

**DUTIES, OBLIGATIONS AND  
POTENTIAL LIABILITY FOR SIGNING  
LEGAL OPINION LETTERS:  
Are You a Lawyer or a Gambler?**

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**CLOSING OPINIONS**

- Also known as Third-Party Opinions
- Opinions prepared by an attorney for one party and presented to a third-party for their reliance
- Leaves you advising both sides of a transaction

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**CLOSING OPINIONS (continued)**

- Majority of the law is found in papers developed by the American Bar Association and State Bar associations
- Very little law
- Even though little legal guidance, they have become a routine part of the practice of municipal law
- Research shows these opinions cause an unusual amount of anxiety for practitioners

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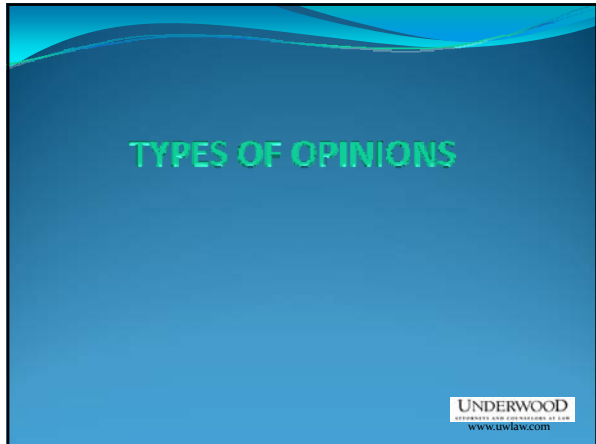
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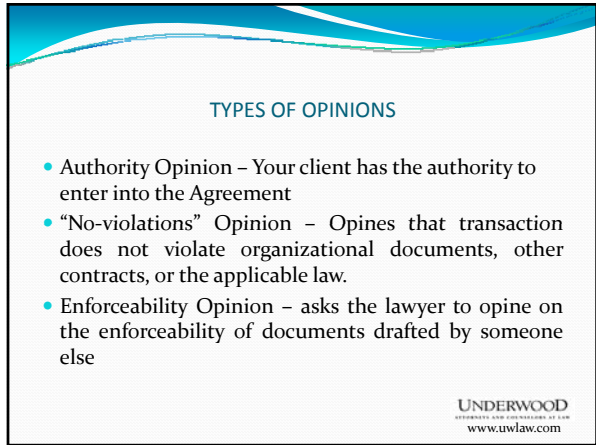
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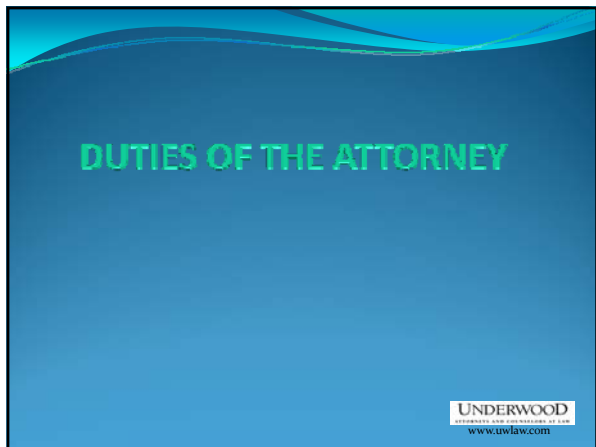
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DUTIES OF THE ATTORNEY

- Ethical duty to client
- Ethical duty to third party
- Duty of care to client – and a developing theory of duty of care to third-party

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DUTIES OF THE ATTORNEY (continued)

- Every article you read discusses the growing trend of claims asserted based on third party opinions
- Some school of thought that criminal charges might be an easier path to get an attorney

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TEXAS DISCIPLINARY RULE 4.1

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TEXAS DISCIPLINARY RULE 4.1

Truthfulness and Statements to Others:

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 making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

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THE TRAPS

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THE TRAPS

1. Liability through Litigation
2. Confidentiality
3. Knowledge
4. Your Client
5. Particulars of Drafting

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THE TRAPS – Liability Through Litigation

- Great concern of Attorneys
- Small but growing trend

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THE TRAPS – Breach of Confidential Information

- As the attorney for one side, you are entrusted with vital information

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THE TRAPS – Breach of Confidential Information (cont.)

- ABA Rule 2.4:
  - When the client's consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

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THE TRAPS – Breach of Confidential Information (cont.)

Must be aware of what client intends to remain confidential, and whether that interferes with attorney's ability to provide a reliable opinion

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THE TRAPS - Knowledge

- Opinion is only as good as the factual information you relied on
- Problem – attorney not involved in the transaction
- Problem – legal opinion falls outside of lawyer's area of expertise
- Quality of an evaluation depends on the freedom and extent of the investigation upon which it is based

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THE TRAPS – Your Client

- An attorney must know and feel comfortable with the client
- Transaction is banking in part on your reputation as an attorney

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THE TRAPS – Particulars of Drafting

- Negotiating the opinion letter
- Define the scope of the opinion
- Accord v. Non-Accord Opinions
- Assumptions, Limitations and Interpretations
- Acknowledge uncertain or changing law
- Honesty is the Best Policy
- Define key words
- Is the opinion based on the lawyer or the law firm?

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The Threshold Question

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The Threshold Question

- Is an opinion truly necessary
- Who should do the opinion?
- Who should bear the costs?
  - What is the cost?
  - What is the benefit?
    - Is the benefit measurable or quantifiable?
    - Is there a benefit with all of the qualifications included?
    - Does the benefit lie in negotiation of the opinion letter?
- What happens if you say “No”?

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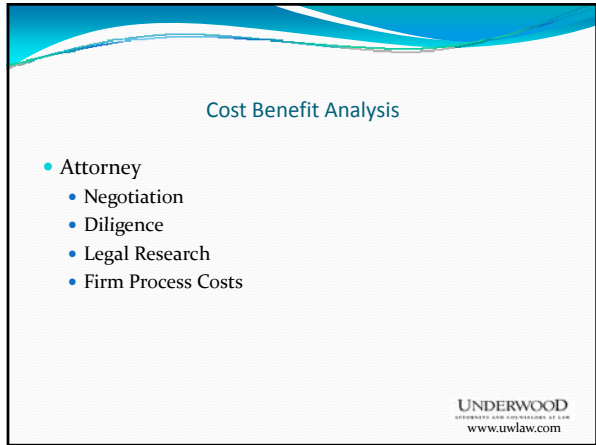
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**OPINION COMMITTEE**

- Law firms are beginning to designate Opinion Committees to review opinion letters prior to signing
- There is a wide variation in the formality of firm Opinion Committees
- Wide variation in the duties of firm Opinion Committees

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**OPINION COMMITTEE (continued)**

- Some firms require consultation with at least one fellow attorney prior to giving an opinion
- Some firms now require consultation in basic or routine opinion matters, but require consultation as the issues or potential risks increase
- Legal malpractice insurance carriers are now encouraging or requiring the use of a consultation system prior to delivery of opinion letters
- An important function of opinion committees is education and standardization

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**OPINION COMMITTEE CHECKLIST/REPORT**

1. Name of Client
2. File Number
3. Type of Opinion
4. Date Reviewed
5. Audit Letter File Reviewed (if necessary in giving "no litigation" opinion)
6. Draft of Opinion Reviewed
7. Opinion Letter is on firm's letterhead; not an individual lawyer's letterhead

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**OPINION COMMITTEE CHECKLIST/REPORT (cont.)**

8. Opinion Letter is signed on behalf of the firm; not with an individual name
9. Opinion Committee met with requesting attorney to discuss opinion(s)
10. Limitations, Qualifications and Exceptions Chart reviewed for determination of the application to this Opinion
11. Opinion Approved
12. Date

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**Sample California Third-Party  
Legal Opinion for Business  
Transactions**

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Sample California Third-Party  
Legal Opinion for Business Transactions

[Date]

[Name of Lender], a National Banking Association  
[Address of Lender]

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Ladies and Gentlemen:

We have acted as counsel to [City] (the "Borrower"), in connection with the [Name of Agreement] (the "Loan Agreement"), dated as of \_\_\_\_\_, between the Borrower and [Name of Lender], a National Banking Association (the "Lender"). This opinion is delivered to you pursuant to Section \_\_\_ of the Loan Agreement. Each capitalized term that is defined in the Loan Agreement and that is used but not defined in this letter has the meaning given to it in the Loan Agreement.

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**A. DOCUMENTS EXAMINED**

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**A. DOCUMENTS EXAMINED**

We have examined the following documents:

- (i) The Loan Agreement;
- (ii) The Promissory Note;
- (iii) The Guaranty;
- (iv) The Constitution of the State of Texas and the statutory laws of the State of Texas as they apply to the status and existence of Texas municipalities;

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**A. DOCUMENTS EXAMINED (continued)**

- (v) Records certified to us by an officer of the Borrower as constituting all records of proceedings and actions of the City Council [and the shareholders] of the Borrower relating to the Loan;
- (vi) A certificate of the [Chief Financial Officer, or other appropriate officer] of the Borrower identifying certain agreements and instruments to which the Borrower is a party or by which the Borrower's properties or assets are bound (the "Certificate Relating to Agreements");

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**A. DOCUMENTS EXAMINED (continued)**

- (vii) A copy of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being a true and correct copy of the original ("Material Agreements");

We have also examined such other documents and made such further legal and factual examination and investigation as we deem necessary for purposes of rendering the following opinions.

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**B. CERTAIN ASSUMPTIONS**

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**B. CERTAIN ASSUMPTIONS**

We have assumed, for purposes of the opinions express herein that:

The Lender is (i) a subsidiary of a bank holding company (as such terms are defined in Section \_\_\_\_ of the Texas Statutes) or is a bank organized under the laws of the United States or any State thereof, (ii) a foreign (other nation) bank described in Section \_\_\_\_ of the Texas Statutes meeting the criteria for exemption set forth therein, or (iii) licensed under the Texas Finance Lenders Law;

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**C. OPINIONS**

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**C. OPINIONS**

Based on and limited to the foregoing, and subject to the qualifications set forth in Section \_\_\_\_ below, it is our opinion that:

1. The Borrower is a municipality duly existing under the Constitution and laws of the State of Texas.
2. The Borrower has the power and authority to enter into and perform its obligations under the Loan Agreement.

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**C. OPINIONS (continued)**

- 3. The Borrower has taken all action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party; and the Borrower has duly executed and delivered the loan Documents to which it is a party.
- 4. Each of the Loan Documents to which the Borrower is a party is a valid and binding obligation of the Borrower, enforceable against it in accordance with its terms.

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**C. OPINIONS (continued)**

- 5. The execution and delivery by Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not:
  - (a) Violate the Charter of Borrower;
  - (b) Result in a breach of or constitute a default under any Material Agreement or result in the creation of a security interest in, or lieu upon, any of the Borrower's properties or assets under any Material Agreement;

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**C. OPINIONS (continued)**

- (c) Violate any judgment, order or decree of any court or arbitrator [known to us]; or
- (d) Violate any law, rule or regulation applicable to Borrower.

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**D. CONFIRMATIONS**

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**D. CONFIRMATIONS**

We are not representing the Borrower in any action or proceeding that is pending, or overly threatened in writing by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Loan Documents or the performance by the Borrower of their respective obligations thereunder.

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**E. CERTAIN QUALIFICATIONS**

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**E. CERTAIN QUALIFICATIONS**

Our opinions are limited to the federal law of the United States and the law of the State of Texas. Furthermore, we express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein,] we express no opinion on local or municipal law, antitrust, environmental, land use, securities, tax, pension, employee benefit, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, or investment company laws and regulations.

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**E. CERTAIN QUALIFICATIONS (continued)**

Our opinions are subject to the following additional qualifications:

(1) Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws of general applicability relating to or affecting creditors' rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.

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**E. CERTAIN QUALIFICATIONS (continued)**

(2) Where a statement is qualified by "to our knowledge" or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Borrower in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower.

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**E. CERTAIN QUALIFICATIONS (continued)**

- (3) [The enforcement of Section \_\_\_ of [the Loan Agreement], relating to the payment of attorneys' fees and costs, is subject to the Texas law.
- (4) We express no opinion regarding the enforceability of Section \_\_\_ of the Loan Agreement, which purports to fix the venue of proceedings relating to the Loan.
- (5) We express no opinion regarding the enforceability of Section \_\_\_ of the Loan Agreement, which purports to waive the parties' rights to a jury trial.

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**E. CERTAIN QUALIFICATIONS (continued)**

- (6) We express no opinion regarding the enforceability of the provision of the Loan Documents determined to provide for a penalty and liquidated damages herein.

This letter is being provided to you at the request of our client, \_\_\_\_\_, in furtherance of its desire to execute the Loan Documents. This law firm, and I individually, have no direct knowledge as to the finances or ability of \_\_\_\_\_ to meet its obligations under the Loan Documents. This letter may be relied upon solely by the Lender for use in connection with the transactions contemplated by the Loan Agreement. No other party may rely upon this letter or the opinions expressed herein without our prior written consent.

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