Ariz. 1981); *Cooley v. Veling*, 19 Ariz. App. 208, 209, 505 P.2d 1381, 1382 (1973).

79. ARIZ. REV. STAT. ANN. § 33-402 (1974).

80. *Mounce v. Coleman*, 133 Ariz. 251, 254, 650 P.2d 1233, 1236 (Ct. App. 1982).

81. 15 U.S.C. §§ 1602 to 1607 (1988).

82. *In re Garcia*, 11 Bankr. 10, 12 (Bankr. D. Ariz. 1981).

83. *Valley Nat'l Bank of Ariz. v. Avco Dev. Co.*, 14 Ariz. App. 56, 60, 480 P.2d 671, 675 (1971).

84. ARIZ. REV. STAT. ANN. § 33-411(A) (1974).

85. *Id.* § 11-480(A)(1) (1977). *But see* *Watson Constr. v. Amfac Mortgage Corp.*, 124 Ariz. 570, 576, 606 P.2d 421, 427 (Ct. App. 1979) (failure to be captioned does not render document void as against subsequent lienholders if the county recorder accepts the document for recording and properly indexes it).

86. ARIZ. REV. STAT. ANN. § 11-480(A)(2) (1977).

87. *Id.* § 11-480(A)3.

88. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 477, 578 P.2d 152, 156 (1978). *But see* *Bisbee v. Sec. Nat'l Bank & Trust of Norman*, 157 Ariz. 31, 33, 754 P.2d 1135, 1137 (1988).

A valid deed of trust lien requires a "Trust Deed" or "Deed of Trust"⁸⁹ containing the mailing address of each trustor, trustee, and beneficiary⁹⁰ and containing a statutorily prescribed legal description.⁹¹ There also should be a conveyance of real property to a trustee⁹² who is qualified to be a trustee.⁹³

If a deed of trust fails to comply with all of the deed of trust requirements, it may still be enforceable as a mortgage if it complies with the mortgage requirements, or it may be treated as an equitable mortgage.⁹⁴

C. Knowledge and Materiality Limitations

In the Illustrative Opinion, the lawyer's opinion about certain matters is qualified by the statement "we have no knowledge" or "to our knowledge."

The Committee recommends that the term "knowledge," unless otherwise defined, should have the meaning given in the ABA Policy Statement.⁹⁵ Unless otherwise defined, knowledge is limited to matters that have been given substantive attention by the lawyer. If the lawyer rendering the opinion is a member of a law firm or law department, the opinion speaks for the entire firm or department. The recipient may assume the lawyer has endeavored, to the extent the lawyer deems necessary, to determine from other lawyers currently in the law firm or department whether they have knowledge relevant to the opinion. Use of the term knowledge, however, does not negate a lawyer's ethical obligations.⁹⁶

The recipient of an opinion should not assume that the lawyer rendering the opinion has made any investigation beyond that required by the definition of knowledge. Where specific investigation is requested of the lawyer, the opinion should state the scope of the investigation actually undertaken.

89. ARIZ. REV. STAT. ANN. § 33-801(5) (Supp. 1988).

90. *Id.* § 33-802(B).

91. *Id.* § 33-802(A).

92. *Id.* § 33-801(6). *But see* *Bisbee v. Sec. Nat'l Bank & Trust of Norman*, 157 Ariz. 31, 33, 754 P.2d 1135, 1137 (1988).

93. ARIZ. REV. STAT. ANN. § 33-803 (Supp. 1988).

94. *Shelton v. Cunningham*, 109 Ariz. 225, 228, 508 P.2d 55, 58 (1973) (issue is whether mortgage was intended); *Merryweather v. Pendleton*, 91 Ariz. 334, 342, 372 P.2d 335, 340 (1962) (six conditions influence the determination whether the doctrine of equitable mortgage should be applied); *Heller v. Levine*, 7 Ariz. App. 231, 234, 437 P.2d 983, 986 (1968) (fact that mortgage was not properly acknowledged does not invalidate it as an equitable mortgage).

95. *See supra* note 51.

96. *See supra* Section II.B.

Occasionally, it is inappropriate to limit an opinion to a lawyer's knowledge. For example, an opinion regarding applicable laws calls primarily for a legal rather than a factual conclusion; and, generally it is not appropriate to limit the opinion to the lawyer's knowledge unless the limitation is satisfactory to the party requesting the opinion.

The qualifying term "material" is sometimes used in opinion letters. Although ostensibly limiting the scope of disclosure, its use places on the lawyer the burden of making such judgments as the potential magnitude of adverse litigation and the potential impact on the client's financial condition or operations of adverse litigation. This burden may be reduced by adopting a definition of "material" that excludes items that do not exceed a specified dollar amount.

D. Assumptions

The opinions set forth in an opinion letter are subject to commonly recognized assumptions. Certain assumptions should be set forth explicitly in the body of the opinion. Others are so basic to the opinion process that they need not, but may be, explicitly stated. In either case, a lawyer may not make an assumption contrary to the lawyer's knowledge, unless the assumption and the lawyer's contrary knowledge are expressly stated in the opinion and the party receiving the opinion either consents to or requests the assumption.⁹⁷

1. Stated Assumptions

The Committee recommends that the following assumptions, if applicable in a particular transaction, be expressly stated:

Genuineness. A lawyer may assume the genuineness of signatures not witnessed, the authenticity of documents submitted as originals, and the conformity to originals of documents submitted as copies.

Capacity. A lawyer may assume the legal capacity of each individual signing any of the documents.

No Outside Agreements. A lawyer may assume that the documents accurately describe the mutual understanding of the parties contained therein, and that there are no oral or written statements that modify, amend, or vary, or purport to modify, amend, or vary any of the terms of the documents.⁹⁸

97. See *supra* Section IV.C.

98. This assumption derives from *Darner Motors Sales v. Universal Underwriters*, 140 Ariz. 383, 387 n.5, 682 P.2d 388, 392 n.5 (1984).

Recordation and Filing. If the lawyer is not responsible for recordation or filing, the lawyer may assume the due and proper recordation or filing, as appropriate, of documents. In the case of a document intended to be recorded, such an assumption necessarily includes the further assumption that the document has been properly acknowledged.

Choice of Law. If the lawyer does not expressly exclude choice of law from the enforceability opinion, and the documents recite an Arizona choice of law, the lawyer may include the following assumption:

We have assumed that the result of the application of Arizona law would not be contrary to a fundamental policy of the law of any other state with which the parties may have contact in connection with the transaction.

Usury. In a loan transaction, in light of the language of Arizona Revised Statutes sections 44-1201 and 44-1202,⁹⁹ the lawyer may include the following assumption:

We have assumed that you will receive no interest, charges, fees, or other benefits or compensation in the nature of interest in connection with the transaction other than those that the Company has agreed in writing in the Documents to pay.

2. Implicit Assumptions

The assumptions identified below may be stated in the opinion, but the Committee believes that they are so basic to the opinion process that they should be understood to be applicable even if not expressly stated:

Authority of Other Parties. A lawyer may assume that the obligations of parties to the transaction other than his client are valid, binding, and enforceable with regard to those parties.

Fraud. A lawyer may assume that no fraud has occurred in connection with the transaction.

Statutes, Rules, and Regulations. A lawyer may assume that a statute enacted by the legislature, and a rule or regulation issued by an official administrative entity, is constitutional, valid, and enforceable.

Accuracy and Completeness of Certificates. A lawyer may assume that a certificate or other document issued by a public official is complete and accurate.

99. ARIZ. REV. STAT. ANN. §§ 44-1201, -1202 (1987).

E. Use and Disclosure of and Reliance upon Opinion by Addressee and Others

Ordinarily, only the addressee is entitled to rely on an opinion, unless the opinion states that someone else is entitled to do so. The Illustrative Opinion provides:

This opinion is being furnished to you solely for your benefit and only with respect to the Transaction. Accordingly, it may not be relied upon by or quoted to any person or entity without, in each instance, our prior written consent.

F. No Duty to Update

An opinion letter normally is dated the date of delivery and “speaks” as of that date, although it may deal in part with the availability of remedies in the future. A lawyer is not expected to update an opinion because of changes in the law unless the lawyer has undertaken to do so. Although it is not necessary to state the absence of the duty, some lawyers do so in language similar to that contained in the Illustrative Opinion:

The opinions expressed in this letter are based upon the law in effect on the date hereof, and we assume no obligation to revise or supplement this opinion should such law be changed by legislative action, judicial decision, or otherwise.

IV. INAPPROPRIATE SUBJECTS FOR LEGAL OPINIONS

Factual matters or matters involving intertwined fact and law issues, recognized legal uncertainties, and the laws of jurisdictions in which the lawyer rendering the opinion is not licensed to practice are generally inappropriate subjects for legal opinions unless the lawyer possesses the necessary knowledge and experience to render the opinion. The “Golden Rule” is applicable in this context: A lawyer should not ask another lawyer for a legal opinion that the requesting lawyer would be unwilling to render.

A. Factual Matters/Mixed Fact and Law Issues

Lawyers should neither render nor request legal opinions about factual matters beyond the scope of legal expertise. A legal opinion should address matters of law, not merely confirm facts the parties or other experts are better able to verify. For example, a lawyer should not render an “opinion” that a real property development project has an

assured water supply for the next one hundred years or that the company has filed all necessary federal, state and local tax returns. Further, most lawyers are not trained to analyze technical or engineering problems.

Opinions about purely factual matters are usually highly qualified, either by limiting the opinions to the lawyer's present actual knowledge without any independent investigation or by relying entirely upon the certifications of other professionals. Opinions qualified in this manner mean only that the lawyer has no actual knowledge contrary to the statements made and, therefore, are of little benefit. Although a lawyer may assist in the analysis of factual matters, for example, by reviewing title data and corporate filings, a legal opinion should not be used to shift significant business risks of a transaction to the lawyer.

The investigation and confirmation of the matters discussed below are generally beyond the scope of legal expertise. However, particular lawyers under particular circumstances may be competent to render opinions about some of the subjects. The following list of subjects is not exhaustive.

1. Blanket Compliance with Laws and Regulations

A lawyer may be asked for an opinion that a company's business or a particular project is in full compliance with all applicable statutes, rules, regulations, judgments, decrees, orders, franchises, or permits. Such an opinion requires the lawyer to have knowledge whether numerous facts exist or do not exist and also requires the lawyer to have expertise in many specialized legal subjects ordinarily beyond the scope of legal representation. Rarely is the scope of due diligence and legal research necessary to render this type of opinion possible on an economic or timely basis. Thus, the Committee recommends that this type of opinion be avoided.

2. Zoning, Health and Safety, Subdivision, and Environmental Laws and Regulations

A lawyer may be asked for an opinion that a business or project complies with applicable zoning, health and safety, subdivision, or environmental laws and regulations. A comprehensive opinion on these matters requires knowledge of, or an intensive investigation to determine, purely factual matters including, for example: the measurement of setbacks, building heights, and parking spaces under the zoning laws; the adequacy of sprinkler systems, fire walls, and ventilation under health and safety laws; the size of lots, the sufficiency of water supplies, and the cost of assessments or improvements under the sub-

division laws; or the adequacy and accuracy of soil tests and geological surveys, and the history and use of the property and adjoining properties, under environmental laws. Lawyers who specialize in these matters may have the expertise to render opinions in these areas. Even specialists, however, usually confine their opinions to specific questions of law or to the application of law to known and stated facts, and do not render legal opinions about purely factual matters.

Legal opinions about these matters are not necessary in most circumstances because less costly and more effective alternatives are available. Representations and warranties in transactional documents may be used to allocate liability to the appropriate party. A party may provide certificates of technical experts and copies of governmental approvals and permits. A party may attempt to obtain an appropriate endorsement to a title insurance policy or confirmation from government officials that they have no knowledge of violations of applicable law.

3. Title or Priority Matters

Arizona lawyers customarily do not render opinions on title to real property or priority of liens. Instead, the parties to a transaction usually rely on policies of title insurance issued by title insurance companies or on UCC searches.

To issue a proper title opinion, a lawyer must ascertain whether the legal description of the property is correct and sufficient. The lawyer must also analyze the relevant documents in the chain of title and conduct an extensive search of public records, including court files, probate records, and other governmental files. Most Arizona lawyers do not have the expertise necessary to undertake an extensive abstracting investigation or to ascertain whether the legal description of the property is correct and sufficient. The preparation and review of legal descriptions is normally performed by a licensed land surveyor.

Title to real property and lien priority are often affected by matters that do not appear in public records. The existence and priority of mechanic's liens, for example, involve issues such as when work commenced or was completed. An opinion about title to real property or lien priority must address these factual matters. Title companies are usually willing to insure title to property and lien priority even though title or priority could be affected by "off record" matters.

The Illustrative Opinion contains a form of opinion that addresses the proper documentation to evidence the creation of liens in personal property. However, title and lien priority present significant problems when personal property is involved. Generally, such opinions are heavily qualified because ownership of most personal property cannot be es-

tablished or traced with any certainty. In addition, the UCC and other statutes establish many "off record" lien priorities. Consequently, except for opinions about the sufficiency of instruments, personal property title opinions and priority of lien opinions are often inappropriate, and the Committee recommends that they be avoided except in special circumstances.

B. Legal Uncertainties

A lawyer should neither render nor request an unqualified legal opinion about issues subject to substantial legal uncertainty. If a proposed transaction is subject to substantial legal uncertainty, the lawyer should so inform the client and, if appropriate, other parties to the transaction so that the parties can make informed business decisions about the transaction.

Opinions about issues subject to substantial legal uncertainty are often heavily qualified, or "reasoned." In a reasoned opinion, the lawyer indicates that the law is not settled on a particular issue, discusses statutory and judicial authorities, and predicts how the issue may be decided if properly presented to a court. In many cases, a reasoned opinion serves to inform the recipient about unsettled law, but does not provide significant comfort about a desired result. For this reason, it is often better for each party to rely on the advice of its own lawyer about issues subject to substantial legal uncertainty.

C. Opinions About Laws of Foreign Jurisdictions

With certain exceptions,¹⁰⁰ a lawyer should not render an opinion about the law of a jurisdiction in which the lawyer is not licensed to practice. If a party requires an opinion about the law of another jurisdiction, a lawyer licensed to practice in that jurisdiction should be retained.

Lawyers are often asked to render opinions about documents that state that they are to be governed by the laws of another jurisdiction. In many instances, the party requesting the opinion is unwilling to bear the expense of retaining an additional lawyer and will seek comfort from the lawyer already familiar with the documents. Under these circumstances, the lawyer has three alternatives: (1) assume, notwithstanding the express terms of the documents, that Arizona law will govern the documents; (2) assume that the law of the other jurisdiction

100. See, e.g., *supra* Section III.B.1.c (recognizing exception for opinions with respect to the organization and good standing of Delaware corporations).

is the same as Arizona law; or (3) render an opinion that the choice of law provision of the document is valid.

The first two alternatives have the same practical result of giving comfort about the legal effect of the documents under Arizona law. This is exactly the assurance sought by the party requesting the opinion, who is often already familiar with the legal effect of the documents under the laws of the other jurisdiction. The first two alternatives suffer from the disadvantage that they require an assumption that is either contrary to the intent of the parties (in the case of alternative (1)) or contrary to the knowledge that Arizona law is not the same as the law of any other jurisdiction (in the case of alternative (2)). Although both alternatives suffer from disadvantages, alternative (1) is preferable to alternative (2).

If rendering an opinion under one of the first two alternatives is necessary, the opinion should clearly state the assumptions made. For the first alternative, the opinion may state:

The Documents state that they are to be governed by the laws of _____. We are not familiar with those laws and render no opinion about them. For purposes of our opinion we have assumed, with your consent, that the Documents will be governed by the laws of Arizona notwithstanding their express terms. We express no opinion about what law will actually govern the Documents.

For the second alternative, the opinion may state:

The Documents state that they are to be governed by the laws of _____. We are not familiar with those laws and render no opinion about them. For purposes of our opinion we have assumed, with your consent, that the laws of _____ are identical in all relevant respects to the laws of Arizona. We express no opinion about the reasonableness of this assumption.

The third alternative is theoretically preferable because it requires no hypothetical opinions. Unfortunately, a conflict of laws opinion generally requires substantial due diligence and, because it does not address the substantive provisions of the documents, it does not give the party receiving the opinion the desired assurance about the substantive provisions of the documents. If a conflict of laws opinion is given, it may provide:

You have requested that we advise you whether an Arizona court would give effect to the choice of law provision in the Agreement in favor of the law of the State of _____. The Supreme Court of Arizona has consistently ruled that where it is not bound by a previous decision or by legislative enactment, it will follow the rules

in the Restatements of the Law, including, without limitation, the Restatements of Conflict of Laws. *Smith v. Normart*, 51 Ariz. 134, 75 P.2d 38 (1938); *Western Coal & Min. Co. v. Hilvert*, 63 Ariz. 171, 160 P.2d 331 (1945); *Burr v. Renewal Guaranty Corp.*, 105 Ariz. 549, 468 P.2d 576, (1970); *Taylor v. Security National Bank*, 20 Ariz. App. 504, 514 P.2d 257 (1973); and *In re Levine*, 145 Ariz. 185, 700 P.2d 883 (Ariz. App. 1985). Section 187 of the Restatement (Second) Conflict of Laws provides that the parties to a contract may stipulate their choice of law to govern the contract and that the laws of the state chosen will be applied unless (i) the particular issue is one that the parties could not have resolved by an explicit provision in their agreement directed to that issue and (ii) either:

(a) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or

(b) Application of the law of the chosen state would be contrary to a fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and that, under the rule of Section 188 of the Restatement (Second) Conflict of Laws, would be the state of applicable law in the absence of an effective choice of law by the parties.

Based on the facts concerning the negotiation of the Documents and the terms thereof and considering such other matters as we have deemed relevant, we believe that an Arizona court would give effect to the choice of law provisions in the Agreement in favor of the law of the State of _____ [subject to the application of Arizona law with respect to (a) the issue of perfection of the security interest created by the Security Agreement and (b) the enforcement of rights and remedies against real property located in Arizona].

APPENDIX A

ILLUSTRATIVE OPINION

[LETTERHEAD]

[DATE]

ABC Entity
Commerce Center
Suite 100
_____, Arizona 85000

RE: Transaction (the "Transaction") between ABC
Entity ("you") and XYZ Entity (the "Company")

Ladies and Gentlemen:

We have acted as counsel to the Company in connection with the Transaction evidenced by the Documents (as defined below). You have requested our opinion about certain matters pursuant to Section _____ of the Agreement (as defined below).

Capitalized terms used and not otherwise defined in this letter shall have the meanings ascribed to them in the Documents. For purposes of this opinion, we have examined such questions of law and fact as we have deemed necessary or appropriate, and have examined the following documents (collectively, the "Documents"):

- a. Agreement, dated _____, 19____, between the Company and you (the "Agreement");
- b. Promissory Note, dated _____, 19____, in the principal amount of \$ _____, executed by the Company and payable to you (the "Note");
- c. Deed of Trust, dated _____, 19____, executed by the Company (the "Deed of Trust");
- d. Security Agreement, dated _____, 19____, executed by the Company (the "Security Agreement");
- e. Financing Statements, dated _____, 19____, executed by the Company;
- f. Agreement Not To Compete and Consulting Agreement, dated _____, 19____, executed by the Company;

ABC Entity

[Date]

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g. Stock Pledge Agreement dated ____, 19____, executed by ____ and ____, shareholders of the Company; and

h. Guaranties, dated ____, 19____, executed by ____ and ____, shareholders of the Company (the "Guaranties").

We have further examined:

i. A Certificate of the President of the Company, dated ____, 19____; and

ii. A Certificate of Good Standing with respect to the Company, dated ____, 19____.

Based on the foregoing, and subject to the qualifications set forth below, it is our opinion that:

1. (If the Company is a corporation) The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of Arizona.

2. (If the Company is a general partnership) The Company is a validly existing Arizona partnership.

3. (If the Company is a limited partnership) The Company is a limited partnership duly organized and validly existing under the Arizona Uniform Limited Partnership Act.

4. (If the Company is a foreign corporation) The Company [is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____ and] is qualified to do business as a foreign corporation under the laws of the State of Arizona.

5. (If the Company is a foreign limited partnership) Based solely on the certificate of limited partnership filing dated ____, 19____, issued by the Arizona Secretary of State, the Company is qualified to do business as a foreign limited partnership under the laws of the State of Arizona.

ABC Entity

[Date]

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6. The Company's authorized capital consists of 1,000,000 common shares, par value \$1.00 per share, of which 100,000 shares are issued and outstanding. The Shares issued [pledged] in the Transaction have been duly authorized and are validly issued, fully paid, and nonassessable.

7. The Company has the requisite corporate [partnership] power and corporate [partnership] authority (i) to own and operate its properties and assets [the properties and assets described in ____]; (ii) to carry out its business as such business is currently being conducted [as described in ____]; and (iii) to carry out the terms and conditions applicable to it under the Documents. The execution, delivery, and performance of the Documents by the Company have been duly authorized by all requisite corporate [partnership] action on the part of the Company and the Documents have been duly executed and delivered by the Company.

8. We have no knowledge of any [material] pending [or overtly threatened] litigation or other legal proceeding against the Company after ____, 19____ [except ____].

OR Based solely upon our knowledge and the representations of the Company [in the Agreement] [in a certificate to us dated ____], there is no [material] pending [or overtly threatened] litigation or other legal proceeding against the Borrower [except ____].

OR Based solely upon our examinations as of ____, 19____, of the records of the filings in the Superior Court of ____/____ and United States District Court for the District of Arizona, [and ____] from ____, 19____, through ____, 19____, our knowledge, and the representations of the Company, there is no [material] pending [or overtly threatened] litigation [or other legal proceeding] against the Company [except ____].

9. The execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of any applicable law or rule affecting the Company.

ABC Entity

[Date]

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10. No consent, approval, authorization, or other action by, or filing with, any federal, state, or local governmental authority is required in connection with the execution and delivery by the Company of the Documents and the consummation of the Transaction [or, if any of the foregoing is required, it has been obtained].

11. The execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of the Company's Articles of Incorporation or bylaws [partnership agreement].

12. Based solely upon [our knowledge] [and a review of judgments, orders, and decrees disclosed by the Company in the attached officers' certificate, dated ____, 19____,] [and by a search of the records of the Superior Court of ____, Arizona, the United States District Court for the District of Arizona and ____ for the past ____ years], the execution and delivery of the Documents and consummation of the Transaction by the Company will not conflict with or result in a violation of any judgment, order, or decree of any court or governmental agency to which the Company is a party or by which it is bound.

13. Based solely upon [our knowledge] [and a review of those agreements disclosed to us by the Company on the [attached] officer's certificate dated ____, 19____], the execution and delivery of the Documents, and consummation of the Transaction by the Company will not conflict with or result in a violation of any contract, indenture, instrument, or other agreement to which the Company is a party or by which it is bound.

14. The Documents constitute legal, valid, and binding obligations of the Company, enforceable in accordance with their terms.

15. The Deed of Trust [Mortgage] creates a valid lien upon the Company's interest in the real property described therein [and, upon recordation with the county recorder of the county in which the property is located, shall impart constructive notice of the lien to third parties].

ABC Entity

[Date]

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16. The Security Agreement creates a valid security interest in the collateral described therein, to the extent that the Company has rights in the collateral, but our opinion is limited to collateral in which a security interest may be granted pursuant to Article 9 of the Uniform Commercial Code as adopted in the State of Arizona. All action necessary to perfect such security interest in collateral in which a security interest may be perfected by filing has been taken. [For your information, it is necessary to file continuation statements within six months prior to [a date six years from the original date of filing].]

In rendering the foregoing opinions we have assumed:

(i) The genuineness of the signatures not witnessed, the authenticity of documents submitted as originals, and the conformity to originals of documents submitted as copies;

(ii) The legal capacity of all natural persons executing the Documents;

(iii) That the Documents accurately describe and contain the mutual understanding of the parties, and that there are no oral or written statements or agreements that modify, amend, or vary, or purport to modify, amend, or vary, any of the terms of the Documents;

(iv) That the Company owns all of the property, assets, and rights purported to be owned by it;

(v) That you will receive no interest, charges, fees, or other benefits or compensation in the nature of interest in connection with the Transaction other than those that the Company has agreed in writing in the Documents to pay;

[(vi) That the applicable Documents, immediately after delivery, will be properly filed or recorded in the appropriate governmental offices; and]

[(vii) That the result of the application of Arizona law will not be contrary to a fundamental policy of the law of any other state with which the parties may have contact in connection with the Transaction].

ABC Entity

[Date]

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The opinions set forth above are subject to the following qualifications and limitations:

a. The enforceability of the Documents may be subject to or limited by bankruptcy, insolvency, reorganization, arrangement, moratorium, or other similar laws relating to or affecting the rights of creditors generally;

b. The enforceability of the Documents is subject to general principles of equity; and

c. The enforceability of the Documents is further subject to the qualification that certain waivers, procedures, remedies, and other provisions of the Documents may be unenforceable under or limited by the law of the State of Arizona; however, such law does not, in our opinion, substantially prevent the practical realization of the benefits intended by the Documents [other than the Guaranty] [except that the application of principles of guaranty and suretyship to the Guaranty may prevent the practical realization of the benefits intended by the Guaranty].

We are expressing no opinion as to the title to any property described in, or the priority of any lien or security interest created by, the Deed of Trust or any of the other Documents.

We are qualified to practice law in the State of Arizona, and we do not purport to be experts on, or to express any opinion concerning, any law other than the law of the State of Arizona and applicable federal law. Insofar as our opinion pertains to matters of ____ law, we have relied upon the opinion of Messrs. [firm name] of [city], [state], dated ____, 19____, a copy of which is attached.

The opinions expressed in this letter are based upon the law in effect on the date hereof, and we assume no obligation to revise or supplement this opinion should such law be changed by legislative action, judicial decision, or otherwise.

ABC Entity

[Date]

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This opinion is being furnished to you solely for your benefit and only with respect to the Transaction. Accordingly, it may not be relied upon by or quoted to any person or entity without, in each instance, our prior written consent.

Very truly yours,

[Law Firm] [Lawyer]

Appendix B

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