WAIT…WHAT DID I JUST SAY?: WHAT LAWYERS NEED TO BE CONCERNED ABOUT WHEN ISSUING THIRD-PARTY CLOSING OPINIONS

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INTRODUCTION

No matter what your mother says, it is not always better to give than to receive. Opinion letters are concrete proof. Opinion letters “provide[ ] the opinion recipient with the opinion giver’s professional judgment about how the highest court of the jurisdiction whose law is being addressed would appropriately resolve the issues covered by the opinion on the date of the opinion letter.” Parties to business transactions commonly require counsel for the opposing party to opine on “1) the ‘authority’ of [their client] to engage in the transaction, 2) the enforceability of the transaction contracts against [their client], and 3) [whether] the transaction [or their client] is . . . in violation of any applicable law or contract.” Although opinion letters have long been routine in business transactions, preparing an opinion letter can still bring anxiety to the hearts of even the most experienced lawyers. This anxiety stems from the liability that an opinion letter can bring upon the issuing counsel.

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4 See Lipson, supra note 2, at 61 (when issuing opinions, “lawyers conduct themselves as if their professional lives were on the line”).

5 See id. at 65, 107.
Generally, there are two types of opinions: first-party opinions and third-party opinions.⁶ A first-party opinion is delivered by an attorney to a client upon the client’s request for the lawyer’s professional judgment on an issue.⁷ As its name implies, a third-party opinion is delivered by an attorney to a non-client on a client’s behalf.⁸ Business parties often demand third-party opinions from opposing counsel as part of due diligence in completing a transaction.⁹ The TriBar Opinion Committee describes some common situations in which opinion letters are used:

The relevant agreement in a business transaction will often provide for delivery of an opinion letter as a condition of closing. In some cases, such as a loan, the borrower will furnish an opinion letter of its counsel to the lender. In other cases, such as in some mergers, each side will furnish an opinion letter of its counsel to the other side.¹⁰

Third-party opinions are used by recipients to help ensure that the other party to the transaction has fulfilled its legal obligations and that there are not any relevant legal issues of which the recipient is unaware.¹¹ Third-party opinions “are viewed as a ‘fixture of the American legal scene,’ and are routinely delivered in financings, mergers and acquisitions, stock issuances, and other large, complex transactions.”¹²

While opinion letters are a routine part of business transactions,¹³ lawyers issuing opinion letters should not take the task lightly.¹⁴ Lawyers can be and have

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⁷ See Lipson, supra note 2, at 116 n.294.

⁸ See id. at 61-62; TriBar Opinion Committee, supra note 1, at 596; Committee on Legal Opinions, Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association, 47 BUS. LAW. 167, 169 (1991).

⁹ Lipson, supra note 2, at 71 (citing Committee on Legal Opinions, Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875, 875 (2002)).

¹⁰ TriBar Opinion Committee, supra note 1, at 596.

¹¹ Schwarcz, supra note 6, at 10-11 ("[T]he inability of counsel to deliver a requested opinion at closing signals a problem and allows intended opinion recipients to refuse to consummate the transaction."); see Committee on Legal Opinions, Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875, 875 (2002).

¹² Lipson, supra note 2, at 62. “Because the transactions requiring third-party legal opinions span the entire range of business and financial undertakings, such opinions have become far more prevalent than opinions directed to clients.” Schwarcz, supra note 6, at 9.

¹³ See supra text accompanying notes 10-12; Lipson, supra note 1, at 80.
been sued by third parties for false or misleading statements contained in opinion letters. In fact, many lawyers perceive this risk of liability to be increasing. In a study conducted by Professor Jonathan C. Lipson, “[m]any of the lawyers interviewed . . . said that they thought that lawyers were becoming increasingly attractive litigation targets when transactions failed, and that opinion letters would form an important link in the chain leading to liability.”

Complicating matters, there is little case law governing tort liability arising from false or misleading opinion letters. There is also a lack of academic literature on the subject, despite the prevalence of opinion letters. Other than sporadic case law and reports from state bar associations, the only major resources on third-party opinions are an article written by the TriBar Opinion Committee, two articles written by the American Bar Association’s Section of Business Law, two sections in the Restatement (Third) of the Law Governing Lawyers, two sections in the Restatement (Second) of Torts, Model Rule of Professional Conduct 2.3, and a treatise by Arthur Norman Field and Jeffrey M. Smith.

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14 Id. at 102 (“[L]awyers express increasing anxiety about liability for their opinion letters, and find support for this concern in recent decisions.”); see Joseph S. Berman, Attorney Opinion Letters, BOSTON B.J., Sept.-Oct. 2005, at 20.

15 Berman, supra note 14, at 20; see Lipson, supra note 2, at 102-09.

16 Lipson, supra note 2, at 65, 102.

17 Id. at 65.

18 See id. at 102-05. See generally Berman, supra note 14 (analyzing two seemingly contradictory Massachusetts cases).

19 Lipson, supra note 2, at 61 (“Few practices among U.S. lawyers are more curious—or (curiously) less studied by legal scholars.”); Schwarcz, supra note 6, at 12 (The relevant scholarly literature is . . . sparse.”).

20 TriBar Opinion Committee, supra note 1, at 592.

21 Committee on Legal Opinions, supra note 11; Committee on Legal Opinions, Legal Opinion Principles, 53 BUS. LAW. 831 (1998).


24 MODEL RULES OF PROF’L CONDUCT R. 2.3 (2002).

25 ARTHUR NORMAN FIELD & JEFFREY M. SMITH, LEGAL OPINIONS IN BUSINESS TRANSACTIONS (2d ed. 2007).
There may be a couple of reasons why there is not highly developed case law or an extensive amount of scholarly research on third-party-opinions. It may be that most cases against lawyers over faulty opinion letters are settled. Alternatively, there may not be many of such cases filed. Whatever the reason for the dearth of case law and research on the issue, lawyers are still fearful of potential liability, and many predict that attorney liability will only increase in the future.

Perhaps even more troubling than the scarcity of case law, existing case law on opinion letter liability is sometimes contradictory. For example, in April of 2004, one Massachusetts state trial court held that an attorney did not owe a duty of care to a recipient of a third-party opinion letter because that duty conflicted with obligations to his client. In December of 2004, under similar facts, another Massachusetts state trial court held that an attorney does owe the recipient of a third-party opinion letter a duty of care because the recipient is entitled to rely on the opinion. Thus, even when relevant authority exists, it does not always provide clear guidance. This Article endeavors to synthesize the lessons from existing case law; report the trends in opinion letter liability as documented in case law, bar reports, and scholarly articles; and use those resources to provide guidelines to help lawyers avoid liability. The law on opinion letters is unsettled, but it is possible to discern a few general rules and to identify some situations where lawyers should explicitly protect themselves from potential liability.

Part I of this Article discusses the scope of an opinion letter and how and why opining counsel must define this scope to lessen their chances of liability. Part II examines the complexities lawyers face when the law that is the subject of the opinion is unclear or likely to change and suggests how lawyers may safely issue an

\[26\] See Lipson, supra note 2, at 104-06. “Many of the lawyers interviewed for this project acknowledged that they personally knew of no lawyers who had been sued for errors in a third-party closing opinion and held liable (or settled for more than nominal damages) . . . ‘[o]pinion issues represent a very, very small number’ of malpractice claims.” Id.

\[27\] Id. at 105 (“[T]he fact that there aren’t a lot of cases to hold lawyers liable and there isn’t a lot of experience of lawyers being sued, doesn’t mean that people aren’t fearful of it nevertheless.”); see supra text accompanying note 17.

\[28\] See Lipson, supra note 2, at 84; supra text accompanying note 18.


\[31\] See supra text accompanying notes 18-19, 28-30.
opinion under those circumstances. Part III lists some subjective terms and phrases that are commonly used in opinion letters, explains what issues arise when these terms and phrases are used, and offers ways for lawyers to avoid litigation. Finally, Part IV explores whether opining counsel owes a duty of care or disclosure to third-party opinion recipients.

I. SCOPE OF THE OPINION LETTER

One of the most basic concerns for opinion-giving counsel should be the scope of the opinion letter. A lawyer issuing an opinion should be keenly aware of what bodies of law are covered by the opinion letter, as those laws define the scope of the lawyer’s professional judgment on the issues and will be used to determine whether that judgment was proper. The scope of an opinion letter may be different, however, if the opinion has adopted the Legal Opinion Accord (“Accord”). To decrease the risk of liability for an opinion letter, opining counsel must carefully define the scope of the opinion and understand how the scope may change if the opinion adopts the Accord.

A. Non-Accord Opinions

In Day v. Dorsey & Whitney, plaintiffs sued a law firm and one of its partners for legal malpractice, fraudulent misrepresentation, negligent misrepresentation, and consumer fraud resulting from a third-party opinion letter. The parties disputed the areas of law that the firm agreed to cover in the opinion letter. Plaintiffs contracted to buy stock in a subsidiary of the firm’s client, a gaming corporation. As a condition to consummation of the deal, plaintiffs required counsel for the gaming corporation to issue an opinion as to the validity of both the stock purchase

32 See TriBar Opinion Committee, supra note 1, at 597 (“Opinions are often subject to qualifications, some stated and some not.”).
33 See FIELD & SMITH, supra note 25, at § 3.7; TriBar Opinion Committee, supra note 1, at 597.
34 See infra text accompanying notes 68-72 (discussing the meaning and effect of the Accord).
35 No. 98-1425, 2001 U.S. Dist. LEXIS 26149 (D. Minn. Feb. 21, 2001), aff’d, 21 F.App’x 530 (8th Cir. 2001).
36 Id. at *1.
37 Id. at *5-*6, *20.
38 Id. at *2.
and the gaming corporation’s operations under securities law and Indian gaming law.\textsuperscript{39}

The law firm believed it had been retained solely to address questions concerning securities law, despite the fact that the firm actually had an Indian gaming practice group.\textsuperscript{40} In the engagement letter between the firm and the gaming corporation, the corporation requested that the firm “pay[] especially close attention to the securities related issues, as [the corporation was] frankly not very knowledgeable to the securities area.”\textsuperscript{41} The court stated that “the letter appears to limit [the firm’s] representation . . . to securities-related issues . . . .”\textsuperscript{42} The plaintiffs claimed, however, that the firm “had an obligation to review Indian gaming matters as they arose in [its] representation of [the gaming corporation] and to adequately address those issues in [its] opinion letter.”\textsuperscript{43} The gaming corporation gave conflicting signals concerning the scope of the firm’s representation, with one executive officer testifying that he did not specifically direct the firm to research or not to research Indian gaming law.\textsuperscript{44}

The plaintiffs based their suit on one false representation in the opinion letter.\textsuperscript{45} The firm had opined in the letter that “we knew of no material failure by the [gaming corporation] to (i) comply with any laws, regulations and orders applicable to its business . . . or (iii) comply with any state or federal judgment, decree, order, statute, rule or regulation applicable to or binding upon the [gaming corporation].”\textsuperscript{46} In fact, the corporation was (allegedly) in violation of federal Indian gaming law, and federal agents raided the corporation’s offices, seizing company records, books, and computer equipment.\textsuperscript{47} The plaintiffs claimed that the failure of the subsidiary and

\textsuperscript{39} See id. at *5.
\textsuperscript{40} Id. at *5-*6.
\textsuperscript{41} Id. at *5.
\textsuperscript{42} Id. at *5-*6.
\textsuperscript{43} Id. at *6.
\textsuperscript{44} Id. at *7 n.4.
\textsuperscript{45} Id. at *11-*12.
\textsuperscript{46} Id. at *9.
\textsuperscript{47} Id. at *11.
the subsequent loss of their investments resulted due to public disclosure of the
gaming corporation’s alleged violations of federal law.\footnote{48}

The court granted the defendants’ motion for summary judgment, holding as
a matter of law that plaintiffs’ reliance on the opinion letter was unreasonable and
that any alleged misrepresentations in the opinion letter did not proximately cause
the investment loss.\footnote{49} Thus, the court never reached whether the scope of the firm’s
representation included Indian gaming law.\footnote{50} The court hinted at the result, however, by calling plaintiff’s claim that the representation included Indian gaming law “questionable.”\footnote{51} In addition, the court noted that the engagement letter between the firm and corporation seemed to limit the firm’s representation to
securities law.\footnote{52}

The court further stated that “[a]s legal representative for the investors in this
transaction, [the lead plaintiff, who was both an investor and the attorney for the
investors] had the unique opportunity to negotiate statements from [the] defendants
that [the gaming corporation’s] operations were in full compliance with federal
Indian gaming laws,” as opposed to just “applicable laws.”\footnote{53} The court found the
plaintiffs’ failure to avail themselves of this opportunity to be especially conspicuous
given that plaintiffs had negotiated an opinion letter from another lawyer that did
contain those affirmative representations.\footnote{54} The court’s analysis could indicate that
the term “applicable laws” is not as broad as it may seem, although the court
assumed for purposes of the summary judgment motion that the opinion covered
Indian gaming law.\footnote{55} Thus, while it is plausible that an opinion covering “applicable
laws” would indeed cover applicable Indian gaming laws, the court’s language
suggests that the phrase “applicable laws” might not cover all laws that would seem
to be applicable—especially if another opinion letter in the same transaction
specifically addressed certain applicable bodies of law.\footnote{56} The court highlighted the

\footnote{48} Id.

\footnote{49} Id. at *24, *30.

\footnote{50} Id. at *20 n.10.

\footnote{51} Id.

\footnote{52} See supra note 42 and accompanying text.

\footnote{53} Day, 2001 U.S. Dist. LEXIS 26149 at *22-*23.

\footnote{54} Id.

\footnote{55} Id. at *22-*23, *20 n.10.

\footnote{56} See id. at *22-*23.
limitations of the firm’s opinion letter, declaring that it “only provides a negative assurance, limited to [the firm’s] knowledge, that [it] ‘know[s] of no material failure by [the gaming corporation] to comply . . . with applicable laws . . . and state and federal statutes.’”57 The plaintiffs’ failure “to negotiate affirmative assurances from [the firm] concerning [the gaming corporation]’s compliance with federal Indian gaming laws” was one reason the court found the plaintiffs’ reliance on the opinion letter to be unreasonable as a matter of law.58

If the Day case had not ended with summary judgment, it seems likely that the court would have determined that the firm’s representation did not extend to Indian gaming law and, thus, there was no false representation of compliance with Indian gaming laws in the opinion.59 The firm and the attorney may have avoided litigation altogether, however, by explicitly providing in the opinion letter what bodies of law the opinion did and did not cover.60 If the opinion letter specifically provided that it only applied to securities law or that it did not apply to Indian gaming law, any claim that the opinion was false or misleading in regards to Indian gaming law would obviously fail. To avoid liability, third-party opinions should include a provision “that states what law is covered by the closing opinion.”61 Such provisions are “strictly construed to exclude responsibility for any other law.”62

The opinion letter at issue in Day did include a provision stating that it was “limited ‘to the laws of the State of Minnesota, the Delaware General Corporation Law, and the federal laws of the United States of America.’”63 It did not, however, state what federal laws did not apply. The firm could have prevented the lawsuit by simply (1) informing the plaintiffs that the opinion letter would not address Indian gaming law64 and (2) stating in the opinion letter that the opinion was applicable only

57 Id. at *23.
58 Id. at *24 (“[T]he Court finds that under the facts and circumstances of this case—the opinion letter’s disclosures, plaintiffs’ access to the relevant information and Day’s ability, as legal representative, to negotiate affirmative assurances from defendants concerning [the gaming corporation]’s compliance with federal Indian gaming laws—plaintiffs’ reliance was unreasonable as a matter of law.”); see infra notes 82-96 and accompanying text for further discussion of the Day case.
59 See supra text accompanying note 50.
60 See FIELD & SMITH, supra note 25, at § 3.7.
61 Id.
62 Id.
64 Normally, the opinion recipient will tell issuing counsel what law should be covered in the opinion. See Committee on Legal Opinions, supra note 10, at 215-16 (“To avoid misunderstandings, the
to securities law matters and that it “express[ed] no opinion with respect to [any other] matters.”

B. Accord Opinions

If an opinion letter has adopted the Accord, it is generally much easier to define the scope of the opinion. The Accord is a collection of various assumptions, limitations, and interpretations that governs all opinions that adopt it. It was promulgated by the Business Law Section of the American Bar Association in 1991 as a way for opining counsel to standardize opinion letters and incorporate many of the customary assumptions and limitations in their opinions implicitly. Developed in response to the confusion that plagued opinion givers and recipients over the meaning of opinion provisions, the Accord is “a detailed set of rules that define[] for those who [choose] to adopt them how an opinion letter should be interpreted, the laws it should be understood to cover, the factual investigation the opinion giver [is] expected to conduct and the meaning of several standard opinion clauses.”

Adopting the Accord would generally prevent the questions present in Day concerning the scope of an opinion letter. Section 18 of the Accord provides that an opinion that adopts it “deals only with the specific legal issues it explicitly addresses.” Section 19 states that an adopting opinion “does not address any of the following legal issues unless the Opinion Giver has explicitly addressed the specific legal issue in the Opinion Letter.” Section 19 then lists eighteen different types of

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65 Id. at 221.
67 Committee on Legal Opinions, supra note 11, at 170.
68 See Infocure, 210 F. Supp. 2d at 1356; Committee on Legal Opinions, supra note 11, 169.
69 See Glazer, supra note 3, at 34. Although the Accord was created as a way to bring uniformity to opinion letter interpretation, adoption in opinions is not common. As noted by Glazer, “[t]he Accord never caught on in major financial centers.” Id.
70 See supra note 69 and accompanying text.
71 Committee on Legal Opinions, supra note 11, at 214.
72 Id. at 215-16.
legal issues from federal securities law to federal and state labor laws and regulations.\(^\text{73}\)

In *In re Infocure Securities Litigation*, plaintiffs attempted to bolster their claims of securities fraud and breach of contract by arguing that an opinion letter from opposing counsel addressed securities law.\(^\text{74}\) Because the opinion letter adopted the Accord, however, it was clear that securities law was beyond the scope of the opinion.\(^\text{75}\) The court declared that ―an [o]pinion [l]etter subject to the ABA Accord contains many limitations on its scope‖ and that the letter at issue ―does not relate to [a corporation’s] overall compliance with securities laws.‖\(^\text{76}\) The court also stated that such an opinion letter ―simply confines itself to the execution of the transaction documents and the obligations thereunder.‖\(^\text{77}\)

II. WHEN THE LAW IS UNCLEAR OR SUBJECT TO CHANGE

Opinion-issuing counsel may be concerned when the law at issue is unclear or subject to change. Lawyers are often asked to issue an opinion regarding well-established law, but are sometimes asked to give an opinion regarding law that is either ambiguous or in a state of flux.\(^\text{78}\) While some lawyers may elect to forgo issuing opinions in such situations,\(^\text{79}\) opinions are often still required to close the deals.

A lawyer’s representations (1) that her client and the transaction at issue do not violate the law and (2) that the transaction is enforceable under applicable law are based on the lawyer’s perception of the current state of the law. If the law cannot be accurately perceived or is likely to change after the opinion has been issued, a “no

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\(^{73}\) Id.


\(^{75}\) Id. at 1358.

\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) See generally *Day v. Dorsey & Whitney*, No. 98-1425, 2001 U.S. Dist. LEXIS 26149 (D. Minn. Feb. 21, 2001), aff'd, 21 F.App’x 530 (8th Cir. 2001) (law allegedly covered by the opinion letter was unclear at the time of issuance).

\(^{79}\) There is an argument that it would be unfair to ask lawyers to give a legal opinion in this situation. The American Bar Association’s Committee on Legal Opinion’s “Golden Rule” is that “[a]n opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise.” Committee on Legal Opinions, *supra* note 11, at 878.
violation” or “enforceability” opinion may be inaccurate. Of course, because lawyers are not expected to possess psychic qualities, they are not required to accurately predict the future state of the law. According to the American Bar Association’s Committee on Legal Opinions, both Accord and non-Accord opinion letters “speak[ ] as of [their] date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments.”

Thus, the problem is not that the law is uncertain or likely to change; the real problem is how to issue such an opinion. As is often the case, honesty is the best policy.

In Day v. Dorsey & Whitney, the firm’s opinion that the corporation complied with all applicable laws was subject to an exception provided in an exhibit of the agreement. Exhibit B included any matters that could cause the corporation to be in violation of an applicable law. Although the law firm did not consider its opinion to include Indian gaming law, Exhibit B disclosed that the corporation’s Indian gaming operations could contravene the law in some states. At the time of issuance, the legality of the corporation’s operations under Indian gaming law, though supposed, was unclear. Exhibit B provided a relevant Supreme Court case and federal statute that indicated the probable legality of the gaming operations but cautioned that the corporation’s operations could still be halted by state action.

In addition to the information in Exhibit B, plaintiffs also received a letter from one of the corporation’s executive officers and the corporation’s Form 10-K. Both stated the possibility that the corporation’s gaming operations could violate the law. Even though the opinion indicated that the gaming operations were probably free from legal challenge under Supreme Court case law, the disclosure of possible invalidity prevented a reasonable reliance on that opinion. Importantly, the court found that the opinion letter disclosures were relevant to the firm’s avoidance of

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80 Id.; see Committee on Legal Opinions, supra note 8, at 196 (“The Opinion Giver has no obligation to advise the Opinion Recipient (or any third party) of changes of law or fact that occur after the date of the Opinion Letter—even though the change may affect the legal analysis, a legal conclusion or an informational confirmation in the Opinion.”).


82 Id.

83 Id. at *9-*10.

84 See id.

85 Id.

86 See id. *21-*22.

liability, despite the fact that the letter did not specify which laws the client was potentially violating.\textsuperscript{88}

According to the court, “the opinion letter contained express warnings to investors regarding the potential risks of their investment.”\textsuperscript{89} Quoting another case, the court further stated that “plaintiffs’ reliance [is] unreasonable where the letter ‘raise[s] more red flags about the investment than gives assurance . . . .’”\textsuperscript{90} Considering “the opinion letter’s disclosures, plaintiffs’ access to the relevant information [in the letter from the corporation’s executive and the Form 10-K] and Day’s ability, as legal representative, to negotiate affirmative assurances from defendants concerning [the corporation’s] compliance[,] . . . plaintiffs’ reliance was unreasonable as a matter of law.”\textsuperscript{91}

Thus, as illustrated in \textit{Day}, when issuing an opinion regarding law that is unclear or subject to change, a lawyer should state in the opinion that the law is unclear or subject to change.\textsuperscript{92} As an added precaution, this disclosure could be documented in other correspondence between the client and third party. In \textit{Day}, the opinion letter specifically provided that the corporation’s games could be removed from casinos, and plaintiffs had a letter from the corporation and the corporation’s Form 10-K that provided the same.\textsuperscript{93} The more sophisticated an opinion recipient, the more likely that a disclosure in the opinion will suffice to protect an opining attorney from liability: “[I]n evaluating the reasonableness of plaintiffs’ reliance, the Court asks not whether the representations would deceive the average person, but rather whether the representations would deceive ‘a person of the capacity and experience of the particular [plaintiff].”\textsuperscript{94}

\textsuperscript{88} \textit{Id.} at *23.

\textsuperscript{89} \textit{Id.} at *24.

\textsuperscript{90} \textit{Id.} (quoting Nolte v. Pearson, 994 F.2d 1311, 1318 (8th Cir. 1993)).

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} This, of course, would comply with one of the first “guidelines” in issuing third-party opinions—not to mislead the recipient. “An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.” Committee on Legal Opinions, \textit{supra} note 11, at 876.


III. DEFINITION OF SUBJECTIVE TERMS

In addition to the scope of representation and the certainty of governing law, opining counsel should pay particular attention to the definition of subjective terms contained in their opinion letters. This is especially true in opinions that do not adopt the Accord and, therefore, do not have a set of rules that guide interpretation.\(^{95}\) When the meaning of certain words or phrases is ambiguous, it is likely that different parties will interpret the words or phrases differently.\(^{96}\) When interpretations differ, litigation may follow.\(^{97}\)

A. “To Our Knowledge”

Perhaps the most common phrase in any document involving factual representations is “to our knowledge.”\(^{98}\) The phrase “to our knowledge” is a standard limitation that restricts the breadth of the representation being made.\(^{99}\) Instead of certifying that certain facts are true, a representation that includes the clause “to our knowledge” simply states that the party making the representation does not know that certain facts are untrue.\(^{100}\) Although the ambiguity in this phrase is not readily apparent, a quick look at opinion letter case law reveals uncertainty in application.\(^{101}\) One of the main areas of uncertainty involves the degree of investigation required before making a representation to one’s knowledge. Another concern involves the scope of knowledge that opining counsel is expected to possess.\(^{102}\)

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95 See supra text accompanying notes 66-70.
96 The ABA acknowledged this in its promulgation of the Accord. The ABA intended to produce a document that would prevent the frequent misunderstandings between parties over the interpretation of opinion letter provisions. See supra text accompanying notes 66-70 (explaining the creation and adoption of the Accord).
97 See infra Part III, A, B.
98 See Committee on Legal Opinions, supra note 11, at 879; Berman, supra note 14, at 20.
99 See Committee on Legal Opinions, supra note 11, at 879.
100 See id.
101 See generally Berman, supra note 14, at 20-22 (examining conflicting opinion letter case law).
102 See Committee on Legal Opinions, supra note 11, at 879; Berman, supra note 14, at 21-22.
The American Bar Association states in its Guidelines for the Preparation of Closing Opinions ("ABA Guidelines"), created for opinions that do not adopt the Accord.\(^{103}\)

To avoid a possible misunderstanding over the meaning of "knowledge," the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend "to our knowledge" to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).\(^{104}\)

*Dean Foods Co. v. Pappathanasi*\(^{105}\) illustrates that even a definition of "to our knowledge" in the opinion letter may not fully protect opining counsel.

In *Dean Foods*, a law firm and three attorneys were sued for negligence, negligent misrepresentation, and violation of a Massachusetts unfair practices act in connection with a third-party opinion letter.\(^{106}\) The plaintiff had contracted to buy stock in a holding company that held all of the stock of the firm's client.\(^{107}\) As a condition to consummation of the stock purchase, the defendant issued the plaintiff a "no litigation" opinion (*i.e.*, an opinion stating that the firm's client was not threatened by any pending or potential litigation).\(^{108}\) The opinion at issue represented:

To our knowledge, except as set forth in Schedule 2.10 of the Company Disclosure Schedule, there is no claim, action, suit, litigation, proceeding, arbitration or, [sic] investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or threatened against the Company or any of its subsidiaries and neither the Company nor any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing

\(^{103}\) Committee on Legal Opinions, *supra* note 11, at 875.

\(^{104}\) *Id.* at 878.


\(^{106}\) *Id.* at *11.

\(^{107}\) *Id.* at *6*. Although the plaintiff in this case is really a group of "corporately related" entities, for the purposes of the case, all function together as a single company. *Id.* at *1.

\(^{108}\) *Id.* at *7.*
investigation by, any Governmental Entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders.\textsuperscript{109}

In defining “to our knowledge,” the opinion letter stated:

With respect to matters stated to be ‘to our knowledge,’ we call your attention to the fact that we have not made any independent review or investigation of agreements (other than those expressly referred to herein), instruments, orders, writs, judgments, rules, regulations or decrees by which our clients or any of their properties may be bound, nor have we made any investigations as to the existence of actions, suits, investigations or proceedings, if any, pending or threatened against our clients, except to the extent that any of the above is disclosed in any exhibit or schedule to the Purchase Agreement. However, nothing has come to our attention which causes us to doubt the accuracy of such exhibits or schedules.\textsuperscript{110}

The firm further stated in the opinion letter that “[i]n rendering our opinions we have examined such materials as we have deemed relevant to those opinions . . . .”\textsuperscript{111}

When the firm issued the opinion, the firm knew that its client’s records had been subpoenaed by a grand jury in connection with a case involving the client’s rebate program.\textsuperscript{112} The firm also knew that the Assistant U.S. Attorney was investigating the legality of the client’s rebate program.\textsuperscript{113} Nowhere in Schedule 2.10 or in any other schedule or exhibit to the agreement did the firm disclose the grand jury subpoena or rebate investigation.\textsuperscript{114}

Three years after the opinion letter was issued, the firm’s client pled guilty to conspiracy to commit tax evasion in connection with its rebate program.\textsuperscript{115} The plea

\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at *1,*8,*10.
\textsuperscript{113} Id. at *2, *9,*10.
\textsuperscript{114} Id. at *8; see id. at *10.
\textsuperscript{115} Id. at *10.
resulted in a fine of over seven million dollars. The plaintiff sued the firm and attorneys involved for the misrepresentations in the opinion, arguing that it would not have purchased stock in the client’s company had it known of the grand jury subpoena and rebate investigation. Although the firm’s defense was not entirely clear, one of the litigators in the firm asserted that he did not accurately comprehend what matters needed to be included in the opinion and that he was unaware the firm was issuing an opinion letter regarding the client’s criminal liability. Although the court absolved the attorneys of individual liability, the court held the firm liable for both common negligence and negligent misrepresentation.

The court began its analysis of the case by exploring the meaning of third-party opinions in general. Quoting § 95(1) of the Restatement (Third) of the Law Governing Lawyers, the court declared: “In furtherance of the objectives of a client in representation, a lawyer may provide to a nonclient the results of the lawyer’s investigation and analysis of facts or the lawyer’s professional evaluation or opinion on the matter.” The court also quoted § 95(3), which states: “[i]n providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient . . . .” The court then looked at the customary standard of care. A court dealing with an opinion that adopted the Accord probably would not need to look at customary practice to interpret meaning, but the court here was forced to examine other sources to determine the breadth of the third-party opinion in general and the no-litigation opinion in particular.

Quoting the widely read and highly respected TriBar Opinion Committee report, Third Party “Closing” Opinions (“TriBar Report”), the court stated that “[f]actual information that is the subject of an opinion (e.g., no litigation) . . . must be

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116 Id.
117 Id. at *10.
118 Id. at *9.
119 Id. at *23.
120 See id. at *11.
121 Id. (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95(1) (1998)).
122 Id. (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95(3) (1998)).
123 Id. at *12.
124 See supra text accompanying notes 66-70 (explaining that adoption of the Accord means that an opinion will be subject to a defined list of assumptions, limitations, and interpretations).
125 Dean Foods Co., 2004 WL 3019442, at *12.
established in a way that meets the needs of the parties to the transaction.”

After explaining that an opinion giver must use judgment in determining whether the opinion conforms to customary practice of the locale, the court made it clear that the opinion giver has an underlying responsibility to refrain from misleading the recipient.\textsuperscript{127} Quoting the TriBar Report, the court explained:

> When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas excluded from the opinion. . . . Inclusion of the phrase ‘to our knowledge’ in an opinion does not by itself . . . state a limitation on the investigation required by customary diligence.”\textsuperscript{128}

The court again quoted TriBar Report, stating:

> The no litigation opinion is intended to elicit information regarding the \textit{existence} of pending and threatened actions and proceedings . . . that might be of concern to the opinion recipient. . . . The presence or absence of the phrase ‘to our knowledge’ does not change the meaning of the opinion. With or without ‘to our knowledge,’ the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable.\textsuperscript{129}

The court found that the phrase “to our knowledge” represents that the opinion is accurate as to the knowledge of all of the lawyers in the firm, not just the lawyers who actually prepared the opinion.\textsuperscript{130} Responding to the defendants’ argument that the opinion was not prepared by the same group of lawyers who handled the client’s litigation matters, the court stated that “[a]n opinion letter is usually written on a law firm’s letterhead and signed in the name of the firm. It thus

\textsuperscript{126} Id. at *13 (quoting TriBar Opinion Committee, \textit{supra} note 1, at 598).

\textsuperscript{127} Id.; see \textit{supra} note 99 (explaining that honesty is the best policy).

\textsuperscript{128} Id. (quoting TriBar Opinion Committee, \textit{supra} note 1, at 602, 619).

\textsuperscript{129} Id. at *14 (quoting TriBar Opinion Committee, \textit{supra} note 1, at 664).

\textsuperscript{130} Id. at *13.
purports to express the opinion of the firm, not merely that of the opinion preparers.”131 Additionally, the court stated:

The no-litigation opinion is based on the assumption that the opinion giver has a special awareness of pending or threatened actions, a special ability to verify their existence or nonexistence through client records, or special ability to ask the right questions of the appropriate people to determine that the certificate provided by the officers of the company includes and appropriately describes all pending actions.132

Significantly, it was of no consequence that the defendants did not believe the grand jury subpoena and rebate investigation would result in criminal prosecution.133 The court also again referenced the TriBar Report, holding that any possible or pending actions should be disclosed in the no litigation opinion.134 The court explained that these matters must be included even if presumably closed:

There is a dramatic difference in asking a lawyer . . . whether he thinks a grand jury investigation has gone away, and asking him whether his law firm can decline to reveal the grand jury investigation in an opinion letter that confirms the absence of pending or threatened investigations, while being embroidered with the nothing-has-come-to-our-attention-which-causes-us-to-doubt-the-accuracy-thereof language.135

Of course, the use of the phrase “nothing has come to our attention which causes us to doubt the accuracy of such exhibits or schedules” made the court’s analysis easier.136 This phrase makes the defendants’ representation that they did not know of any pending investigation much more explicit. As stated by the court:

In its Opinion Letter . . . [the law firm] not only failed to list in Schedule 2.10 the . . . grand jury subpoena/rebate investigation, it went

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131 Id. (citing TriBar Opinion Committee, supra note 1, at 605).

132 Id. at *14.

133 See id. at *8 (stating that one defendant-lawyer’s “guesstimate[d]” that the matter had gone away).

134 See supra text accompanying note 129.

135 Dean Foods Co., 2004 WL 3019442, at *17.

136 See supra text accompanying note 110.
a significant step further when it affirmatively said: “nothing has come to our attention which causes us to doubt the accuracy thereof.” These words—“nothing has come to our attention which causes us to doubt the accuracy thereof”—appear in the Opinion Letter not just once, but twice.137

It is probable, however, that the absence of this phrase would not have affected the end result of firm liability for common negligence and negligent misrepresentation. After all, opinion givers have a general obligation not to mislead opinion recipients,138 especially in no litigation opinions, which represent that there is no undisclosed pending or threatened claim, action, suit, litigation, proceeding, arbitration, or investigation.139 By issuing a no litigation opinion, a firm represents that it does not know of any litigation and implicitly represents that it does not know of any facts that might indicate possible litigation.

Examining the court’s analysis in Dean Foods, there are several lessons for lawyers who make factual representations in opinion letters. The primary lesson is that the phrase “to our knowledge,” no matter how defined, cannot transform the meaning of a representation.140 Because an opinion letter should not mislead the opinion recipient, the use of “to our knowledge” will not free opining counsel from liability for issuing an opinion that it had reason to know was not true.141

Another lesson found in Dean Foods is rather simple, but very important: if an opinion letter is signed by a firm, the opinion is considered to be issued by the entire firm and not just the lawyers who participated in drafting the opinion.142 “To our knowledge” in a firm-issued opinion means “to the knowledge of all the lawyers in this firm.”143 If a firm represents a client in several different capacities, lawyers drafting the opinion letter for the client should verify with other lawyers working for the client that the opinion letter is accurate.144 “There is no absolute requirement

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137 Id. at *18.
138 See supra text accompanying note 130.
139 See supra text accompanying note 133.
140 See supra text accompanying notes 130-33.
142 See supra text accompanying notes 134-35.
143 See id.
that every lawyer be consulted and every file reviewed. Informal consultations will satisfy the due diligence inquiry, provided that the opinion preparer talks to the appropriate people.”

The ability of opining counsel to lessen this duty of “due diligence inquiry” is another question for which *Dean Foods* has an intriguing answer.

Interestingly (and perhaps disturbingly), *Dean Foods* can be read to mean that opinion preparers are always subject to duties imposed by customary diligence and that the phrase “to our knowledge” cannot limit those duties. If this is true, despite any explanation of the meaning of “knowledge” in the opinion, “to our knowledge” may not ever be completely defined within the four corners of an opinion letter. The American Bar Association instructs opining counsel to define the meaning of “to our knowledge” as used in an opinion, but *Dean Foods* suggests that part of its meaning may be dictated by customary practice beyond the express definition. Thus, use of the phrase “to our knowledge” may bind opining counsel to the phrase’s customary meaning, even when the opinion provides otherwise.

The *Dean Foods* court essentially stated that a firm making a factual representation in an opinion letter has a customary duty to investigate the accuracy of the representation as to all the lawyers within the firm, regardless of which attorneys drafted the opinion, notwithstanding the “to our knowledge” limitation.

Understanding the facts of *Dean Foods* and the court's analysis, the court’s ruling that “to our knowledge” does not limit the investigation required by customary practice is probably not as broad as it seems. Although *Dean Foods* could be read to mean that a “to our knowledge” limitation does not limit those duties imposed by customary practice, *Dean Foods* probably means that “to our knowledge” cannot implicitly abrogate those obligations required by customary practice. When a firm does not state whether it has investigated pursuant to customary diligence, the firm will be held to the standard of customary diligence; on the other hand, when a firm explicitly states that it did not complete the investigation required by customary diligence, the firm probably would not be held to that standard. It is unlikely that the *Dean Foods* court would find a firm liable if (1) the firm explicitly provided in the opinion letter that its representations were limited to the knowledge of the actual

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145 Berman, supra note 14, at 22.
146 See supra text accompanying note 111.
147 See supra text accompanying note 104.
preparers and (2) the preparers did not possess actual knowledge concerning any investigations. 149

*Dean Foods* also teaches that required matters must be disclosed in an opinion even if opining counsel thinks that the matters will be resolved. 150 The obligation to disclose certain matters to a third-party recipient remains even when opining counsel believes disclosure is unimportant. 151 Moreover, as evidenced by the facts of *Dean Foods*, it may be hard to tell which matters are important. Undoubtedly, the court’s analysis of this issue was aided by the fact that an expert witness testified that it was below a lawyer’s standard of care to think that such matters were closed.

*Dean Foods* is also fascinating because the firm actually advised its client to disclose the existence of the grand jury subpoena and rebate investigation in the opinion letter. 152 The client, however, decided against including the matters in the opinion letter, fearful that disclosure would lead to interference with the stock purchase by minority shareholders. 153 In addition to the more analytical points provided by this case, there is also a common sense tip: when a client desires to exclude a matter from an opinion letter because of fear that disclosure will kill the deal, counsel should know that that is the sort of matter that must be included.

Although *Dean Foods* is an unreported state court decision, its reasoning is based on the TriBar Report, one of the premier sources of authority on third party opinions. 154 Thus, what could otherwise be considered an irrelevant decision offers invaluable insight into how other courts would handle these issues.

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149 This point is especially compelling due to the sophistication of the opinion recipients. See supra notes 101 and accompanying text. In some situations, however, there may still be an argument that an opinion letter by its nature imposes some duties that cannot be abrogated. According to the D.C. Circuit Court, “[u]nder the securities laws, a statement of opinion includes an implied representation that the speaker rendered the opinion in good faith and with a reasonable basis. Good faith alone is not enough. An opinion must have a reasonable basis, and there can be no reasonable basis for an opinion without a reasonable investigation into the facts underlying the opinion.” Michael Sackheim, *Selected Ethical and Professional Responsibility Issues*, 1642 PRAC. L. INST.: CORP. L. & PRAC. COURSE HANDBOOK SERIES 129, 149 (2008) (citing Weiss v. SEC, 468 F.3d 849, 855 (D.C. Cir. 2006)).

150 See supra text accompanying notes 141-44. See infra Part IV.B. for an extended discussion on an opinion giver’s duty to disclose.

151 See *Dean Foods Co.*, 2004 WL 3019442, at *17.

152 Id. at *8.

153 Id.

154 See supra note 25 and accompanying text.
B. Other Subjective Terms

As previously discussed, in a “no litigation” opinion, opining counsel represents that there is no threatened litigation. Often, however, there is confusion as to what constitutes a “threat” of litigation. Additionally, in a “no litigation” opinion, opining counsel frequently provides that no threatened litigation exists that could have a “material adverse effect” on the client or the transaction. Often there is confusion as to what is considered “material.”

In In re Infocure Securities Litigation, the plaintiffs claimed that the defendant law firm did not disclose a threat of litigation in violation of the firm’s “no litigation” opinion. Plaintiffs claimed that a third party sent a letter threatening litigation against the firm’s client, creating a matter that required disclosure in the “no litigation” opinion. The district court, however, considered the letter to be a demand letter and stated that a demand letter was not a “threat” of litigation. A demand letter is defined as “[a] letter by which one party explains its legal position in a dispute and requests that the recipient take some action (such as paying money owed), or else risk being sued.” The court pointed out that the letter in this case contained only a demand and did not contain any express threat of future litigation. Moreover, the third party who sent the letter testified at trial that he had, in fact, agreed to cooperate with the client and did not threaten litigation by his letter.

The court in In re Infocure Securities Litigation did not explain why a demand letter did not constitute a threat of litigation despite the fact that demand letters are


156 Infocure Securities, 210 F. Supp. 2d at 1360.

157 Id.

158 Id. (“Moreover, a fair reading of the December 21, 1999, letter from Hafner’s counsel is that it was a demand letter, not a threat of litigation.”).

159 BLACK’S LAW DICTIONARY 462-63 (8th ed. 2004).

160 Infocure Securities, 210 F. Supp. 2d at 1360 (“Although Hafner’s attorney demands the registration of his client’s shares in accordance with the Registration Rights Agreement, he makes no threat of litigation in the December 21, 1999, letter.”).

161 Id. (“[The law firm] was expressly told and understood from the Infocure executives who were in direct contact with Hafner, that he had acquiesced in the delay in registration of his shares, and that he was not threatening litigation.”).
typically sent to ask the recipient to resolve a dispute “or else risk being sued.” The court merely distinguished between a demand letter and a threat of litigation without explaining the distinction. The court’s readiness to find a demand letter not a threat of litigation hinged on the peculiar facts of that case. Despite the general nature of demand letters, the demand letter at issue never mentioned litigation, and the sender admitted that he agreed to the client’s actions and was not threatening litigation.

The court’s quick dismissal of a “demand letter” as not a threat of litigation fails to provide guidance for a case in which a demand letter actually contains language expressly or implicitly discussing potential litigation, particularly when the client is unable or unwilling to comply with the letter’s demands. Uncertainty also exists in cases where the person who sent the letter testifies at trial that he intended the letter to serve as a threat of litigation. To avoid uncertainty over a court’s definition of a “threat” of litigation in different circumstances, opining counsel should define what constitutes a “threat” and specify what qualities a communication must possess in order for it qualify.

The most obvious way opining counsel can restrict the breadth of the term “threat” is to provide that only written threats must be disclosed. The opinion letter at issue in In re Infocure Securities Litigation, having adopted the Accord, contained such a provision. The Accord provides that only written threats must be disclosed in a “no litigation” opinion. According to the Accord, “[b]ecause it is so often difficult to judge whether oral communications regarding disputes constitute actual threats of legal proceedings, the confirmation in the Opinion Letter relates only to legal proceedings that have been overtly threatened by a written communication.”

162 See supra text accompanying note 159.
163 See supra note 158.
164 See supra notes 160-61 and accompanying text.
165 The “no litigation” opinion at issue in In re Infocure Securities appears to use “Threatened” as a defined term. See Infocure Securities, 210 F. Supp. 2d at 1341.
166 See id. at 1360 (stating that only written threats must be disclosed under the language of the “no litigation” opinion).
167 See id. at 1361 (“The ABA Accord clearly limits the confirmation of the threatened litigation to written communications.”); see supra note 75 and accompanying text (explaining that the opinion letter adopted the Accord).
168 Infocure Securities, 210 F. Supp. 2d at 1361.
169 Id. (quoting Committee on Legal Opinions, supra note 10, at 213).
Therefore, it is good practice to include a similar provision in “no litigation” opinions that do not adopt the Accord.

Similarly, opining counsel may limit what constitutes a threat to specifically defined language. To help prevent a claim like that in In re Infocure Securities Litigation, opining counsel should provide that a threat does not exist unless there is an express (as opposed to implicit) warning of litigation. Opining counsel should clearly state that a threat of litigation is an explicit warning of a suit, arbitration, action, claim, complaint, grievance, investigation, or proceeding if certain action is not taken or if certain action continues. This approach is similar to the Accord, which provides that a threat of litigation in a “no litigation” opinion refers only to those “legal proceedings overtly threatened by a written communication.” The opinion letter at issue in In re Infocure Securities Litigation adopted the Accord and, thus, provided that only overt threats could constitute a “threat” within the meaning of the opinion letter. While such a provision did not prevent litigation, it prevented the court from ruling against the firm. Although it may not be worth the extra time and expense in every situation, the more specifically the word “threat” is defined, the more certain opining counsel will be as to its interpretation. After In re Infocure Securities Litigation, opining counsel should consider expressly stating that a demand letter does not constitute a threat of litigation.

In addition to the word “threat,” disagreements often arise concerning the definition of “material.” “No litigation” opinions often state that pending or threatened litigation must be disclosed only if it could have a “material adverse effect” or result in a “material impairment” to the parties or the transaction. When the word “material” is used by multiple parties to a transaction, each party probably has its own idea as to what is, in fact, material.

Black’s Law Dictionary defines “material” as “[o]f such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.” The Restatement (Second) of Torts § 538 states that a matter is material if:

170 Committee on Legal Opinions, supra note 8, at 213.
171 See Infocure Securities, 210 F. Supp. 2d at 1359.
173 BLACK’S LAW DICTIONARY 998 (8th ed. 2004).
(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it. 174

In some situations, the materiality of an adverse effect or impairment would be beyond question. For example, a billion dollar judgment against a party will probably always be considered to have a material adverse effect or cause a material impairment. A thousand dollar judgment could be material, however, if it affected a contract central to a business’s operations. Non-monetary judgments could be considered material if they resulted in bad press for a corporation. Reasonable minds could easily differ as to what constitutes “material.”

In *National Bank of Canada v. Hale & Dorr, LLP*, four banks who lent money to a firm’s client sued the firm after receiving and relying on the firm’s opinion letter. 175 Alleging negligent misrepresentation, negligence, misrepresentation, breach of contract, and violation of a Massachusetts state statute, the banks claimed that the firm failed to disclose pending litigation involving its client as required by the firm’s “no litigation” opinion. 176 The “no litigation” opinion at issue stated:

To our knowledge, there is no action, suit, proceeding or investigation pending or threatened against [our client] before any court or governmental department, which could prevent the consummation of the transactions contemplated . . . or which, if adversely determined, could have a material adverse effect on the business, condition, affairs or operations of [our client] or any material impairment of the right or ability of [our client] to carry on its operations as now conducted. 177

When the firm issued its opinion, lawyers in the firm’s litigation practice group knew of a patent infringement suit against the client. 178

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174 *Restatement (Second) of Torts* § 538 (1977).
176 *Id.* at *1, *9–*10.
177 *Id.* at *5–*6.
178 *Id.* at *4.
The firm argued that its failure to disclose the patent infringement suit did not violate the “no litigation” opinion because the suit would not have a material adverse effect on its client even if adversely determined. A lawyer in the defendant firm argued that, because the client was already using technology that did not involve the patent at issue, an injunction prohibiting use of the patent would have little effect on its client. The banks countered that the loan would have involved significantly different terms or would not have been completed had they known about the patent infringement litigation. Because a genuine issue of fact existed concerning the likelihood of a material adverse effect resulting from the patent litigation, the banks’ claim of misrepresentation survived summary judgment.

Because of the subjectivity involved in the interpretation of “material,” the Accord provides that materiality should be defined using monetary amounts. It states: “[i]n order to avoid the uncertainties inherent in the meaning of materiality, it is desirable, whenever possible, to limit confirmations regarding pending or threatened legal proceedings seeking money damages to those exceeding an objective monetary or other threshold.” For opinions that do not adopt the Accord, the ABA Guidelines provide assistance. They state that “[w]hen possible, an opinion giver should avoid use of a materiality standard by using objective criteria (for example, a particular dollar amount, a specific category, or inclusion on a specified list) when limiting the matters addressed by an opinion.” ABA reports and relevant case law suggest that opining counsel should refrain from using the word “material” in its opinions. If opining counsel chooses to include the word, it should be defined using objective criteria. Although a party cannot use monetary thresholds as objective criteria when determining whether litigation involving equitable relief must be disclosed, some objective criteria should be used. For example, the firm in National Bank of Canada could have provided that only legal proceedings involving

179 Id. at *25.
180 Id.
181 Id. at *25-*26.
182 Id. at *26-*27.
183 Committee on Legal Opinions, supra note 8, at 213.
184 Id. It further states that “[t]his sort of limitation would not, of course, apply to legal proceedings seeking equitable relief or otherwise to interfere with the Transaction.” Id.
185 See Committee on Legal Opinions, supra note 11, at 878.
186 Id.
187 See supra note 184.
more than $1 million or potentially enjoining its client from using currently employed technology could be considered to have a material adverse effect on its client.

**IV. DUTY TO THIRD-PARTY RECIPIENT**

One of the most important issues surrounding third-party opinions is whether opining counsel owes a duty to the third-party recipient.\(^\text{188}\) Much of the case law and secondary authority concerning third-party opinions directly or indirectly address this question.\(^\text{189}\) For many claims, a duty to third-party recipients is a prerequisite to finding lawyer liability.\(^\text{190}\) If opining counsel can successfully argue that it does not owe a duty to third-party recipients, it may escape liability for what would otherwise be a faulty opinion.\(^\text{191}\) In examining the potential liability associated with issuing an opinion, opining counsel needs to determine what duties it may owe to recipients.

Generally, third-party recipients claim that they are owed both the duty of care and the duty of disclosure.\(^\text{192}\) A duty of care imposes an obligation to “exercise the competence and diligence normally exercised by lawyers in similar circumstances.”\(^\text{193}\) A duty of disclosure requires lawyers to reveal information to a third-party recipient when necessary to avoid misrepresentations caused by omissions.\(^\text{194}\) All negligence claims, including negligent misrepresentation, require

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\(^{188}\) See supra text accompanying notes 29-30 (discussing two Massachusetts trial courts that addressed similar cases in the same year and resolved them differently). See also Berman, supra note 14, at 20.


\(^{190}\) See, e.g., *Infocure Securities*, 210 F. Supp. 2d at 1351-54 (showing that securities fraud claims require a duty of disclosure to be owed to plaintiff); *Nat'l Bank of Can.*, 2004 Mass. Super. LEXIS 142, at *14-*23 (claims involving negligence require that the defendant owed the plaintiff a duty of care).


\(^{193}\) Restatement (Third) of the Law Governing Lawyers § 52.

\(^{194}\) See *Infocure Securities*, 210 F.Supp. 2d at 1350.
plaintiffs to show that they are owed a duty of care by the defendants. 195 Negligence claims comprise a large percentage of the total claims against lawyers in opinion letter litigation. 196 Fraud claims, including fraudulent misrepresentation, often require plaintiffs to show that they are owed a duty of disclosure by the defendants. 197 A third-party recipient who cannot show that opining counsel owed a duty of care or disclosure may find it difficult to convince the court of liability. 198

A. Duty of Care

Section 95 of the Restatement (Third) of the Law Governing Lawyers provides:

(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.

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(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient to the extent stated in § 51(2) and not make false statements . . . . 199


196 Although Infocure Securities did not involve a negligence claim, it did contain a legal malpractice claim, which (like a negligence claim) requires the plaintiff to prove a duty of care owed by the defendant. See Infocure Securities, 210 F. Supp. 2d at 1367-70.

197 See Infocure Securities, 210 F. Supp. 2d at 1351-54 (requiring a duty to disclose in a securities fraud claim); Freightliner, L.L.C. v. Whatley Contract Carriers, L.L.C., 932 So. 2d 883, 891 (Ala. 2005) (requiring a duty to disclose in a fraudulent suppression claim); Restatement (Second) of Torts § 551 (requiring a duty to disclose in a misrepresentation claim); 37 Am. Jur. 2d Fraud and Deceit § 24 (2008) (requiring a duty to disclose in a constructive fraud claim).

198 Third-party recipients can assert claims other than those based on negligence, and not every fraud or misrepresentation claim requires a plaintiff to show the duty of disclosure. See Nat'l Bank of Can., 2004 Mass. Super. LEXIS 142, at *23-24 (not listing duty to disclose as an element of misrepresentation under Massachusetts law). Because many cases regarding opinion letters involve negligence, and many fraud and misrepresentation claims frequently require plaintiffs to show a duty to disclose, the inability of third-party recipients to show a duty of care or disclosure significantly lessens the ability to prevail against opining counsel.

199 Restatement (Third) of the Law Governing Lawyers § 95.
Section 51(2) of the Restatement (Third) of the Law Governing Lawyers provides that a lawyer owes a duty of 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 or provision of other legal services, and the nonclient so relies . . . .” Section 552(1) of the Restatement (Second) of Torts states:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.201

With such strong and clear language from the Restatement, many courts are imposing a duty of care upon lawyers who issue third-party opinions.202 In the Dean Foods case discussed in Part III, the court used the TriBar Report in addition to the Restatement to support its holding that “a professional duty is owed by the third-party opinion giver to the opinion recipient.”203 The TriBar Report states that a “third-party opinion recipient is entitled to rely only on what is stated in the opinion letter,”204 and that the “recipient’s ‘right to rely’ means that a professional duty is owed by opining counsel to the opinion recipient.”205 The TriBar Report goes on to say that, “[a]s a result, in most jurisdictions, if the opinion is negligently given and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver.”206

Despite the Restatement, TriBar Report, and much of the case law, not all courts impose a duty of care.207 As noted in the TriBar Report, “[a] few jurisdictions

200 Id. at § 51(2).


203 Dean Foods Co., 2004 WL 3019442, at *12 (quoting TriBar Opinion Committee, supra note 2, at 604 n.29).

204 TriBar Opinion Committee, supra note 1, at 604.

205 Id. at 604 n.29.

206 Id.

207 See infra text accompanying note 222.
take the position that a professional cannot owe a duty to a non-client and, thus, that a third-party opinion recipient has no standing to sue the opinion giver.”\textsuperscript{208} In \textit{National Bank of Canada v. Hale \& Dorr, LLP}, a trial court decision discussed in Part III, the court ruled that “an attorney has no duty to a nonclient where the nonclient has potentially conflicting interests with that of the attorney’s client.”\textsuperscript{209} The court in \textit{National Bank of Canada} expounded by stating that “[t]he court will not impose a duty of reasonable care on an attorney if such an independent duty would potentially conflict with the duty the attorney owes to his or her client.”\textsuperscript{210}

The plaintiff-banks in \textit{National Bank of Canada} claimed opining counsel was liable for negligence, negligent misrepresentation, misrepresentation, breach of contract, and violation of a state statute due to an allegedly false statement in a “no litigation” opinion.\textsuperscript{211} Both the negligence and negligent misrepresentation claims were disallowed, however, because the banks could not prove that the defendant firm owed any duty of care.\textsuperscript{212} Acknowledging Section 552(1) of the Restatement (Second) of Torts, which provides that a professional may be liable for negligently supplying false information for the guidance of others,\textsuperscript{213} the court nonetheless stated that a negligence action can only be sustained where the professional owes a duty of care to the recipient of the false information.\textsuperscript{214} The court found that the defendant could not owe a duty to the banks because the interests of the banks and the defendant’s client conflicted.\textsuperscript{215}

\textsuperscript{208} TriBar Opinion Committee, supra note 1, at 604 n.29.


\textsuperscript{211} Id. at *1.

\textsuperscript{212} Id. at *13-*23.

\textsuperscript{213} Section 552(1) provides: “One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for the pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” RESTATEMENT (SECOND) OF Torts § 552 (1977).


\textsuperscript{215} Id. at *20-*21.
[W]as interested in acquiring money from the Banks and protecting its collateral; the Banks were interested in loaning money to [the client] and securing repayment of that debt. Consequently, competing interests existed, thereby negating any duty the Defendant would otherwise owe to the Banks as its non-clients with which it engaged in a business transaction.216

According to the court, “'[i]t is well-established that attorneys owe no duty to their client's adversary.'”217

National Bank of Canada is striking because it was decided in the face of the Restatement, the TriBar Report, and existing opinion letter case law. In 1992, the highest court of New York held that “attorneys, like other professionals, may be held liable for economic injury to third parties arising from negligent representation,” despite attorneys’ ethical obligations to their clients.218 The court explicitly stated that “where . . . the negligent acts, i.e., the creation of an opinion letter and the transmission of that letter to a third party for the party’s own use, were carried out by the lawyer at the client’s express direction, . . . ethical considerations . . . are insufficient reason to insulate attorneys from liability.”219 Thus, a decade before National Bank of Canada was decided, a court had already rejected client loyalty as reason to find no duty of care to third parties.

National Bank of Canada does not appear to have started a “duty of care” revolution in opinion letter liability, and the trend of imposing a duty of care on opining counsel remains.220 In fact, just a few months after National Bank of Canada, a trial court in the same state held that opining counsel owes a duty of care to an opinion recipient because the recipient is entitled to rely on the opinion.221 National Bank of Canada still provides guidance, however, because it illustrates the reasoning

216 Id.
217 Id. at *22 (quoting Lamare v. Basbanes, 636 N.E.2d 218, 219 (Mass. 1994)).
219 Id. On a related note, Model Rule of Professional Conduct 2.3 discusses when a lawyer, for ethical reasons, should get her client’s informed consent before issuing a third-party opinion. MODEL RULES OF PROF'L CONDUCT R. 2.3 (1983).
220 Berman, supra note 14, at 22.
221 See supra text accompanying note 30.
courts may find persuasive in deciding the existence of a duty of care and demonstrates that courts may still be open to persuasion on this issue.

**B. Duty of Disclosure**

Although not as common as cases involving duty of care, questions concerning the existence of a duty to disclose also arise in opinion letter litigation. Plaintiffs who claim that omissions in an opinion letter fraudulently misled them generally have to prove that the issuing lawyer or firm had a duty to disclose the omitted information. The court in *In re Infocure Securities Litigation* held that a law firm did not have a duty to disclose omitted information to an opinion’s third-party recipients because the firm had no fiduciary obligation to a nonclient.

Stating that “[a law firm] can be liable for omissions . . . only if it had a duty to disclose,” the court listed seven factors in determining whether an opinion giver has a duty to disclose under Rule 10b-5. The factors are:

1. “[T]he relationship” between the parties; 2. their “relative access to the information” at issue; 3. “the benefit derived by the defendant” from the transaction; 4. the “defendant’s awareness of [p]laintiff’s reliance” on defendant in making its investment decision; 5. “the extent of the defendant’s knowledge,” 6. “the significance” of the omitted information; and 7. “the extent of the defendant’s participation in the fraud.”

Considering that the “[p]laintiffs [in this case] were represented by their own counsel who had direct access to [the firm’s client]” and that “[t]heir counsel could have asked any questions they wished about any of the information involved,” the court determined that the factors did not impose a duty of disclosure on the law firm. Similar to the reasoning in *National Bank of Canada*, the court stated that “[n]o

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222 See supra note 196 and accompanying text.
224 See supra note 197 and accompanying text.
226 *Id.* Rule 10b-5 is 17 C.F.R. § 240.10b-5 and provides required elements for securities fraud. *Id.* at 1348.
227 *Id.* at 1351 (quoting Ziemba v. Cascade Int'l Inc., 256 F.3d 1194, 1206 (11th Cir. 2001)).
228 *Id.*
attorney-client relationship existed between [the law firm] and Plaintiffs” and that “[w]ithout a fiduciary obligation, it can hardly be said that the attorney for one party owes a duty to the opposing party, who was represented by competent lawyers of his own choice.”

In re Infocure Securities Litigation sheds some light on the factors a court will consider when determining the existence of a duty of disclosure to opinion recipients. Due to the number of factors in this test, however, there could be many different results. For example, if an omission was unusually significant, a third-party recipient may be owed a duty of disclosure even when represented by counsel. Likewise, firms may not owe a duty of disclosure to an unrepresented party when such party is sophisticated and has personal access to the relevant information. Similar to the duty of care, it would be difficult to definitively state the law surrounding the duty of disclosure. This Part merely attempts to show the reasoning behind a court’s decision and how lawyers may use this reasoning to protect themselves from liability.

CONCLUSION

An exploration into opinion letter liability is a long, dark, and confusing path. Relatively little case law or scholarly research exists, and the premier authorities consist mainly of bar association reports and Restatements. Moreover, much of the existing case law is unpublished and sometimes contradictory, providing lawyers little guidance about precedent or the likely application of various rules. This Article sought to analyze the relevant secondary authority and available case law as best possible in order to provide a few warning signs for opining counsel drafting their opinions.

Because a lawyer will generally not be held liable for an improper opinion that was not within her scope of representation, defining the scope of an opinion letter is fundamental. The next important step in avoiding liability is ensuring that opinion recipients are aware if the subject law is unclear or likely to change. In addition, opining counsel should either avoid the use of subjective language apt to

229 Id.

230 See supra text accompanying note 226 (listing factors).

231 Infocure Securities, 210 F. Supp. 2d at 1351.

232 See supra Part I.

233 See supra Part II.
lead to litigation over interpretation or define such subjective language specifically.\textsuperscript{234} Finally, lawyers may be able to avoid liability by realizing what duties they owe to third-party recipients and studying the arguments in favor of finding that no duty exists.\textsuperscript{235}

There is more research to be done and many more cases to be litigated on this issue. Hopefully, this Article provides enough insight into opinion letter liability to allow a few opining counsel to sleep a bit more comfortably tonight. When they wake up, we can remind them that “we have only scratched the surface.”\textsuperscript{236}

\textsuperscript{234} See supra Part III.

\textsuperscript{235} See supra Part IV.

\textsuperscript{236} Lipson, supra note 2, at 126.