

No. 70414-1-I

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COURT OF APPEALS, DIVISION I  
FOR THE STATE OF WASHINGTON

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REED TAYLOR,

Appellant,

v.

SCOTT BELL and JANE DOE BELL, and their marital community;  
FRANK TAYLOR and JANE DOE TAYLOR, and their marital  
community; CAIRNCROSS & HEMPELMANN, a Professional Service  
Corporation,

Respondents.

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**REPLY BRIEF OF APPELLANT REED TAYLOR**

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COURT OF APPEALS  
STATE OF WASHINGTON  
BY 

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## I. ARGUMENT<sup>1</sup>

### A. Eberle Berlin's Third-Party Closing Opinion Letter to Taylor Was No Substitute for Cairncross' Duties Owed to Taylor, and a Limited Scope of Representation Did Not Exist and Could Not Exist.

Cairncross invites this Court to affirm the misapplication of judicial estoppel by a limited scope of representation that did not exist and could not exist—based solely on *one* distorted sentence of Taylor's testimony and his receipt of a third-party closing opinion letter.<sup>2</sup> Resp'ts' Br. at 36-37; *see infra* at 7-10; **RAP 10.3(c)**; CP 78-79, 150-54; RP 46, 70-71. Taylor already asserted any agreement to limit Cairncross' scope of representation is void because its attorneys unlawfully practiced law in Idaho. App's Br. at 37-38 n.21-22. Cairncross did "not respond and thus, concedes this point," which is dispositive.<sup>3</sup> *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005);

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<sup>1</sup> Taylor objects to Respondents' Brief. This Court should disregard the portions of the introduction and restatement of the case (and headings and notes) that lack citations to the record or are argumentative; and the portions of the arguments (and notes) that lack citations to the record or are conclusory, misleading, speculative, or rely on the trial court's improper findings of fact. (Resp'ts' Br. at 1-16, 18-31, 34-37, 39-48). *See infra* at n.2; **RAP 10.3(a)(5)**; **RAP 10.3(a)(6)**; **RAP 10.3(b)**; *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012); *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238 (1992); *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991); *Heringlake v. State Farm Fire and Casualty Co., Inc.*, 74 Wn. App. 179, 192, 872 P.2d 539 (1994).

<sup>2</sup> Cairncross' arguments disregard third-party opinion practice and its purpose for obtaining a third-party closing opinion. *See Glazer and Fitzgibbon on Legal Opinions* (3d ed. 2008) ("Glazer"); *TriBar Opinion Committee, Third-Party "Closing" Opinions*, 56 Bus. Law. 591 (1998) ("TriBar II"); *Report on Third-Party Legal Opinion Practice in the State of Washington* (1998) ("Washington Report"). Libey and McDermott (who assisted in preparing TriBar II with his colleague Glazer) opined the opinion letter does not absolve Cairncross of liability. CP 748-49 n.1, 759, 767-773, 783 n.2, 1037, 1040-41.

<sup>3</sup> Cairncross drafted the agreements and unlawfully represented Taylor in Idaho. **IRPC 1.2(c)** and **cmt.**; **IRPC 1.16(a)(1)**; **IRPC 5.5**; **IRPC 8.5**; **I.C. § 3-420**; **RPC 5.5**; *Cotton v.*

**RAP 10.3(b)**. Under Idaho law, “[t]he scope of representation depends upon what the attorney has agreed to do” and includes issues related to that representation.<sup>4</sup> *Berry v. McFarland*, 278 P.3d 407, 411 (Idaho 2012); *Stephen v. Sallaz & Gatewood, Chtd.*, 248 P.3d 1256, 1261 (Idaho 2011). “A lawyer may limit the [scope] of the representation if the client consents after consultation,” but any limitation must be “by agreement” and “must accord with the [RPCs] and other law.” **IRPC 1.2(c)** and **cmt.**; **IRPC 1.1** (*See App., A*); *see also* **RPC 1.1, 1.2**; CP 551-52, 804-05.

The fee agreement stated that Cairncross “agreed to” broadly represent him for “the matter of the sale of his stock in AIA”—and Bell never testified that scope changed when Eberle Berlin deposed him in 2012.<sup>5</sup> CP 538-39, 596-97, 756, 18-19; *Berry*, 278 P.3d at 411. A requisite

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*Kronenberg*, 111 Wn. App. 258, 269, 44 P.3d 878 (2002); *Idaho State Bar v. Meservy*, 335 P.2d 62, 64 (Idaho 1959); CP 19, 309-10, 540, 577, 596-647, 768-69, 831, 1037, 1329.

<sup>4</sup> There is a conflict between Idaho and Washington’s RPC’s (the 1986 Idaho RPCs adopted the official comments, while the 1995/96 Washington RPCs had not, and Cairncross practiced law in Idaho), so Idaho law and RPCs apply. CP 549-86, 802-39; *see App.’s Br.* at 38-40 and n. 23-25. Cairncross practiced law and communicated advice to Taylor in Idaho, violated Idaho law, agreed to be bound by the Idaho RPCs, committed torts in Idaho, and the transaction was governed by Idaho law. *See supra* at n.3; CP 213, 215, 309-10, 458-68, 587-90, 596-736, 1324-26, 1329, 1358-60; **IRPC 8.5**; *Taylor v. AIA Services Corp.*, 261 P.3d 829 (Idaho 2011); *St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolash & Birch, LLP*, 233 F.Supp.2d 171, 177 (D. Mass. 2002); *Meservy*, 335 P.2d at 64; **I.C. § 3-420**; *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204-05, 676 P.2d 477 (1984); **RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6 and 145**.

<sup>5</sup> “The interpretation of an oral contract is generally not appropriate for summary judgment because the existence of an oral contract and its terms usual depends on the credibility of witnesses testifying to specific fact-based dealings which, if believed, would establish... the contract’s terms.” *Spradlin Rock Prod., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 655, 266 P.3d 229 (2011); *see also supra* at n.1, *infra* at 6-7.

part of representing Taylor for the “sale of his stock” is to provide “independent and objective” advice to ensure that the transaction and the documents that Cairncross drafted were legal, enforceable, and that *Taylor* had the authority to sell his shares. *Stephen*, 248 P.3d at 1261; *In re Marriage of Matson*, 107 Wn.2d 479, 488, 730 P.2d 668 (1986); **I.C. § 30-1-6**; CP 18-19, 35, 89, 588-95, 648-736, 768-73, 1037-43, 1329. Cairncross’ billing records and memos prove it performed the very work pertaining to the legality of the transaction and AIA’s authority (albeit negligently) that it argues was not within its scope of representation: “[a]nalysis re need for shareholder meeting” and “[a]nalysis re corporate authority issues.” CP 35-36, 607-08, 758-63, 768-73, 1037, 1037-43, 1042, 1326; App.’s Br. at 32-33; Resp’ts’ Br. at 36-37; **I.C. § 30-1-6**; **I.C. § 30-1-1703(1)(c)**.

Eberle Berlin’s opinion letter is no proof of a limited scope of representation. CP 150-54, 1331. In 2009, Bell testified that Cairncross was retained “to negotiate, draft agreements, and *close*” the transactions (he recently contradicted his testimony by stating he “papered” the transaction). CP 35, 763, 1329. The opinion letter is only *one* of the 13 deliveries Cairncross required as *part* of its “due diligence process” to represent Taylor for the “sale of his shares” to *close* the transaction (Bell stated it arose “during” Cairncross’ representation and was “normal”). CP 18-19, 150-54, 547, 596, 651-52, 758-59, 770-73, 1037-1043, 1329, 1331; **Glazer**

§§1.1, 1.3.1-1.3.2, 1.6.1, 2.3.2, 9.1.2, at 1-2, 9-15, 29, 67, 259-60 (*See App., B*). The trial court’s oral ruling confirms it misunderstood third-party opinion practice. *Id.*; RP 70. Cairncross also required AIA to provide it any documents “to effectuate or evidence the transactions,” i.e., shareholder resolutions or confidential documents—all *part* of Cairncross’ “due diligence process.” *Id.*; CP 18, 652, 759, 772, 1037. Cairncross’ obligation to require AIA to provide it the required shareholder resolution to “effectuate” the transaction prior to closing is irreconcilable with its present positions. *Id.*; CP 542, 607, 614-47, 699-736, 768-73, 1037-43, 1329.

When Eberle Berlin asked Bell if he inquired into the restrictions of I.C. § 30-1-6 to which he was aware, Bell testified, “I don’t recall” numerous times—he did not testify the work was *not* within his scope. CP 542-43, 483-84. He testified that Cairncross assisted “with documents, research and other matters relating to the representation” and “tax” issues. CP 540. Cairncross’ fee agreement, billing records, and file documents (including copies of Idaho Code) do not support its bald arguments. CP 35-36, 538-45, 596-647, 761-63, 768-69, 1037, 1042, 1244-1319, 1324-26, 1329-36, 1358-60. Cairncross’ six attorneys charged Taylor over \$90,000 (over \$140,000 in today’s dollars) for over 100 days of negligent work. CP 35, 589, 598-647, 758-73, 1037-43. Taylor testified there was no limited scope of representation, one was not requested and his experts agree. CP

588-95, 754-73, 1037-43, 1018-28. Cairncross relies solely on its flawed interpretation of one sentence of his testimony. *Id.*; CP 78-79. *See infra* at 7-10. Thus, at a minimum, the jury must decide issues of credibility (Bell has not been deposed here), the interpretation of testimony, and if there was an oral contract to limit the scope of representation. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 979 (2004); *Hansel v. Ford Motor Co.*, 3 Wn. App. 151, 160, 473 P.2d 219 (1970); *Spradlin Rock*, 164 Wn. App. at 655.

Cairncross' duties were, *inter alias*, to communicate "objective and independent information" to Taylor and the opinion letter is only *part* of its "due diligence process"—that letter is no substitute for its duties to Taylor nor did it absolve it from liability. CP 18-19, 150-54, 596, 768-73, 1037-43; *Matson*, 107 Wn.2d at 488; **Glazer §§1.1, 1.3.1-1.3.2, 1.6.1, 2.3.2, 9.1.2**, at 1-2, 9-15, 29-30, 67, 259-60. McDermott and Libey opined Cairncross' purported limited scope of representation is "unreasonable" and "Taylor would not have been adequately represented." CP 770-71, 1037, 1040-42. **RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19(1)**; *In re Seare*, 493 B.R. 158 (Bkrtcy. D. Nev. 2013); **IRPC 1.2(c)** and **cmt.**; **IRPC 1.1**; *see also* **RPC 1.1**; **RPC 1.2**; CP 551-52, 804-05. Moreover, Cairncross cannot limit its liability to Taylor or his recourse because the opinion letter arose "during the course of" its representation, not when it was retained. CP 596-97, 598-613, 1331, 1358-60. Thus, Cairncross' purported limited scope

of representation is a void prospective agreement to limit its liability to Taylor or his recourse, as he did not have independent counsel. CP 588, 756, 769-71, 1037, 880-81; **IRPC 1.8(h)**; **RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2)**; *see also* **RPC 1.8(h)**; CP 560, 813. Thus, a limited scope of representation did not exist and could not exist. RP 70.

**B. Taylor Did Not Take Inconsistent Positions Because He Is Entitled to Rely on Eberle Berlin’s Opinion Letter and Cairncross as His Independent Counsel, the Idaho Court Never Accepted Cairncross’ Interpretation of His Testimony, He Will Not Receive an Advantage or Impose a Detriment by Being Made Whole, and, at a Minimum, there Were Issues of Material Fact as to These Issues.**

Taylor asserts the trial court erred and abused its discretion applying judicial estoppel, it must be proven by clear and convincing evidence, and Cairncross waived it. App.’s Br. at 1-12 n. 7-8, 13, 14-38. Cairncross disagrees.<sup>6</sup> Resp’ts’ Br. at 18-29. The trial court erred by not viewing the evidence most favorably to Taylor and by deciding issues of interpretation of testimony, conflicting testimony, credibility of witnesses, and persuasiveness of testimony. *Thomas*, 150 Wn.2d at 874-75; *Hansel*, 3 Wn.

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<sup>6</sup> Judicial estoppel is an affirmative defense and “clear and convincing” proof should apply since positions must be “clearly” inconsistent. **CR 8(e)** (a “matter constituting an avoidance”); *Smeilis v. Lipkis*, 967 N.E. 2d 892, 898 (Il. Ct. App. 2012); *Petock v. Asante*, 240 P.3d 56, 63 (Or. App. 2010); **Black’s Law Dictionary**, at 287 (9th ed. 2009) (“clear” is defined as: “[f]ree from doubt; sure”). Cairncross waived judicial estoppel. *Rainier Nat. Bank v. Lewis*, 30 Wn. App. 419, 422-23, 635 P.2d 153 (1981). Cairncross’ positions are inconsistent with its answer. CP 17-25, 397 n.4, 416, 596-97; RP 36, 46, 70-71. The trial court did not provide Taylor more time, even after the improper order. RP 1-74; CP 1050, 1062-66. Thus, Taylor was prejudiced. **AMJUR PLEADING § 273**. The trial court’s decision is inconsistent with its reasoning to deny Taylor’s amendment. CP 914; *see infra* at 24-25.

App. at 160; *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 226-27, 108 P.3d 147 (2005). There were, at a minimum, genuine issues of material facts as to the elements of judicial estoppel and the issue never reached the trial court’s discretion. App.’s Br. at 11-38; *infra* at 7-18.

**1. Taylor Is Entitled to Assert Claims against Eberle Berlin for Its Opinion Letter and Cairncross as His Independent Counsel.**

Taylor asserts his positions are consistent because: (i) he is entitled to assert Eberle Berlin owes him duties, as a non-client, for the opinion letter and for jointly representing him and AIA; (ii) the opinion letter is no substitute for Cairncross’ duties to him; and (iii) the alleged inconsistent testimony is reconciled by other testimony. App.’s Br. at 13-23. Cairncross argues Taylor testified *only* Eberle Berlin was retained to ensure the redemption had all necessary consents and did not violate any laws. Resp’ts’ Br. at 22-24. Cairncross “does not respond and thus, concedes” Taylor’s arguments, except an alleged interpretation of one sentence of testimony. *Id.*; App.’s Br. at 13-23. *Ward*, 125 Wn. App. at 144; **RAP 10.3(b)**.

For judicial estoppel, Taylor’s “later position [must be] clearly inconsistent with [his] earlier position” and “[t]he positions taken must be diametrically opposed.” *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 580-82, 291 P.3d 906 (2012) *review denied* (citation omitted); **CR 56(c)**. But as Cairncross concedes, Taylor is entitled to argue that *both* Eberle Berlin and Cairncross owed him duties—which are not “diametrically opposed”

positions and thus dispositive. *Kellar*, 172 Wn. App. at 582; **Glazer §§1.1, 1.3.1-1.3.2, 1.6.1, 2.3.2, 9.1.2**, at 1-2, 9-15, 29-30, 67-69, 259-61 (See App., B); **Washington Report**, at 15 n.3, 37-38 n.57. The trial court’s misapplication of judicial estoppel and misunderstanding of the purpose of Eberle Berlin’s opinion letter are confirmed by its oral ruling: “that’s why that opinion letter, that Idaho representation, was clearly beyond [Cairncross’] scope of representation”—its scope of representation was never at issue and Eberle Berlin’s non-party fault defenses against it were never dismissed. RP 70-71; *Id.* at 581-82; CP 482-84, 279-97, 962-1002.

The context of Taylor’s testimony is Cairncross was “not retained by me to act as counsel for AIA.” CP 75, 1018-19. Cairncross, however, relies solely on its distorted interpretation of *one* sentence in Taylor’s 85-sentence affidavit, which is clarified by inserting “for AIA Services” below:

Neither I nor AIA Services had any other attorneys retained [for AIA Services] for the purpose of providing the legal representation to ensure the redemption of my shares had all necessary consents and did not violate any laws.

CP 78-79 ¶7, 75-84; Resp’ts’ Br. at 22-24. Cairncross argues Taylor’s interpretation is “wishful thinking,” but it ironically interprets that sentence numerous times by significantly modifying it and/or by inserting “*other than Eberle Berlin*” or “*relied exclusively on Eberle Berlin*” or similar words. Resp’ts’ Br. at 23, 24 n.11, 25-27, 34, 36-37; CP 53, 56. Taylor’s

interpretation is consistent with his testimony that he relied on *both* Eberle Berlin and Cairncross. CP 75-84, 588-95, 1018-28. Notably, the Idaho court had full knowledge of Taylor's claims against Cairncross (it had a copy of his complaint) when it ruled that he had "separate counsel," which Taylor never disputed. CP 925-41, 988, 998-1000, 1018-28. At his deposition (held one day before judicial estoppel was first asserted), Taylor flatly rejected Cairncross' interpretation. RP 36; CP 1018-28, 53-56, 397 n.4; *see supra* at n.6. Thus, the trial court erred because all inferences must be in Taylor's favor and the interpretation of his testimony, conflicting testimony, credibility of witnesses, and persuasiveness of testimony were all issues for the jury to determine. *Hansel*, 3 Wn. App. at 160; *Thomas*, 150 Wn.2d at 874-75; *Cunningham*, 126 Wn. App. 227; RP 70-71. This is dispositive.

Moreover, Taylor never "disavowed his testimony" to "take another shot" at Cairncross. Resp'ts' Br. at 24; CP 75-84, 588-95, 593, 918, 1018-28. It is Cairncross, not Taylor, who cannot square its argument with the record. *Id.*; CP 35-36, 75-84, 150-54, 252-297, 538-47, 588-95, 596-647, 768-73, 962-1002, 1037-43, 1326, 1329, 1358-60. When Taylor's complaint against Cairncross was before the Idaho court, Taylor *never* asserted that *only* Eberle Berlin was responsible for the legality and enforceability of the transaction, AIA's authority, or his authority to sell his shares. CP 75-84, 417, 486-534, 921-41, 962-86. The Idaho court was aware

Taylor's claims were different. *Id.*; CP 252-77, 780, 783 n.2, 987-1002.

**2. Neither Court Was Misled Because the Idaho Court Did Not Accept Cairncross' Interpretation of Taylor's Testimony.**

Taylor maintains the Idaho court and the trial court were never misled because: (i) the Idaho court never accepted the alleged inconsistent positions; (ii) the Idaho court rejected the alleged positions when it found Cairncross represented him; (iii) the Idaho court rejected the alleged positions when it dismissed his claims as a client; (iv) the Idaho court was not misled by accepting Taylor's claims, as a non-client, on the opinion letter; (v) Cairncross failed to submit any evidence that either court was misled; (vi) the Idaho court was not misled because it was aware of his claims against Cairncross; (vii) he never took the position that Cairncross was liable for the *incorrect opinions* in the opinion letter; (viii) neither court was misled because Eberle Berlin and Cairncross *both* owed him duties; (ix) Cairncross and Eberle Berlin's defenses blaming each other show the need to litigate both lawsuits; and (x) Cairncross never argued the trial court was misled. App.'s Br. at 23-27 and n.15. Cairncross argues: (i) the burden was not on it to prove that either court was misled; (ii) the Idaho court "accepted Taylor's allegation" that he only relied on Eberle Berlin to obtain the necessary consents and ensure the enforceability; (iii) the Idaho court's endorsement of "Taylor's allegation of reliance" was an acceptance of his position Eberle Berlin "represented his only potential source of recovery;"

and (iv) the trial court was misled. Resp'ts' Br. at 24-26. Cairncross "does not respond and thus, concedes" Taylor's arguments in Sections (ii), (vi)-(x). *Ward*, 125 Wn. App. at 144; **RAP 10.3(b)**. This Court should decline to consider Cairncross' argument, raised for the first time on appeal, that the trial court was misled. CP 53-56, 879-80, 1050; *White v. Kent Med. Center, Inc., P.S.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991); *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996).

For the purposes of Cairncross' judicial estoppel arguments, judicial estoppel applies *only* if the inconsistent positions were accepted by a court. *Cunningham*, 126 Wn. App. at 230-31; *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 104, 220 P.3d 229 (2009). Indeed, the Idaho court must decide if it is misled (it did not)—not the trial court—which is dispositive. CP 279-97, 921-41, 987-1002. *Columbia Asset Recovery Group, LLC v. Kelly*, 312 P.3d 687, 691 (Div. I, 2013). Cairncross argues the burden was not on it to prove any positions were accepted, but *Arkinson* confirms that it was. Resp'ts' Br. at 24-25; *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-41, 160 P.3d 13 (2007); **CR 56(c)**. Cairncross failed to meet its burden and the four pages of documents it cites to do not prove the Idaho court accepted its interpretation of Taylor's testimony and the Idaho court did not. CP 55-56, 78-79, 286, 1000, 279-297, 987-1002; Resp'ts' Br. at 24-26.

Taylor never testified in his affidavit, or otherwise, that "he relied

exclusively on Eberle Berlin” or that they “represented his only potential source of recovery” and those allegations were not accepted by the Idaho court. Resp’ts’ Br. at 25-26; CP 78-79 ¶7, 286, 1000, 75-84, 150-54, 279-97, 588-95, 987-1002, 1018-28. The Idaho court implicitly rejected Cairncross’ interpretation of Taylor’s testimony when it ruled twice, without qualification, that he “was represented by separate counsel,” he had “no attorney client relationship” with Eberle Berlin, and dismissed all of his claims—except one as a non-client for the *incorrect opinions* in the opinion letter. CP 280, 286, 252-97, 988, 998-1000, 1178-79. Cairncross argues the “Idaho court clearly accepted Taylor’s sworn testimony that he relied exclusively on Eberle Berlin,” but the two pages of the Idaho court’s orders do not support that argument. CP 268, 1000. The Idaho court simply ruled as an issue of law that Eberle Berlin owed Taylor duties, as a non-client, to draft the opinion letter in a “no[n] negligent fashion.” CP 286, 998-1000. The Idaho court had full knowledge of Taylor’s claims against Cairncross when it ruled and its decisions were consistent with third-party opinion practice. CP 150-54, 280, 286, 471, 770, 783 n.2, 921-41, 998-1000, 1037, 1040-41; **Glazer §§1.1, 1.3.1-1.3.2, 1.6.1, 2.3.2, 9.1.2**, at 1-2, 9-15, 29, 67-69, 259-60; (App., B). Thus, the Idaho court’s finding that Eberle Berlin owed duties to Taylor was derived solely from the opinion letter and not the acceptance of Cairncross’ interpretation of his testimony regarding any

scope of representation. *Id.*; CP 78-79 ¶7, 286, 998-1000. Cairncross' interpretation of Taylor's testimony is irrelevant—that letter did not assure compliance with I.C. § 30-1-6 (although it clearly induced Taylor to sell)—but Cairncross should have. *Id.*; CP 767-73, 1037-43; **ER 401-403**.

The Idaho court never “endorsed” Taylor’s “reliance,” which is not an element of a negligence claim (even if it did, Taylor had a right to rely on the opinion letter, as Cairncross concedes). Resp’ts’ Br. at 25, 8, 41; CP 66, 150-54, 286, 998-1000; *Harrigfeld v. J.D. Hancock*, 90 P.3d 884 (Idaho 2004); **Glazer §§1.6.1, 2.3.2**, at 29-30, 67-69; **Washington Report**, at 15 n.3, 37-38 n.57. Even if Taylor is able to seek the “full measure of damages” from both Eberle Berlin and Cairncross, they are joint tortfeasors and Taylor is entitled to be made whole. Resp’ts’ Br. at 26 n.14. Taylor also has distinct damages against Cairncross, e.g., disgorgement of fees. CP 14, 769-72. If the Idaho court had accepted Cairncross’ interpretation of Taylor’s testimony (e.g., Cairncross had only a limited scope of representation), it would have also dismissed Eberle Berlin’s non-party fault defenses blaming Cairncross—one would have to include the other. CP 279-297, 483-84, 987-1002. It did not. *Id.* Thus, the trial court erred because the Idaho Court did not accept Cairncross’ interpretation of Taylor’s testimony. *Id.*

**3. There Is No Unfair Advantage or Detriment Imposed Because Taylor Is Entitled to File Suit Against All Joint Tortfeasors.**

Taylor maintains that he did not obtain an unfair advantage or

impose a detriment because: (i) Cairncross failed to submit any evidence to support either; (ii) Cairncross drafted for him a \$6M Note due in 10 years, so it knew that he could file suite many years later; (iii) he is entitled to pursue claims against Eberle Berlin and Cairncross to be made whole; (iv) Cairncross bears responsibility for failing to address I.C. § 30-1-6, it already committed malpractice in 1995 and 1996, and thus Taylor's later alleged inconsistent testimony is irrelevant; (v) Eberle Berlin and Cairncross are asserting non-party fault defenses blaming each other; (vi) he was entitled to assert claims on the opinion letter; (vii) obtaining the opinion letter is only *part* of Cairncross' duties to Taylor and is not a substitute for its duties to him; (viii) Cairncross could not rely on the opinion letter or use it as a defense, and obtaining the opinion letter was customary for a transaction of that size; and (ix) Cairncross scope of representation was unlimited, it charged Taylor for work it now alleges was not within its scope of representation, and failed to comply with I.C. § 30-1-6. App.'s Br. at 27-34.

Cairncross argues, without citing to any evidence: (i) Taylor hopes to make Cairncross an insurance policy for work he had delegated exclusively to Eberle Berlin; (ii) that it "performed ably the work with which it was tasked;" and (iii) Taylor is seeking the same funds from Cairncross as Eberle Berlin. Cairncross "does not respond and thus, concedes" Taylor's arguments in Sections (i)-(ix). *Ward*, 125 Wn. App. at

144; **RAP 10.3(b)**. Cairncross’ argument is not supported by any evidence and it “has not shown that accepting [Taylor’s] current position would allow [him] to obtain an unfair advantage of or impose an unfair detriment on [it]”—its bald assertions, speculation and conclusory arguments must fail. **Kellar**, 172 Wn. App. at 582; Resp’ts’ Br. at 27-29; CP 56, 877-84; **Heringlake**, 74 Wn. App. at 192. **West**, 168 Wn. App. at 187.

Taylor never “relied exclusively on Eberle Berlin” or “delegated” any of Cairncross’ work to Eberle Berlin through the opinion letter and that letter does *not* absolve Cairncross of its duties or liability to Taylor. *See supra* at 1-6; **Glazer §§1.1, 1.3.1-1.3.2, 1.6.1, 2.3.2, 9.1.2**, at 1-2, 9-15, 29, 67, 259-60 (App., B); **TriBar II §1.5-1.6**, 56 Bus. Law. at 603-04, 666; **Kellar**, 172 Wn. App. at 582-83; CP 75-84, 1018-28, 748-49 n.1, 759, 770-73, 783 n.2, 1037-43. Taylor is not seeking to make Cairncross an insurance policy. He is seeking to be made whole from all of the attorneys involved (including Cairncross). CP 215, 462, 749 n.1, 783 n.2, 1024, 1040-41. Indeed, Taylor may never be made “whole” from both lawsuits—which is why both courts need to “resolve these issues on the merits.” **Taggart**, 153 Wn. App. at 106; **Shoemake v. Ferrer**, 168 Wn. 2d 193, 198, 225 P. 3d 990 (2010). As to Cairncross’ naked argument that it “ably” performed its duties, McDermott and Libey opined otherwise, as did the Idaho courts. CP 213, 215, 219-50, 462, 767-73, 1037-43. In fact, Taylor would receive an

unfair detriment if Eberle Berlin was his sole recourse, especially when it is asserting non-party fault on Cairncross and that no duties are owed to him as a non-client. CP 482-84, 521-28, 535-36, 881, 1009-14. Notably Cairncross had hoped to benefit from Taylor's net recovery in Idaho. CP 416, 1236-43; *Kellar*, 172 Wn. App. at 583. Thus, the trial court erred again.

**4. The Court Should Have Weighed Other Considerations Before Applying Judicial Estoppel and Cairncross Concedes Them.**

Taylor asserts the trial court should have weighed other considerations for judicial estoppel.<sup>7</sup> App.'s Br. at 12-13, 34-36. Cairncross argues that the trial court properly focused on the three core factors. Resp'ts' Br. at 21-22. It relies on two cases involving the failure to disclose a claim in Bankruptcy (a logical context to not weigh other considerations). *See Cunningham*, 126 Wn. App. 222; *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001). But those cases do not overrule *Markley v. Markley*, 31 Wn.2d 605, 198 P.2d 486 (1948) or other precedent, and the circumstances here dictate that other facts and considerations should have been weighed. *See supra* at 1-18; *Kellar*, 172 Wn. App. at 580; *Arkinson*,

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<sup>7</sup> “[The three core] factors are not an exhaustive formula and additional considerations may guide a court’s decision. *These include*: (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must have been clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other party to change.” *Kellar*, 172 Wn. App. at 573; *New Hampshire v. Maine*, 532 U.S. 742, 751, 149 L.Ed.2d 968 (2001).

160 Wn.2d at 539; *Maine*, 532 U.S. at 751; **28 AM. JUR. 2D ESTOPPEL AND WAIVER § 68**. Cairncross relies on *Arkinson*, even though that case cites *Markley* with approval. Resp'ts' Br. at 21. Cairncross did "not respond and thus, concedes" the other considerations weigh against judicial estoppel. *Ward*, 125 Wn. App. at 144; **RAP 10.3(b)**; App.'s Br. at 34-36.

**5. Cairncross May Not Assert Judicial Estoppel to Avoid Liability and Its Unclean Hands Bars It From Asserting the Defense.**

Taylor maintains Cairncross' unclean hands bars it from asserting judicial estoppel. App.'s Br. at 36-38. Cairncross' argues the issue was not preserved for appeal, judicial estoppel protects the courts, and there is no causal connection. Resp'ts' Br. at 29-36. Cairncross "does not respond and thus, concedes" that it was unlawfully practicing law in Idaho. *Ward*, 125 Wn. App. at 144; **RAP 10.3(b)**. Taylor asserted unclean hands at the hearing and it was fully supported by the record. *Sneed*, 80 Wn. App. at 847; **RAP 2.5(a)**; RP 37; CP 19, 309-10, 401-03, 755, 768-69. Cairncross did not respond nor did its *alleged* expert submit any opinions. CP 398-403, 881, 877-84. Taylor's new declarations added nothing, except Libey confirmed McDermott's opinions. CP 1037, 768-69. While "[j]udicial estoppel protects the integrity of the judicial process," it does not protect "the interest of [Cairncross]...to avoid liability." *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008); CP 215, 462, 768-73. Cairncross' attorneys are "guardians of the law," "officers of the court" and owed Taylor "a duty of

candor” to not represent him in the Idaho transaction. *Id.*; CP 550, 588, 768-69, 803; *In re Poole*, 156 Wn.2d 196, 226, 125 P.3d 954 (2006). The transaction required an opinion letter and Cairncross would have requested one even if licensed in Idaho. CP 546-47, 759, 770, 1331. And there is a direct causal link—this lawsuit would not exist but for Cairncross representing Taylor in Idaho and unclean hands should go to the jury. App.’s Br. at 36-38 n.20-21; CP 18-19, 309-10, 408, 588, 596-647, 768-71, 770-73. *Hudesman v. Foley*, 4 Wn. App. 230, 234, 480 P.2d 534 (1971).

**C. McDermott and Libey’s Opinions Presented Genuine Issues of Material Fact on Legal Causation and Cause and Fact Precluding Dismissal of Taylor’s Claims for Lack of Proximate Cause.**

**1. There Are Multiple Causes for Taylor’s Injuries and Proximate Cause Was an Issue for the Jury in Washington and Idaho.**

Cairncross argues this Court should affirm, as a matter of law, for lack of proximate cause. Resp’ts’ Br. at 38-42; **RAP 10.3(c)**. “The question of proximate cause is one of fact and almost always for the jury.” *Cramer v. Slater*, 204 P.3d 508, 515 (Idaho 2009); *Martini v. Post*, 313 P. 3d 473, 479 (Div. II, 2013). Idaho has adopted the “substantial factor” test for proximate cause when there are multiple possible causes of injury, but Washington applies the “but for” test. *Garcia v. Windley*, 164 P.3d 819, 823 (Idaho 2007); **IDJI 2.30.2**; *Daugert v. Pappas*, 104 Wn.2d 254, 256-63, 704 P.2d 600 (1985). Taylor’s damages were proximately caused by multiple causes: Cairncross’ breached duties to Taylor and the opinion letter induced

him to sell. CP 749 n.1, 770, 768-73, 780-83, 1037, 1037-41; **Glazer §§1.1, 1.3.1-1.3.2, 1.6.1, 2.3.2, 9.1.2**, at 1-2, 9-15, 29, 67, 260 (App., B); **TriBar II §1.2, 1.6**, 56 Bus. Law. at 596, 604 n.29; **Washington Report**, at 15 n.3, 37-38 n.57. Under the conflict of laws, Idaho’s “substantial factor” test applies. *See supra* at n.4. Alternatively, this Court should adopt that test.<sup>8</sup>

Under both Idaho and Washington law, McDermott and Libey’s un rebutted opinions presented genuine issues of material fact that Cairncross has legal responsibility (the opinion letter was only part of its duties) and it is a cause in fact for Taylor’s damages, e.g., losing his shares, the right to collect on the \$6M Note, security interests, contractual rights, and over \$1,000,000 in fees enduring years of litigation over the illegal agreements (Cairncross has \$15 million in malpractice insurance). CP 592, 749 n.1, 767-73, 783 n.2, 1037-43. If Cairncross had ably discharged its duties to see proof of compliance with I.C. § 30-1-6 at the time of closing or had Taylor vote his majority interest to adopt a simple shareholder resolution to approve capital surplus in compliance with I.C. § 30-1-6, the redemption agreements would have been valid and enforceable. CP 590-91, 759, 767-68, 771-73, 1037, 1037-43; **Taylor**, 261 P.3d at 842.

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<sup>8</sup> Unless Cairncross concedes Taylor’s success on his claims on the \$6M Note and related claims, the “some chance of success” standard in Idaho would apply. **Jordan v. Beeks**, 21 P.3d 908, 912-13 (Idaho 2001); CP 666-67, 773, 1037, 1042-43. *See App.’s Br.* at 38-40.

Taylor did not need another opinion letter from another attorney in Idaho—50 more opinion letters would not make the transaction legal. CP 150-54, 880-81. Taylor needed Cairncross for compliance with I.C. § 30-1-6. The opinion letter was only a building block of Cairncross’ due diligence and is no substitute for Cairncross’ independent duties to Taylor. **Glazer §§1.1, 1.3.1-1.3.2, 9.1.2** at 1-2, 9-15, 259-60; **TriBarr II § 1.5**, 56 Bus. Law. at 603, 666; *Matson*, 107 Wn.2d at 488; CP 18, 35, 150-54, 768-73, 1036-43. Notably, Cairncross structured for Taylor illegal transactions and advised him to sign and close them in 1995 and again in 1996, while the opinion letter induced him to sell. *Id.*; CP 462, 590, 768-73, 1037-43, 1329; **I.C. § 30-1-6; I.C. § 30-1-1703(1)(c)**. Indeed, the Idaho court ruled “[t]here is no question that all parties, including [Taylor], either ignored or failed to consider I.C. § 30-1-6.” CP 215, 462; *Taylor*, 261 P.3d at 844. Cairncross recklessly failed to address I.C. § 30-1-6 and breached related duties, which is precisely what McDermott and Libey opined. CP 542, 769-73, 1037-43. There is no “end-run around” based on Eberle Berlin’s incorrect opinion letter. Resp’ts’ Br. at 41. CP 749 n.1, 767-73, 1040-41. The incorrect opinions in the opinion letter are not the basis for Taylor’s claims against Cairncross. CP 542, 749 n.1, 759, 767-73, 780, 783 n.2, 1036-43; **Glazer §§1.1, 1.3.1-1.3.2, 9.1.2**, at 1-2, 9-15, 260; **TriBar II §1.2**, 56 Bus. Law. at 596. The opinion letter induced Taylor to sell, but it did *not* communicate

the “objective and independent information” Cairncross was obligated to provide. *Id.*; **Matson**, 107 Wn.2d at 488; **Taylor**, 261 P.3d 829. CP 590-91. Indeed, the opinion letter is only one of the 13 deliveries Cairncross required for closing—it also required AIA to provide any documents “to effectuate or evidence the transactions” e.g., shareholder resolutions—but it failed to request any. CP 590, 651-52, 758-60, 772, 769-73, 1037-43, 1329.

McDermott, and TriBar II itself, rejects Cairncross’ arguments and interpretation of TriBar II (McDermott and his TriBar colleague Glazer assisted in preparing TriBar II). CP 748-49 and n.1, 759, 767-73; **TriBar II**, 56 Bus. Law. at 592-666, 675; **Glazer §§1.1, 1.3.1-1.3.2, 9.1.2** at 1-2, 9-15, 260 (App., B). Libey agrees. CP 1037, 1036-43. Bell admitted the opinion letter was “normal” and was required—even if he were licensed in Idaho. *Id.*; CP 547, 1331. McDermott and Libey agree. CP 770, 1037, 1040-41. By not obtaining an opinion letter for the 1996 restructuring, the logic behind Cairncross’ flawed arguments separately fails. CP 699-736, 770-71, 1037-43. Thus, Cairncross is liable under both Washington and Idaho law.

## **2. McDermott and Libey Were Both Qualified Expert Witnesses.**

Taylor asserts: (i) it was an abuse of discretion to exclude McDermott’s opinions because he was not licensed in Idaho and he was qualified; (ii) the Idaho standard of care applied; (iii) a multi-jurisdictional standard of care applied; (iv) McDermott could rely on another expert

licensed in Washington to formulate his opinions; (v) Idaho law governed proximate cause; (vi) Libey's opinions (he also adopted McDermott's) cured the issue; and (vii) expert testimony was not required to prove breach or proximate cause. App.'s Br. at 38-44. Cairncross argues: (i) McDermott was not qualified; and (ii) the Washington standard of care applied. Resp'ts' Br. at 42-44. Cairncross "does not respond and thus, concedes" Taylor's arguments in Sections (iii)-(iv) and (vi)-(vii). *Ward*, 125 Wn. App. at 144; **RAP 10.3(b)**. Cairncross' concessions alone are dispositive.

Since it was error to exclude McDermott's opinions based only on his qualifications and expert testimony was not required (which Cairncross concedes), this Court may reverse on either issue alone. *Walker v. Bangs*, 92 Wn.2d 854, 858-59, 601 P.2d 1279 (1979); App.'s Br. at 41-44; Resp'ts' Br. at 38-44; RP 44-45, 66-67; CP 1063. Cairncross concedes that under *Bangs* an expert is not *per se* unqualified for not being licensed in Washington, but nakedly argues "Washington law plainly governs each of Taylor's claims."<sup>9</sup> Resp'ts' Br. at 43. Cairncross fails to explain how the Washington standard of care applies to practicing law in Idaho (regardless of being an out-of-state transaction involving an opinion letter), drafting

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<sup>9</sup> Cairncross' argues the choice of law analysis is "neutral." Resp'ts' Br. at 43 n.21. This is not a breach of contract case, but involves the violation of Idaho law and torts against Taylor in Idaho. *See supra* at n.4. Taylor adequately pled Idaho law applied in his complaint and response. RP 65; CP 1-15, 393-94-98, 401-03, 410; **CR 9(k)(1)**; App.'s Br. at n.23.

agreements for an Idaho transaction, and failing to comply with I.C. § 30-1-6. CP 35, 150-54, 768-73, 1037-43, 1329; *Bangs*, 92 Wn.2d at 859 (a “prudent lawyer in the practice of law *in this jurisdiction*”); *Glazer* §§1.1, 1.3.1-1.3.2, 2.3.2, 9.1.2, at 1-2, 9-15, 260. Cairncross argues McDermott is not qualified, but fails to explain why he could not opine on complying with I.C. § 30-1-6 or Libey’s opinions. CP 1037-43. McDermott is highly qualified, well-respected and he participated in preparing the TriBar II Report that Cairncross relies upon. CP 747-51, 748-49 n.1; App.’s Br. at 42; *TriBar II*, 56 Bus. Law. at 675. Taylor’s complaint alleged “including” the Washington standard of care (e.g. RPC 5.5), but Cairncross denied those allegations. Resp’ts’ Br. at 43; CP 10, 21, 577. Taylor also alleged the “standard of care of...attorneys familiar with Idaho law” and “the impact of Idaho law.” CP 8-10, 309-10, 393-94, 397-403, 768-69, 1037; App.’s Br. at n.23-25. While it is true Taylor asserted no expert testimony is required, he also stated experts would be timely disclosed—and they were. CP 30, 303, 767-73, 870, 1037-43; Resp’ts’ Br. at 44; App.’s Br. at 43-44.

**D. The Trial Court Abused Its Discretion by Not Considering Taylor’s Two Declarations Submitted in Response to Cairncross’ Improper New Arguments and by Denying Taylor’s Motion to Reconsider.**

Taylor asserts the trial court abused its discretion by not considering his two new declarations because they were submitted in response to new arguments raised on (and after) reply and Cairncross never objected. App.’s

Br. at 44-46. Cairncross argues the trial court properly refused to consider the declarations and actually considered them when it properly denied Taylor's motion to reconsider. Resp'ts' Br. at 46-47; **RAP 10.3(c)**. Cairncross "does not respond and thus, concedes" that it improperly raised two new arguments on (and after) reply and that it waived any objection to the declarations. *Ward*, 125 Wn. App. at 144; **RAP 10.3(b)**. Thus, the trial court abused its discretion by granting summary judgment on new arguments asserted on (and after) reply and not considering the two new declarations submitted in opposition to those arguments before its written order. *White*, 61 Wn. App. at 169; *Martini*, 313 P. 3d at 479; CP 916-1043, 1046, 1050. If it had, reconsideration would have been granted since Libey was qualified and the evidence proved the trial court was not misled. CP 916-1043, 1079-80; RP 66-67; *see supra* at 1-17. The trial court abused its discretion by denying Taylor's motion to reconsider—Cairncross was *not* prejudiced (it relies on CP 1000) and Taylor was prejudiced. **CR 59(a)(7)-(9)**; *Martini*, 313 P. 3d at 479; CP 1069-81, 1090; Resp'ts' Br. at 13, 26.

**E. It Was an Abuse of Discretion to Deny Taylor's Motion to Amend.**

Taylor asserts the trial court abused its discretion by denying his motion to amend for lack of actual prejudice. App.'s Br. at 46-47. Cairncross argues denial was proper, but still fails to cite to any evidence of prejudice. Resp'ts' Br. at 46. There simply is none. Cairncross' arguments

and the trial court's unsupported findings are "conclusory assertions [that] do not rise to the level of showing actual prejudice." *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988); **RAP 10.3(b)**; CP 852, 912-14; *see supra* at n.6. Thus, this Court should order amendment on remand.

**F. Cairncross Is Not Entitled to Any Attorney Fees on Appeal.**

If Cairncross prevails, it is not entitled to fees and it improperly requests fees for the first time on appeal. Resp'ts' Br. at 48; *Nye v. Univ. of Wash.*, 163 Wn. App. 875, 888, 260 P.3d 1000 (2011); *Adams v. Krueger*, 856 P.2d 864, 867 (Idaho 1993). If Idaho law applies, Taylor prevailed, at least in part, and no fees should be awarded. *Stephen*, 248 P.3d at 1265. Cairncross did not state the basis for its request under I.C. § 12-120(3) or whether it was for a commercial transaction or contract. *Id.* at 1264-65. Thus, Cairncross is not entitled to any attorney fees under I.C. § 12-120(3).

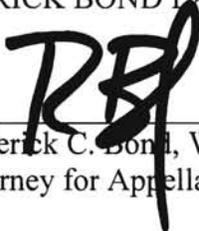
**II. CONCLUSION**

Cairncross' naked arguments are disingenuous and wholly without merit. This Court should reverse the trial court's three orders, reserve an award of Taylor's fees (App.'s Br. at 48), award him costs, and remand.

DATED this 22<sup>nd</sup> day of January, 2014.

RODERICK BOND LAW OFFICE, PLLC

By: \_\_\_\_\_

  
Roderick C. Bond, WSBA No. 32172  
Attorney for Appellant Reed Taylor

**CERTIFICATE OF SERVICE**

I, Roderick Bond, declare that under penalties of perjury under the laws of the state of Washington that, on the date indicated below, I served a true and correct copy of the foregoing on the following party(ies) via the indicated method(s):

Gregory J. Hollon  
Avi Lipman  
McNaul Ebel Nawrot & Helgren  
600 University Street, Suite 2700  
Seattle, WA 98101-3143

**Via:**

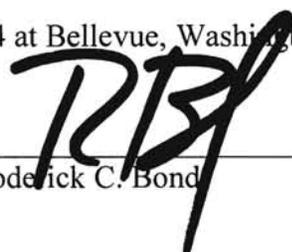
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email (pdf attachment)  
(by Agreement)

Philip A. Talmadge  
Sidney Tribe  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
[Co-Appellant Counsel for Appellant]

**Via:**

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email (pdf attachment)

Dated the 22<sup>nd</sup> day of January, 2014 at Bellevue, Washington.

  
\_\_\_\_\_  
Roderick C. Bond

## **Idaho Rules of Professional Conduct**

### **Preamble: A Lawyer's Responsibilities**

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal

profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by

lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

## Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the Rules in which the lawyer has professional discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedure law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal

counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there has been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to

reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of such Rule is authoritative.

## Terminology

**"Belief"** or **"Believes"** denote that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

**"Consult"** or **"Consultation"** denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

**"Firm"** or **"Law Firm"** denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

**"Fraud"** or **"Fraudulent"** denotes conduct having a purpose to deceive and not merely negligent

misrepresentation or failure to appraise another of relevant information.

**"Knowingly," "Known,"** or **"Knows"** denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

**"Partner"** denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

**"Reasonable"** or **"Reasonably"** when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

**"Reasonable belief"** or **"Reasonably believes"** when used in reference to a lawyer denotes that the lawyer believes the matter in question and the circumstances are such that the belief is reasonable.

**"Reasonably should know"** when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

**"Substantial"** when used in reference to degree or extent denotes a material matter of clear and weighty importance.

# Idaho Rules of Professional Conduct

The Idaho Rules of Professional Conduct became effective on November 1, 1986, (with subsequent amendments) by order of the Idaho Supreme Court. The IRPC are based largely on the ABA Model Rules of Professional Conduct, with some Idaho variations.

The Idaho Supreme Court adopted the IRPC in the form presented here, but did not adopt the comments. The comments have been included as an aid to the reader, but it must be specifically understood that they are included in the discretion of the publisher and not at the direction of the Court.

Conflicts between the Rules and the comments should be resolved strictly in favor of the Rules.

The comments are borrowed from the ABA Model Rules, except where underlining appears. Underlined comments represent changes included to reflect Idaho variations in the text of the particular Rule.

## Client Lawyer Relationship

### Rule 1.1 - Competence

**A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

COMMENT:

#### Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This

applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2

#### Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

#### Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

### Rule 1.2 - Scope of Representation

- (a) **A lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**
- (b) **A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.**
- (c) **A lawyer may limit the objectives of the representation if the client consents after consultation.**
- (d) **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a**

**client to make a good faith effort to determine the validity, scope, meaning or application of the law.**

- (e) **When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.**

COMMENT:

#### **Scope of Representation**

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that a lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### **Independence from Client's Views or Activities**

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of a client's views or activities.

#### **Services Limited in Objectives or Means**

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

#### **Criminal, Fraudulent and Prohibited Transactions**

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience to the statute or regulation or of the interpretation placed upon it by governmental authorities.

### **Rule 1.3 - Diligence**

**A lawyer shall act with reasonable diligence and promptness in representing a client.**

COMMENT:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter,

are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is a fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

#### **Conflict Charged by an Opposing Party**

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may arise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique for harassment. See Scope.

### **Rule 1.8 - Conflict of Interest: Prohibited Transactions**

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
  - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  - (3) the client consents in writing thereto.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.
- (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client consents after consultation;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
- (i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
- (j) A lawyer shall not acquire a proprietary interest in a cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
  - (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

**(2) contract with a client for a reasonable contingent fee in a civil case.**

COMMENT:

**Transactions Between Client and Lawyer**

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

**Literary Rights**

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the agreement conforms to Rule 1.5 and paragraph (j).

**Person Paying for Lawyer's Services**

Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

**Family Relationships Between Lawyers**

Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

**Acquisition of Interest in Litigation**

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for certain advances of the costs of litigation set forth in paragraph (e).

This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

**\*Rule 1.9 - Conflict of Interest:  
Former Client**

- (a) **A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.**
- (b) **A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,**
  - (1) **whose interests are materially adverse to that person; and**
  - (2) **about whom the lawyer has acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.**
- (c) **A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:**
  - (1) **use information relating to the representation to the disadvantage of the former client except as Rules 1.6 or 3.3 would permit or require with respect to a client, or when the information has become generally known; or**
  - (2) **reveal information relating to the representation except as Rules 1.6 or 3.3 would permit or require with respect to a client.**

**\*(Rule 1.9 amended 3-15-90)**

COMMENT:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

- (3) **a nonlawyer has the right to direct or control the professional judgment of a lawyer.**

COMMENT:

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

### **Rule 5.5 - Unauthorized Practice of Law**

A lawyer shall not:

- (a) **practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or**
- (b) **assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.**

COMMENT:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

### **Rule 5.6 - Restrictions on Right to Practice**

A lawyer shall not participate in offering or making:

- \*(a) **an agreement that restricts the rights of a lawyer to practice law after termination of a practice relationship, except agreements concerning benefits upon retirement; and except in situations involving sale of a law practice, or part thereof, as described in Rule 1.17, or**
- \*Section (a) amended 8-28-97 — effective 9-1-97**
- (b) **an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.**

COMMENT:

An agreement restricting the right of partners, **corporate shareholders** or associates to practice after leaving a firm not only limits their professional; autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

## **Public Service**

### **Rule 6.1 - Pro Bono Publico Service**

**A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.**

COMMENT:

The ABA House of Delegates has formally acknowledged "the responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Application of this Rule in Idaho may be affected by additional obligations imposed by the Idaho lawyer's statutory oath prohibiting a lawyer, for personal considerations, to decline representation of the defenseless or oppressed.

### **Rule 6.2 - Accepting Appointment**

- (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This office does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

### Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as the adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

### Rule 8.5 - Jurisdiction

**A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere. A lawyer admitted to practice in other jurisdictions is subject to the Rules of Professional Conduct as adopted in this state, and may be subject of appropriate enforcement proceedings in this state, with respect to any practice of law conducted in this state.**

COMMENT:

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another

jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

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## CHAPTER ONE

### Introduction

- §1.1 What Is a Closing Opinion?
- §1.2 What a Closing Opinion Says
- §1.3 How a Closing Opinion Fits into the Transaction: Its Function and Purpose
  - §1.3.1 Closing Opinion as Part of the Recipient's Diligence
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- §1.4 Exegesis: How to Interpret a Closing Opinion
- §1.5 Deciding Which Opinions to Include: The Opinion Hierarchy
- §1.6 Supporting a Closing Opinion; Liability
  - §1.6.1 Duty of Care; Role of Customary Practice
  - §1.6.2 Opinions by Outside Law Firms and Inside Counsel
  - §1.6.3 Liability
- §1.7 Ethical Considerations
- §1.8 Good Opinion Practice: Timeliness, Relevance, Golden Rule; Duty to Avoid Misleading Opinion Recipient

#### §1.1 WHAT IS A CLOSING OPINION?

In a financial transaction, the parties count on their own lawyers to see to it that, as a legal matter, they will be receiving the benefit of the bargain they negotiated. If the transaction is significant enough, the party putting up the funds also often looks

to counsel for the party on the other side<sup>1</sup> to deliver to it, at closing, a letter expressing that counsel's legal opinion on various aspects of the transaction.<sup>2</sup> When all a lender or investor is receiving from a company is promises and a piece of paper purporting to be a promissory note or stock, it wants counsel for the company to tell it that it is getting what it thinks it is getting from a legal standpoint<sup>3</sup> and that the transaction will not create any major legal problems.<sup>4</sup>

Third-party closing opinions—formal opinion letters delivered at the closing by counsel for one party to a financial transaction to another party—are a fixture of the American legal scene.<sup>5</sup> They also are routinely delivered in cross-border

§1.1 <sup>1</sup>At one time opinions on financial transactions were the preserve of a company's outside law firm. Today many companies have inside legal departments, and lawyers in those departments often deliver opinions that supplement, or in some cases, replace opinions of outside counsel. On some matters inside counsel may be the only one who is in a position, as a practical matter, to give an opinion. Except where expressly noted, the phrase "company counsel," as used in this book, refers to counsel for the entity on whose behalf an opinion is given and does not distinguish between outside and inside counsel. See generally §1.6.2, *infra*.

<sup>2</sup>Closing opinions also are often delivered in acquisitions of privately held companies. They are rare in acquisitions of public companies.

Depending on the transaction, counsel for the recipient may deliver to its client an opinion letter containing some (but usually not all) of the opinions given by counsel for the company. Apart from acquisitions, counsel for the recipient usually does not deliver an opinion letter to the company or its stockholders. See note 4, *infra*.

<sup>3</sup>A lender wants to know, for example, that the borrower has duly authorized, executed and delivered the credit agreement and that the credit agreement constitutes the enforceable obligation of the borrower. See Chapter 9.

<sup>4</sup>A party receiving cash at the closing has no need for an opinion on the cash. Cash is cash. If, however, as in some acquisitions, a party has the right to receive additional payments in the future or other rights extending beyond the closing, it may well want an opinion on its ability to enforce those rights. See §2.3.1 note 6, *infra*.

<sup>5</sup>The practice of giving third-party opinions dates back at least to the late nineteenth century, when, in an effort to bolster investor confidence following wide-spread defaults in railroad aid bonds, dealers in municipal bonds began to obtain and print on the bonds legal opinions regarding the bonds' validity.

transactions involving American companies and are becoming increasingly common in purely foreign transactions.<sup>6</sup>

See Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *Professions and Professional Ideologies in America* 70, 131 n.40 (G. Gerson ed., 1983); Fairman, *Reconstruction and Reunion, 1864-88*, Part One in 6 *The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States*, 918, 921 n.8, 922 (1971). (The authors thank Jonathan C. Lipson, Esq. of Temple University—James E. Beasley School of Law for furnishing them these materials.) By the early 1930s, the practice of giving legal opinions on securities offerings was well established, and a requirement that an opinion be filed with the Securities and Exchange Commission in connection with the registration of securities was included in Schedule A (Part 29) of the Securities Act of 1933. See generally §10.1 note 3, *infra*.

The oldest opinion on a financial transaction known to the authors of this book was delivered in 1899 by the Chicago law firm of Wood & Oakley. That opinion, which was brought to the authors' attention by Paul C. Marengo, Esq., of Hinshaw & Culbertson and is reprinted in *Investment Bankers Association of America, Fundamentals of Municipal Bonds* 127 (1968), stated:

I HEREBY CERTIFY that I have examined a certified copy of the record of proceedings of the Common Council of the City of Prescott, Arizona passed preliminary to the issue by said City of its Water and Sewage Bonds in the amount of Seventy-Five Thousand dollars (\$75,000) dated December 15th, 1898. And in my opinion, such proceedings show lawful authority for the said issue under the laws of the Territory of Arizona now in force. I FURTHER CERTIFY that I have examined the form of bond prepared for the said issue, and find that same to be in due form of law and in my opinion the said issue to the amount aforesaid is valid and legally binding upon the said City of Prescott, and that all of the taxable property in said City is subject to the levy of a tax to pay the same.

The authors are conducting an ongoing contest for the earliest closing opinion. The prize is an acknowledgment in the next supplement to this book.

<sup>6</sup>See *Legal Opinions in International Transactions* at 9:

In most important international business transactions, particularly where one of the parties has retained US lawyers—but increasingly also in transactions where no US lawyer is involved—opinions of counsel are required as a condition precedent to the consummation or 'closing' of the transaction.

*Legal Opinions in International Transactions* is the leading work on closing opinions in international transactions. For an article in which an English lawyer

and circumscribed by qualifications not evident from their words alone.<sup>1</sup>

A closing opinion takes the form of a letter from the opinion giver to the opinion recipient. Like any business letter, it begins with a date, address and salutation. Then, in a few paragraphs, it explains why it is being delivered, defines terms and describes the opinion giver's relationship to the company, the investigation the opinion giver has conducted to support the opinions being given, some of the assumptions of law and fact on which those opinions are based, and the law those opinions cover. The introductory paragraphs set the stage for the body of the letter, which usually begins with the phrase "Based on the foregoing, it is our opinion that"<sup>2</sup> and consists of a series of numbered (or lettered) paragraphs that express the opinion giver's legal conclusions. A closing opinion usually ends with some standard exceptions and, again like any business letter, with "Very truly yours" (or something similar) and a manual signature.

The first numbered paragraph of almost every closing opinion addresses the company's status as a corporation or other business entity.<sup>3</sup> If the transaction involves the issuance of stock, the second numbered paragraph usually states that the stock is "duly authorized, validly issued, fully paid and nonassessable." Next appears what many regard as the most important paragraph: the opinion on the agreement's enforceability. Following these paragraphs, in no set order, are opinions on such matters as the

§1.2 <sup>1</sup> See ABA Legal Opinion Principles §1.B:

[T]he meaning of the language normally used [in opinion letters] . . . [is] based (whether or not stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved.

See also TriBar 1998 Report at 600-602 [App. 9 at 9:11-14].

<sup>2</sup> Variations are set forth and discussed in §2.8, *infra*, and Chapter 3.

<sup>3</sup> The principal focus of this book is opinions on corporations. Chapter 19 addresses opinions on limited liability companies. This book does not specifically address opinions on other business entities. Much of the discussion, however, is relevant regardless of the nature of the entity.

transaction's impact on other agreements and compliance with laws, receipt of government approvals, absence of litigation and, in a secured loan, the status under the Uniform Commercial Code of the security interests granted to the lender.<sup>4</sup>

### §1.3 HOW A CLOSING OPINION FITS INTO THE TRANSACTION: ITS FUNCTION AND PURPOSE<sup>1</sup>

#### §1.3.1 Closing Opinion as Part of the Recipient's Diligence

Before closing a financial transaction the lender, acquirer, investor or underwriter (with the assistance of its legal counsel) conducts "due diligence" to satisfy itself that the company is what it is representing itself to be from a business, financial and legal standpoint and that the transaction does not present any undue problems. The nature of the review it conducts depends on the type and size of the transaction and may include interviews with management, analysis of financial information, review of contracts and other documents, and visits to the company's facilities. At the closing, the company confirms that its representations in the agreement continue to be true, and officers deliver certificates regarding various factual matters. In some transactions, outside experts retained by the company deliver letters of advice—a "fairness opinion" from an investment banker on a merger, for example, or an asset valuation from a professional appraiser in a leveraged buyout.

The receipt of legal advice is another way the parties to a financial transaction conduct due diligence. A party leaving a

<sup>4</sup> For several illustrative closing opinions, see Appendices A-1, A-2, B-1 and B-2 to the TriBar 1998 Report. TriBar 1998 Report at 667-674 [App. 9 at 9:99-110].

§1.3 <sup>1</sup> For a discussion of the purpose of a closing opinion from a European point of view, see Jander & de Rochemont, *Die Legal Opinion im Rechtsverkehr mit den USA RIW/WAD-Recht der Internationalen Wirtschaft*, June 1976, at 332. See also *Legal Opinions in International Transactions* 9-13.

closing with nothing but promises and other intangibles normally (and understandably) wants advice from a lawyer on the legal status of what it is bringing home.

The principal way a party to a transaction satisfies itself about its legal position is through the services of its own counsel. A party looks to its own counsel to help structure the transaction and to prepare and negotiate the agreements. It also looks to its own counsel to identify worrisome legal problems and to provide advice on how to solve them. Sometimes, the advice a party receives from its own counsel takes the form of a legal opinion. Receipt of legal advice from its own counsel, however, normally is not the only way a party to a transaction informs itself about the legal aspects of the transaction.

Another way a party to a transaction obtains information about its legal position is to obtain a closing opinion from counsel for the other side.<sup>2</sup> A third-party closing opinion, however, is only

<sup>2</sup> Revised ABA Guidelines §1.1 at 875 [App. 4 at 4:2].

When received, the closing opinion serves as a part of the recipient's diligence, providing the recipient with the opinion giver's professional judgment on legal issues concerning the opinion giver's client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.

See also California 2005 Report at 7 [App. 22 at 22:16] ("Lawyers and clients often cite due diligence as the principal reason for requesting opinion letters in business transactions."); California 2004 Remedies Opinion Report App. 4 at 2 [App. 23 at 23:38]; Michigan Report at 5 [App. 37 at 37:7] ("opinion provides . . . comfort with respect to legal matters"); Texas Report §II.C [App. 42 at 42:26] ("The primary role of the Opinion is to provide some formal confirmation through a written statement of professional judgment by a lawyer as to the availability of the essential elements of the transaction for which the parties have bargained"); Washington State Report [App. 43 at 43:7] ("purpose of a legal opinion is to provide assurance as to the legal underpinnings of a transaction, not to insure against loss arising out of the transaction").

As part of their overall due diligence, the underwriters in public offerings of securities and investors in private offerings normally make receipt of a closing opinion a condition of closing. Banks and other institutional lenders also often require closing opinions (as do acquirers in some acquisitions of privately held companies). See, e.g., §4.4 of the Private Placement Enhancement Project's Model

a building block in the recipient's due diligence. Third-party closing opinions address specific legal issues<sup>3</sup> and by design

Forms (Nos. 1 and 2) of Note Purchase Agreement (Sept. 13, 1994), described in Blassberg, Bird & Gale, Debt Financing Developments in Negotiated Acquisitions and Leveraged Transactions, 8 Insights No. 9 at 4, 9 (Sept. 1994). For an article arguing that, in a typical loan, some of the opinions that lenders traditionally have requested from counsel for the borrower are not cost justified, see Mason & Snider, Those Third-Party Closing Opinions: Can Loan Transaction Costs be Reduced?, 7 Bus. L. Today 48 (Sept./Oct. 1997) (predicting that "many lenders will begin to break from tradition" and stop requesting enforceability and UCC opinions from borrower's counsel).

Rhode Island has enacted legislation prohibiting financial institutions that make loans in that state and their legal counsel from requiring, as a condition for making a loan, that borrower's counsel give an opinion on "the validity, binding effect, or enforceability of any of the loan documents or the availability of remedies thereunder." Opinions on the authority and status of the borrower and matters relating to the collateral are excluded from the statutory prohibition as are opinions for public offerings of indebtedness. R.I. Gen. Laws §19-9-7. Although not subject to a statutory prohibition, English law firms, in the experience of an English commentator, similarly resist giving enforceability opinions to parties to a transaction who are not their clients. They resist even when the agreements are governed by English law and some of the parties are organized in foreign jurisdictions where third-party enforceability opinions are customary. See Yeowart, *supra* §1.1 note 6, at 167. The cited article, however, does appear to contemplate the giving of enforceability opinions to non-clients in at least some cross-border transactions. *Id.* at 168 (last paragraph of Eighth Principle).

An opinion letter also may be required by a regulatory agency. For example, the SEC requires that an opinion letter confirming the legality of a company's stock be filed as an exhibit to a registration statement under the Securities Act of 1933. See Securities Act of 1933 Regulation S-K, Item 509. The ABA Report on Opinions in SEC Filings [App. 7] discusses those opinions at length.

<sup>3</sup> See Revised ABA Guidelines §1.2 at 876 [App. 4 at 4:2].

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver.

Counsel for the company often will be in the best position to address many of the issues covered by a standard closing opinion. That counsel, for example, may have overseen the company's incorporation, drafted the resolutions

do not cover many legal matters that may bear on a decision to close.<sup>4</sup> Receipt, therefore, of an opinion from the other party's counsel is no substitute for the general legal advice an opinion recipient is expected to receive from its own counsel.<sup>5</sup>

approving the transaction and negotiated the contracts covered by the no breach or default opinion. Company counsel, however, normally is not in the best position to give an opinion on the enforceability of the agreement, which usually is drafted by counsel for the recipient and is based on a form that counsel has used numerous times. Nevertheless, the enforceability opinion is the centerpiece of most closing opinions, and company counsel can expect to have little success arguing that the recipient should rely on its own counsel for that opinion.

Counsel for the recipient plays an important role in the recipient's due diligence by advising what opinions to request, confirming that the opinions received do not contain any unacceptable exceptions or assumptions and, when necessary, explaining what the opinions mean. *See generally* Ryan, Recipient Counsel Responsibilities and Concerns, 62 Bus. Law. 401 (2007). As discussed more fully in §§1.5 and 1.8, *infra*, counsel for the recipient should be guided by considerations of economy and good sense and by the Golden Rule, which deems inappropriate a request for an opinion that counsel for the opinion recipient would not give if it were giving the opinion itself.

<sup>4</sup>Closing opinions, for example, are not read as a matter of customary practice to cover local law unless they do so expressly. ABA Legal Opinion Principles §II.C. An opinion giver is, of course, free to give an opinion on local law or other matters not normally addressed if it regards itself as competent to do so.

<sup>5</sup>*See* Restatement of Law Governing Lawyers §95, Comment c [App. 1 at 1:10] ("The third-person recipient of a lawyer's evaluation does not thereby become the client of the lawyer. . . . In rendering an evaluation, a lawyer does not undertake to advise the third person except with respect to the questions actually covered by the evaluation"); TriBar Bankruptcy Opinions Report at 72:1 [App. 14 at 14:10] (opinions to third parties "only express views on specific issues of law and do not impose an obligation of providing general advice to the recipient"); California 2005 Report at 7 [App. 22 at 22:16-17] ("An opinion letter may be one component of a party's due diligence, but it should not normally be used as a substitute for due diligence performed by the recipient. . . . and its counsel").

Section 7 of the ABA Accord expresses this principle as follows for closing opinions that adopt the Accord:

The Opinion Recipient may not rely on the Opinion or the Opinion Giver for any legal or other analysis beyond that set forth in the Opinion Letter, such as the broader guidance and counsel that the Opinion Giver might provide to the client.

### §1.3.2 Other Benefits of a Closing Opinion

Closing opinions may have collateral benefits. The work required to support them may reveal defects that can be corrected prior to closing and problems that, if not curable, can be taken into account by the opinion recipient in deciding whether to close. Receipt of a closing opinion also may help directors and officers of the recipient establish that they have exercised care and acted in good faith if a transaction later turns out badly.<sup>6</sup>

Paragraph 7.1 of the Commentary to §7 elaborates:

[T]he Opinion Recipient is not the Opinion Giver's client. . . . The Opinion Giver's responsibility is therefore limited to rendering an Opinion that responds appropriately to the specific legal issues that the Opinion Giver has undertaken to address.

*See also* Geaslen v. Berkson, Gorov & Levin Ltd., 613 N.E.2d 702 (Ill. 1993) (opinion giver did not owe fiduciary duty to recipient of closing opinion where recipient was not a client of opinion giver, was represented by its own counsel and knew opinion giver was acting on behalf of the other party to the transaction). In Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318, 322 (N.Y. 1992), one of the instruments covered by a closing opinion, a recorded mortgage document, incorrectly stated that the secured indebtedness was \$92,885 when the correct amount was \$92,885,000. In rejecting the opinion recipient's claim that the opinion "had falsely assured it that the mortgage documents in question would continue to fully protect its existing \$92,885,000 security interest," the New York Court of Appeals held that the opinion covered only what was stated in the documents "whatever those terms might be," noting that the opinion "did not set forth a specific dollar amount as securing the debt" and that the form of opinion was accepted by the opinion recipient, who had a right under the agreement to require an opinion letter in a form satisfactory to it.

<sup>6</sup>Many corporation statutes expressly permit directors in discharging their duties to rely on opinions of legal counsel. *See, e.g.*, Rev. Model Bus. Corp. Act §8.30(b). In Kane v. Atlantic Aviation Corp., Civ. A. No. 89-28-CMW (D. Del., May 10, 1990), the court held that reliance on a legal opinion (confirming in carefully qualified language that a mandatory retirement policy was lawful) "should not end the inquiry" but "is certainly probative" in establishing that the company did not "willfully" violate the Age Discrimination Act of 1967. For cases to the same effect relating to patent violations, *see* Read Corp. v. Portec, Inc., 970 F.2d 816, 828-829 (Fed. Cir. 1992); Ortho Pharmaceutical Corp. v. Smith, 959 F.2d 936, 944 (Fed. Cir. 1992); Transmatic, Inc. v. Gulton

Some lawyers have suggested that another benefit of a closing opinion is that its delivery may dissuade a company from later taking positions that are inconsistent with the legal opinions given by its counsel.<sup>7</sup> Other lawyers, however, have expressed skepticism that delivery by company counsel of a closing opinion would prevent the company from asserting whatever defenses it later identifies as being available to it or prevent a court from reaching its own legal conclusions. Cases holding that utilities lacked the power to enter into supply contracts notwithstanding opinions to the contrary given by their counsel suggest that the skeptics may be right.<sup>8</sup>

*Indus., Inc.*, 818 F. Supp. 1052 (E.D. Mich. 1993). See generally Hawes, *Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va. L. Rev. 1 (1976) (briefly discussing reliance on legal opinions at 32-34). Cf. *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992) (reliance on a legal opinion stating, incorrectly, that mutual fund was not required to register helped establish that it lacked the scienter necessary for liability for nondisclosure under federal securities laws); *NCR Corp. v. AT&T*, 761 F. Supp. 475 (S.D. Ohio 1991) (shelter of business judgment rule lost because directors had not been informed that opinions on stock issued to ESOP as antitakeover device omitted phrase “validly issued, full [sic] paid, and nonassessable”); *Kramer v. Jasper*, Civ. A. No. 88-6721, 1990 WL 2868 (E.D. Pa., Jan. 16, 1990) (reliance on legal opinion helped accountant establish that he lacked scienter and intent necessary for common law fraud).

Other benefits ascribed to closing opinions are that they “help the parties to achieve a mutual, subjective understanding of the meaning and effect of their ‘agreement’” (Georgia Report §1.03 [App. 33 at 33:13]) and that they “may help to characterize the business transaction as an arm’s-length agreement that should be upheld” (Maryland 2007 Report at 7 [App. 34 at 34:18]). Receipt of an opinion also may be necessary to satisfy contractual or regulatory requirements. See California 2005 Report at 7 [App. 22 at 22:16].

<sup>7</sup> See Smith, *Rendering Legal Opinions*, in 1 Massachusetts Business Lawyering at 4-1, 4-6 (S. Keller ed., 1991) (“Requiring a legal opinion from the lawyer representing the party making the representation . . . may in some cases have a practical estoppel effect on the client if the client wanted to challenge the agreement at a later date, since the client would effectively have to change lawyers in order to make the challenge”).

<sup>8</sup> See cases cited in §9.3 note 9, *infra*. The California 2004 Remedies Opinion Report [App. 23] considers at length whether receipt of an opinion on the enforceability of an agreement (discussed in Chapter 9 of this book) provides the recipient a basis for asserting that the opinion giver’s client is equitably estopped

Another benefit sometimes ascribed—wrongly—to a closing opinion is that it serves as an insurance policy. Unlike the holder of an insurance policy, however, the recipient of a closing opinion has no claim simply because the opinions given to it prove to be incorrect. Legal opinions are expressions of professional judgment, not guarantees that a court will reach the same conclusions as the opinion giver.<sup>9</sup> Lawyers may be liable

from claiming that an undertaking it made in the agreement is unenforceable. The report concludes that it does not. The report also considers whether the ability to make an “estoppel” argument has any other practical benefit. Again, it concludes that it does not with the possible exception that, if the agreement is later renegotiated, it may provide the opinion recipient a basis “to counter” a claim by the opinion giver’s client that the agreement has “legal infirmities.” California 2004 Remedies Opinion Report App. 4 at 5-6 [App. 23 at 23:11-16].

<sup>9</sup> ABA Legal Opinions Principles §1.D (“The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.”); Revised ABA Guidelines §1.2 at 876 [App. 1 at 1:2] (“Opinions included in a closing opinion should be limited to . . . matters that involve the exercise of professional judgment by the opinion giver”); see California 2005 Report at 6 [App. 22 at 22:16]; Georgia Report §1.04 [App. 33 at 33:14]; Texas Report §IV.C.1 [App. 42 at 42:72]. One court has quoted with favor the following passage from the Foreword to the ABA Legal Opinion Report:

A third-party legal opinion is an expression of professional judgment on the legal issues explicitly addressed. By rendering a professional opinion, the opinion giver does not become an insurer or guarantor of the expression of professional judgment . . . .

*Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 891 F. Supp. 777, 790 (D. Vt. 1995) (quoting ABA Legal Opinion Report at 171 [App. 2 at 2:5]). The Foreword goes on to state, “Nor does the rendering of an opinion guarantee the outcome of any legal dispute that may arise out of the transaction.” Another court, addressing the broader duty a lawyer has in counseling the lawyer’s own client, has stated:

Massachusetts law requires an attorney . . . to advise the client in a manner that permits the latter intelligently to assess the risks of taking . . . a particular action. But lawyers—even high priced lawyers—ordinarily are not guarantors of favorable results. . . . Thus, lawyers are not obliged . . . to anticipate remote risks.

*Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 182 (1st Cir. 1997).

Next in the hierarchy is the cluster of opinions that cover aspects of the transaction, such as the transaction's effect on the company's other contracts, that are not addressed by the opinion on the agreement's enforceability.<sup>7</sup> These opinions ordinarily are intended to elicit information already known to the opinion preparers or available without extraordinary effort. Whether they are given and what they cover involves in each case a balancing of the work required to support them against the benefit to the opinion recipient. The opinion preparers have more room to negotiate the wording of these opinions, to include appropriate limitations and qualifications, and in some cases to refuse to give a particular opinion at all.<sup>8</sup>

At the bottom of the hierarchy are the purely "background" opinions, such as those addressing the company's outstanding stock (as opposed to the stock being issued in the transaction)<sup>9</sup> or the absence of pending or threatened litigation that could have a material adverse effect on the company.<sup>10</sup> What and how much these opinions say, and indeed whether they are given at all, ultimately will depend on a balancing of the cost of their preparation against the benefit to the opinion recipient.<sup>11</sup>

<sup>7</sup> See Chapters 13, 14, 15 and 16. This cluster of opinions also includes "opinions" in the absence of legal proceedings relating to the transaction. See §17.1, *infra*.

<sup>8</sup> For example, a firm that does not normally represent the company but that has been brought in for the transaction might well resist giving an opinion that would require it to review all of the contracts listed by the company in the schedules to the agreement. (The no breach or default opinion is discussed in Chapter 16.) If the company has inside counsel or regular outside counsel, one of them might give the opinion. See TriBar 1998 Report at 669, 673 [App. 9 at 9:102, 108] (Illustrative Opinion Letters of Inside Counsel). Alternatively, the firm might argue that the recipient should rely on its own (or its own counsel's) review of those contracts. See California 2005 Report at 14 [App. 22 at 22:26] (instead of opinion, "time and financial resources of the parties and their counsel often are better served" by representations in agreement and recipient's own investigation).

<sup>9</sup> See §10.10, *infra*. See California 2005 Report at 14 [App. 22 at 22:26] (citing opinion on outstanding stock as example of opinion that "often is not cost-effective").

<sup>10</sup> See Chapter 17.

<sup>11</sup> See generally TriBar 1998 Report at 599-600 [App. 9 at 9:10].

When the cost of preparing a "background" opinion will be high, the opinion preparers should point that out to the opinion recipient and, if necessary, enlist the aid of the company in resisting the opinion request.<sup>12</sup>

## §1.6 SUPPORTING A CLOSING OPINION; LIABILITY

### §1.6.1 Duty of Care; Role of Customary Practice

A lawyer who delivers a closing opinion owes a duty of care to the opinion recipient even though the recipient is not the lawyer's client.<sup>1</sup> That duty requires the lawyer not to "function as an advocate for the legal or factual position of the lawyer's client" but to provide the recipient an opinion that is "fair and objective"<sup>2</sup> and that has been prepared with the "competence and diligence

<sup>12</sup> As the Revised ABA Guidelines state, "The benefit of an opinion to the recipient should warrant the time and expense required to prepare it." Revised ABA Guidelines §1.2 at 876 [App. 4 at 4:2]. See California 2005 Report at 14 [App. 22 at 22:26] ("opinion giver should . . . resist acquiescing to opinions on matters that are peripheral to the transaction at hand").

<sup>1</sup> Restatement of Law Governing Lawyers §51(2)(a) [App. 1 at 1:1] ("a lawyer owes a duty to use care . . . to a nonclient when and to the extent that . . . the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion"). See generally 2.3.2, *infra*.

Theoretically, an opinion giver can modify its duty of care by express language in the opinion. Why a recipient would accept such an opinion, however, is another matter. See *Mark Twain Kansas City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 912 S.W.2d 536 (Mo. Ct. App. 1995). In *Mark Twain*, the court held that the recipient, a "sophisticated investor," could not have justifiably relied on the opinions expressed in an opinion letter containing the following disclaimer: "This opinion is valid as of the date hereof, but we take no responsibilities to any information or opinions contained herein." Rejecting the recipient's assertion that the disclaimer contained a typographical error, the court declined to read into the disclaimer the word "update" between the words "to" and "any." The court did so even though "update" appeared in the opinion giver's other opinion letters and adding it would have made the disclaimer read (more sensibly as well as grammatically) "but we take no responsibilities to update any information or opinions contained herein."

<sup>2</sup> Restatement of Law Governing Lawyers §95, Comment c [App. 1 at 1:40].

addressee of a closing opinion from counsel for the other side. For example, if the company is entering into a credit agreement, it may receive from counsel for the lender an opinion on its right to take down additional funds in the future; if it is not publicly traded and is being acquired for stock, it may receive from counsel for the acquiring company an opinion on the stock's validity.<sup>6</sup>

When the transaction in question is a syndication, counsel may be asked by the placement agent to address an opinion letter generically, for example, to "the purchasers of interests in the Partnership." Lawyers should think carefully before agreeing to such a request because of the likelihood that many of the purchasers will not be represented by counsel or know enough themselves about opinions to understand the opinions they are receiving.<sup>7</sup> By analogy to the opinion letter of company counsel

in SEC Filings [App. 7], a report by the Task Force on Securities Law Opinions of the ABA Section of Business Law. That report points out that, instead of "legally issued," many lawyers give, and the SEC staff accepts, the more traditional "duly authorized" and "validly issued" formulations of the opinion (discussed in Chapter 10 of this book). Legal Opinions in SEC Filings at 239 [App. 7 at 7:4].

<sup>6</sup>A closing opinion also may be delivered to the company by counsel for the acquirer in an all-cash transaction—for example, on the enforceability of an "earn out" provision requiring the acquirer to make additional cash payments upon achievement of specified earnings targets. When an opinion is only addressed to the acquired company, stockholders of the acquired company may not be able to rely on it. For a discussion of that problem and a possible solution, see last paragraph of note 10, *infra*.

<sup>7</sup>An opinion giver's ability to rely on customary practice is premised on the expectation that the opinion recipients will be represented by their own counsel or will themselves be knowledgeable about customary practice. Restatement of Law Governing Lawyers §95, Comment a [App. 1 at 1:38]; TriBar 1998 Report at 601 n.24 [App. 9 at 9:12]. The Revised ABA Guidelines state that an opinion giver is entitled to assume, without so stating, that "the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions." Revised ABA Guidelines §1.7 at 876 [App. 4 at 4:3-4]. See Connell, Legal Opinions in the Context of a Private Placement, in Opinions in SEC Transactions 1991 at 265, 275 (PLI) ("The addressee issue is of particular concern in the syndicated private placement. The delivery of an opinion, even one appropriately qualified and restricted, to 'the purchasers of interests in ABC Partnership,' though acceptable as to form, involves considerable peril since the lawyer cannot be certain that the recipient will understand the

in an underwritten offering, the opinion letter in a syndicated private offering normally should be addressed only to the placement agent and not to the purchasers.<sup>8</sup>

### §2.3.2 Liability to Addressees and Others

The general rule on liability is that a lawyer owes a duty of care to a non-client addressee of a closing opinion and to any other non-clients whom "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites . . . to rely" so long as the non-client relies on the opinion<sup>9</sup> and "is not, under applicable tort law, too remote from the lawyer to be entitled to protection."<sup>10</sup> With

opinion or will use the opinion in the intended manner."). See also §1.4 note 13, *supra*. Some of the most troublesome court cases relate to opinions given in connection with the syndication of tax shelters. See §1.2.3.1 note 33, *infra*.

<sup>8</sup>The analogy is not perfect because the purchasers from the issuer in a firm commitment underwritten offering are not the public investors but the underwriters. Nevertheless, if the underwriters were to ask company counsel to address its opinion letter to the public investors, company counsel no doubt would refuse.

<sup>9</sup>While reliance by the recipient is necessary for it to establish liability, reliance alone is not sufficient. Reliance by the recipient must be reasonable. *First Mass. Bank, N.A. v. Florian*, No. 02-1007 BLS1, 2007 WL 1829379, at \*19-20 (Mass. Super. Ct. June 12, 2007) (finding reliance by bank not reasonable given sophistication of bank and its counsel); Restatement of Law Governing Lawyers §51, Comment e [App. 1 at 1:4] (lawyer owes duty to nonclient if nonclient is invited to rely on lawyer's opinion and "the nonclient reasonably does so"); TriBar 1998 Report at 604 [App. 9 at 9:16] ("opinion recipient has no right to rely on an opinion if reliance is unreasonable under the circumstances or the opinion is known by the opinion recipient to be false").

In one recent case, even though the opinion recipient apparently did not prove that it relied on the opinion, the court was willing to presume reliance on the grounds that the opinion was a condition of and "present" at the closing. See *Dean Foods Co. v. Pappathanasi*, No. 01-2595 BLS, 2004 WL 3019442, at \*10, \*19 (Mass. Super. Ct. Dec. 3, 2004) (pointing out that president of opinion recipient had examined a schedule to the agreement covering the same matters as were covered in opinion but nowhere stating that he relied on opinion itself; rejecting argument that opinion "was just an extraneous, perhaps redundant, piece of paper lying unnoticed and uncared for in a rack of documents at the closing").

<sup>10</sup>Restatement of Law Governing Lawyers §51(2) [App. 1 at 1:1]. For discussions in bar association reports of opinion giver's liability to non-clients, see

California 2005 Report at 22 [App. 22 at 22:37-38]; Florida Report at 1-116 [App. 31 at 31:10-11]; Georgia Report §2.02 and Interpretive Standard 8 [App. 33 at 33:29 and 33:174]; Maryland 2007 Report at 23-24 [App. 34 at 34:37-38]; Texas Report §IV.C.2 [App. 42 at 42:73-76] (as anticipated by the Texas Report, which was written in 1992, the Supreme Court of Texas in 1999 reversed apparently contrary case law and held that a lack of a privity does not bar a non-client from suing a lawyer for negligent misrepresentation. *McCannish, Martin, Brown & Loettler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999)). See generally W. Estey, *Legal Opinions in Commercial Transactions* 255-297 (1990) (focusing on Canadian law); Harries, *Die Rechtscheinhaftung für fehlerhafte Rechtsgutachten bei internationalen Verträgen in Festschrift Für Konrad Zweigert* 451 (Tübingen 1981).

For opinion letters that adopt the ABA Accord, §7 of the Accord states that "the Opinion Recipient may rely upon the Opinion" and the Glossary defines "Opinion Recipient" to be "the addressee or addressees of the Opinion Letter." Section 20 of the Accord states that only "the Opinion Recipient is entitled to rely upon or to assert any legal rights based upon the Opinion Letter." The Technical Note to §20 makes clear that §20 applies to §7. The limitations on reliance in the Accord were given literal effect in *In re Infocure Sec. Litig.*, 210 F. Supp. 2d 1331, 1351-1352 (N.D. Cal. 2002), which held that the stockholders of an acquired corporation were not entitled to rely on an Accord opinion because it was addressed to the corporation and not to them. The court's holding meant that the only person who could rely on the opinion was the addressee corporation, which after the closing was wholly owned by the opinion giver's client. 210 F. Supp. 2d at 1351, 1359 (stating that fact opinion was addressed to attention of individual did not change result).

As illustrated by *Infocure*, the inability of those who are not addressees of a closing opinion to rely on it can have serious consequences when a company is acquired in a merger. (While closing opinions are rarely given when the acquired company is public, they are still common when the acquired company is privately held.) If the opinion letter of the acquirer's counsel is addressed only to the acquired company, the stockholders of the acquired company would not be able to bring an action against the opinion giver even though it gave an erroneous opinion on a matter as important to the stockholders as the validity of the stock issued to them as consideration in the merger. One approach stockholders of a company being acquired in a merger might consider would be to have the acquirer's counsel address the opinion letter to (or also to) them or include language in the opinion letter expressly permitting them to rely. That approach would put those stockholders in roughly the same position they would have been in had the transaction been structured as a sale of assets and as stockholders of the seller they had the benefit of the opinion through their interest in the seller or, upon the seller's liquidation, through their acquisition of the seller's claims against the opinion giver. A key difference, however, between an opinion giver's delivering an opinion

few exceptions courts agree that addressees may properly rely on a closing opinion<sup>11</sup> and in some jurisdictions have gone further and allowed standing to others who reasonably could have been expected to rely.<sup>12</sup> To avoid any question as to who may rely,

letter on a sale of assets and on a merger is that, rather than giving opinions to a company represented by counsel, an opinion giver who addresses an opinion letter on a merger to stockholders or otherwise permits stockholders to rely may be giving opinions to stockholders who are not represented by counsel and are not conversant with customary practice in interpreting the meaning of closing opinions. See §1.4 note 13, *supra*. Thus, depending on who the stockholders are and their number, an opinion giver that is willing to give an acquired company an opinion on a merger nonetheless may be unwilling to give it to the acquired company's stockholders or otherwise authorize them to rely.

<sup>11</sup> See, e.g., *First Nat'l Bank of Durant v. Trans Terra Corp. Int'l*, 142 F.3d 802 (5th Cir. 1998); *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *Vereins Und Westbank AG v. Carter*, 691 F. Supp. 701 (S.D.N.Y. 1988); *Mohally, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230 (Colo. 1995) (addressees of closing opinion, even though not clients of opinion giver, may bring action for negligent misrepresentation against opinion giver); *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 322 (N.Y. 1992) ("bond" between opinion giver and third-party opinion recipient "sufficiently close to establish a duty of care running from the former to the latter" when closing opinion was addressed and sent directly to the opinion recipient and was relied on (as opinion giver anticipated) by the recipient). *But see* *United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Associates-Charco Redondo Butane*, 755 F. Supp. 1195 (S.D.N.Y. 1989) (holding, as discussed more fully in §2.5.4, *infra*, that lawyer had no duty of care to addressee where opinion was not given at the request of client); *National Bank of Can. v. Hale & Dorr LLP*, No. 2000-00296, 2004 WL 1019072 (Mass. Super. Ct. April 28, 2004) (opinion giver's motion for summary judgment granted on negligence and negligent misrepresentation claims on grounds that opinion giver owed no duty to recipient; opinion giver's motion for summary judgment denied on misrepresentation claim). *National Bank of Canada* has been criticized as being out of step with the decisions of most other courts, including a decision later the same year in the Business Law Session of the Massachusetts Superior Court. See Committee on Legal Opinions, ABA Section of Business Law, Annual Review of the Law on Legal Opinions, 60 Bus. Law. 1057, 1059 (2005). *Compare* *Dean Foods Co. v. Pappathanasi*, No. 01-2595 BLS, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004) (holding opinion giver liable to opinion recipient for negligent misrepresentation).

<sup>12</sup> The question of who besides an addressee may rely on an opinion is not a new one. Indeed, more than 100 years ago the U.S. Supreme Court considered whether a lender had a claim in negligence against a lawyer who gave a defective opinion to the borrower on the borrower's title to real property in which the

impediments specific to the other party that might prevent it from entering into the agreement or enforcing its contractual rights against the company.<sup>20</sup>

- (iii) Persons acting on behalf of parties to the Transaction other than the Client, including agents and fiduciaries, were duly authorized to act in that capacity.

As discussed in §4.3.3, *supra*, the list of implicit assumptions contained in the Accord is a useful compilation of the assumptions of general application that need not be stated in closing opinions whether or not they adopt the Accord.

<sup>20</sup>See *JST Properties v. First Nat'l Bank of Glencoe*, 701 F. Supp. 1443 (D. Minn. 1988) (holding that opinion of borrower's counsel to lending bank that note and other documents were legal and binding did not cover the question whether the bank was prohibited from entering into transaction by banking statute prohibiting "tying" a loan to a purchase from the bank); *TriBar* 1998 Report at 628 [App. 9 at 9:49]:

[The] remedies opinion is not as a matter of customary practice normally read to cover regulatory statutes applicable solely to the opinion recipient. Thus . . . borrower's counsel [in a bank loan] is not passing on whether the loan violates the bank's lending limit or whether the bank obtained any required governmental approvals.

In California contracts entered into by a corporation while in violation of California franchise tax filing and payment requirements are voidable at the instance of any other party to the contract unless the corporation cures the violation as permitted by the statute. This is rarely a problem when giving an enforceability opinion because a violation does not make the contract unenforceable against the company. See Cal. Rev. & Tax Code §§23301-23303, 23305, 23305a.

For closing opinions that adopt the ABA Accord, §1(d) of the Accord permits the opinion preparers to rely without disclosure or investigation (but subject to the limitation in §5 on unwarranted reliance) on an assumption that "[e]ach party to the Transaction (other than the Client) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Client." Paragraph 4.4 of the Commentary to §1 cites as examples of matters covered by §1(d) compliance by a lending bank with bank licensing requirements and by an insurance company with laws restricting the investments that may be made by insurance companies. Paragraph 4.4 points out, however, that §1(d) does not cover "satisfaction of legal requirements applicable to the terms of the Transaction," for example, "that the Transaction interest rate comes within a special range for 'banks' established by Law," unless such requirements arise from the special status of "a party having special legal status under the laws of a particular jurisdiction." Some members of the ABA Legal Opinions Committee, the authors of this book

## §9.1.2 When Should an Enforceability Opinion Be Requested?

Lawyers representing a company in a financial transaction have long questioned why the party on the other side routinely asks company counsel for an opinion on the enforceability of an agreement that was drafted by that party's own counsel using that party's own form. Why, those lawyers have asked, should they be put to the time and effort, and their client to the expense, of analyzing the legal status of an agreement when the recipient of their opinion, through consultation with its own counsel, already knows which provisions are enforceable and which are not. Despite the logic of that question, however, and the frequency with which it was asked, the literature on legal opinions almost totally ignored it—until 2004.

In 2004 the State Bar of California Business Law Section, in the California 2004 Remedies Opinion Report, took on what it termed the "threshold question" of when a third-party enforceability opinion should be requested and given.<sup>21</sup> Its answer, characterized as the "view" of the State Bar of California Business Law Section, is that:

lawyers should not recommend that a client request a third party remedies opinion that will result in significant costs unless a clear benefit that justifies the cost is likely to be enjoyed by their client.<sup>22</sup>

The report then goes on at length to analyze the cost of preparing an opinion and its benefit to the recipient.<sup>23</sup>

among them, found this limitation on the coverage of §1(d) and its explication in the Commentary difficult to understand and to apply. Although §1.4 was rewritten numerous times, the final version did not resolve these difficulties.

<sup>21</sup> California 2004 Remedies Opinion Report at 5 [App. 23 at 23:8].

<sup>22</sup> *Id.* App. 4 at 1 [App. 23 at 23:36].

<sup>23</sup> As the California 2004 Remedies Opinion Report points out, the cost of an opinion includes not only the legal fees to prepare it but also the cost of

As with other opinions, the principal benefit of an enforceability opinion is the assistance it provides the recipient in conducting due diligence.<sup>24</sup> If, however, the opinion is on a form of agreement that is used by the recipient on a regular basis and with which it is thoroughly familiar, the opinion is unlikely to provide the recipient any real benefit in terms of new information and, thus, a request for it is not justifiable no matter how small the cost.<sup>25</sup> The California 2004 Remedies Opinion Report concludes

negotiating the language of the opinion and the exceptions. *See* California 2004 Remedies Opinion Report App. 4 at 2 n.7, 3, 7 [App. 23 at 23:37-38, 44] (pointing out that discussions between the opinion preparers and counsel for the opinion recipient regarding the nature and extent of the exceptions are frequently lengthy and sometimes acrimonious). The report also points out that the non-economic costs of an opinion can be of equal or greater importance. Those costs can include delays in closing the transaction, distraction from the principal task at hand, impairment of the working relationship of the lawyers, and inadvertent disclosure of a client's negotiating strategy or confidential information. *Id.* App. 4 at 7 [App. 23 at 23:44]. Finally, the report suggests that a cost/benefit analysis should take into account not just the cost incurred by the opinion giver's client but the aggregate costs incurred by all the parties. Besides the legal fee for preparing and supporting the opinion, those costs, it points out, normally will include the legal fee of counsel for the opinion recipient for reviewing and negotiating the opinion and also may include that counsel's fee for delivering to the opinion recipient an opinion of its own. *Id.* App. 4 at 2 n.7 [App. 23 at 23:37-38].

<sup>24</sup> *See* §1.3.1, *supra*.

<sup>25</sup> *See* California 2004 Remedies Opinion Report at 6 [App. 23 at 23:9].

[Where the recipient does not in fact rely on the opinion, the request for and issuance of a remedies opinion increases transaction costs without providing any real benefit. In such cases, a third-party remedies opinion should not be requested or given and the opinion recipient is better served by relying upon the advice of its own counsel.

*See also id.* App. 4 at 13 [App. 23 at 23:51].

Frequently, a third-party remedies opinion is requested on documents that are prepared and regularly used by the requesting party or its counsel, and are basically in the same form from one transaction to the next. Lenders, in particular, frequently insist on standardized agreements . . . . It appears to be both more beneficial and cost effective for the opinion recipient to rely on its own counsel for legal advice regarding enforceability. Therefore, a request for a remedies opinion, in this

that the opinion is of no real benefit to the recipient in the "vast majority of transactions."<sup>26</sup>

By limiting its conclusion to the "vast majority of transactions," the California 2004 Remedies Opinion Report takes care not to rule out the possibility that the enforceability opinion might be of benefit in some circumstances. One such circumstance is when the opinion letter covers the law of the state where the company has its principal office but not the law of the state whose law is selected in the agreement as its governing law. In that case an opinion on the enforceability of the agreement "as if" it were governed by the law of the state where the company has its principal office benefits the recipient by providing it comfort that, if it were forced to seek enforcement of the agreement in the company's home state, the courts of that state would give effect to the agreement even if they were to disregard the governing law clause and apply their state's law.<sup>27</sup> Another such circumstance is when an opinion is given by company counsel to the winning bidder in a transaction put out for bid by the company. If as is often the case the agreement was drafted by company counsel and the winning bidder is required to enter into it with only a limited opportunity to negotiate its terms, an opinion that the undertakings of the company in the agreement are enforceable against the company is of obvious benefit to the winning bidder, and company counsel, presumably having specified in the governing clause the law of a state with which it

situation, in the absence of special factors in the transaction, seems inappropriate.

Commenting on the use of the word "seems" in the last sentence of the quoted passage, a note indicates that a "large number" of the members of the Opinions Committee are of the view that a request for a remedies opinion in the situation described "would be inappropriate." That view is (or, at least to the authors of this book, seems) correct.

<sup>26</sup> *Id.* App. 4 at 3 [App. 23 at 23:38] (in "vast majority of transactions" opinion does not identify any enforceability issues unknown to recipient or its counsel).

<sup>27</sup> *See* §9.12.3, *infra*.