I. Introduction

In 1973 James J. Fuld authored the frequently cited article *Legal Opinions in Business Transactions - An Attempt To Bring Some Order Out of Some Chaos.* In that provocative and futuristic article, he wrote:

. . . I can find hardly any cases considering the substance and form of legal opinions; there is virtually no printed word on the subject in the law books or articles; so far as I know, neither the law schools nor the institutes for practicing lawyers consider the subject; and, unlike the accountants, the lawyers do not have any generally-accepted principles covering opinions.

Mr. Fuld encouraged lawyers and the organized Bar to establish general principles regarding legal opinions, including (among other matters) what investigation is ordinarily required before a particular opinion is given and what words should ordinarily be used and the meaning of those words. The year 1973 also saw the publication of an article by John P. Freeman which offered a guide to opinion letter policies and procedures. Although the process has appeared to be painstakingly slow, currently there has been no reluctance of those involved to analyze, warn or instruct practitioners concerning the opinion process.
Although in recent years matters have appeared to evolve quickly, the ideas behind them have been slowly fermenting. Like most revolutions, the causes which justified a realization that a better approach is necessary (and possible) had their foundation in individual experiences, concerns and perceptions that each has harbored. It was not until there was an understanding that our own experiences, concerns and perceptions were commonly shared that the movement toward a consensus to produce a better understanding of the opinion process was possible. Indeed, that was the intent first expressed in 1979 by the TriBar Report\(^6\) and which culminated in 1990 by the Exposure Draft of the Section of Business Law, American Bar Association’s Accord.\(^7\)

In between the TriBar Report and the Accord, there have been numerous reports issued or drafted by state bar associations or committees addressing legal opinions. Commentators have also been fertile in their production of articles directed toward the scope, content and due diligence applicable to opinions.\(^8\) The perceived need to overcome the uncertainty and confusion in which legal opinions have traditionally been rendered (through custom, bargaining and need) and to bring some uniformity and consensus to the process is well under way. It is a welcome relief to the profession and to the client (who has borne the cost and shared the frustration). Many talented hours have been spent to achieve a better understanding and a consensus. Many more hours will be spent in creating that easier path. Whether or not these efforts will achieve acceptance is an open question.
II. Is There (or Can There Be) a Consensus Regarding Due Diligence?

The endeavor to bring about a consensus and simplification to the opinion process does not affect, however, the lawyer’s professional responsibility to his client and to the opinion recipient. The ethical considerations involved in the process remain consistent and are now more publicized.9 Maybe the path will be easier and maybe there will be a clearer understanding of what role each individual party plays in the process; maybe there will be a better consensus as to what certain words mean and what type of opinions are appropriate or inappropriate; and maybe there will be a greater agreement of what due diligence (or at least guidelines with respect to such due diligence) may be required in rendering the various aspects of an opinion. The issuing of an opinion, however, still must be accomplished in the context of ethical standards and professional responsibilities. While it is acknowledged that lawyers are held to certain standards of skill and care in preparing legal opinions, the nature and extent of the same are not well defined.10

While much has been written and discussed since 1973 in hopes of constructing an easier path on which we can all travel (and on which there are appropriate roadsigns to provide generally established principles to guide our endeavors and, hopefully, to lesson the financial burden of our clients), there has been little analysis provided as to what law firms have done (or should do) in the way of internal procedures, not only to defend a lawsuit, if that should become necessary, but also to avoid any such lawsuits in the first instance.11 The creation of formal firm internal policies and procedures to be utilized in issuing an opinion appears to have lagged behind the attention given to reaching a better understanding as to the purpose, scope and language of opinions.
Law firms usually have formal written or understood policies and procedures concerning the rendering of opinions in what has traditionally been recognized as high risk areas (tax and security opinions, opinions rendered in state or municipal bond transactions, public offering opinions, audit letters and other similar areas). Most law firms, however, do not appear to have established such formal procedures or policies with respect to opinions given in the typical business or real estate loan transaction. The risk of exposure to claims of malpractice or third party claims, however, is also present in the more conventional and more voluminous opinions that are regularly rendered. There are several reasons for this less formal approach.

One is the lack of recognition that the risk of exposure in the more “typical” transaction could be as great as in the more identifiable high risk areas. Also, the internal cost and time associated with creating policies and due diligence standards are not considered to be cost effective. Additionally, there is the belief that the integrity and the professionalism of the partner working on the transaction will provide the comfort and anticipated quality control to give the firm assurances that the appropriate practices and procedures are being followed. In most instances, such reliance on the individual was probably well placed. Individual effort, however, results in independent approaches as to the opinion’s form and substance. This runs counter to the trend towards establishing uniformity and a consensus. With the recent explosion of material directed toward the opinion process, it may become essential that a firm have designated individuals or committees that are responsible for keeping current with the recent literature to ensure compliance with matters affecting their jurisdiction and those matters which may reflect a common standard or a common understanding.
Standards may have been (or are in the process of being) created by various state bar association groups and commentators. Despite the protestations in the commentaries to the contrary, the recommendations reflected in the various state bar association and committee reports may or may not create minimum standards by which those in their jurisdiction must take notice. The standards can only be ignored at the firm’s peril.

A. **Internal Quality Control**

Many law firms have established internal procedures creating standards of review in situations where there could be a perceived conflict or pressure which would objectively (or subjectively) threaten the independence of the opinion process (such as an attorney or a member of the law firm being a shareholder, director or officer of the client or the client being a significant client and economically important to the law firm). However, there has been a lack of a formal review practice or procedure for many of the typical transactions in which opinions are rendered.

In 1987 the Subcommittee on Quality Control of the ABA’s Business Law Section’s Committee on Law Firms circulated a questionnaire relative to internal control procedures.\textsuperscript{12} Fifty firms responded to the questionnaire with the average respondent having between 100 and 200 practicing lawyers and two to five branch offices. The responses indicated that most of the responding firms required some form of internal approval for written opinions. Only four of the firms required committee approval for all written opinions, and the most common approach (31 of the responding firms) was to require a second partner to approve the opinion. The survey,
however, did not make a distinction between types of opinions. It is, therefore, difficult to draw any conclusions as to the typical opinion in a business or loan transaction. The survey did indicate, however, that 40 of the firms required approvals on formal opinions in the “transactional areas” (whatever that means) and 35 of those required some internal approval with respect to opinions on which third parties would be expected to rely. Because the questions were general in character and the responses were from larger law firms with an assumed sophisticated practice, the survey gives limited guidance as to internal firm practices.

The Attorneys’ Liability Assurance Society, Inc. (ALAS) recently issued a pronouncement on opinion letters to all of its members.\textsuperscript{13} ALAS issued its materials “not because opinion giving has contributed substantially to ALAS’ claim expense (it has not) but because many of our Members have asked ALAS to help on that subject.”\textsuperscript{14} This is an indication that firms are uncertain as to the mechanics of establishing internal quality control procedures and are seeking guidance with respect to those procedures (probably as reaction to the current attention and publicity which has surrounded the subject). ALAS reported that it had experienced only two costly claims directly attributable to erroneous opinions. In both instances, a common element which attributed to the adverse outcome was that a partner who authored the opinion had a personal financial interest in the transaction. Therefore, ALAS’ recommendation was straightforward: Those firms that do not have formal opinion review procedures should have formal procedures in place to ensure that an individual partner does not render an opinion without review by another partner in any matter where the opinion giver has a personal interest or similar extracurricular interest in the transaction or the client.\textsuperscript{15}
Regardless of whether a firm has made the effort to establish formal written internal policies and procedures to be followed in issuing an opinion or, more ambitiously, a due diligence manual to be complied with, it is obvious that a firm should have an established procedure to recognize those instances where real or perceived conflicts exist and to avoid (without some other review) the rendering of an opinion by a partner who may have an interest in the transaction or the client which may interfere with the objectivity and independence that are required. This can be accomplished by a second partner review, an opinion committee, or some other type of arrangement which would ensure objectivity and independence. There are some who believe that where significant factors exist which may impinge upon the required objectivity and independence it may be necessary or wise to disclose such factors in the opinion or to provide written disclosure to the opinion recipient.16

Another issue of quality control, besides recognizing those areas in which the objectivity of the firm may be influenced, is the preservation of the documents and the creation of a procedure to reconstruct the basis upon which the opinion was issued. Lawyers and firms should be in a position to respond to inquiries concerning their opinions without having to go through a Chinese fire drill. In a transaction many documents and hundreds of pages of material are reviewed. Typically, documents relating to an opinion are found amongst all of the other closing papers. A separate opinion file should be created which centrally locates the supporting documents which support the opinion’s conclusions. Other methods may include a due diligence checklist which identifies what documents or procedures are required to be reviewed or followed for a particular aspect of the opinion which the responsible attorney or others must complete. Another approach is to retain the opinion, broken into the relevant paragraphs, and below each
paragraph of the opinion state the various steps taken to support the conclusions expressed. One large domestic-international law firm requires that a memorandum be prepared, together with a checklist, which summarizes what internal investigation was conducted. The scope and detail of the memorandum will depend on the nature and scope of the transaction which is the subject of the opinion. This firm in its opinion manual also suggests that in many instances a “Legal Opinion Preparation and Clearance Memorandum” also be used and given to the partner who provides the second review.

The internal time, effort and expense to create formal internal procedures and due diligence manuals are great. Oftentimes the size and type of transaction may dictate an avoidance or relaxation of established procedures. Timing is also a factor. Although it is commonly understood that the scope and content of an opinion and the anticipated due diligence responsibilities of the opinion giver should be negotiated early to discourage frustration, misunderstanding and eleventh hour pressure, opinions many times tend to be the last area to be discussed. This can lead to pressured opinions (the opinion being the only thing holding up a closing), a lack of compliance with internal procedures and inadequate due diligence.

B. What Other Firms Do

The degree and magnitude of internal firm quality control procedures vary. But how widespread are the use of internal procedures and due diligence manuals and how do firms treat some of the common concerns which we all seem to share about the opinion process? The 1987 survey of the ABA’s Business Law Section’s Subcommittee on Quality Control does not appear
to be too helpful because of the broad general character of the questionnaire and the responses received.

Some of the most ambitious data collected to date is that of R. Bradbury Clark. In mid-1988 in preparation for an American College of Investment Council Legal Opinions Panel, Mr. Clark solicited information from approximately 60 partners in law firms asking about their firm’s practices regarding legal opinions. Mr. Clark followed his 1988 endeavor by two 1989 questionnaires that were sent to approximately 100 law firms. Mr. Clark’s surveys have been reprinted17 and provide an interesting look at how the opinion process is perceived by the responding firms.

In preparation for the American College of Real Estate Lawyers’s ("ACREL") October, 1991 program on Attorney’s opinions, a survey was distributed to the ACREL membership also seeking responses to several questions concerning internal firm practices and procedures relating to the opinion process. The ACREL survey also sought responses as to the impact, if any, the Accord would have on the process. Additionally, one of the most debated issues concerning an opinion regards the enforceability and remedies portion of a typical opinion and whether or not firms utilize the generic qualification or a laundry list of exceptions. The ACREL Survey asked its members to address this issue. The ACREL survey and the responses received, together with an explanatory note, are attached as Attachment No. 1.

A brief review of some of the questions asked and responses received by Mr. Clark, as well as the questions asked and responses received by the ACREL survey, follow. It should be
noted that Wall Street firms and California firms make up a significant portion of the firms responding to Mr. Clark’s surveys and the responses are primarily from larger law firms. Also, only a portion of Mr. Clark’s surveys are reviewed. The questions asked by Mr. Clark are well thought out and the information obtained from the surveys are both interesting and informative. I encourage, for those of you who are so inclined to learn more about internal firm practices and procedures, to review and analyze Mr. Clark’s surveys. Additionally, since the ACREL membership is more diverse as to geographic location and size of the membership’s firms and was limited to real estate and loan transactions, the ACREL survey provides a more general understanding as to the responding firm’s practices and procedures regarding the issues addressed in the survey.

**B-1 Mr. Clark’s Survey**

(i) **Opinion Committees**

In Mr. Clark’s 1988 survey, out of the 41 law firms responding, 17 of the respondents indicated that they had an opinion committee with a substantial designated function. Only five firms, however, indicated that the opinion committee itself reviews each opinion (but 20 responding firms stated that they do have a second partner review procedure which may include a member of the committee). The substantial designated function of the opinion committee, therefore, may not be to review opinions but, possibly, to prescribe internal procedures for the preparation and review of opinions or to review and revise opinion formats. The 1989 survey, which asked whether or not the firm had an opinion committee without qualifying the same as to having a substantial or designated function, revealed that 35 firms had an opinion committee, 24 did not and four were thinking of having one. Of the 35 that responded positively, 12 indicated
that the committee did review opinions (the survey did not indicate whether this was full committee review or a second partner review by a member of the committee). Consistent with the 1988 survey, of those responding to the 1989 survey, the majority indicated that the opinion committee did prescribe procedures for issuing opinions. Fifteen of the respondents to the 1989 survey indicated that a function of the opinion committee was to prescribe opinion forms. It is uncertain whether these forms were for all types of transactions or were limited to special high risk areas. The split amongst the Wall Street, California and other law firms that responded as having opinion committees was evenly divided. However, those that, responded that they did not have a committee were mainly other than wall Street or California law firms. This again may emphasize the type of practice reflected by the larger Wall Street and California firms and the need to have an opinion committee for guidance in high risk areas.

(ii) Second Partner Review

The 1988 survey indicated that a majority of the respondents had an internal procedure which required that an opinion be reviewed by at least one other partner. The majority of the respondents to the 1989 survey also utilized a second partner review for all opinions with additional firms requiring the same for tax opinions and unusual questions that might arise upon which the firm is opining. The large number of respondents stating that a second partner review is required would indicate that, even though there is an opinion committee, most firms use, as a safeguard, a second partner review process. The 1989 survey also revealed, however, that there is considerable discretion given to the originator or attorneys working on the transaction concerning the review process. Additionally, it would appear that a second partner review is often on an informal basis. Clearly, the 1989 survey indicated that the majority of the
respondents (the largest number of firms responding to a particular question) indicated that the primary focus of the reviewing body (whether an opinion committee or second partner) is with respect to the language of the opinion itself and that few (only one of the respondents) indicated that the reviewing person or body reviews fully all the documents and due diligence materials related to the opinion. This is not surprising since such an endeavor is time consuming and expensive. Again, the 1989 survey supports the conclusion that a significant percentage of second partner review is done on an informal basis. Forty of the responding firms indicated that the scope of review is a general discussion intent on identifying any special problems or other matters for review or reworking. (The large domestic international firm referenced earlier, states in its manual that, in addition to the reviewing partner’s addressing novel or difficult issues, the second partner review process should involve matters of form, consistency with similar opinions previously rendered, adequacy of the preparation procedures and the apparent soundness of the opinion.)

(iii) Standard opinion Forms

The 1988 and 1989 surveys indicated that only a small portion of the respondents had standard forms of opinions for all transactions. The 1989 survey emphasized that those firms that have form opinions have them for specific types of transactions. only three of the responding firms in the 1989 survey indicated that they had forms for all types of opinions. However, 39 of the respondents indicated that they did have forms for some type of opinions. Real estate and loans were two areas in which forms seem to be prevalent. A majority of the responding firms did not have any specific rules which govern deviation from the forms and approximately 75% of the responding firms stated that the use of the forms was not mandatory.
(iv) Due Diligence Rules

Over 60% of the respondents to the 1989 survey indicated that there is some required or specific due diligence concerning particular opinions, while over 35% indicated that there was none. Those that have due diligence requirements probably have them with respect to high risk areas. The 1989 survey also revealed that the responding firms rely heavily on the partner involved in preparing and maintaining a due diligence file. While approximately 53% leave the creation and maintenance of a due diligence file to the discretion of the individual partner working on the transaction, 45% indicate that they have internal rules for the same. This result is consistent with other aspects of the survey which give the partner in charge of the transaction considerable discretion in the opinion process.

Only a minority of the firms had specified internal procedures designed to identify the existence of a potentially interfering interest or influence in the transaction (or a party to it) which may jeopardize the objectivity and independence of the opinion rendering process. The majority would appear not to have any formal internal procedure to determine if there is a potential conflict regarding the individual lawyer or the firm itself. However, if an interfering interest is known to exist, the results of the 1989 survey indicate that most of the firms would require a more diligent review and would eliminate some of the discretion otherwise given to the responsible partner who may be in charge of the particular transaction. It is also interesting to note that there appears to be an even split amongst the firms when a potential interfering interest is known as to whether or not to disclose the interest in the opinion.
Only a minority of the firms indicated that the size of the transaction, type of transaction or to whom the opinion is addressed would require a different internal procedure. Those that did respond in the affirmative stated that the type of transaction (I assume tax, securities, audit requests or other high risk areas) may require special procedures and that the size of the transaction may also trigger a more detailed review process.

(v) **Factual Inquiry - Client Certificates**

A troublesome question which often arises is whether or not one should look beyond a factual certificate of the client when the firm is relying on the certificate as a basis for its opinion. This is often a part of the “no conflicts” or “no litigation” aspects of an opinion. Where there is no indication to question the integrity of the client certificate, twice as many of the responding firms to the 1989 survey indicated that they do not look beyond the certificate compared with those that do, where further investigation is made as part of the firm’s normal due diligence process, even in the absence of any doubt as to the client’s certification’s integrity, the majority indicated that such further review is general in nature. It could be assumed, therefore, that most firms use a “smell” test with respect to the client’s certification and do no look behind it unless there is some doubt regarding the certification.

(vi) **The “Knowledge” Qualification**

Mr. Clark’s 1989 survey also inquired as to the firm’s perception of the meaning of the qualification “to our knowledge” (relating to existing or threatened litigation or to agreements or documents which would be violated by the instant transaction). The majority of the responding firms indicated that they believed such a qualification was with respect to the knowledge of all
lawyers in the firm, with the second highest percentage responding that it was limited to all lawyers who recently worked for the client or were working on the particular transaction. Twenty-three of the responding law firms indicated that they have particular opinion language defining whose knowledge is meant, while 32 do not have such a particular formulation. The vast majority of the firms responding also indicated that, as a firm, they did not have a mandated procedure (I assume a survey of attorneys or a review of client files) for ascertaining such knowledge. This would appear consistent with providing and maintaining flexibility of the partner in charge to utilize that partner’s own discretion in identifying and inquiring of those in the firm who are necessary to support such a qualification.

(vii) ABA Model Rule of Professional Conduct 2.3

Mr. Clark’s 1989 survey was quite revealing as to whether or not the promulgation of ABA Model Rule of Professional Conduct 2.3 required any changes or special procedures regarding consultation with or consent from the client. Approximately 88% of the respondents indicated that Model Rule 2.3 has had no effect on their procedures. The vast majority stated that a requirement in an agreement signed by the client that a legal opinion was to be provided is sufficient client consent and that it did not make any difference if the opinion to be given is or is not fully set forth in the agreement.

(viii) Current Awareness of Legal opinions

It is also interesting to note that the responding firms to the 1989 survey were almost evenly divided as to whether or not, during the two years prior to the survey, the “geometrically”
increasing discussions of and concerns with giving opinions have influenced the firms’ procedures. Those that responded in the negative (29) either have ignored the same or have had, what they believe, adequate procedures in place. Those that responded in the affirmative (22) emphasized that such discussions and concerns have resulted in creating standardized forms or standardized internal procedures.

(ix) **What is An Opinion?**

Lastly, Mr. Clark’s 1989 survey revealed that a majority of the responding firms did not have any specific rules to decide whether or not a requested communication is an “opinion” which triggered whatever special procedures a firm may have for opinions. In most of the responses, the author of the communication decides or there are certain characteristics in the communication which designates it as an opinion. The old duck rule seems to apply: if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck.

**B-2 The American College of Real Estate Layers Survey (1991)**

Responses to the ACREL survey were received both prior to and subsequent to ACREL’s program. The majority of the responses, however, were received prior to the program. The survey was an abbreviated survey and, although numerous questions were desired to be asked, the survey was intentionally kept brief to elicit the maximum number of responses. Over 230 responses were received.
(i) **Firm Manuals**

The ACREL survey asked whether or not the firm had a manual for real estate or loan opinions. Approximately 32% of the total respondents indicated that the firm did have a manual. It comes as no surprise that those firms that have over 100 attorneys make up the majority of the affirmative responses. However, approximately 62% of the responses from the large firm category did not have manuals. Additionally, approximately 65% of those that do have manuals are located in the Eastern and Western portions of the country. Those of our peers located in the South are less inclined to have a manual (approximately 86% responded in the negative). This is reflective that most of the larger law firms responding are located in the Eastern and western portions of the country. The larger the law firm, typically, the more structured its practices and procedures. Also, the larger the law firm the frequency of significant transactions would be higher and, therefore, would be more conducive to expending the internal time and cost in creating such manuals. ACREL’s survey supports the results of Mr. Clark’s 1988 survey which indicates that it is the exception rather than the rule to have firm manuals.

ACREL’s survey included a series of subquestions to the primary question which was to be answered by those that responded in the affirmative that the firm did have a manual. The first subquestion was whether or not the manual prescribed what minimum due diligence was required for various aspects of the opinion (existence and good standing; due authorization, execution and delivery; no conflicts; litigation; enforceability, etc.). Approximately 80% of the total respondents answered this subquestion in the affirmative.
The next subquestion was whether or not the manual addressed or attempted to identify potential conflicts which the firm or the responsible attorney may have in rendering the opinion. Such conflicts may include a lawyer in the firm being an officer, director or equity investor in the client or where there is a close personal relationship. Approximately 54% responded in the affirmative. The majority of the affirmative responses came from the larger law firms.

The last subquestion with respect to manuals was whether or not it prescribed form opinions to be used in real estate or loan transactions. Over 84% responded that the manual did contain prescribed form opinions and the responses were relatively uniform regardless of the size or geographic location of the firm. This again is consistent with Mr. Clark’s surveys in which the responses indicated that real estate and loan transactions are two areas in which firms have created standard opinion forms. However, a subquestion was also asked with respect to prescribed form opinions. That subquestion was whether or not the use of the forms was mandatory. Consistent with Mr. Clark’s surveys, those firms which have taken the time and effort to create standard forms do not require their mandatory use. This response was also relatively consistent regardless of the size or geographic location of the firm.

(ii) Second Partner Review

The ACREL survey asked whether or not the firm required a second partner review for loan or real estate opinions. Consistent with Mr. Clark’s survey, the majority of the responding firms (approximately 73%) indicated that a second partner review was required. Only in those law firms with 25 or less attorneys was the response at substantial variance to the total responses received. This is understandable since in a smaller law firm there are less partners, less formal
procedures and more independence given to the partners. A subquestion to the second partner review question was whether or not the scope of the second partner review was pursuant to formal standards or was discretionary on the part of the second partner. The response was overwhelming that the second partner review is discretionary and not pursuant to formal prescribed standards. This response is not surprising since the cost and expense of a full review by a second partner would both be time consuming and expensive (which expense may or not be passed on to the client). Additionally, it is only natural that considerable reliance is placed upon the integrity and professionalism of the responsible partner to have conducted the necessary due diligence in rendering the opinion and the second partner review, depending upon the facts and circumstances relating to the transaction and the opinion, would be an informal process.

(iii) **Opinions Committee**

The establishment of an opinion committee to oversee firm practices and procedures is another vehicle for internal control. Like formulating a firm manual, however, creating an opinion committee, while helpful, is also time consuming and internally costly. The ACREL survey asked whether or not the firm had an opinion committee. The total responses indicated that a slight majority did not have an opinion committee, although over 68% of those law firms responding in the 51-100 size category indicated that they did and over 58% responding in the 100 plus size category responded in the affirmative. Mr. Clark’s surveys revealed that approximately 70% of those responding did have an opinion committee. Since Mr. Clark’s surveys were sent to larger law firms, his findings are somewhat consistent with the ACREL survey.
A series of subquestions were asked for those that responded to the primary question in the affirmative. The first was whether or not a purpose of the committee was to review and approve opinions. Close to 80% responded that this was a function of the committee. The response, however, would not be indicative that all members of the committee review and approve an opinion. This function would probably be spread amongst all of the committee members and would constitute the second partner review. The larger the law firm the more likely that the review and approval of the opinion is part of the committee’s function.

Another subquestion was whether or not a purpose of the committee was to develop, maintain and update an opinion manual. Approximately 57% of the respondents indicated that this was a function of the committee. The affirmative response was relatively consistent regardless of the size or location of the firm.

Another subquestion was whether or not a purpose of the committee was to prescribe opinion forms. Interestingly, although the use of such forms appear to be discretionary, over 70% responded in the affirmative.

Lastly, a subquestion was asked whether or not a function of the committee was to keep the firm current on legal and other issues associated with the opinion process. Approximately 88% of the total responses indicated that this was a function of the committee. It would appear, therefore, that, although the committee acts as part of the second partner review, a more consistent purpose of the committee is to inform its members as to recent developments.
(iv) The Enforceability Opinion

There has been considerable debate and disagreement as to whether or not there should be a generic qualification or a laundry list of exceptions to the enforceability or remedies portion of the opinion. The two approaches could be summarized as follows. Under one approach, the opinion would state that the loan documents are enforceable in accordance with their terms except for specific matters enumerated in a “laundry list” of exceptions which would be excluded from coverage of the opinion. In the generic qualification, the “bad news” and “good news” approach is taken. The opinion would state that certain remedies and other provisions of the loan documents may not be enforceable but that the party to whom the opinion is addressed would have the “practical realization” of the principal benefits provided by the loan documents.

The ACREL survey asked whether the firm used a generic qualification or a laundry list of exceptions. The responses were interesting and may be reflective of the general way in which the question was asked. Of the total responses, 50% indicated that their firms used both the generic qualification and the laundry list of exceptions. What the survey did not ask, was whether or not they were integrated as part of the same opinion or were used independently depending on the nature of the transaction. Because of the conservative nature of lawyers and the confusion which has surrounded the enforceability opinion, it has been known for firms to qualify their opinion by both a generic qualification and a laundry list of exceptions. The responses indicating that both are used should not, however, indicate that this was the intent of the responses. It could also be that, depending upon the type of transaction, the firm’s involvement, or the particular preference of the partner in charge of the transaction, the firm may use in one instance a generic qualification and in an other instance a laundry list of exceptions.
In any event, the total number of responses, regardless of size or geographic location, would indicate, except in one instance, that firms have the tendency to utilize both or each when it is beneficial for them to do so. The only exception is with respect to the smaller size law firm (less than 25) in which the generic qualification is used with a higher degree of frequency. As between the use of a generic qualification or a laundry list of exceptions, the generic qualification is more popular than the laundry list. The only deviation from this is with respect to law firms in the 26 to 50 category. Additionally, possibly because of the influence of the California State Bar Association, the Western portion of the country, although more apt to use both the generic qualification and a laundry list of exceptions, is much more inclined to use the generic qualification versus the laundry list of exceptions.

The responses to this question underscores the difficulty in reaching a consensus concerning the enforceability or remedies portion of the opinion. Some factors attributable to this are: confusion, insecurity, lack of certainty of acceptable or industry wide standards for the generic language or accepted laundry list of exceptions, custom, difficulties with local law and practices, or a combination of all the above factors. For anyone that has followed the reports of the various state bar associations and the various articles which have recently been published concerning the enforceability or remedies portion of the opinion, the results of the ACREL survey are not surprising.

(v) The “Knowledge” Qualifier

Although not as intense as the debate concerning the generic qualification versus the laundry list of exceptions, there is considerable debate as to the intent and meaning of the typical
“knowledge” qualifier. When a portion of the opinion is qualified by words “to our knowledge” or similar words, uncertainty oftentimes exists as to whose knowledge is intended.

The ACREL survey inquired that when an opinion is qualified by “to our knowledge” or similar words, does this mean that the firm must investigate the knowledge of (i) all the lawyers in the firm or (ii) all lawyers and paralegals who currently work on the client’s matters, or (iii) only those lawyers and paralegals working on the subject transaction? The total number of responses to each of these questions indicates that the answer may depend upon the nature, size or scope of the opinion. Approximately 25% of those responding indicated that it was with respect to the knowledge of all lawyers in the firm. Except for the law firms having 25 or less attorneys, the response was relatively uniform regardless of size or location. Over 75% of the total responses indicated that such a knowledge qualifier was with respect to all lawyers and paralegals who currently work on the client’s matters. This response indicates that firms have approached the issue with some common sense to avoid a full blown investigation of all the lawyers in the firm, to lessen the internal burden associated with such an investigation and to lessen the financial burden to the client related to such an investigation. The ACREL survey is somewhat opposite Mr. Clark’s survey in which the majority of the responses indicated that all lawyers in the firm were included. This is a little unusual because the responses to Mr. Clark’s survey were primarily from larger law firms in which such a practice would be burdensome. Only approximately 16% of the larger law firms responding to the ACREL survey sought an investigation of all the lawyers in the firm.
(vi) **The Accord and the Recent Attention Given to Legal opinions**

As stated earlier, there has been a considerable attention recently given to the opinion process and the Accord. The ACREL survey asked several questions concerning the Accord and the recent explosion of articles concerning the opinion process.

It was asked whether or not the Accord would have an influence in the negotiation and content of loan and real estate opinions. Approximately 57% of the total responses indicated that the Accord would have an influence and an approximately 97 indicated that it would have an influence or somewhat of an influence. A subquestion was whether or not the Accord would make the opinion process easier and more uniform. Although not as overwhelming as the first response, the total responses was either in the affirmative (approximately 60%) or in the affirmative and somewhat category (approximately 91%).

A related question was asked as to whether or not the Accord and the recent attention, discussion and documentation concerning legal opinions changed in any significant way the firm’s opinion procedures. Of the total responses, approximately 48% answered in the negative and only approximately 19% answered in the affirmative. However, a considerable percentage did indicate that there was some significant change because of either the Accord or the recent attention. Several factors can be attributed to the responses. Drafts of the Accord have only recently been published and it is far too early to ascertain the impact the Accord will have in the future. As more people become aware of the Accord, the responses to this question may vary. Additionally, the responses may indicate that many of the firms are confident in the procedures and in the manner in which they approach the opinion process.
The last question of the survey was whether or not the recent attention, discussion and documentation concerning legal opinions have been justified. Maybe out of frustration or the hope that the process would become easier and more uniform, approximately 74% responded in the affirmative and approximately 94% indicated in the affirmative or in the somewhat category. A surprisingly low 6% indicated in the negative. I truly believe that the response to this question reflects the uncertainty which currently exists in the opinion process and the frustration which many of us have experienced in negotiating opinions. It would also appear to be an indication that all of us want the process to be a “kinder and gentler” process with more certainty and uniformity.

**B-3 Interpretation?**

I believe a distinction should be made between internal firm procedures and due diligence manuals. While each have common goals, maintaining the integrity of the opinion rendering process and minimizing the risk of a potentially erroneous opinion, internal firm procedures should be directed at maintaining the objectivity and independence of the firm and the partner responsible for preparing the opinion. As Mr. Clark’s and the ACREL surveys reveal, significant latitude and discretion are given to the partner in charge of a transaction to render professional judgment based upon the facts and circumstances and to seek guidance and assistance when those facts and circumstances justify a more stringent review or due diligence process.
I do not believe that anyone would question that the responsible partner who has a direct or significant indirect interest in the client or the transaction (as an officer, director, shareholder, or friend or even if a longstanding account receivable will only be paid if the transaction closes) may find himself, either consciously or unconsciously, in a compromising position. It is only in those instances, however, when matters do not go as expected, that such intervening facts as to the objectivity and independence of the partner or the firm will be called into question. Perception is a greater part of reality, and it would be very difficult to explain a lack of a more stringent standard in those circumstances or why such factors were not made known to the recipient of the opinion. It would be beneficial, therefore, that there be an internal firm procedure which may require a more stringent process in those circumstances which lessens the normal discretion given to the partner in charge. Mr. Clark’s surveys indicate that only a minority of the firms have a formal specific procedure to identify the existence of compromising factors and the ACREL survey reveals that only a slight majority of those firms having a firm manual address this issue in their manuals.

Under those circumstances, in which there exists the potential for an interfering interest that may adversely affect the integrity of the process, it may be prudent for those firms which have an opinion committee to ensure that the opinion is reviewed by the committee or members of the committee with a significant number of due diligence questions being asked. Those firms which do not have an opinion committee should require a second partner review with the same intensified due diligence questioning. However, prior to that point, it will be necessary for the firm to have an established procedure which identifies any potential conflict or interference in the opinion rendering process. Whether in a large firm or small firm, attorneys tend to be very
independent. This independence is often necessary and often characterizes the strengths of the individuals within the firm. However, such independence quite frequently leads to a lack of communication. Therefore, to avoid embarrassment and exposure, a firm should have formal internal firm procedures which would identify any potential conflict or adverse interference which a partner or the firm may have in a given transaction. Whether or not a firm has any other type of formal or written procedures regarding opinions, it would appear that in a transaction in which the firm’s objectivity and independence can be questioned, no opinion should be rendered without the approval of another partner. The degree of review by the second partner should be flexible and dependent upon the facts and circumstances.

The creation of an opinion committee is something to which many firms have gravitated. The functions and purposes of the committee vary. The surveys indicate opinion committees, as a whole, generally do not actively review each and every opinion but require that a member of the committee review and approve an opinion. This may differ if the opinion is unusual or related to a high risk area. Additionally, the size and type of transaction may also require the review by the entire committee or by more than just one member thereof. I believe the primary function of an opinion committee is that of establishing general firm procedures regarding all opinions and, for specific opinions in situations where the firm is placed, for various considerations, at greater risk. Additionally, the firm’s opinion committee should be responsible for continually reviewing trends and matters regarding opinions and to consistently review the firm’s quality control process. Based upon the ACREL survey, this would appear to be a generally accepted function of the committee. The creation of forms for opinions in various transactions can also be another function of the committee. As the surveys indicate, the creation
of forms is considered a common function of the committee and forms are incorporated in the firm’s manual. However, if the time, energy and expense in creating forms are to have a beneficial return on that investment, it will only occur if the forms are utilized and if procedures are created which allow flexibility for their modifications to reflect the transaction at hand. Surprisingly, each of the surveys strongly indicates that for those firms which have prescribed forms their use was not mandatory. This may be evidence that specific forms may be so conservative and tightly worded that their benefit is minimal or it may be reflective of the independence and discretion given to the partner in charge of the transaction and the reliance which the firm has on its partners for professionalism and integrity. Because of the trend towards uniformity and the possible impact of the Accord, the use of standardized forms may become less discretionary in the future.

Reliance upon a second partner review appears to be uniform and common. Although some firms only require a second partner review under specified circumstances, a second partner review policy does not appear burdensome and would provide some degree of comfort. Even in those firms which do not require a second partner review, it is assumed that the partner in charge, if that partner has any uncertainty or doubt, would engage in general discussions with another partner.

The nature and extent of the second partner review is a matter in which there can be considerable debate. Except for the extraordinary circumstances involving the type or size of the transaction or a potential for a conflict or interference with the objectivity and independence of the process, a “cold review” with the requisite questioning by the reviewing partner should
suffice. A more in-depth and full review places a greater burden on the process and becomes more expensive for the client. Having written internal procedures with respect to the review process is, I believe, beneficial only if they are general and practical. The more detailed, the greater the risk that they will not be followed and, if not followed, may lead to greater exposure. This is contrary to the intent and the purpose of such procedures.

It is outside the scope of this paper to fully address the procedures and mechanics of a second partner review. The brief reference here is to only emphasize that some procedure is necessary to preserve the objectivity and independence of the process. Procedures that are created should be followed. The more specific the procedures, the greater the risk that the independence and discretion that is often allowed partners in charge of transactions result in discrepancies between standards and practice.

Separate and apart from the internal procedures which firms may have to guide the opinion process, some firms have taken the time and effort to formalize the due diligence procedures necessary in rendering various of the opinions typically associated with a normal business or loan transaction. For those firms which have an opinion’s manual, such due diligence often is a part of that manual. Additionally, many of the state bar associations or committees thereof which have published reports concerning legal opinions to be issued in their jurisdictions have also incorporated due diligence guidelines and suggestions.19

The time and effort on behalf of the state bar associations or committees in promulgating their reports were expended to eliminate some of the gamesmanship which exist in the opinion-
rendering process and to provide a more common consensus as to the scope of the opinion and to bring some uniformity as to certain aspects of the due diligence. Those firms which have created their own due diligence manuals have probably done so to internally standardize the process to avoid exposure and to bring a certain degree of integrity to the process. Clearly, opinions in many types of transactions are customary, and there appears to be a common understanding for their use. The opinion is usually an expression of legal conclusions contained within precise technical language. The opinion flows from, and is part of, the due diligence process associated with the transaction.

A problematic issue is whether or not the state bar association reports that have incorporated due diligence procedures and whether or not the firms which have internal procedures and due diligence manuals create, as to the former, established standards which firms in those jurisdictions ignore at their risk or, in the case of the latter, standards which create a higher basis of liability or negligence if not followed.

The creation of internal procedures and manuals must be carefully considered. As expressed later, in the unfortunate instance of litigation, such procedures and manuals may be discoverable and admissible.

In the previous discussion of the ACREL survey concerning the Accord and the recent attention given to legal opinions and the opinion process, the responses clearly indicated that attorneys have been somewhat frustrated by the process and the negotiations which are normally a part of that process. It would appear that the legal profession is seeking assistance in making
the opinion process more understandable and uniform to lessen the confusion and expense (and probably the potential malpractice exposure) now associated with that process. It is too early to tell whether or not the intent and spirit of the Accord will take hold and provide an easier path. The ACREL survey reveals that this is clearly the hope of those responding to the survey. Issues as to the pros and cons and benefits and limitations of a generic qualification or a laundry list of exceptions to the enforceability opinion will continue.

Substantial debate will also continue regarding other aspects of the opinion process and whether or not the Accord should be used as a mechanism for a common starting point for many of the issues which arise in the opinion process.

III. Discoverability and Admissability of Internal Procedure and Due Diligence Manuals

Law firms may be hesitant in preparing due diligence manuals or in having detailed internal control policies for the issuance of opinions because of the concern that the manuals and policies may impose a greater standard of care or that they will be discoverable and admissible, with adverse consequences, during any subsequent malpractice litigation. Assuming that the information in internal manuals is relevant to the standard of care owed to or reasonably expected by parties who are the intended beneficiaries of opinions, the manuals are likely to be discoverable because of the allowed broad scope of discovery and the absence of statutory exceptions to protect a law firm’s work product which is not prepared in anticipation of litigation. If the manuals are relevant to the standard of care owed, they are also likely to be admissible. This discussion is predicated upon the assumption that the party suing over the opinion letter is not barred from standing by the privity requirements of the state in which the suit was brought.
A. Standing

Although proper standing to sue over an opinion letter is assumed and is not directly at issue in this discussion, it bears mentioning that the privity requirements in many states still bar actions against attorneys for their opinions. The citadel of privity, however, is falling as regards professional liability.\(^{21}\)

It is beyond the scope of this paper to discuss the various theories of liabilities for an erroneous opinion. Generally, however, a client may sue his attorney over an opinion so long as there is privity, alleged negligence and damage. Although courts have traditionally disfavored malpractice claims by third parties against attorneys, there are a growing number of jurisdictions that allow third party malpractice claims. These are allowed for public policy reasons or because the courts have upheld causes of action for negligent misrepresentation.\(^{22}\) In order to be successful, a plaintiff must prove a negligent breach of the standard of care which the lawyer has a duty to maintain. The standard of care relates to the locality, community or state in which the lawyer is located.

B. Types of Cases

One of the primary issues that can impact whether an internal manual is either admissible or discoverable is the posture of the case at trial: Is the attorney being sued by his client? Is the addressee of the opinion suing? Is some other third party suing over reliance? Is the client using the opinion as an affirmative defense to a suit filed by a party with whom it is in privity? One in which it is not?
The context in which the opinion itself is relevant to the litigation can impact upon whether or not a due diligence manual used to prepare an opinion is legally relevant to the underlying litigation. The standard of care owed to a plaintiff in any of these types of litigation will also be relevant to whether a manual is legally relevant. If the use of an internal manual is part of an implied or express contract with a client, it is more likely to be deemed relevant to the standard of care owed in a malpractice suit by the client as opposed to when the litigation is by a third party over reliance on an opinion and the standard of care is determined to be the “industry” standard.

C. **Broad Scope of Discovery**

Even if internal due diligence manuals might not be admissible, because of the broad scope of discovery, which allows for any relevant information to be discovered, internal firm manuals will be discoverable in most cases. Rules 26 through 37 of the Federal Rules of Civil Procedure govern discovery in federal cases; many states have similar rules. Rule 26(b)(1) provides for the broad scope of what may be discovered:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not
grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The cases that discuss whether the discovery of internal procedures and manuals should be allowed (few of which are directly on point regarding law firm manuals in the opinion context) focus on the relevance of the information sought to the asserted claim and on the burden of producing the documents.23 Efforts to prevent discovery of internal procedures and manuals are usually based either on the unduly burdensome scope of the request or the lack of relevance of the material.24 Assuming that a due diligence manual would not, of itself, be unduly burdensome to produce, the issue remains whether such a manual would be relevant for the purposes of discovery.

One court summarized the issue of relevance as follows: “Relevance is broadly defined throughout the discovery stage, and this broad definition applies with equal force to matters that may be brought out during depositions or through document requests.”25 The court further held that a company’s policies, and whether or not they had been complied with, “may be highly relevant to defendant’s potential negligence . . . ”26 An internal due diligence manual used to prepare an opinion would be relevant to any malpractice action brought against an attorney if the manual raises, changes, or reflects the standard of care. Internal procedures and due diligence manuals may have one or more of those results.
While there do not appear to be cases on point concerning the discovery of law firm due diligence manuals, internal procedure manuals are regularly discoverable in other settings. Where employee manuals are relevant to the existence of an employment contract or the terms of the contract, courts have held such manuals to be both admissible and discoverable. Courts have also allowed the discovery of hospital rules and regulations for the determination of medical malpractice suits, the discovery of internal safety procedures used company-wide for a chain of grocery stores in a personal injury action, The discovery of internal operating and design manuals for a coal gasification process in a suit over a breach of licensing agreement, and the discovery and admissibility of internal safety and procedural manuals of a State Highway Department.

Courts have also compelled the discovery of the internal manuals of accounting firms. In In re Sunrise Securities Litigation, the court compelled Deloitte, Haskin & Sells to produce documents regarding Deloitte’s “policies and procedures governing audits of savings and loan associations.” The court, however, also issued a protective order limiting the access to and use of the policies because Deloitte deemed them to be confidential.

The court has broad discretion in designing ways to protect confidential information. Rule 26(c)(7) provides “that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.” The rule also states that courts should consider justice and undue burden and expenses when limiting discovery. Law firms may be able to limit access to their internal manuals if they are able to
convince a court that the manuals are commercial documents that give the firm a competitive advantage. Although this argument is tenable, it is likely to fail.

(i) **Statutory Exceptions**

Because it is likely that an internal procedure manual will be relevant to the standard of care, or that it would lead to the discovery of admissible evidence in an attorney malpractice suit, it is unlikely that courts would limit its discovery. Where discovery of internal procedures is limited, it is usually because of limited statutory exceptions to the discovery rules. Such statutory exceptions are generally for public policy reasons. Internal manuals have statutorily been withheld from discovery because of the likelihood that discovery of a manual relating to law enforcement would assist certain people in their “thwarting and circumventing the law.”

There have also been statutory exceptions relating to the discoverability of medical peer review boards’ investigations, documents and findings. One commentator stated that the statutory shield for discovery of a medical peer review board’s findings is based upon the presumption that a party in a medical malpractice suit would have other relevant information, including hospital manuals of policy and procedure, with which to support a cause of action.

Since many of the underlying reasons giving rise to the statutory exceptions are already addressed in the legal context by the attorney-client privilege and work product privilege, there are few compelling public policy reasons for similar treatment for the attorney.
(ii) **Attorney-Client Privilege**

The attorney-client privilege is unlikely to prevent the discovery of an internal manual because the purpose of the privilege is to ensure full and open communication between the attorney and client, not to protect the lawyer. An internal manual is also not in the nature of legal advice to the client, and would, therefore, not be protected by the privilege. A manual is prepared for broader internal reasons, and not to benefit any one particular client. Even if a manual could be claimed to be protected by privilege, a client waives the privilege in the client’s malpractice suit against the attorney.

If a client shares the opinion letter with a third party, the privilege may also be waived. In *United States v. Jones*, the defendants’ attorneys issued various legal opinions as to the federal income tax consequences of the purchase of certain coal leases. Their clients attempted to claim the attorney-client privilege for any communications which they had with their lawyers. The court held the privilege had been waived when the opinions were made available to third parties. The court then required the attorneys to produce “any documents and research notes used in preparation of the . . . opinions.” A due diligence manual would be used in preparation of an opinion and would, therefore, likely be discoverable in a similar situation.

Although the information a client gives his lawyers may remain privileged in some third party suits, an internal manual is not itself covered by the attorney-client privilege. At least one law firm, however, has successfully asserted the argument that the attorney-client privilege should protect internal law firm communications that amount to advice over legal issues. The firm argued
that a law firm may consult its own attorneys as house counsel to secure legal advice in connection with or related to the firm’s representation of a client, and as a result obtain the protection of the attorney-client privilege on the basis that it is its own client.’ May 31 Memorandum, at 572.46

The court held that so long as the firm’s ethical and fiduciary obligations to the client did not conflict with the firm’s representation of itself, the attorney-client privilege would apply to the internal firm communications.47 Since a standardized manual is not in the nature of legal advice, a similar argument is not likely to create an attorney-client privilege for a firm’s due diligence manual.

(iii) Work Product Privilege

The work product doctrine from Fed. R. Civ. P. 26(b)(3) protects from discovery documents and other tangible things including those prepared in anticipation of litigation or for trial. An internal manual will not meet the test of having been prepared in anticipation of litigation since it would have been prepared before the opinion that is the subject of the lawsuit. Since the work product immunity “requires a more immediate showing than the remote possibility of litigation,” the fact that a due diligence manual is originally prepared to prevent malpractice is not enough to warrant work product protection.48

In Garfinkle v. Arcata National Corp., a case in which an opinion was asserted as a defense to the failure to register securities, the court allowed discovery of documents relating to
the attorney opinion because a party is “entitled to know how the letter came into being.”49  A
due diligence manual would directly impact the steps by which attorneys formed their opinions.
Although the firm in Garfinkle did not use a manual, the court did allow discovery of drafts of
the opinion, comments on the drafts, and internal memorandums concerning the legal issues.50

Courts have even allowed the discovery of attorney work product prepared in anticipation
of litigation where the work product is relevant to a theory of the case. Attorney work product
was held discoverable when a plaintiff alleged bad faith in litigating a claim.51 “Allegations of
negligence or other misconduct while rendering legal advice also can place attorneys’ mental
impressions and opinions directly at issue and eliminate work product protection.”

Because of the limited protection afforded attorney’s papers when the attorney’s work is
the subject of litigation, an internal manual is not likely to be barred from discovery because of
the work-product privilege.

D.  Admissibility of Manuals into Evidence

Although discoverable, whether or not an internal manual would be admissible into
evidence depends primarily on whether a court holds that internal standards are relevant to the
question of liability. Trial courts have a great deal of discretion in determining the relevance of
such information, and the courts appear to have taken a wide variety of approaches. In general,
anything that is relevant to a legal proposition that is of consequence to the litigation can be
admitted.53
There are policy arguments to both support and oppose the admissibility of the manuals. If the internal manual does not actually create the standard of care, its admission could be opposed on the grounds that presenting evidence of the internal standard would be prejudicial to the law firm. Relevant evidence may also be excluded if it would be prejudicial to one of the parties, lead to confusion of the legal issues, or mislead the jury.54

If jurisdictions hold firms to an industry standard for similarly situated law firms, the fact that an internal manual reflects a higher standard of care may not be relevant to the determination of any legal issue and should, therefore, be inadmissible. There are also public policy concerns arising from the theory that an internal standard that is higher than the industry standard creates a higher standard for negligence. If an internal manual, which is intended to decrease liability by standardizing procedures, can be used against the law firm in a malpractice action, there is a disincentive to raise the standards. Internal standards, however, may be relevant to the rising standards for opinions and the increased attention which opinions have experienced within the profession and it could be argued the standards are, therefore, relevant. Because each firm’s standards are relevant to the standard in the community, it appears that internal standards will almost always be relevant, even if they do not create a standard of care for an individual law firm.

If a particular firm’s reputation for excellence is based upon the existence of internal procedures higher than the norm, whether those higher standards were followed may be relevant, especially if the firm has made any representations about its procedures to the client or to potential clients. Such representations may be found to be a warranty of services.
In a variety of cases, jurisdictions seem to be divided over the issue of admissibility of internal manuals and whether they are relevant to the standard of care. Cases concerning the accounting industry are particularly illustrative. In Garsite Products, Inc. v. Arthur Young & Co., the court barred the introduction of internal manuals because such manuals were not relevant to the standard of care owed, “the industry-wide standards and accepted practices.” The court stated that an internal manual does not establish the standard and that expert witness testimony is instead required.

At least one California court has taken the opposite approach: “internal manuals could properly be deemed relevant to the broader standard of care.” The court held that following Generally Accepted Accounting Procedures and Generally Accepted Accounting Standards were relevant, but not determinative, of whether the standard of care of professionals in the accounting industry, similarly situated, had been met. The court explicitly rejected arguments that the internal manual was irrelevant to the standard of care or prejudicial to the accounting firm’s case. New York has a more restricted view regarding the admissibility of internal manuals as reflected by Crosland v. New York City Transit Authority and Rivera v. New York City Transit Authority.

Other courts, if some foundation for relevancy has been laid, seem likely to hold the internal manuals relevant and admissible. A Missouri court allowed the negligence charge to the jury in a hospital malpractice case to include the fact that hospital employees had not followed their internal procedures. A Nebraska court allowed excerpts from a hospital internal manual to be read into the record to show the standard of care within the hospital, although an expert
testified that the procedures, if followed, were at least equal to the standard of care of similar hospitals in the community.  

Another case involving a hospital found prejudicial error by the trial court in excluding an emergency room policy manual. The court specifically held that internal manuals, “should be admitted when they contain either 1) evidence of a general industry custom or standard, or 2) evidence that the defendant violated its own policy or an industry standard.”

Courts in other analogous situations have refused to admit manuals into evidence if their relevance has not been shown, i.e., if a plaintiff is seeking to introduce the manual there may have to be proof that the standards within the manual have been violated. Internal manuals have also been denied admission where they have been improperly introduced into evidence. Counsel attempted to introduce hospital manuals based upon the deposition of a nurse. The court found that the nurse was not an expert witness and, therefore, disallowed the manual. Counsel never established the relevance of the manuals by use of expert testimony, and then failed to preserve the issue for review.

Whether an internal manual will be admitted at trial to show that an attorney has been negligent in preparing an opinion will depend upon the standard of care applied by the court. Some courts have held that evidence of the violation of an internal policy is admissible as evidence, even if inconclusive, of negligence. Other courts have held that only the failure to meet an industry-wide standard can be evidence of negligence. Although it seems likely that courts will apply the same rules and standards of admissibility by analogy to attorneys that they
apply to other professions, courts do not always do so. A recent Ohio case held that accountants could be held liable to foreseeable third parties, but that attorneys could not.\textsuperscript{70}

Whether or not a court allows the admission of internal manuals into evidence will depend upon the state laws governing admissibility and the state’s approach to the relevance of internal manuals to the standard of care owed. At least one state, New York, seems to restrict the admission of internal manuals as being irrelevant or are not admissible to the extent that they impose a higher standard of care than that imposed by law. Other states, such as California and Florida, have strong case-law precedent allowing the admission of internal manuals as being relevant to the standard of care owed by both the profession and by a particular member of that profession. Although due diligence manuals for opinions may not raise the standard of care, they are likely to be deemed relevant because they reflect a standard of care in the community. If an internal manual has not been followed, it is even more likely to be admissible because it may be directly relevant to an allegation of negligence.

E. Conclusion

If law firms choose to use internal manuals to help standardize and establish the quality of services and reduce their exposure, firms should be aware that such manuals will usually be discoverable and admissible in jurisdictions where the manuals are deemed relevant to the standard of care. Firms should, therefore, prepare manuals and instruct their members accordingly. If the creation of internal manuals and procedures are perceived as fostering beneficial goals and creating increased integrity and professionalism for the protection of the firm and the client, statutory exceptions to the discoverability and admissability of internal
manuals and procedures should be sought in the same context that some states have protected hospital manuals and internal procedures. In the medical context, however, there is a greater awareness that hospitals need to continually evaluate their procedures and practices because of the service they provide and consequences for physical injury in providing those services negligently. This significant distinction would appear to lessen any comparative treatment for attorneys.

IV. The “No Conflicts” Opinion - Close But No Bananas

The objectives of commentators, the Accord, and the various state bar association or committee reports are to make the opinion process more understandable, to arrive at some consensus as to the scope and intent of various aspects of the opinion, and to provide a framework for the due diligence responsibilities of the opinion giver. I believe it is beneficial to take one common opinion that is generally rendered in a loan or business transaction (the so-called “no conflicts” opinion) and to compare how two state bar association groups or committees and one New York law firm have structured that opinion, including due diligence guidelines. The analysis illustrates a movement toward a consensus but also demonstrates that more is needed. Where appropriate, the Accord is also discussed to interpose yet another view as to the meaning of certain elements of the opinion and to suggest that the adoption and use of the Accord would be helpful in eliminating some of the differences associated with the examples. Some of the matters discussed below can, themselves, be the subject of separate lengthy articles. I will only attempt to acknowledge and summarize the differences and defer to others to provide more detail.
A. **Purpose of the Opinion**

The subject matter of a “no conflicts” opinion usually addresses the client’s organizational documents; judgments, orders or decrees, etc.; agreements or instruments to which the client is a party or which its assets may be bound; and existing laws, rules and regulations.

The opinion recipient has a legitimate concern about the impact that the subject transaction may have on the client’s other contractual rights and obligations and that the client is not otherwise legally obligated in a manner that would be at variance with the subject transaction. The no conflicts opinion is interesting because it raises significant issues and approaches as to wording, intent, knowledge, reliance on client certificates, and potentially hidden opinions. It is an opinion that requires a careful determination of the degree of due diligence required and, because of the potential magnitude of due diligence, may involve negotiation of its contents to achieve a balancing of the energy expended to the benefits derived. It is also an opinion that, to some extent, will require the opinion giver to verify the representations of the client and, therefore, encompasses both a degree of factual and legal analysis.

B. **Selected Examples**

Set forth below are three examples of a typical no conflicts opinion. The first example (“Example 1”) is the suggested form prepared by a New York (non-Wall Street) law firm, the second (“Example 2”) is from the report of the State Bar of Arizona, Corporate, Banking and Business Law Section Subcommittee On Rendering Legal Opinions In Business Transactions.
and the third (“Example 3”) is from the Special Joint Committee on Lawyers’ Opinions in Commercial Transactions by a Special Joint Committee of the Maryland State Bar Association, Inc., and The Bar Association of Baltimore City. The client-borrower in each of the Examples is assumed to be a corporation and the transaction is assumed to be a loan transaction. Each of the Examples was chosen because each illustrate a somewhat different approach which highlights the difficulties in rendering this type of opinion.

**Example 1**

Borrower’s execution and delivery of the Loan Documents to which it is a party, and Borrower’s payment of the indebtedness evidenced by the Note, do not on this date (a) conflict with or result in a breach of any provision of the Certificate of Incorporation or By-Laws of Borrower, or (b) to our actual knowledge without independent investigation, [(i) result in a breach of any of the provisions of, or constitute a default under, or result in the creation or imposition of a lien, charge or encumbrance upon any of the assets of Borrower pursuant to, any agreement or instrument to which Borrower is a party or by which any of Borrower’s assets is bound (assuming that the laws of each jurisdiction governing such agreement or instrument are the same as the laws of the State of New York), or (ii) violate any existing judgment, order, writ, injunction or decree expressly applicable to Borrower, or (iii)] violate any existing law, rule, regulation or ordinance applicable to Borrower and affecting the enforceability of any of the Loan Documents to which Borrower is a party.
Example 2

(a) The execution and delivery of the Documents and the 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.

(b) Based solely upon [our knowledge] [and a review of judgments, orders, and decrees disclosed by the Company in the attached officer’s certificate, dated ______________,] [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 ______________], the execution and delivery of the Documents and the 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.
Example 3

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

C. Analysis

(i) Performance/Consummation

The first noted differences within the Examples is with respect to the use of the word “performance” in Example 3, the use of the word “consummation” in Example 2 and the use of the words “Borrower’s payment of the indebtedness evidenced by the Note” in Example 1.

Since the subject matter of the opinion is with regard to four distinct elements -- organizational documents, agreements, court orders and laws -- the inclusion (or exclusion) of those or similar words is important, especially regarding that portion of the opinion dealing with other agreements, court orders and laws. Some suggest that the word “performance” or like words not be used because it may convey unintended meanings and inadvertently broaden the
scope of the opinion. There is a concern that “performance” may include performance of all obligations including future activities or events that may be contemplated by the Loan Documents (i.e., in a construction loan setting that the construction will not violate or shall be in compliance with applicable zoning, building code, and other similar laws). Additionally, it may be impossible to ascertain whether the performance of each and every obligation under the loan documents would conflict with some other agreement or obligation. As a result, some avoid using the word “performance” and address only the execution and delivery of the Loan Documents and (as in Example 1) the payment of the underlying obligation. The Maryland Report, although it uses the broader phrase “performance of the obligations under the loan documents”, states in its Report that such phrase is limited to the payment of the underlying obligation and acts incidental thereto.

If there are certain aspects of the transaction that require special attention to performance, these should be addressed by the parties and the scope and limitation relating to the same agreed upon. (For example, the executory agreement of a ground lessor under a ground lease to subordinate its fee interest to a tenant’s future loan may violate covenants in existing indentures regarding mortgage indebtedness.)

Example 2 uses the word “consummation”. In so doing, however, the Arizona Report states that the activities to be consummated are those required to be obtained or complied with before or at closing (no future activities or events intended).
Further, the Arizona Report states that the phrase “consummation of the transaction” relates only 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. It is uncertain whether or not “performance” or “consummation”, when limited to nonfuture activities or events, has any distinction.

The better practice, unless the meaning of the words “performance” and “consummation” are clearly understood by the parties or are otherwise defined, would be to limit its use to the execution or delivery of loan documents and the payment of the underlying indebtedness. To do so would identify (and limit) the future obligations on which counsel is opining.

(ii) organizational Documents

Each of the Examples uses the word “conflict” when providing the opinion regarding the organizational documents of the Borrower. However, Example 1 also uses the word “breach” and Example 2 also uses the word “violation” in the same context.

The words “conflict with”, “violate”, “result in a breach of”, or “constitute a default of”, or other similar words overlap in meaning and common usage. Each such concept may be applicable to the organizational documents and to contracts and agreements in general but may not have common applicability or meaning with respect to laws or court orders. Again, this may be a distinction without a meaning when rendering an opinion on Borrower’s organizational documents and, as the Examples illustrate, that word has been eliminated when issuing the other portions of the opinion.
The opinion regarding the Borrower’s organization documents is customary and generally does not create a problem as to the understanding of the due diligence required to give the opinion. This usually involves a review of a certified copy of the borrower’s Article of Incorporation or a Certificate of Incorporation from the Secretary of State and review of the Bylaws or Code of Regulations of the borrower appropriately certified by an officer of the borrower as being true, correct and complete. Nothing fancy here, although, it has been noted that this opinion may not be necessary and that the “duly authorized, executed and delivered” portion of an opinion may already incorporate this aspect of the opinion.

(iii) Other Agreements And Contracts: “To Our Knowledge” And Other Modifiers

The wording of the second stage of the opinion regarding other agreements and contracts is more complicated and potentially dangerous. Examples 1, 2 and 3 each seek, appropriately, to limit the scope of the opinion and the due diligence required to give the opinion. The due diligence manual and instructive notes in the sample form of opinion used by the firm from which Example 1 is taken and the Reports from which the other two Examples are taken go into detail concerning this aspect of the opinion and the due diligence which is necessary prior to rendering the opinion.

Clearly, this is one area of the opinion which requires an early and clear understanding as to what the opinion giver will provide and what limitations are applicable. It is generally understood that the due diligence required to render this portion of the opinion, without limiting
the scope of the same, may be too burdensome and expensive and should be tailored to the transaction. Some transactions may warrant a more fulsome inquiry while others may not. The size and type of transaction will often dictate what is required.

Each of the Examples limit the opinion to some type of knowledge and/or an identification of the agreements on which the opinion is being rendered. The word “conflict” is dropped in each of the Examples. Also, Example 3 uses the modifier “material” before breach or default. Example 2 provides for an alternative whereby the officer’s certificate may or may not be attached while Example 3 attaches the same. Example 1 does not provide for an officer’s or borrower’s certificate, but the firm’s commentary concerning the opinion indicates that it will not provide the opinion unless the firm acted as general counsel for the borrower and obtains a borrower’s certificate. (The firm also indicates in its explanation of the opinion that it will not use the term “general counsel” in the opinion. There is some belief that the use of the term “general” or “special counsel” is used to convey a greater or lesser role of the opinion giver. However, others believe that the distinction between “general” and “special” counsel is not well taken, there is no need to distinguish between the two except in limited instances and that the distinction does not imply any lesser degree of due diligence.80)

Counsel, even though it may really be general counsel, will not have full knowledge of all of the client’s business endeavors and agreements. It would be unrealistic and too costly for the client to have the opinion giver’s law firm spend the necessary time and effort in tracking down each and every one of the client’s agreements or contracts. It is also unlikely that, even if such an endeavor were made, such a search would uncover every agreement and contract. To
render this aspect of the opinion, therefore, it will be necessary for the parties to negotiate the scope of the opinion, the scope of the required due diligence and the appropriate language of the opinion.

The first accepted limitation is to reach an understanding as to what agreements and contracts are the subject of the opinion. This is usually accomplished by having an officer, who is knowledgeable with this aspect of the borrower’s affairs, execute a certificate identifying those agreements and contracts which are relevant to the borrower and to the opinion being given. The opinion giver would then rely on that certification. The officer should not certify to legal conclusions (such as a statement that “the transaction does not violate the terms of any material agreement”). Counsel may not properly rely on certifications that are legal conclusions or which contain “ultimate facts.” The certificate should be certified to the opinion giver together with a statement that it is being delivered to counsel to be relied upon by counsel in rendering its opinion. The certificate should be prepared by the opinion giver and discussed with the client. (The law firm that provided the language for opinion 1 requires that the certificate track precisely the language of the opinion.) It then would be up to the opinion giver to review the agreements and contracts referenced therein in order to provide the opinion. Depending on the type of transaction, it may also be appropriate for the opinion giver to request from the opinion recipient the type of agreements and contracts which the opinion recipient requires to be reviewed. Unless the opinion recipient is intimately familiar with the borrower or unless the transaction underlying the opinion is limited in nature, such a request is impractical.
Some suggest that the certificate and the opinion be limited to “material” agreements. Mr. Fuld, in his historic article, commended the accountants for having built into their process the concept of materiality. He would suggest that this concept also be incorporated into this aspect of the opinion. However, a materiality qualification would require the task of clearly defining what the word “material” means. This is especially true in providing a precise definition so that the borrower’s officer, who is providing the certificate, has a clear understanding as to its meaning and intent. Materiality could be defined as a dollar amount, agreements entered into other than in the ordinary course of business, or agreements having a term of less than a specified period. The large domestic-international firm, mentioned earlier, states in its manual that the opinion recipient often requests a materiality concept in the negotiating process but that this approach should be rejected because of the difficulty in providing an adequate definition.

The borrower’s certificate should be made available to the opinion recipient or attached to the opinion for its review and approval. However, there may be certain circumstances in which the opinion giver’s client may not want to divulge the information contained in the certificate either because of proprietary or confidential concerns. Additionally, if the information is protected under a claim of privilege (such as counsel’s knowledge of an unasserted claim which is possible of assertion), the disclosure is likely to waive the privilege. In each of these circumstances negotiation will be necessary in order to provide the intended benefits but without jeopardizing the opinion giver’s client’s confidence. The former may be resolved by providing to the opinion recipient such information on a confidential basis. In the latter situation, which is more difficult, it may be necessary for the opinion giver to opine, without disclosing the contents
of the certificate, that nothing in the certificate causes the opinion giver to be unable to give the opinion.

This aspect of the opinion is one in which counsel must rely on others to provide factual information prior to rendering the opinion. Much has been written on the different nature and variety of facts upon which counsel may or may not rely and which are appropriate for a borrower’s certificate. While counsel’s role is not to be an insurer of the client’s representations and warranties or factual information, counsel must be prudent in laying the framework upon which he seeks factual information from the client.

The Accord recognizes, as do all of the state bar reports and commentators, that in rendering this aspect of the opinion some limitation is necessary for practical and cost concerns. The Accord (§3) summarizes when reliance on the client’s certificate is justified: such certificates are only with respect to objective factual matters (not ultimate facts); the person providing the certificate is, in the exercise of the professional judgment of the opinion giver, an appropriate source because of that person’s knowledge of the client and the client’s affairs; and the opinion giver has exercised professional judgment as to the certificate’s form and scope. It is also commonly understood that the opinion giver should not be able to rely upon a certification if he has knowledge that the information contained therein is false or if he has knowledge of other factors that make such reliance unreasonable.

Example 1 does not reference a borrower’s certificate. However, in its due diligence manual, the firm requires that a certificate be obtained. The Arizona Report, from which
Example 2 is taken, states that counsel should be able to rely on a certificate, but it is optional as to whether or not the certificate is to be referenced in the opinion or attached to the opinion. The Maryland Report, from which Example 3 is taken, requires obtaining a certificate from the client as to the Identified Borrower Contracts and the certificate is attached to the opinion. The Report further states, however, that, because the client may have numerous agreements it may be impractical to obtain an accurate list from the client and, if obtained, the time and cost associated with reviewing the agreements listed may not be cost-beneficial. The Report suggests that, depending on the size and importance of the transaction, this aspect of the opinion be avoided. However, if the opinion is to be given, the Report recommends early discussion to reach an understanding of the opinion giver’s responsibilities and required due diligence.

Also, this portion of the opinion usually contains a “knowledge” modifier to further limit the intended scope of the opinion. Examples 2 and 3 utilize the words “our knowledge” and Example No. 1 utilizes the words “to our actual knowledge without independent investigation”. The firm responsible for Example No. 1 states in its commentary concerning the opinion that it will not opine without the knowledge qualifier.

In this context, a “knowledge” modifier has been generally accepted as appropriate. The intent of the modifier is to apply only to factual statements. It is to express that counsel does not have actual knowledge of facts different from those identified by his client in the certificates supporting the opinion.
The knowledge modifier can take many forms. Usually the use of the knowledge qualifier and the selection of the qualifier will be a result of negotiation between the parties and may be based upon the relative importance of the specific matter as to which the opinion giver will be rendering its opinion and the cost of performing the required due diligence. The opinion qualifier is not intended to avoid the other requisite due diligence that is necessary in rendering the opinion. The knowledge qualifier usually takes the form of “knowledge”, “actual knowledge” or “best of knowledge”. Additional modifiers are sometimes added to those qualifications, such as “to our knowledge after limited investigation” or “to our knowledge after investigation”. The insertion of these additional qualifiers do affect the due diligence required in rendering the opinion, but are often ill-defined.85

The question which has no uniform answer is: whose knowledge? The firm responsible for Example 1 intends its knowledge modifier to mean the actual knowledge of all the principals or partners in the law firm. It would endeavor to poll each of the principals or partners to ascertain whether or not they are aware of any information which would affect the giving of the opinion. Although Example 1 expressly provides “without independent investigation,” the firm’s due diligence manual requires a review of the borrower’s files within the firm to locate and review all material agreements and instruments to determine if the execution and delivery of the loan documents will conflict with or breach any such material agreement. The necessary scope of the review of the firm’s files is to be determined through consultation with the partner in charge of the transaction and a member of the opinion committee. The firm’s due diligence manual further states that the determination of what files are to be sought and reviewed should be based upon factors such as the size of the client, the period of time during which the firm has
represented the client, and the size of the transaction. The firm’s due diligence manual also indicates that there should be a discussion with the client concerning any material agreements and instruments to which the client is a party. Additionally, the firm requires search reports of UCC filings and applicable searches with the county clerk’s office to confirm that there are no senior creditors of Borrower. If such exists, then it is necessary to review the applicable loan and security agreements for potential conflicts or breaches.

The Arizona Report, which is the basis of Example 2, recommends that the term “knowledge”, unless otherwise defined, should have the meaning given to it in the ABA Statement of Policy regarding lawyer’s responses to auditor’s requests for information. Knowledge is limited to matters that have been given substantive attention by the lawyer rendering the opinion. 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, and the recipient may assume the lawyer has endeavored, to the extent the lawyer deems necessary, to determine from other lawyers currently in the firm or department whether they have knowledge relevant to the opinion.

The Maryland Report recommends that the term “our knowledge” be defined to refer only to information which has come to the attention of lawyers in the firm rendering the opinion who have recently worked on matters on behalf of the client. The Report further states that it may be impractical, particularly with respect to large firms with multiple offices, to make inquiry of every lawyer in the firm or even with respect to every lawyer who has performed legal services for the borrower.
As illustrated, there is no consensus as to what the modifier “knowledge” means in the context of a lawyer practicing within a firm. The Maryland Report attempts to limit the scope to those lawyers in the firm who are part of the transaction or opinion rendering process or who have recently worked on matters on behalf of the client. The TriBar Report states that the knowledge of each lawyer in a firm is attributed to the firm and states that the opinion recipient may assume that the lawyer has endeavored, to the extent the lawyer deems necessary, to determine from other lawyers currently in the firm whether they have knowledge relevant to the opinion. This is essentially the view of the Arizona Report.

The Accord (§§6-A and 6-B) indicates that the words “actual knowledge” or its equivalent means the conscious awareness of information by the Primary Lawyer or the Primary Lawyer Group without undertaking any investigation or other inquiry except as may be necessary to canvass within the Primary Lawyer Group for that awareness. The Primary Lawyer is defined as the lawyer in the firm’s organization who signs the opinion and any lawyer in the organization who has active involvement in the preparation of the opinion or is primarily responsible for providing the response concerning the particular opinion issue or information regarding factual matters. The phrase “Primary Lawyer Group” refers to all of the Primary Lawyers when there is more than one. The Accord further attempts to establish an understanding as to what due diligence is required within the scope of the knowledge qualification. The Accord states the obvious, the burden and cost of a complete file search of the firm’s files would generally not be cost beneficial. The Accord, therefore, states that the opinion recipient should understand that the knowledge qualification implicitly excludes any information contained in the opinion giver’s file that is not within the actual knowledge of the Primary Lawyer or Primary
Lawyer Group. The Accord also recognizes that larger firms, with specialized practice groups, may attend to various aspects of the client’s affairs and may even have multiple offices to service the client. The Accord would not require a canvass of all the lawyers in the firm and limits inquiry to the Primary Lawyer or the Primary Lawyer Group. The Accord, however, acknowledges that the type of transaction or the circumstances surrounding the transaction may dictate an expanded framework for the knowledge qualification.

Those that suggest that each member of the firm’s knowledge is imputed to the lawyer rendering the opinion require a broad scope of due diligence review by requiring a survey of attorneys in the firm and a review of the firm’s files. Discretion and judgment, however, should be utilized so that such endeavor is limited to a practical scope so that the client does not bear an extraordinary cost. The Maryland Report, as well as the Accord, would require a less fulsome, but meaningful, inquiry.

Example 1 expands the no conflict opinion with respect to other agreements to include “or result in the creation or imposition of a lien, charge or encumbrance upon any of the assets of Borrower”. This is intended to assure that the transaction will not contravene a provision in one of the borrower’s other agreements which might convey to a creditor a security interest in the borrower’s property. Such an adverse consequence, if it is important to the opinion recipient (and such importance should only be limited to a lender that might be concerned about additional encumbrances on the collateral) is probably not otherwise covered by the no conflicts opinion and should be separately addressed. Based upon the other modifiers, as to identification of agreements and the knowledge qualification, rendering this type of opinion should not prove
burdensome since the identified agreements will have been reviewed in rendering other portions of the opinion. However, such an opinion may unintentionally include liens arising by operation of law. Therefore, unless the creation of such liens are of special concern to the opinion recipient and the transaction is significant enough to justify the additional cost or expense that might be associated with the necessary due diligence, the best approach would be to limit the opinion to “contractual liens”.

Examples 1 and 3 do not use the word “conflict” in rendering the opinion with respect to other agreements. Example 2 does use that term. The better approach is that taken by the Accord (§15) which recommends not using the term “conflict with” when rendering this portion of the opinion. The Accord correctly points out that the legal significance of the term “conflict” is not as certain as that with respect to default or breach. Additionally, it could be that the loan documents may conflict with other agreements without such conflict being of such a nature as to constitute a default or breach. The Accord suggests that when the words “conflict with” are used in the context of the no conflicts opinion that the words should be understood to mean a conflict that constitutes a breach or default unless a different interpretation is clearly indicated.

It is also interesting to note that Example 3 modifies breach and default with the word “material”. It does this without any commentary or definition. The attempt is obviously to provide another limitation and safeguard for counsel. It is reasonable and practical that the opinion recipient should not be concerned with breaches or a default which do not jeopardize the benefit of the bargain and the security given for that bargain. However, without clearly defining what is meant by material, the use of that term would appear to be objectionable.
(iv) **Court Orders, Judgments, Etc.**

Similar to the no conflict opinion relating to other agreements, the portion of the no conflict opinion addressing judgments, court orders or decrees of courts or governmental agencies is a mixed question of law and fact, and the scope and intent of the opinion and required due diligence are dependent upon the limitations contained in the wording of the opinion. The limitations (knowledge of opinion giver and reliance upon a borrower’s certificate) reflect the same considerations set forth in earlier discussions concerning those elements.

Counsel should not have to conduct an independent investigation on these issues and should be permitted to rely on a certificate. As with the opinion concerning other agreements, reliance based upon a certificate should be noted in the opinion, and the certificate should either be attached to the opinion or provided to the opinion recipient.

Examples 2 and 3, however, expand the required due diligence by requiring that search of applicable court records in applicable jurisdictions be conducted to verify any court orders which may be binding on borrower. The report is attached to the opinion. The firm’s due diligence standards for Example 1 states that the attorney should obtain search reports on judgments, mechanics’ liens and tax liens from the county clerk’s office or the office of the clerk of the circuit court to confirm existing judgments and liens. If any exist, a review is necessary to confirm that there are no violations by the execution and delivery of the loan documents. The due diligence required by the Maryland Report suggests that those matters which are of record (court orders and judgments, etc.) should be sought out and reviewed, but the lawyer should be
permitted to limit his search to specified jurisdictions. Typically, in a loan transaction secured by real property, counsel will have the benefit of a title insurance commitment which should disclose any litigation initiated against the borrower in the jurisdiction in which the subject real property is located. This, together with a client’s certificate, should be sufficient in most instances to provide the required due diligence.

Each of the Examples further attempt to limit the scope of the opinion by modifying what judgments, orders, writs and decrees are attempted to be covered. Example 1 uses the phrase “expressly applicable to Borrower”; Example 2 limits those to which the “Company is a party or by which it is bound” and Example 3 uses the phrase “binding on the Borrower.” Such limitations are to avoid a potential expanded interpretation which might include borrower as a part a larger class. It might be more appropriate to restrict the language to those matters which are specifically applicable to the borrower or to those in which borrower is named. The term “by which it is bound” may include the broader interpretation, which is clearly not intended. In a transaction, however, in which the borrower is in a highly regulated industry, the opinion may be properly expanded to include the larger class of regulated industries of which borrower may be a part. Unless the facts and circumstances dictate otherwise, this portion of the opinion should be limited to only those matters in which the borrower is named and which the borrower is specifically included. This is the recommendation of the Accord (§15).

(v) **No Contravention of Laws**

The next portion of the typical no conflicts opinion is with respect to laws, rules, and regulations affecting the borrower. This also raises significant questions and concerns as to the
scope and intent of the opinion and can involve significant due diligence. It is also dangerous because it can involve an unintended scope which may include a hidden opinion. As a consequence, the due diligence required is also dependent upon the wording of the opinion. The Maryland Report (Example 3) does not provide this portion of the opinion in its no conflicts opinion. The Report states that the ability of counsel to effectively render such an opinion in any reasonable fashion is questionable at best, and such an opinion has little, if any, practical value. The Report suggests that the parties would be better served if the party requesting the opinion identifies those laws, rules and regulations or categories of laws, rules and regulations which are of practical concern to the transaction and to request that the opining lawyer focus his opinion accordingly. If such an opinion is requested, the Report states that the scope should be narrowed and the required due diligence should be agreed upon.

Example 2 does address the law’s portion of the opinion. The Arizona Report indicates that this portion of the opinion may overlap the “enforceability” opinion and the “no-consents or approvals” opinion. The Arizona Report suggests that, to have a valid and enforceable document, the document generally cannot conflict with applicable laws. Similarly, the no consents or approvals opinion requires a determination that the consummation of the transaction will not violate any laws requiring that such consent or approval be obtained. This interpretation is not universally accepted. The Arizona Report goes further to state that, if such an opinion is requested, it should be limited to the execution and delivery of the loan documents and the consummation of the transactions contemplated thereby. The Arizona Report interprets “consummation” as relating only to the transfer of consideration, the imposition of liens, the granting of any assignments, or any other event which is a prerequisite to closing the transaction.
Example 1 provides this opinion but limits the opinion to those laws, rules, regulations, or ordinances applicable to Borrower and affecting the enforceability of any of the loan documents to which borrower is a party. The due diligence manual for the firm responsible for Example 1 requires that, if borrower is part of a regulated industry, additional due diligence is required.

As the universe of applicable laws is great, this opinion, if given, should be limited in scope. Without appropriate qualifiers and limitations, the opinion can be part of the “hidden” or “backdoor” opinion that is to be avoided. This is especially true if the opinion is made in connection with “performance”.

Contrary to the Arizona Report, the Accord (§16) suggests that this portion of the opinion is intended to fill in gaps left by other aspects of the overall opinion, such as a remedies opinion, but is not to serve as a substitute for those opinions or provide a backdoor remedies opinion. The Accord specifically states that this aspect of the opinion does not cover provisions of law that neither prohibits the conduct in question nor imposes a fine, penalty or similar sanction for violation that a lawyer exercising customary professional diligence would reasonably recognize as being directly applicable to the client, the transaction or both. The Accord also suggests what laws are not intended to be covered by the opinion (including, but not limited to: federal and state land use and subdivision laws, environmental laws, security laws and Local Laws). The Accord states that, if the excluded laws are to be covered by the opinion, they should be specifically requested by the opinion recipient. In a particular transaction, compliance with
certain local laws, especially those dealing with zoning, development or land use, may be of particular importance. This should be specifically requested and the scope and required due diligence agreed upon.

(vi) The Accord Does Help in Closing the Gap

The different approaches reflected by the three Examples illustrate some common framework as to the intended scope of the opinion, appropriate qualifications to the opinion, and the basis of the required due diligence. However, within that framework, there is some difference in interpretation. Complete uniformity as to all aspects of an opinion may be impossible. It is interesting to note, however, that the Accord addresses many of the differences expressed by the Examples and the approaches taken by the firm and the Bar Reports from which they were taken. Adoption and use of the Accord would narrow many of the differences associated with the Examples.

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FOOTNOTES


2. Id. at 915.

3. Id. at 919.


6. Legal opinions to Third Parties: An Easier Path, 34 Bus. Law. 1891 (1979) (hereinafter the TriBar Report). The TriBar Committee consists of the following: a) Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers’ Association; b) Special Committee of the Corporation Law Committee of the Association of the Bar of the City of New York; and c) Special Committee on Legal Opinions of the Banking, Corporation and Business Law Section of the New York State Bar Association.


8. See Note 5.

9. Most of the state bar association or committee pronouncements discuss the ethical considerations and the professional responsibilities of the lawyer. See Report on Lawyers’ Opinions in Commercial Transactions, Special Joint Committee of the Maryland State Bar Association, Inc., and The Bar Association of Baltimore City, reprinted in Business Opinions 1991, supra, note 5, at 149, 153.


14. *Id.* at 673.

15. *Id.* at 674.


17. Mr. Clark’s questionnaire is reprinted in *Business Opinions 1991*, supra note 5, at 639. (Mr. Clark was a member of the Silverado task force and is a member of the Silverado committee. The 1988 survey was sent to partners in firms in which he had personal contact. The 1989 survey was sent to those who responded to his 1988 survey and those firms who were represented on the Silverado committee.)


23. See *Texaco Development Corp. v. Dow Chemical Co.*, No. 7493 slip op. at 4 (Del. Ch. Sept. 11, 1985).


26. *Id.* at 598.


29. Fann, 115 F.R.D. 593.

30. Texaco, No. 7493 slip op. at 3.


32. 130 F.R.D. 560, 579 (E.D.Pa. 1989),

33. *Id.*


42. 696 F.2d 1069 (4th Cir. 1982).

43. *Id.* at 1072.

44. Jones, 696 F.2d at 1071.
45. *In re* Sunrise Securities Litigation, 130 F.R.D. 560, 595 (E.D. Pa. 1989) (firm sought to protect undisclosed documents as being advice of in-house counsel and, therefore, not discoverable by FSLIC in a suit against a bank and its attorneys).

46. *Id.* at 594.

47. *Id.* at 597.


49. *Id.* at 689.

50. *Id.* at 690.


52. *In re* Sunrise Securities Litigation, 130 F.R.D. at 567.


56. *Id.* at 2.


58. 271 Cal. Rptr. at 474.

59. 271 Cal. Rptr. at 476.

60. 68 N.Y.2d 165, 498 N.E.2d 143 (1986)

61. 77 N.Y.2d 322, 569 N.E.2d 432 (1991)


64. Marks v. Mandel, 477 So.2d 1036 (Fla. App. 3 Dist. 1985)
65. *Id.* at 139 (citations omitted).


68. *Id.* at 732.

69. See Dean Witter Reynolds, Inc. v. Hammock, 489 So.2d 761, 767 (Fla. App. 1 Dist. 1986).


76. *Legal opinions on Commercial Real Estate Transactions*, *supra* note 20, at 1191; *Special Joint Committee on Lawyers’ Opinions in Commercial Transactions*, *supra* note 24, at 742; Fitzgibbon, *supra* note 21, at 885.

77. Fitzgibbon, *supra* note 21, at 384 for a full discussion of the same.


82. Fuld, *supra* note 1, at 924.


84. Fitzgibbon, *supra* note 21, at 387; *Accord, supra*, note 7, at 55.

85. *See Florida Report, supra* note 16.