The Preparation of an Environmental Opinion Letter: A Practitioner's Guide

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I. INTRODUCTION

Over the past two decades, environmental law has undergone remarkable proliferation at the federal, state, and local levels. The
environmental issues requiring statutory attention have steadily increased in number and complexity, precipitating the enactment of elaborate new laws. Concomitant with this proliferation has been a growing sensitivity of the business community to the potential effects of these laws on business transactions. One expression of this new awareness is the increasing use of environmental opinion letters. These letters are signed opinions of counsel evaluating business transactions in light of environmental law. As the scope of this area of the law has expanded, the use of environmental opinions has become increasingly commonplace.

A well prepared environmental opinion advises the recipient of the extent to which certain activities are subject to and in compliance with specified environmental laws. Although an environmental opinion may be generated in other contexts, an opinion typically is prepared at the request of a lender contemplating a loan to finance the commercial development of a piece of property. The opinion is designed to provide the lender with a basis for determining whether the property is presently or potentially in violation of environmental laws. The lender desires this information because a violation could precipitate a civil or criminal action to enforce these laws against the borrower. If successful, such an action could, in many instances, impair the security interest of the lender or the ability of the borrower to generate income to pay off the loan. Wishing to hold down its own immediate costs and recognizing that borrower’s attorney may have more ready access to the necessary factual information than its own counsel, a lender often stipulates that a satisfactory environmental


5. See generally R. Odell, ENVIRONMENTAL AWAKENING: THE NEW REVOLUTION TO PROTECT THE EARTH (1980) (presents an overview of current environmental issues and discusses the ways in which these issues might be resolved).

6. To assist them in the management of land-use business risks, businessmen often request zoning and title opinions as well as environmental opinions. A zoning opinion expresses the attorney’s professional judgment concerning zoning restrictions on a piece of property. A title opinion expresses the attorney’s professional judgment of the marketability of title of the property. In some instances, an attorney may be requested to prepare a single land-use opinion addressing title, zoning, and environmental issues.

7. For example, a client may request an environmental opinion concerning property the client is interested in purchasing. An opinion in this situation could assist the client in determining whether the property is suitable for the client’s purpose.

opinion must be submitted prior to the closing of the loan. Since a majority of environmental opinions are prepared at the request of commercial lenders, this article focuses solely on the use of these opinions in the development loan situation.

This article presents a guide to the basic steps involved in the preparation of an environmental opinion by borrower’s counsel. Because the situations in which a lender may request an environmental opinion are diverse, the article cannot provide a set of ready-made formulae applicable in all, or, even most, situations. The article explores, instead, those issues fundamental to the preparation of all environmental opinions in the development loan context. Consideration is given to both the mechanics of the opinion preparation process and the ethical considerations unique to each step in this process. As the attorney follows these steps, the comments raised will hopefully chart the path before her and illuminate the pitfalls into which she might stumble if she proceeds without due care. The guidance provided is intended to suggest the ways in which the conscientious practitioner may develop a superior environmental opinion and thereby better serve her client and limit her risk of liability.

The article addresses the issues involved in the preparation of an environmental opinion in the order in which they are encountered by the attorney. First, consideration is given to the ethical responsibilities fundamental to the preparation of an environmental opinion. Second, the article discusses how an attorney should familiarize herself with environmental laws and identify which of these laws merit discussion in the opinion. Third, suggestions are presented regarding how the practitioner should elicit the factual information she needs in order to determine the extent of the project’s environmental compliance. Finally, the article explores through illustrations the issues raised by the actual drafting of the opinion.

II. E th ical R esponsibilities F undamental to th e P reparation of th e O pinion

Like all competently drafted legal documents, a satisfactory environmental opinion requires diligent, thoughtful preparation. The attorney must be mindful of not only the mechanics of the preparation process, but also the duties of due care incumbent upon the attorney as she works through this process. An understanding of the ethical underpinnings of these duties helps the attorney practice in a manner consistent with the requirements of due care.
An attorney exercises due care generally whenever her professional conduct satisfies the standard of skill, diligence, and knowledge that lawyers of ordinary proficiency and capacity commonly possess and exercise in the local jurisdiction. An attorney’s preparation of an environmental opinion will be measured against this standard unless she represents herself as an expert in the field of environmental law. In this case, her conduct may be measured against the customs and practices of other specialists in this field. Because the legal duties of an attorney are largely defined by local custom, it is difficult to provide a complete description of what constitutes the attorney’s duty of due care in preparing an environmental opinion. The Model Code of Professional Responsibility and the Model Rules of Professional Conduct, however, give some substance to this elusive concept.

In preparing an opinion, the attorney should be mindful of several basic ethical obligations. First, an attorney has a duty to provide her client with competent counsel. This requires that she not undertake


The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions . . . ; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.

Lucas, 56 Cal.2d at 591-92, 15 Cal. Rptr. at 825, 364 P.2d at 689.


11. Custom is not necessarily dispositive of the measure of care required of the attorney. See, e.g., Gleason v. Title Guarantee Co., 300 F.2d 818, 814 (5th Cir. 1962) (attorney’s conformance to local custom in certifying clear title held not to constitute due care). Judge Hand eloquently formulated the general rule thus:

[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), cert. denied, 287 U.S. 662 (1932).


14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). Commentary to the Rule states:

In determining whether a lawyer [is competent] in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the
a matter for which she is ill-equipped or ill-prepared. If borrower's attorney entertains doubts concerning her competency to render an environmental opinion, at least one authority indicates that she is ethically obligated to share her doubts with the borrower before proceeding. The Code, however, permits the attorney to prepare the opinion "if in good faith [s]he expects to become qualified through study and investigation [and] as long as such preparation would not result in unreasonable delay or expense to [her] client." Second, the attorney should assess whether rendering the opinion is compatible with the attorney-client relationship of the borrower and the attorney. If the two are incompatible, she may be required to refuse to prepare the opinion. Third, she should describe to the borrower in writing the information to be disclosed in the opinion. Finally, the attorney may not knowingly make a false statement of law or fact, or participate in, or advise or aid the client in dishonest, illegal, or fraudulent conduct. These basic responsibilities form the ethical foundation of the legal duties specific to the opinion preparation process. The attorney should be mindful of these responsibilities as she works through each of the steps in this process.

special preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id. Rule 1.1. comment.


17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3 (1979); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) (stating that "[a] lawyer shall act with reasonable diligence and promptness in representing a client").


19. Id. Rule 2.3(a)(2). Confidential information obtained from the borrower in the preparation of the opinion is protected by the attorney-client privilege. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 89 (2d ed. 1972). Once this information is disclosed to the lender the privilege is lost. See id. § 94. Describing to the borrower the contemplated contents of the opinion provides the borrower an opportunity to preserve the privilege. The borrower can accomplish this by instructing the attorney not to reveal information the borrower wishes to remain privileged. See ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information ¶ 1(b), ¶ 1 commentary (1975) (states that attorney should fully disclose to client the attorney's intended response to an auditor's information request so that the client can prevent an undesirable waiver of the attorney-client privilege) [hereinafter cited as ABA Policy Statement], reprinted in 31 BUS. LAW. 1709 (1976).


III. Opinion Preparation

There are three basic steps in the process of preparing an environmental opinion. First, the attorney must determine what laws are to be addressed in the opinion. Second, she must elicit factual information from professionals knowledgeable of the project. Finally, she must apply the law to the stated facts and draft an opinion. Each of these three stages in the preparation of the opinion—legal research, factual research, and opinion formulation—imposes upon the attorney unique responsibilities of due care. Consideration is given to these steps in the order in which they should be taken by the attorney.

A. Legal Research

An attorney usually must first determine which laws merit discussion within the opinion. Whether this step is necessary depends on the type of environmental opinion requested. An opinion request will take one of two forms: 1) lender's counsel may specify the laws and regulations to be addressed in the opinion; or 2) lender’s counsel may request an opinion concerning the project’s compliance with environmental laws generally. If the former request is made, preliminary legal research is unnecessary because borrower’s counsel already knows which laws to address. If the latter request is made, borrower’s counsel must choose which laws the letter should address among the myriad environmental statutes, regulations, and ordinances. The attorney should seek a law-specific request because it enables her to dispense with preliminary legal research and thereby save the borrower time and money. In most instances, however, lender’s counsel will insist that borrower’s attorney select the laws for opinion discussion.

To the practitioner uninitiated in the preparation of environmental opinions, the prospect of identifying the relevant laws may seem an overwhelming task. The federal, state, and local land-use laws potentially applicable to any one construction project form an intricate weave of complex legal provisions. It is often difficult to discern which of these laws are technically “environmental.” Environmental laws do not constitute a discrete, cohesive body of law; rather, they form a diverse collection of laws spilling over into many non-environmental areas such as tax policy22 and banking regulation.23 The

breadth and complexity of environmental laws thus make legal research for an environmental opinion both difficult and challenging.

Regardless of the complexity of the task, the law erects an exacting standard of due care for the attorney conducting legal research. The attorney must possess the legal knowledge common among her peers and "discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." In order to satisfy this standard, the attorney unfamiliar with environmental law should seek guidance from colleagues, publications, and lender's counsel. By relying on these resources, the diligent attorney should be able to identify the environmental laws potentially applicable to the project and thus discharge her duty to conduct her legal research with reasonable care.

After identifying the environmental laws potentially applicable to the project, the attorney must select the specific laws that merit discussion in the opinion. Because an excessive amount of time and expense would be consumed by addressing all or even most environmental laws, this selection should be made with discrimination and care. The laws whose violations carry the gravest consequences for the project or the borrower should be identified. These are the stat-

24. See supra texts and notes at notes 9-11.
26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3, DR 6-101(A)(1) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1983). A colleague experienced in the preparation of environmental opinions can assist the opining attorney by, among other things, providing a copy of a completed opinion to instruct him regarding what laws are customarily addressed. Most lawyers consult sample opinions before preparing one of their own. Legal Opinions to Third Parties: An Easier Path, 34 Bus. LAW. 1891, 1894 (1979) [hereinafter cited as Legal Opinions to Third Parties].
27. Because the law varies from state to state, publications focusing solely on local law are recommended. Local and state bar association publications and supplements to continuing legal education programs should be consulted. See, e.g., G. McGregor, ENVIRONMENTAL LAW (1981) (very useful outline of Massachusetts environmental law published by the Massachusetts Continuing Legal Education-New England Law Institute, Inc.).
28. The attorney can request lender's counsel to specify the laws to be addressed. If lender's counsel complies, preliminary legal research will be unnecessary. Borrower's attorney can also request a copy of an environmental opinion previously prepared or reviewed by lender's counsel. A sample opinion could serve as a guide to the preparation and drafting of borrower's attorney's opinion. See supra note 26.
29. If this research may cause the client undue delay or expense, the attorney is well advised to refer the client to a more qualified attorney. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3 (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1983). The attorney is required to exercise reasonable care in selecting another attorney. Wilderman v. Watchell, 149 Misc. 623, 624-25, 267 N.Y.S. 840, 842 (Sup. Ct. 1933), aff'd, 241 App. Div. 812, 271 N.Y.S. 954 (1st Dept. 1934).
utes and regulations whose violation could result in severe penalties, expensive alterations to the project, sharp devaluation of the property, or enjoinment of business activity at the site. Because a violation of any of these laws represents a material threat to the lender’s interest in the project, these laws are matters of genuine concern to the lender, and warrant discussion in the opinion. Unless lender’s counsel objects, only these laws should be addressed.

B. Factual Research

Once the attorney has determined which laws the opinion will address, she must elicit factual information from persons familiar with the project. The attorney needs this information before she can gauge the extent of the project’s compliance with the laws identified in the legal research stage. The simplest method to extract this information is the preparation of a questionnaire to be answered by the architect and/or the engineers supervising the project. These individuals are asked to respond because they presumably are both familiar


31. The attorney is well advised to negotiate what laws are material with lender’s counsel prior to the rendering of the opinion. See Legal Opinions to Third Parties, supra note 26, at 1895; ABA Committee on Audit Inquiry Responses, Introductory Analysis and Guides to Statement of Policy Regarding Lawyers’ Requests for Information, reprinted in 31 BUS. LAW. 1737 (1975). By negotiating beforehand the laws to be addressed, the attorney may avoid objections by lender’s counsel at the loan closing that a material law has been neglected.


33. A questionnaire can be used also by lender’s counsel to determine what laws the opinion should address or whether an opinion is needed at all. By evaluating the responses to the questionnaire, lender’s counsel can determine whether the project is likely subject to any significant environmental laws. If an issue of environmental compliance is raised, lender’s counsel can direct borrower’s attorney to address specifically this issue in an opinion. If no issue is raised, there is no point in insisting upon the preparation of an opinion by borrower’s attorney. In cases where the nature of the project clearly indicates that it is or will be subject to major environmental laws — a land fill, a chemical factory, or a hazardous waste disposal facility, for example — no purpose is served by preliminary research by lender’s counsel. In these instances, the need for a full opinion is obvious.
with the project and competent to answer the necessarily technical questions. If professionals with the needed expertise have not been engaged, the borrower should be advised to employ them for the purpose of answering the questionnaire.

A good questionnaire will elicit all of the factual information the attorney needs in order to render her opinion. The better organized the questionnaire, the more likely that this will be achieved. The questionnaire should be arranged, by sections, according to the environmental issues addressed. For example, a "hazardous waste section" might contain questions relating to the Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act, and the National Emission Standards for Hazardous Pollutants under the Clean Air Act. Clear, logical organization in the questionnaire assists the respondent in identifying exactly what information is desired, thereby facilitating complete, accurate information gathering.

Because environmental laws are usually complex, the questionnaire should focus primarily on the threshold issues that trigger the application of the relevant statutes. This enables the attorney to keep the questionnaire a manageable length. The following questions relating to the National Environmental Policy Act ("NEPA") illustrate how questions should be designed:

**National Environmental Policy Act**

1. Federal Involvement
   a. Please describe the extent to which the Project is and will be supported by or involved with federal grants, contracts, subsidies, loans, or other forms of federal funding assistance.
   b. Please describe the extent to which the Project is and will be authorized by federal lease, permit, license, certificate, or other entitlement.

2. Environmental Impact
   Please describe the extent to which the Project does and will affect the quality of the environment. The answer should include, but not be limited to, a discussion of any existing or foreseeable air pollution, water pollution, impact on traffic or land-use patterns, impact on wildlife, or effects on human health.

34. An alternative to sending a questionnaire to the developer is to conduct an interview with the borrower, the architect and the engineers. Because this practice enables the attorney to ascertain quickly through discussion the extent of the project's compliance, this approach is more efficient. This approach, however, is feasible only if the attorney has mastered the relevant law.

37. 40 C.F.R. §§ 61.01-.71 (1982).
NEPA requires environmental impact statements to be prepared by federal officials overseeing "major Federal actions significantly affecting the quality of the human environment." Because federal involvement and environmental impact trigger the impact statement requirement, the questions focus on these factors. By evaluating the factual responses to these questions in light of applicable case law, the attorney can formulate an opinion concerning the applicability of NEPA to the project.

It is crucial to the accuracy of the opinion that respondents in their answers use terms as statutorily defined. To accomplish this, the questionnaire should, where needed, provide definitional guidance.

Reference to the relevant law is also helpful when a question concerns a statute whose application can be triggered by numerous factors. The Resource Conservation and Recovery Act of 1976 ("RCRA") is of this type. The Act applies whenever a substance, which is to be generated, stored, transported, treated or disposed of, contains any of several hundred specified hazardous chemicals, has any of the regulatorily defined properties of ignitability, corrosivity, reactivity, or EP toxicity, or "pose[s] a substantial present or potential hazard to human health" if improperly handled. A question listing all the factors which trigger RCRA's application would thus be very long and complicated. A more efficient and equally effective question refers the respondent to the regulations:

Resource Conservation and Recovery Act

1. Does or will the Project have on its premises any material which contains any of the chemicals identified at 40 C.F.R. §§ 261.31-261.33?

40. Id. § 4332(2)(C) (1976).
41. The questionnaire must use terms as statutorily defined to elicit responses which can serve as a sound factual basis of the opinion.
43. Id. § 6903(5)(B).
45. Id. § 261.21.
46. Id. § 261.22.
47. Id. § 261.23.
48. Id. § 261.24.
2. Does or will the Project have on its premises any material which has any of the properties of ignitability, corrosivity, reactivity, or EP toxicity as defined at 40 C.F.R. §§ 261.21-261.24?

3. Does or will the Project have on its premises any material which poses a substantial hazard to human health or the environment if improperly treated, stored, transported or disposed of?

4. If any of the questions 1-3 was answered affirmatively, please describe the wastes and how such wastes are and/or will be disposed of.

By thus referring to the regulations, this question becomes more manageable than would otherwise be possible.

Although questions which refer to relevant laws are helpful, their drafting requires particular care. If improperly designed, such questions may lead a respondent to give his judgment of the project’s compliance with the law. Because the attorney may not appropriately rely on the legal conclusions of laymen, such a response is unacceptable. To obtain genuinely useful answers, the attorney must elicit only factual information. This requires that the attorney prepare and evaluate the questionnaire with care.

In the course of obtaining responses to the questionnaire, the attorney will often learn that the client has been authorized by permits to proceed with certain aspects of construction, and that applications for other permits are under review. Because the nature of the applications and permits may affect the attorney’s opinion, she should request copies of these documents and examine them for defects. An evaluation of the legal sufficiency of a permit should include an investigation as to whether the permit was issued in accordance with procedural requirements, whether an appeal has been filed, whether the permit covers the desired work for the entire project, whether

50. Because of the many sophisticated technical requirements of environmental law, the attorney is dependent upon the technical experts who respond to the questionnaire. Many attorneys lack the technical competence necessary to evaluate a respondent’s answer. The attorney may therefore find that she is forced to transform a respondent’s assertion of fact into an opinion of law without the benefit of legal analysis. This melding of fact and law can occur, for example, when an engineer certifies that the project is utilizing Best Available Control Technology (“BACT”) to control its emissions into the air as may be required under the Clean Air Act. See 42 U.S.C. §§ 7475(a)(4), 7479(3) (Supp. V 1981). The use of BACT is a legal requirement. Ideally, the attorney would determine whether the facility was utilizing BACT. Because the attorney may lack the necessary technical expertise, however, she may be forced to depend on the engineer to give what is essentially a legal opinion.

51. See Babb, Barnes, Gordon & Kjellenberg, Legal Opinions to Third Parties in Corporate Transactions, 32 BUS. LAW. 553, 555 (1977) [hereinafter cited as Babb & Kjellenberg].

52. Because the permits and applications would likely be deemed to require legal expertise in their preparation and interpretation, it would be imprudent to rely on the judgment of laymen as to the legal sufficiency of these documents. See id.
the permit is presently in full force and effect and will remain so for the project's duration, and whether the conditions of the permit can be satisfied. The attorney should also monitor the process of permit application and inform the client of any permit the client needs but has neglected to obtain.

Unless the attorney has agreed to undertake an independent investigation of the facts, the attorney is under no general duty to verify the factual information represented to her by others.\textsuperscript{53} The attorney, however, should not provide an opinion on a matter when she suspects the accuracy of a represented material fact.\textsuperscript{54} If the attorney is confronted with inconsistent information, or if her experience or the circumstances lead her to doubt the material veracity of represented information or the expertise of the person making the representation, she should undertake an investigation sufficient to eliminate these suspicions.\textsuperscript{55}

Once the attorney is satisfied that she has sufficient factual information on which to render a competent opinion, the information should be reduced to a single document to be certified by the respondents to the questionnaire.\textsuperscript{56} This certificate should disclose all information known to the attorney that is material to the opinion or potentially determinative of the lender's action on the loan.\textsuperscript{57} The


As a general rule, an attorney is not required to investigate the truth or falsity of facts and information furnished by his client, and his failure to do so would not be negligence on his part unless facts and circumstances of the particular legal problem would indicate otherwise or his employment would require his investigation. Id. at 808.

\textsuperscript{54} See supra note 53. If in preparing the opinion, the attorney relies upon a represented fact she suspects as false, she may well be guilty of misrepresentation. "A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 comment (1983).

\textsuperscript{55} See supra note 53. See infra note 56 for a discussion of the steps the attorney should take if she doubts the expertise of a respondent.

\textsuperscript{56} Certification requires the respondents both to sign the certificate and to affix their seals. The purpose of the seal is to demonstrate that the respondents are licensed to practice in their respective fields. The seal also indicates that the attorney is exercising reasonable care when relying on the competence of a respondent. If the attorney has reason to suspect the expertise of a respondent, a seal alone might not be sufficient to demonstrate the respondent’s competence. In such a case, the attorney would be well advised to inquire about the respondent’s professional reputation and standing with the appropriate state licensing board. See Fuld, supra note 30 at 924; Segall & Arouh, How to Prepare Legal Opinions, 25 PRAC. LAW. No. 4, at 29, 33 (1979).

certificate should, moreover, include copies of all relevant permits and permit applications as attachments. The certificate may also include statements by the questionnaire respondents that applications will be submitted for all needed permits and that no material variation will be made from the construction plans as presently drafted.

The certificate is relied upon by lender's counsel to evaluate the soundness of the environmental opinion. To facilitate lender's counsel's review of the opinion, the information disclosed in the certificate should be organized according to the legal issues addressed in the opinion. Every legal issue discussed in the opinion should have a factual counterpart in the certificate. Ideally, the organizational structures of the opinion body and the certificate are identical. This enables lender's counsel to determine quickly whether the legal conclusions of the opinion have a solid factual foundation.

C. Opinion Formulation

Once the attorney believes she has been sufficiently apprised of the facts, she must examine these facts in light of relevant laws. The conclusions and supporting reasoning resulting from this examination will form the substance of the opinion. In drafting the opinion, the attorney will likely be tempted to express her conclusions in two potentially conflicting ways. Recognizing the borrower's status as client, the attorney, on the one hand, will presumably desire to facilitate execution of the loan by satisfying the lender with forthright legal conclusions. If the attorney is negligent in preparing the opinion, she may incur liability to the lender. Fearful of increasing her exposure to this liability, the attorney, on the other hand, may also feel a need to limit sharply the scope and substance of the opinion through the use of qualifying language. In formulating the opinion, the attorney must be careful to strike a balance between these two approaches.

58. The relevant laws are those which have already been identified as material during the legal research. See supra text and notes at notes 29-32.

59. The Model Code of Professional Responsibility provides: "In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client." Model Code of Professional Responsibility EC 7-9 (1979).

60. See infra note 66.

61. See Segall & Arouh, supra note 56, at 29-32; Fuld, Lawyers' Standards and Responsibilities in Rendering Opinions, 33 Bus. Law. 1295, 1304 (1978). Mr. Fuld elsewhere observes:
Structurally, an environmental opinion consists of three distinct parts; the opening, the body, and the closing. Proper formulation of each of these parts requires that the attorney be aware of unique drafting and due care considerations. Drafting illustrations are presented as examples of how an attorney may adequately take these considerations into account. The illustrations are intended solely as aids in the explanation of issues raised in the process of opinion formulation, and not as drafting models. Practitioners are advised to examine the opinion language customarily used in their local jurisdictions before adopting the language provided.

1. The Opening

The opening of an environmental opinion should accomplish several purposes. It should explain the legal and business contexts in which the opinion was drafted and identify the factual information and assumptions on which the opinion is founded. It should also contain any statements intended to restrict either the lender’s ability to rely upon the opinion or the opinion’s substantive meaning. Because lender’s counsel may object to qualifications or assumptions stated in the opening, borrower’s attorney should negotiate the contents of the opening with lender’s counsel prior to the rendering of the entire opinion. Delay, expense, and controversy at the time of opinion delivery can, in this manner, be avoided.

The opinion opening consists of seven parts, each serving a distinct purpose. This section considers these parts in the order in which they should appear in an opinion. The underlying purpose of and the issues raised by each of these parts is discussed.

a. Date

January 15, 1984

An opinion ordinarily “speaks” as of its date. It expresses the attorney’s opinion regarding only the circumstances existing on or
prior to the date specified. 65 Realizing this, lender's counsel is likely to insist that the environmental opinion be dated the day scheduled for the loan closing. This, in effect, assures the lender that the attorney considers her opinion accurate when the lender makes its final decision regarding issuance of the loan. The lender might refuse an opinion dated prior to the loan closing because events subsequent to the dating might have materially affected the project's ability to comply with environmental laws.

b. Addressee

Curry, Guy & Associates
1 State Street
Gretchen, Vermont

The opinion is addressed to the lender. This practice serves three distinct purposes. First, the designation of the lender as the addressee states, in effect, that the lender is intended to rely on the opinion. 66 The lender presumably wants this to be stated as explicitly as possible. To bring a successful attorney malpractice action, a non-client, such as the lender, must generally establish that the attorney intended to influence or benefit the non-client in preparing the opinion letter. 67 A statement that the lender is intended to rely on the opinion thus serves to protect the lender in the case of a negligently prepared opinion. Second, by naming the lender as the sole addressee, the opinion implies that it is not for the use of other parties. 68 This serves to curtail the attorney's potential liability to

65. Id.
66. See id.; Legal Opinions to Third Parties, supra note 26, at 897.
67. See Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 111, 128 Cal. Rptr. 901, 906 (1976) (malpractice action held maintainable by non-client opinion recipient against drafting attorneys). The Roberts court embraced the increasingly accepted test for the existence of a duty of due care running from an attorney to a non-client:

The determination of whether the duty undertaken by an attorney extends to a third party not in privity involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. Id. at 110, 128 Cal. Rptr. at 905-06 (quoting Donald v. Garry, 19 Cal. App. 3d 769, 771-72, 97 Cal. Rptr. 191, 192 (1971)) (emphasis added). This test has been endorsed by numerous courts. See, e.g., Fickett v. Superior Court of Pima County, 27 Ariz. App. 793, 558 P.2d 988, 989-90 (1976) (duty to ward of client); Lucas v. Hamm, 56 Cal.2d 583, 588, 15 Cal. Rptr. 821, 823, 364 P.2d 685, 687 (1961) (duty to beneficiary under will), cert. denied, 368 U.S. 987 (1962); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313, 318 (1980) (duty to title opinion recipient).
68. "It is generally understood that ordinarily only an addressee is entitled to rely upon the opinion." Legal Opinions to Third Parties, supra note 26, at 1897.
unintended recipients. Third, etiquette and proper business form dictate that the recipient of an opinion letter be identified as its addressee.

c. Title

RE: Environmental Opinion
212 East Hampton Ave.
Spencerville, New Jersey

Following the identification of the addressee appears a simple statement that the document is an environmental opinion regarding specified property. This enables the reader to identify quickly and easily the nature of the document.

d. Introduction

Ladies and Gentlemen:

We are counsel for Construction Borrowers, Inc. (the "Borrower") in regard to the mortgage loan in the amount of $275,000.00 by you to the Borrower. You have requested our opinion regarding environmental laws and regulations applicable to construction of Plaza Parking Garage (the "Project") at 212 East Hampton Ave., Spencerville, New Jersey (the "Premises").

A brief introductory paragraph follows the salutation. The first sentence identifies the parties to and the nature of the underlying loan transaction. This statement assists the reader in understanding the business context of the opinion. The law firm rendering the opinion is identified simply as "counsel" for the borrower, and not as its "general" or "special" counsel because these terms add only ambiguous distinctions. The second sentence states the purpose of the opinion and identifies the lender as the intended recipient. This statement not only informs the reader of the nature of the opinion,

69. See supra text and note at note 67.
70. An environmental opinion is in form a business letter. It is customary to identify the intended recipient of a business letter as the addressee.
71. See Segall & Arouh, supra note 56, at 35; Fuld, supra note 56, at 920; Legal Opinions to Third Parties, supra note 26, at 1898.
72. Legal Opinions to Third Parties, supra note 26, at 1898. It is unsettled whether an attorney identified as "general counsel" may be held to a higher standard of knowledge regarding the client's affairs than an attorney referred to as "special counsel." Id. The nature of the attorney's duty of due care should depend upon the specific facts, not upon how the attorney is classified in the opinion. Id.
but also further protects the lender against the possibility of a negligently prepared opinion. 73

e. Assumptions

It is our understanding that on the Premises will be constructed a four (4) story parking garage with a four hundred (400) vehicle capacity according to the plans (the "Plans") attached hereto drawn by ABC Engineering, Inc. We have assumed the accuracy of the Plans and the factual representations contained in the Environmental Certificate attached hereto. We have relied exclusively on the Plans and Environmental Certificate as to all matters of fact. We have further assumed the competence and authority of the persons who have signed the Environmental Certificate and have not undertaken an independent investigation as to any factual matter. We know of no facts which lead us to believe that any opinion set forth below is incorrect.

This paragraph identifies the documents containing the factual information upon which the opinion is based and states the attorney's assumptions regarding the accuracy of these documents. Absent a statement of these assumptions, the opinion might lead the lender to believe that the attorney has independently verified the relevant factual information. 74 The assumptions are intended in part to inform the lender that no such independent investigation has been conducted or was necessary. 75 If this is not the case, the stated assumptions must be altered accordingly.

An attorney has a duty to conduct an independent investigation of factual representations whose veracity she doubts in light of either the circumstances or her experience. 76 This obligation cannot be eschewed by the mere recital of these assumptions. 77 The assumptions are valid only to the extent to which they are employed in good faith. 78 By stating that the attorney knows of no fact rendering the opinion incorrect, the final sentence, in effect, provides an express assurance to the lender that the attorney is, indeed, acting in good faith.

73. See supra text and notes at notes 66-69.
74. See Segall & Arouh, supra note 56, at 32.
75. See id.
76. See supra text and notes at notes 53-55.
77. An attorney should not manipulate contractual language to dispense with her duty of due care. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-5, EC 6-6 (1979).
78. Good faith requires that "[a]ssumptions . . . be made [o]nly if a lawyer is not aware of facts suggesting or requiring a different conclusion." Legal Opinions to Third Parties, supra note 26, at 1903.
faith. If the attorney has made an independent verification of the facts, she should disclose this fact and qualify the stated assumptions accordingly. Otherwise, the stated assumptions create the false impression that no investigation has been conducted.

f. Opinion Use Delimited

This opinion is exclusively for your information in regard to the above described loan and should not be quoted or otherwise referred to, in whole or in part, in any document, or furnished to any other person without our prior written consent.

This paragraph is designed to restrict the scope of the potential malpractice liability of the attorney. By stating that the opinion is intended for the exclusive use of the lender, this paragraph informs an unintended recipient that it relies on the opinion at its own risk. By stating that the opinion is intended to be used by the lender solely in regard to the loan transaction, the attorney protects herself from liability for injuries resulting from the lender's reliance on the opinion in other contexts. Although a statement of these restrictions may not be necessary to limit the attorney's potential liability, such a statement at the very least promotes the reader's understanding of the intended limited purpose of the opinion.

g. Laws Addressed

This opinion addresses those laws, exclusive of those mentioned immediately below, which in our opinion are material to the Project, and, therefore, in our opinion merit discussion. We render no opinion with respect to the Project's compliance with the State Building Code, or local noise or zoning ordinances and

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79. See Fuld, supra note 61, at 1309-10.
80. See id.
81. The ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information suggests that express restrictions may be unnecessary to delimit the intended use of the opinion:

Unless otherwise stated in the lawyer's response, it shall be solely for the auditor's information in connection with his audit of the financial condition of the client and is not to be quoted in whole or in part or otherwise referred to in any financial statements of the client or related documents, nor is it to be filed with any government agency or other person, without the lawyer's prior written consent.

ABA Policy Statement, supra note 19, at ¶ 7. This policy statement, however, applies only in the auditing context, and, thus, can only be instructive and not dispositive as to whether the restrictions are necessary in an environmental opinion letter.

82. The few commentaries addressing the preparation of opinion letters urge the inclusion of such restrictions. See Fuld, supra note 61, at 1310; Segall & Arouh, supra note 56, at 37; Legal Opinions to Third Parties, supra note 26, at 1897.
bylaws. Recognizing the vastness and complexity of federal, state, and local environmental laws, we note that laws and regulations less significant than the ones herein discussed may apply to the Project. This opinion, however, addresses those laws and regulations customarily considered by this and other local firms which render or review environmental opinions.

In explaining which laws will be addressed, the final paragraph defines the substantive scope of the opinion. The paragraph illustrates how an attorney can balance her desire to satisfy the lender against her desire to restrict her potential liability. The bold language of the first sentence helps secure the lender's acceptance of the opinion. Stating that material laws will be discussed, this sentence informs lender's counsel that a legal judgment has been made concerning the extent of environmental compliance required to protect the lender's interests. This statement goes to the heart of the lender's concerns regarding the project. Failure to make this statement might force lender's counsel either to advise the lender to reject the opinion or to duplicate the legal research of borrower's attorney to determine if a material law had been neglected. If the attorney diligently conducted the original legal research and the opinion discusses the laws customarily addressed, no persuasive reason supports the exclusion of this assertion. Such a statement can prevent needless delay in closing the loan and does not unreasonably increase the attorney's exposure to liability.

Addressing the attorney's concern for limiting her potential liability, the remaining sentences qualify the preceding materiality statement. The second sentence clarifies the scope of the opinion by excluding from consideration certain specified laws that might otherwise be regarded as impliedly addressed. If a statement of this nature is incorporated, the attorney must be careful to list exhaustively those arguably material laws not expressly considered. The attorney can, in this manner, avoid giving an implied opinion on any material law not expressly addressed. The burdensome task of listing these laws may be sidestepped, however, if the lawyers for the two principals have previously agreed which laws merit discussion. The third sentence further defines the scope of the opinion by essen-

83. See supra text and notes at notes 59-61.
84. See supra text and notes at notes 30-32 for a discussion of the characteristics of a law material to lender's interests.
85. See Segall & Arouh, supra note 56, at 36.
86. Fuld, supra note 30, at 921.
87. Prior negotiation on the opinion's language and contents is strongly recommended. See supra text and notes at 31, 62-63.
tially stating that applicable, but not material, environmental laws are not discussed. This statement underscores the basic message of the paragraph that only those laws representing a genuine threat to the lender’s interests are addressed. The paragraph concludes by assuring the lender that the opinion discusses those laws customarily addressed in other local environmental opinions. This, in effect, states that the attorney’s background legal research was no less diligent than those of her local colleagues working on other environmental opinions. Although this statement may be made, it should be noted that custom is only instructive, and not dispositive, of the measure of due care required of the attorney.\(^8^8\)

The preceding sections presented the seven distinct parts which comprise the opinion opening. These parts should explain the opinion’s legal and business contexts and reveal its factual foundations and assumptions. The scope of the opinion should also be defined through statements restricting the lender’s ability to rely upon the opinion and the opinion’s substantive meaning. With the context and scope of the opinion thus clearly defined, the attorney is ready to proceed to the body of the opinion.

2. The Body

Subject to the qualifications of the opinion opening, the body of the opinion states the attorney’s professional judgment of the project’s compliance with environmental laws. Since the body is the core of the opinion, it should be drafted with particular care. Logical organization, analytic accuracy, and clarity of expression should be the goals of the attorney.\(^8^9\) Consideration of each of these elements is important to the preparation of a competent opinion.

a. Organization

To facilitate opinion preparation and review, the organizational structures of the opinion body and the environmental certificate should be identical. Each document should be organized under the same headings to enable lender’s counsel to assess quickly and easily the factual basis of each legal conclusion. In both the opinion body and the environmental certificate, the discussion pertaining to an individual legal issue should be isolated under a heading identifying the nature of that issue. For example, under the opinion body heading

\(^8^8\). See supra note 11.

\(^8^9\). See Segall & Arouh, supra note 56, at 29-35.
“Water Pollution” might appear the attorney’s opinions of the project’s compliance with the Clean Water Act,90 the Rivers and Harbors Act of 1899,91 the National Flood Insurance Act,92 and the Federal Coastal Zone Management Act.93 Subheadings should identify the individual issues raised by these laws. The factual bases for these opinions should appear under identical subheadings in the certificate. Imposition of the same detailed organizational structure upon the opinion body and the environmental certificate will assist lender’s counsel in evaluating the opinion, as well as facilitate borrower’s attorney’s preparation of the opinion analysis.

The discussion of each issue should, wherever feasible, follow a standard format. An opinion’s consideration of an environmental issue addresses three elements; the applicable law, the pertinent facts, and the attorney’s professional opinion. Because the law determines what factual information concerning the project is relevant, an exposition of the applicable law precedes an explanation of the facts. The exposition of the law should clearly indicate what factual information is needed to determine the project’s compliance. This information should follow. The discussion should conclude with a statement of the attorney’s opinion of the project’s compliance. This issue discussion format—statement of law, statement of facts, and statement of opinion—is illustrated by the following example:

Domestic Sewage

The Water Purity Control Authority, under the authority of State General Laws ch. 43, § 21, has promulgated Reg. 1617, which requires a permit for the construction, modification, maintenance, or use of any sewer extension or connection where more than one thousand (1,000) gallons per day of domestic sanitary sewage is to be discharged. According to the Environmental Certificate, the Project: 1) will be connected to the Spencer-ville sewer system; 2) will discharge approximately 1,500 gallons per day of sanitary sewage; and 3) has obtained a permit attached hereto authorizing such discharge. After reviewing the Environmental Certificate and the permit, it is our opinion that the Project is in compliance with Reg. 1617.

This example illustrates how the use of a standard organizational format promotes clarity and thereby facilitates the reader’s understanding of the opinion letter.

b. Analysis and Language

In formulating the opinion, it is often difficult for the attorney to mechanically apply the law to the stated facts. Many areas of environmental law are unsettled, requiring the attorney to choose among several possible legal interpretations. The unsettled state of a law does not in any way lessen the attorney's duty to exercise reasonable care in conducting her legal research. The attorney may attempt to discharge this duty by seeking the legal interpretation of the government agency overseeing a law's administration or enforcement. In communicating with an agency, the attorney must be careful not to alert the agency to a potential or existing violation by the project. Although the nature of the agency response will likely be determined by the responsible official's honest interpretation of the law, agencies may exhibit a tendency to arrogate jurisdiction and construe the law in favor of enforcement. It should be noted, however, that an administrative position is binding only when it is supported by a regulation or a statute.

If, after conducting the necessary legal research, the attorney concludes that the applicable law is open to various reasonable interpretations, she should qualify her opinion accordingly. The attorney should also state any material differences between her interpretation of a law and what the attorney believes to be the interpretation of the responsible administrative agency. This practice, in effect, alerts the lender and the borrower that litigation may be necessary to vindicate the attorney's legal analysis. Regardless of whether an issue is open to interpretation, the attorney should select language judiciously to ensure that her analysis conveys precisely the meaning intended.

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95. The attorney may also seek assistance from colleagues and publications in her efforts to properly interpret a law. See supra text and notes at notes 26-27.
96. Under the Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1982), a federal administrative agency generally may promulgate a regulation only after public notice of the proposed rule and an opportunity for public comment. Id. § 553. These requirements prevent an informal interpretation of a law by an agency official from having the force of law.
97. Fuld, supra note 30, at 922; Fuld, supra note 61, at 1306-07, 1311.
98. Fuld, supra note 61, at 1311.
99. See Fuld, supra note 30, for opinion language analysis and recommendations.
3. The Closing

The signature of the attorney or her law firm constitutes the final portion of an environmental opinion. This signature is important to the lender because it identifies the party claiming responsibility for the contents of the opinion. The lender presumably wants to bind the party with the "deepest pocket." An opinion signed by a law firm is, therefore, more valuable to the lender than one signed solely by the drafting attorney. The lender may insist that the opinion state that it is rendered on behalf of the law firm. This can be accomplished by having either the firm itself or a partner expressly on behalf of the firm sign the opinion. There is no substantive difference between these two approaches; each equally binds the firm. If an attorney signs, it is important that she be a partner because without this status her signature might not bind the firm. An attorney signing on behalf of a firm should use the following format:

MacMahon & Kirby
by Martha Hepburn, a partner

This assures the lender that the opinion is rendered on behalf of the firm.

IV. CONCLUSION

Over the past two decades, environmental laws have matured into an elaborate, extensive new body of law. Recognizing the significance of these laws to certain business transactions, commercial lenders are increasingly stipulating that, before issuing a construction loan, the borrower must present a legal opinion regarding the project's present and future compliance with environmental laws. Wanting to minimize its risk of financial loss, the lender will consider the opinion in determining whether the loan constitutes a wise investment. As environmental law continues to develop, the use of environmental opinions will become increasingly widespread.

Before preparing an environmental opinion, the attorney for the borrower should be aware of certain basic professional responsibilities. These responsibilities are outlined in the Model Code of Profes-
sional Responsibility and the Model Rules of Professional Conduct. These responsibilities are important because they form the ethical foundation of the attorney’s duties of due care corresponding to the steps involved in preparing the opinion.

The attorney’s first step in preparing an environmental opinion is to become familiar with environmental laws generally and then to select from these laws the ones that merit opinion discussion. Col­leagues, publications, and lender’s counsel can provide assistance in this step. Once familiar with environmental law generally, the attorney should select for discussion in the opinion only the laws material to the lender’s interests. In taking this step, the attorney must be careful not only to acquire the legal knowledge of her peers in this area but also to conduct a reasonable amount of legal research on every issue presented.

The attorney’s second step is to discover the factual information she needs in order to determine the project’s compliance with the laws selected for opinion discussion. For this purpose, the attorney is advised to develop a questionnaire to be answered by the architect and/or engineers supervising the project. The attorney must take care to draft the questionnaire so that it elicits only factual information and to independently investigate any factual representations whose veracity she doubts. Once satisfied that she has sufficient information to support a competent opinion, the attorney should reduce the information to a single document to be certified by the respondents to the questionnaire.

The final step is the drafting of the opinion. The opinion comprises an opening, a body, and a closing. Each of these parts must be drafted with care. In drafting the opening, the attorney must be careful to balance her desire to limit her liability against her desire to satisfy the lender. Any assumptions or qualifications stated in this part must be stated in good faith. The body should follow the same organizational format as the environmental certificate and it should be drafted with particular care. The attorney should disclose any information material to her opinion or potentially determinative of the lender’s action on the loan. To satisfy the lender, the closing should be drafted so that the opinion is rendered expressly on behalf of the drafting attorney’s law firm.

This article has charted the steps the attorney must take to prepare a competent environmental opinion. The comments raised were intended as guideposts for the attorney as she wends her way through this process. It is hoped that the guidance provided suggests the ways in which the conscientious practitioner can render a competent opinion.