Opinion Letters – Do's and Don'ts
(Ethics, Professionalism and Malpractice Avoidance)

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This article contains practical tips in the form of "do's" and "don'ts" when rendering an opinion letter given in connection with a real estate transaction.

1. Opinion letters subject the firm to liability – **don't** sign one unless you are authorized (partner signature would normally be required).

2. Opinion letters are subject to negotiation - **don't** sign what is submitted to you without making appropriate changes (**don't** be pressured by a client to sign a "bad" opinion letter just to get the deal closed).

3. Opinion letters are "custom" – **do** make sure the terms match "the deal."

4. Opinion letters "assume" certain facts – **do** include all the appropriate "assumptions."

5. Opinion letters need to be "qualified" – **do** include all the appropriate "qualifications."

6. From a borrower's counsel's perspective, a well drafted opinion letter limits the opinions rendered – **don't** give opinions without the limitations afforded by including appropriate "assumptions" and "qualifications."

7. Opinion letters rely upon verifications of many facts – **do** your "homework" (check with all in house attorneys with any information about the client (there is sometimes a disclaimer in an opinion letter as to the law firm only being obligated to check with those attorneys in the firm that would normally be expected to have information about that particular client); check the client's governing documents; make sure there is an entity "consent" for the transaction with incumbency language; check with the Secretary of State, etc.).

8. Borrower(s) and Guarantor(s) should verify in a "Certificate" to the law firm all of the necessary facts upon which you rely – **do** attach a "Borrower's Certificate" and a "Guarantor's Certificate" verifying the appropriate facts; also, when serving solely as "local counsel," it may be appropriate under the circumstances to qualify the opinion with a statement that you are relying upon the Borrower's regular counsel for factual

statements (such as when the opinion is limited to the enforceability of the mortgage/deed of trust).

9. Opinion letters are not opinions on "title" – **do** incorporate a title policy for matters of title and priority and **don't** make our firm into the title insurer (for example, **don't** include a sentence that provides in essence that Borrower is granting bank a "first" priority deed of trust on a parcel). It may also be appropriate to incorporate the survey by reference.

10. Opinion letters reference certain documents described therein – **don't** draft an opinion letter without having read each document incorporated into the opinion (if you are reading only "drafts," make sure you disclose that and an "assumption" that the drafts will not change before being executed).

11. Opinion letters assume generally that you have seen the Borrower and Guarantor "sign" the documents; if you are mailing out any documents for signatures, **do** modify the assumption to disclose which signatures you did not personally witness (there are many war stories about attorneys who were lulled into a false sense of security when permitting a party to the transaction "to take" the originals "to be signed" by an absentee party… **don't** be trapped by this)(if it can't be avoided, disclose to, and obtain approval of, the bank; also, attach a notary page to the document being sent out of the office for execution; in some circumstances, it may be appropriate to have loan documents executed at an out-of-state law firm); if you are not the party responsible for having loan documents executed, make sure the assumptions include a provision that the loan documents will be duly authorized, executed and delivered by all parties.

12. The underlying loan documents need to be supported by valid "consideration" – if there is any question about that, **don't** sign the opinion letter without adding an "assumption" about the existence of adequate consideration (see McLamb v. T.P., Inc., 173 N.C. App. 586, 619 S.E.2nd 577 (2005).

13. For a Guaranty, **don't** opine as to the consideration (there may be questions later when a guarantor tries to avoid liability under a guaranty for lack of consideration).

14. When a third party is pledging collateral, **do** require a "Hypothecation Agreement" (or proper hypothecation language in the mortgage/deed of trust) to back up consideration and then include a disclosure that you are relying upon the Hypothecation Agreement to support the consideration.

15. The loan documents **must** all be dated the same date to be enforceable – **don't** sign an opinion unless you are the one dating the loan documents or adding an "assumption" that the bank will date all the loan documents the same date (see Beaman v. Head, 353 BR 122 (Bankr EDNC 2006)).

16. The loan documents must themselves be complete with all exhibits attached – **don't** sign an opinion unless you have verified the documents are all completed and all exhibits are attached (including the all too often "missing" legal description which is supposed to be attached as Exhibit A); if you are acting solely as local counsel, then include an assumption that Borrower's regular counsel will attach all exhibits.

17. The loan documents must be executed by the proper parties – **don't** sign an opinion letter without verifying that the proper parties are shown in the execution block and that the proper parties signed (as per the entity Consent)(also, review the entity's governing document, such as the LLC Operating Agreement, to verify any requirements on authority to bind the entity).

18. The Borrower must be in good standing – **don't** sign an opinion without verifying this (and if necessary, the entity who is the manager, which if is another entity, needs another entity to be verified); for example:

By: Nexsen Pruet's a Great Firm, LLC

By: Nexsen Pruet Clients Love Us, LLC,

Its sole member

By: Nexsen Pruet Works Harder, LP,

Its sole member

By: NP Lawyers Love the Law, LLC,

Its General Partner

19. **Do** clarify which party is responsible for verification of facts relevant to the opinion (and include an appropriate assumption or qualification if you are not the party responsible).

20. **Do** make a full disclosure of all known material facts.

21. If there are fact specific conditions to closing, and you are acting solely as local counsel, **do** include an assumption that you are not responsible for determining that the conditions have been satisfied and/or an assumption that the bank is satisfied that its conditions to close have been satisfied .

22. **Do** comply with the bank requirements in the closing instructions and get approval from the bank (in writing) for any changes required by the firm.

23. **Do** issue your draft opinion with a redline showing changes in ample time for review by the other side (see Lefever v. Taylor, ___ N.C. App. ___, ___ S.E.2nd ____ (2009)(2009 WL 2177323)(unpublished).

    Lefever involved a dispute over an undisclosed change made in a deed, after it was first prepared, but before it was executed, in which the plaintiffs argued:

> [Plaintiffs' attorney] is in his 34th year of practicing law in the State of North Carolina and only once before in those 34 years has an attorney who submitted a deed for review before closing changed the deed that was tendered at the closing without the attorney mentioning to [the attorney] the changes the attorney made to the deed after it was reviewed and approved until this transaction…
>
> [The attorney] changed the deed that he had submitted for review and approval to the [other attorney] after it was reviewed and approved, but [the drafting attorney] failed to disclose to the [attorney] that a significant change had been made, and the [attorney] failed to notice the change before the deed was recorded.

    The court commented on the accusation of unprofessionalism as follows:

> [If] there is any 'injustice' in this case, it was the failure of defendant's counsel to behave in the manner that plaintiff's counsel had come to expect based upon his many years of law practice, in accordance with the professional courtesy and cooperation normally extended from one member of the bar to another.

24. **Don't** forget the "golden rule" -- sometimes the law firm represents the bank, and we want a "comprehensive" opinion letter with some other law firm being liable for any error; sometimes we represent the borrower, and we want a less "comprehensive" and, of course, far more "reasonable" opinion letter (in other words, **don't** ask for opinions you wouldn't give….).

25. **Don't** just "use" a "go by" without reading carefully – there will be custom provisions to delete, custom provisions to add… it is very embarrassing to see a reference to another deal or another borrower or another bank in your client's opinion letter….

26. Whom do you represent and in what capacity? **Do** disclose this to all ("This firm is solely acting as special local counsel to ….").

27. What is the effective date of your opinion letter? **Do** make sure it matches the loan documents and "ends" with the transaction. ("This opinion letter is rendered through the date hereof and the firm accepts no responsibility for acts thereafter….").

28. What state laws are you addressing? **Do** disclose that the opinion is limited to federal law and the laws of the State of North Carolina and never, ever, give an opinion about laws in a state for which you are not licensed – you associate another firm in that state for a "sub" opinion on whatever out of state issue is involved).

29. Who is allowed to rely on the opinion? Just the bank? Successors and assigns? Bank's counsel? Rating agencies? **Do** add a limitation on parties entitled to rely upon your opinion.

30. What is excluded from the opinion letter? **Do** disclose exclusions, such as land use/zoning, subdivision, environmental, tax laws, "bankruptcy remote," etc. These types of opinions require "experts" in that area of law and expose the firm to liability.

31. What is new in the law? **Don't** fall prey to taking an opinion letter from the "forms" database without determining what is new? For example, has there been a change in the various usury laws? What about a new case that impacts the area of law covered by your opinion (for example, see In re General Growth Properties, Inc., 409 BR 43 (Bankr SDNY 2009) and "General Growth: Special Purpose Entities (Barely) Survive First Bankruptcy Test" by W. Rodney Clement, Jr. and H. Scott Miller, ABA Probate & Property Journal (March/April 2011, Vol. 25, #2)).

32. Does your transaction involve corporate, tax or other areas of law? **Do** associate an attorney in another department for that part of the opinion.

33. **Do** exclude things that don't apply to your transaction, such as UCC provisions if no Security Agreement/UCCs.

34. **Don't** include any opinion on an unsettled area of law without adding a qualification that this is your "reasoned" opinion. North Carolina case law is well established that an attorney is not liable for a mere "error of judgment":

> An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and

on which reasonable doubt may be entertained by well-informed lawyers.

Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

Hodges v. Carter, 239 N.C. 517, 80 S.E.2nd 144 (1954)(citations omitted); Rorrer v. Cooke, 313 N.C. 338,329 S.E.2nd 355 (1985).

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Author's note: This paper was prepared for an in-house CLE at Nexsen Pruet. At that time, handouts were distributed to explain these comments in context. References to attachments (and the attachments) were deleted from the original paper due to size constraints. If it would be helpful to you to see the attachments, please email Margaret at MBurnham@NexsenPruet.com to request copies.