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An Overview of Real Estate Finance Opinions

Presented to the ISB Real Property Section
by Christine E. Nicholas
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Presenter:



Christine E. Nicholas

Practice emphasis: real estate, finance and business transactions.

- Fellow, American College of Mortgage Attorneys (2022 incoming co-chair, Opinions Committee)
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AN OVERVIEW OF REAL ESTATE FINANCE OPINIONS



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Objectives for today:

1. What are 3rd Party Legal Opinions in Real Estate Finance Transactions?
2. What are the Major Differences between Lead Counsel and Local Counsel opinions?
3. What Opinion Guidance is Available?
4. What are Best Practices?

3rd Party Legal Opinions

- Legal opinion rendered to someone other than your client
- In r.e. finance transaction, usually:
 - Lender
 - Agent bank
 - Note purchaser/assignee
- Restatement Second, Torts § 299A sets a liability standard for legal advice as the absence of application of “the skill and knowledge normally possessed by members of that profession or trade in good standing.” (no ID case law)

3rd Party Legal Opinions

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- Tort of negligent misrepresentation? (ID allows as against accountant; no case law extending to lawyers)
- Malpractice
- Breach of fiduciary duty to nonclient?
- Taylor v Riley, 162 Idaho 692, 403 P3.3d 636 (ID 2017)



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3rd Party Legal Opinions

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Rules of Professional Conduct are Applicable

Drafting an opinion letter invokes a number of the Idaho Rules of Professional Conduct (“I.R.C.P.”) that govern the practice of law in Idaho:

- **Rule 2.3** – A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.



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3rd Party Legal Opinions

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- **Rule 1.1** – A lawyer must provide competent representation to a client.
 - legal knowledge
 - skill
 - thoroughness and preparation



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3rd Party Legal Opinions

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- **Rule 1.6** – The lawyer must preserve the confidentiality of client information and only make disclosure of confidential information with client consent
 - Impliedly authorized?
 - Engagement letter describes opinion
 - Opinion also states the opinion is delivered at the request of the client



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3rd Party Legal Opinions

- **Rules 1.2, 2.1, and 4.1** – Lawyer may take action impliedly authorized to carry out the representation. The lawyer shall exercise independent professional judgment. In the course of representing a client, a lawyer shall not knowingly (a) make a false statement of material fact to a 3rd person or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a fraudulent act by a client.
- Underlying principle: opinion giver should never give an opinion that the opinion giver recognizes will mislead the recipient about the matters addressed in the given opinions. (See, Guidelines for the Preparation of Closing Opinions, ABA Business Law Section Committee on Legal Opinions, 57 The Bus. L. (ABA) 875 (Feb. 2002) at para 1.5.



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Lead counsel opinion vs local counsel opinion

Local counsel opinion generally limited to local law issues:

- Form of mortgage/deed of trust is recordable per state law
- Recordation creates a lien per state law
- Mortgage/deed of trust enforceable per state law
- Property owner/borrower qualified to do business in local state



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Lead counsel opinion vs local counsel opinion

Lead counsel will likely give more opinions:

- Borrower is duly organized and existing
- Borrower has power and authority to borrow and pledge real estate
- Borrowing does not violate Borrower's constituent documents or other agreements
- Person who signs on behalf of Borrower is authorized to sign



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Commonly asked local counsel opinions

Enforceability: the out of state lender receiving the opinion wants to know that the real property security document is enforceable.

Central opinion in the opinion letter



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Commonly asked local counsel opinions

Common formulation of enforceability opinion:

The Idaho Deed of Trust is enforceable against the Grantor in accordance with its terms, except as may be limited by (i) bankruptcy, fraudulent transfer, reorganization, receivership, moratorium, insolvency or other similar laws affecting the rights and remedies of creditors generally, and (ii) general principles of equity (regardless of whether considered in a proceeding in equity or at law).



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Commonly asked local counsel opinions

Another common formulation of enforceability/remedies opinion adds a “practical realization” qualification clause, like this:

Certain of the provisions of the Idaho Deed of Trust may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not make the remedies afforded by the Idaho Deed of Trust inadequate for the practical realization of the principal benefits intended to be provided.



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Commonly asked local counsel opinions

The “practical realization” qualification is understood to mean that, where inconsistent or legally defective remedies are set forth in a deed of trust, the remedies provisions (taken as a whole) will provide the opinion recipient the benefits of its bargain following a breach by the opinion giver’s client.

Ambiguous?



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Commonly asked local counsel opinions

New York counsel seem to prefer to receive this “material default comfort” language instead of a “practical realization” qualification:

The foregoing opinion as to enforceability of the Idaho Deed of Trust is also subject to the qualification that certain provisions contained in the Idaho Deed of Trust may not be enforceable, but (subject to the limitations set forth in the foregoing clauses (i) and (ii)) such unenforceability will not render the Idaho Deed of Trust invalid as a whole or substantially interfere with realization of the principal benefits or security, or both, provided thereby.



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Commonly asked local counsel opinions

The enforceability/remedies opinion subsumes opinions on status and power of the grantor/mortgagor, authorization by the grantor/mortgagor, and execution and delivery – these opinions need to be given, relied on or assumed in order to give the enforceability opinion.

Local counsel usually gives a status opinion based on secretary of state certificates, may give power opinion if the entity is formed in the opinion-giver's jurisdiction, and assumes authorization, execution and delivery.



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Commonly asked local counsel opinions

“Bifurcated” choice of law: many loan agreements in transactions involving parties or collateral in multiple states choose New York law to govern all but the deed of trust on Idaho property, or the deed of trust will recite that issues of creation, perfection and priority of the lien of the DOT will be governed by Idaho law and all other issues will be governed by New York law.



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Commonly asked local counsel opinions

Typical “bifurcated” choice of law clause:

The provisions of this Mortgage regarding the creation, perfection, and enforcement of the liens and security interests herein granted shall be governed by and construed under the law of the state in which the Mortgaged Property is located. All other provisions of this Mortgage shall be governed by the law of the State of New York (including, without limitation, Section 5-1401 of the General Obligations Law of the State of New York), without regard to choice of law principles.



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Commonly asked local counsel opinions

Commonly requested formulation:

An Idaho court will give effect to the choice of law provision in paragraph ___ of the Mortgage applying Idaho law to matters regarding the creation, perfection, and enforcement of the liens and security interests herein granted and the law of the State of New York (including, without limitation, Section 5-1401 of the General Obligations Law of the State of New York) to all other matters.



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Commonly asked local counsel opinions

Lender wants to know:

- The choice of New York law to apply to “non-local” matters will be given effect by state and federal courts in Idaho
 - Requires analysis of Restatement (Second) of Conflicts of Laws
 - Usually a “reasoned” opinion
 - See *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 773 P.2d 1143 (1989) and *Carroll v. MBNA America Bank*, 148 Idaho 261, 220 P.3d 1080 (2009)



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Commonly asked local counsel opinions

Lender wants to know:

- That the mortgage/deed of trust is in recordable form
- That once recorded the mortgage/deed of trust creates a valid and enforceable lien
- That the terms of the mortgage/deed of trust are enforceable under Idaho law



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Commonly asked local counsel opinions

Additional opinions out-of-state Lender's counsel usually wants:

- That the DOT/mortgage is in recordable form in Idaho
- That once recorded the mortgage/deed of trust creates a valid and enforceable lien against the described property
- That the loan documents don't violate local lending laws (usury)



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Commonly asked local counsel opinions

Typical request:

The Deed of Trust is in form sufficient to permit recordation under the Law of the State.

- Adequate legal description
- Appropriate form of acknowledgement
- Margin for recording information



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Commonly asked local counsel opinions

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Typical request:

The Deed of Trust is in form sufficient to create (i) a lien on all right, title and interest of Grantor in and to the Real Property, including the Leases and Rents, and (ii) an assignment of all right, title and interest of Grantor in the Leases and Rents.

When giving an opinion like this, consider Bennett v. Bank of Eastern Oregon, 167 Idaho 481, 472 P.3d 1125 (2020)(recording of a deed of trust does not create a lien; it instead serves as notice that legal title has passed to a trustee and secures the beneficiary's priority).



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Commonly asked local counsel opinions

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Typical request:

The payment of any interest as provided in the Transaction Documents will not violate the usury laws or laws regulating the use or forbearance of money in the State.

- consumer vs commercial loan



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Opinion Guidance?

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- 2012 Real Estate Finance Opinion Report
https://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/v47/o2/2012_aba_rpte_journal_v47_no2_fall_real_estate_finance_opinion_report.pdf
- 2016 Local Counsel Report
https://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/v51/o2/2016_aba_rpte_journal_v51_no2_real_estate_finance_opinion_report_2012.pdf
- ABA RPTE Legal Opinion Committee website
https://www.americanbar.org/groups/real_property_trust_estate/committees/real-property-committees/legal-opinions-in-real-estate-transactions/
- ABA Business Law Section Legal Opinions Committee Resource Center:
https://www.americanbar.org/groups/business_law/committees/opinions/tribar/



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Best Practices?

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- **Don't wing it – have a process**
 - Understand the building blocks for each opinion given and take the time to build the opinion
 - Have a partner or colleague give your opinion a second review
 - Draft your opinion early in the deal so you aren't rushed
- **Study the available opinion guidance – understand what is being asked of you**
- **Prepare a standard-form opinion**
 - Having a form of opinion you can modify for the deal helps avoid the last-minute rush that attends most opinions
- **Be thoughtful about your qualifications, assumptions and limitations**



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QUESTIONS?

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