

# Ethics, Obligations, and Potential Liability Related to Legal Opinion Letters: What Exactly Are You Signing?

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# What is a third-party opinion letter?

- Customarily prepared for another party to the agreement
- Addresses certain matters related to your own client
- Reallocates risk away from your client
  - Reallocates risk to the law firm preparing the opinion letter
  - The opinion letter is the attorney's risk, not client's risk

# What is a third-party opinion letter?

- Generally covers certain areas:
  - Client's legal existence – not a great fit with municipalities
  - Client's authority to enter into transaction – state law
  - Client will not be violating any other agreements
  - No present claims or lawsuits that could affect transaction or client
  - **And whatever else someone else can try to slip in there**

# What is the history of opinion letters?

- Not created for the purposes usually seen in a municipal practice.
- Entire premise is that these letters are based on known and understood rules, scope, customary practice, assumptions and disclosures
  - Idea is that attorneys experienced in this area of the law are preparing them for other lawyers experienced in this area of law to review.
- Not what happens when you have a preprinted form for a lease purchase.

# What is the reality of opinion letters?

- Opinion recipients demand a lot in the letters
- Opinion providers attempt to say as little as possible
- The legal fees received for an opinion rarely warrant the liability risk for the opinion giver
- Are there so many limitations and qualifications that they are legally worthless?

# Why Are We Asked to Give 3<sup>rd</sup> Party Opinions?

- They are traditionally given in these types of transactions.
  - Not an acceptable reason.
- Where lawyer for one party is more familiar with certain information or has better access to obtain such information.
  - Makes sense in corporate authorization opinions.
- Does the benefit of any such opinion justify the cost?

# Initial Concerns

- Does my malpractice insurance cover third party opinions delivered to non-clients?
  - Look in the exclusions of your policy, not just in the coverage section.
- Is lawyer giving the opinion or his firm?
- Do I try to limit liability?
- Do I know enough about this transaction to complete it properly?
- Am I disqualifying myself or my firm from future representation on this matter?

# Getting Started

- Legal opinions carry real risk
- You should never rush in completing one
- You should never just copy a prior one
- You owe a duty of care to the recipient
- Duties for inside counsel are the same as for outside counsel



# Getting Started

- Understand the transaction.
- Find a precedent opinion letter.
  - If you are not stealing you are not trying.
  - Only use it as a base document for your opinion letter.
  - Does your firm have a firm format that needs to be followed?
- What opinions are being requested? Are necessary?
- What is the relationship of client to your firm?

# Ethics Basics – How Many Rules are Involved?

- What ethical issues arise?
  - Rule 1.1 – Competence and Diligence
  - Rule 1.02 – Scope and Objectives of Representation
  - Rule 1.05 – Confidentiality of Information
  - Rule 2.02 – Evaluation for Use by Third Persons

# Rule 1.1 – Competence and Diligence

- Letter to a non-client is for the benefit of your client
- Letter must be drafted in a competent and diligent manner
- Likely prohibits signing the pre-printed form your client emails you while they are signing the documents on a transaction you don't know about
- It is often seen by all parties (incorrectly) as an insurance policy to protect the transaction

# Rule 1.02 – Scope and Objectives of Representation

- A lawyer may limit the scope, objectives and general method of representation if the client consents.
- A lawyer cannot assist the client in engaging in fraud.
- Must attempt to dissuade client from criminal or fraudulent actions that would injure the financial interests of another.
- Lawyer must consult with client on relevant limitations on the lawyer's conduct.

# Rule 1.05 – Confidentiality of Information

- Request by client to prepare opinion letter does not waive confidentiality in and of itself
- **Must still have consent to disclose confidential information**
- What happens when you know protected information that interferes with your ability to provide truthful information in the opinion letter?

# Rule 2.02 – Evaluation for Use by Third Persons

- A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless:
  - The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
  - The client consents after consultation

# The Concern That Matters to The Client

- How much will it cost? They sent a pre-printed form.
  - Due diligence takes time.
    - Time delays the transaction and drives up costs through attorneys' fees.
    - Factual investigation and legal research are needed.
  - The special knowledge needed and the increased risk might be worth a higher fee.
- Every Firm should have policies and a committee requiring multiple sets of eyes on the opinion letter.

# The Firm Opinion Committee

- **Must involve 2 or more firm attorneys**
- Certain opinions subject to higher level of review
- Identify attorneys with specialized knowledge in areas addressed in opinion letter
- Must review the due diligence performed in preparing opinion letter



# Firm Opinion Letter Policies

- Who can sign on behalf of firm?
- Signed by firm or individual?
- Process for determining if opinion should be issued.
- How do we deal with last-minute changes?

# Can you negotiate an opinion letter?

- Every opinion letter should be negotiated
  - Requires that counsel have notice and sufficient time
- What is reviewed, applicable law, ultimate opinions
  - What is the actual purpose of the opinion letter?
  - Is it necessary? What parts are necessary?

# Anatomy of an Opinion Letter - Facts

- If facts are wrong, opinion is likely wrong
- Determine the appropriate source for needed information
- Confirm that you have all of the information required
- Must be based on credible information
- Information must come from credible people

# Anatomy of and Opinion Letter - Facts

- Client certifications are valuable
  - Give basis for facts relied upon
  - Provides protections for attorney
  - Should be limited to factual assertions, not legal conclusions
- Facts in the documents reviewed are valuable

# Anatomy of an Opinion Letter – Language Related to Facts

- May use legal terms in setting forth facts, but should avoid legal conclusion:
  - Use: “proper notice was given”
  - Don’t Use: “transaction has been duly authorized”
  - Use: “approval of the transaction was adopted at a meeting of the City Council”
  - Don’t Use: “all laws and formalities were acted on in accordance with statutory authority”

# Certification of Facts -- Examples

- I certify that the Personal Property was **procured and purchased in accordance with City Policy and Texas bid laws** and was approved by the City Council at their regular meeting on \_\_\_\_\_, 2017.
- The City intends to finance the purchase of the Personal Property plus the associated cost of issuance for financing the transaction under a 15-year Public Property Finance Act Contract, No. 7766 (the “Lease Agreement”) with Capital Corporation (“CC”).

# Certification of Facts

- The total amount to be financed is \$990,000. A copy of the Executed Agreement with all exhibits and attachments is attached hereto.
- I certify that I have reviewed the Agreement, and that the factual representations and covenants contained therein, particularly Sections 5 “The City’s Covenants and Representations” are true and correct.

# Certification of Facts

- The decision to purchase the Personal Property through TIPS and finance the purchase and installation of the Personal Property through CC was made upon a majority vote of the City Council on April 3, 2017 and May 16, 2017, at properly noticed and held meetings.
- At the April 3rd meeting, the City Council approved the purchase of the Personal Property, and at the May 16th meeting, the City Council approved entering into the Agreement with CC to finance the purchase of the Personal Property.
- The meetings were held in accordance with the Texas Open Meetings Act. The matters were discussed in open session at such meetings and action on the purchase of the Personal Property and on the Agreement was made pursuant to properly posted agenda items.
- Notices of the meetings were given as provided by law. The notice of the April 3, 2017 meeting was posted on March 31, 2017, and notice of the May 16, 2017 meeting was posted on May 12, 2017.



# Certification of Facts

- All City Council members present at the May 16, 2017 meeting voted for entering into the Agreement with CC.
- I certify that there are no suits, proceedings, claims or investigations pending or, to my knowledge, threatened against or affecting City that would have an adverse effect on the transaction contemplated in the Agreement or the ability of City to perform its obligations under the Agreement.
- Lessee has certified that the entering into and performance of the Lease Agreement will not conflict with, or constitute a breach of, any judgment, consent decree, order, bond, or agreement applicable to Lessee.

# Certification of Facts

- I certify that City is not in default under any material obligation for the payment of borrowed money, for the deferred purchase price of property or for the payment of any rent under any Agreement which either individually or in the aggregate would have the effect of hindering the ability of City to perform its obligations under the Agreement.
- The City has sufficient appropriations or other funds available to pay any amounts due under the Lease Agreements for the current fiscal year.

# Opinion of Counsel – Your Opinion Letter

- This Opinion letter is being provided to you at the request of our client, in furtherance of its desire to execute the proposed Lease and acquire the Equipment addressed in the proposed Lease. Our review and opinion of the validity of the terms of this proposed Lease are based on the representations of the City of Slater, Texas, as certified by its Mayor and City Manager, as to the details of procuring the Lease, and is limited to the recited opinions and solely for the benefit of Lessor.
- Our Firm has issued this letter, as requested, prior to execution of the proposed Lease by any party. Accordingly, our opinions could change once all documents have been finalized.

# Opinion of Counsel – Your Opinion Letter

Sir/Madam:

I am attorney for Lessee and in that capacity, I am familiar with the above referenced transaction, the Lease, and all other documents pertaining to the Lease (the Lease and such other documents pertaining to the Lease being referred to as the “Lease Agreements”).

I am an attorney for Lessee but was not part of the negotiation or execution of the Lease Agreement. I have reviewed the documents provided to me by all parties, which are \_\_\_\_\_ **(list them)**.

As counsel for Lessee, I have examined unexecuted drafts of the Equipment Lease-Purchase Agreement dated August 14, 2012 (the “Lease”), between Lessee and CC.

# Opinion of Counsel – Your Opinion Letter

Based on my examination of these and such other documents, records and papers and matters of fact and laws as I deemed to be relevant and necessary as the basis for my opinion set forth below, upon which opinion Lessor and any subsequent assignee of Lessor's interest may rely, It Is my opinion that:

Based on my examination of these documents and relevant laws, it is my opinion that:

# Opinion of Counsel – Your Opinion Letter

Lessee is a fully constituted political subdivision or agency duly organized and existing under the Constitution and laws of the State of Texas (the "State") and is authorized by such Constitution and laws (i) to enter into the transaction contemplated by the Lease Agreements and (ii) to carry out its obligations thereunder.

Lessee is a Texas municipality authorized (i) to enter into the transaction contemplated by the Lease Agreements and (ii) to carry out its obligations thereunder, subject to any applicable federal or state laws.

# Opinion of Counsel – Your Opinion Letter

The Lease Agreements (i) have been duly authorized, executed and delivered by Lessee and (ii) constitute valid, legal and binding obligations and agreements of Lessee, enforceable against Lessee in accordance with their terms.

The Lessee has certified that the Lease Agreement has been properly authorized, executed and delivered by Lessee.

# Opinion of Counsel – Your Opinion Letter

The authorization, approval and execution of the Lease Agreements, and all other proceedings related to the transactions contemplated by the Lease Agreements, have been performed in accordance with all applicable open meeting, public records, public bidding and all other applicable laws, rules and regulations of the State.

Assuming that the Lease Agreement has been properly authorized, executed and delivered by Lessee, the Lease Agreement constitutes valid, legal and binding obligations of Lessee, enforceable against Lessee subject to applicable state and federal law.



# Opinion of Counsel – Your Opinion Letter

- The parties and **all contractors and subcontractors employed in relation to Project** have legal authority to sign any and all necessary documents to effectuate the purpose of the Agreement and such necessary documents have have been duly authorized, executed and delivered by such party, contractor or subcontractor and constitute valid, legal and binding obligations and agreements of such party, contractor and subcontractor, enforceable against such signor in accordance with their terms.
- **Legal term is “Hell No”.**

# Opinion of Counsel – Your Opinion Letter

No further approval, license, consent, authorization or withholding of objections is required from any federal, state or local governmental authority with regard to the entering into or performance by Lessee of the Lease Agreements and the transactions contemplated by the Lease Agreements.

No further approval is required from any federal, state or local governmental authority with regard to the Lessee entering Lease Agreements.

# Opinion of Counsel – Your Opinion Letter

Lessee has sufficient appropriations or other funds available to pay any amounts due under the Lease Agreements.

\*\*\*and/or\*\*\*

The appropriation of moneys to pay the Lease Payments coming due under the Lease and any other amounts contemplated by the Lease Agreements does not and will not result in the violation of any constitutional, statutory or other limitation relating to the manner, form or amount of indebtedness which may be incurred by Lessee.

Lessee has certified that Lessee has sufficient appropriations or other funds available to pay any amounts due under the Lease Agreements for the current fiscal year. This law firm and I, individually, have no direct knowledge as to the finances of City of Slater, Texas and have made no investigation of Lessee's financial condition.

# Opinion of Counsel – Your Opinion Letter

The Interest payable to Lessor by Lessee under the Lease Agreements is exempt from federal income taxation pursuant to Section 103 of the Internal Revenue Code of 1986, as amended.

The Interest payable to Lessor by Lessee under the Lease Agreements is currently exempt from federal income taxation pursuant to Section 103 of the Internal Revenue Code of 1986, as amended. No opinion is given as to any state tax consequences.

Why is this question of law subject to a third-party opinion?

# Opinion of Counsel – Your Opinion Letter

The entering into and performance of the Lease Agreements will not (i) conflict with, or constitute a breach or violation of, any judgment, consent decree, order, law, regulation, bond, agreement, indenture or lease applicable to Lessee, or (ii) result in any breach of, or constitute a default under, or result in the creation of, any lien, charge, security interest or other encumbrance upon any assets of Lessee pursuant to any indenture, mortgage, deed of trust, bank loan, credit agreement or other instrument to which Lessee is a party, or by which it or its assets may be bound.

Lessee has certified that the entering into and performance of the Lease Agreement will not conflict with, or constitute a breach of, any current judgment, consent decree, bond, or agreement applicable to Lessee.

# Opinion of Counsel – Your Opinion Letter

No litigation or proceeding is pending or, to the best of my knowledge, threatened to, or which may, (a) restrain or enjoin the execution, delivery or performance by Lessee of the Lease Agreements, (b) in any way contest the validity of the Lease Agreements, (c) contest or question (i) the creation or existence of Lessee or its governing body or (ii) the authority or ability of Lessee to execute or deliver the Lease Agreements or to comply with or perform its obligations under the Lease Agreements. There is no litigation or proceeding pending or, to the best of my knowledge, threatened that seeks to or could restrain or enjoin Lessee from annually appropriating sufficient funds to pay the Lease Payments (as defined in the Lease) or other amounts contemplated by the Lease Agreements. In addition, I am not aware of any facts or circumstances which would give rise to any litigation or proceeding described in this paragraph.

City has certified that there are no suits, proceedings, claims or investigations pending or, to its knowledge, threatened against or affecting City that would have an adverse effect on the transaction contemplated in the Agreement or the ability of City to perform its obligations under the Agreement.

The attorney identified below is not aware of any litigation or threatened litigation that would interfere with Lessee's right or ability to execute, deliver or perform under the Lease Agreement.

# Opinion of Counsel – Your Opinion Letter

The Units are personal property and, when subjected to use by Lessee, will not be or become fixtures under the laws of the State.

Make sure this is true – what is the personal property and how will it be used.

Why is this a basis for a third-party opinion letter?

What does agreement say about personal property versus fixtures?

# Opinion of Counsel – Your Opinion Letter

The Lessor will have a perfected security interest in the Units upon the filing of an executed UCC-1 or other financing statement at the time of acceptance of the Units with the Secretary of State for the State of Texas.

Are you qualified to know this?

Have you reviewed the documents?

Should you rely on someone else's professional opinion?



# In-House Counsel

- In-House counsel signs opinion in her own name.
  - Company is not a lawyer or law firm – no professional standing to deliver a legal opinion
  - Using company letterhead or signing as an employee will not limit personal liability.
  - Questionable whether you are covered for such actions under a directors and officer's policy.
    - Indemnification is its own problem in governmental employers.
    - Look at employed lawyers professional liability policies.

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