4-1-1995

Legal, Ethical and Due Diligence Requirements For Third Party Legal Opinions

Victoria Hunt Carter

LEGAL, ETHICAL AND DUE DILIGENCE REQUIREMENTS FOR THIRD PARTY LEGAL OPINIONS

Victoria Hunt Carter*

I. INTRODUCTION

Most commercial real estate lenders require third party legal opinions from the borrower's attorney. Although these opinions vary considerably depending on the structure of the transaction, they usually require the borrower's attorney to opine that the borrower (if an entity) is "duly organized and validly existing" and has the requisite "power and authority" to enter into the loan transaction.[1] They may also require the borrower's attorney to examine the loan documents and render an opinion as to whether the documents have been "validly executed by the borrower" and are "enforceable in accordance with their terms".[2] This article explores the legal and ethical requirements for issuance of a third party opinion as well as the due diligence necessary to address the typical requirements of such opinions.[3]

---

* J.D. 1973, University of Florida; Ms. Carter is a partner in Carter, Stein, Schaaf & Towzey, St. Petersburg, Florida, and is Co-Vice Chair of the Legal Opinions Committee for the Real Property, Probate and Trust Law Section of the Florida Bar.

1 In lieu of the phrase."duly incorporated and validly existing" the *Report on Standards for Opinions of Florida Counsel of the Special Committee on Opinion Standards of the Florida Business Law Section*, dated April 8, 1991, recommends the following language:

> The Company has been incorporated [and organized] under the Florida Business Corporation Act [or the Florida General Corporation Act] and its status is active.

2 The enforceability opinion, generally thought to be the *raison d' etre* for the third party opinion, is surrounded by a great deal of controversy regarding its proper scope. The typical enforceability opinion, i.e. "the [*loan documents*] are valid binding and enforceable against the borrower" is almost always coupled with qualifications which either generally warn the lender that various laws (usury, insolvency, creditors' rights, bankruptcy and consumer protection) or legal principals (equity) may limit or render unenforceable certain provisions of the mortgage (the "generic" qualification), or identify specific provisions of the documents which are limited or unenforceable (the "laundry list" qualification). For an in depth discussion of the pros and cons of the generic versus the laundry list qualifications, *see., Opinions on Loans Secured by Real Estate: A Guide to the Reports of the Bar Associations, a Report of the Subcommittee on Comparison of Opinion Reports of the ABA Section of Real Property, Probate and Trust Law's Committee on Legal Opinions*, 12 ABA Real Est. Financing Newsl., December 1, 1992.

3 The author wishes to acknowledge the contribution of the Legal Opinions Committee for the Real Property, Probate and Trust Law Section of the Florida Bar for the analysis set forth in this article, particularly the sections discussing due diligence.

II. ETHICAL CONSIDERATIONS

Not surprisingly, the Florida Rules of Professional Conduct (the "Rules") govern the issuance of third party opinions. Specifically, Rule 4-2.3 allows attorneys to issue opinions to third parties on matters affecting their clients provided they reasonably believe "that making the evaluation is compatible with other aspects of [their] relationship with the client" and "the client consents after consultation."[4]

This Rule, which is clearly intended to protect both the client and the opinion recipient, also requires the attorney to state "any material limitations that were imposed on the scope of the inquiry or on the disclosure of information" and, except to the extent disclosure is required in connection with the opinion letter, protect client confidences as required by Rule 4-1.6.[5]

---

[4] Florida Rules of Professional Conduct Rule 4-2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) WHEN LAWYER MAY UNDERTAKE EVALUATION. A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:
  (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
  (2) the client consents after consultation.

(b) LIMITATION ON SCOPE OF EVALUATION. In reporting the evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) MAINTAINING CLIENT CONFIDENCES. Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 4-1.6.

[5] Florida Rules of Professional Conduct RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) CONSENT REQUIRED TO REVEAL INFORMATION. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c) and (d), unless the client consents after disclosure to the client.

(b) WHEN LAWYER MUST REVEAL INFORMATION. A lawyer shall reveal such information to the extent the lawyer believes necessary:
  (1) to prevent a client from committing a crime; or
  (2) to prevent a death or substantial bodily harm to another.

(c) WHEN LAWYER MAY REVEAL INFORMATION. A lawyer may reveal such information to the extent the lawyer believes necessary:
  (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
  (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
  (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
  (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

In addition to Rule 4-2.3, the Rules governing confidentiality, the duty of loyalty, conflicts of interest and attorney misrepresentations to third parties may impact a third party opinion depending on the circumstances surrounding its issuance. For instance Rule 4-1.7(b), which cautions attorneys not to allow self interest to influence their actions may have relevance in a situation where the client applies pressure on the attorney not to issue an opinion which adversely affects the client's interests or the viability of the transaction. Similarly, Rule 4-4.1, which concerns truthfulness to others, provides the attorney with a reminder of the dangers of making statements which, although technically correct, are designed to mislead the opinion recipient.

Although under Florida law a violation of the Rules will not provide a basis for a negligence action against an attorney, it may constitute evidence of a breach of the required standard of care.[6] Violation of the Rules may also constitute grounds for a disciplinary action by the Florida Bar against the attorney rendering the opinion.

III. LEGAL CONSIDERATIONS

Historically Florida courts have limited an attorney's liability for professional negligence to clients with whom the attorney is in privity and those third parties the client intends to benefit.[7] The most common example of an

---

or

(5) to comply with the Rules of Professional Conduct.

(d) EXHAUSTION OF APPELLATE REMEDIES. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

Consent after disclosures presumes that before consent is given the client fully understands the scope of the attorney's legal and ethical duties to the opinion recipient and is aware that the attorney may be required to disclose information that the client would rather keep confidential.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

[6] Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 655 F.Supp. 1573 (S.D.Fla. 1987) *aff'd. mem.* 846 F.2d 743 (llth Cir. 1988) *cert. den.* 488 U.S. 854, 109 S. Ct. 142 (1988) and Gomez v. Hawkins Concrete Construction Co., 623 F.Supp. 194 (N.D. Fla. 1985). The court in Gomez, citing a Sixth Circuit Court of Appeal, case stated: "While the Code of Professional Responsibility does not undertake to define liability of lawyers for professional conduct, it constitutes some evidence of standards required of them. Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980)."

[7] Angel, Cohen and Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987) *See also* Moss v. Zafiris, Inc., 524 So.2d 1010 (Fla. 1988); and Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 612 So.2d 1378 (Fla. 1993). In *Angel* the Florida Supreme Court, noting that "the only instances in Florida where this rule of privity has been relaxed is where it was the apparent intent of the client to benefit a third party" refused to expand the third party beneficiary exception and "specifically rejected any "invitation to

attorney's liability to third parties is found in the area of will drafting.[8] However, as recently noted in the case of *Greenberg v. Mahoney, Adams & Criser,*[9], the Florida Supreme Court in *Angel* did not limit third party liability to will drafting. In *Greenberg*, the court held that a third party beneficiary does not have to fit within the testamentary exception to have a negligence claim against an attorney. The court finding that "Appellants pled in their complaint that they were intended third party beneficiaries" held that they stated a viable cause of action.[10]

Although there are no cases which directly deal with an attorney's liability to the recipient of a third party opinion letter (the *Greenberg* case dealt with an unspecified third party relationship), it seems likely that a Florida court reviewing an opinion letter drafted at the direction of the client for the benefit of a third party will find the attorney liable to the third party for any negligence.

IV. DUE DILIGENCE

Attorneys asked to render third party opinions are not required to consult tarot cards or engage in reading tea leaves in order to respond to the lender's legitimate concerns. They are, however, required to exercise appropriate due diligence in investigating the facts and the law necessary to meet their professional obligations to the lender.

Clients - Organization and Status

The due diligence necessary to determine whether a client has been properly organized and is in existence varies depending upon the entity.

Corporations

In order to give an opinion that a corporation is incorporated and organized under Florida law and its status is active, the attorney should obtain a certificate of status from the Department of State which will confirm, among other things, that: (1) the corporation has been incorporated; (2) all fees have been paid to

---

adopt California's balancing of factors test. Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958)." *Angel* at 194.

[8] Tew v. Arky, et. al., 655 F.Supp. 1573; Angel, 512 So.2d 192.

[9] 614 So.2d 604 (Fla. 1st DCA 1993)

[10] *Id.* at 605.

the Department of State; (3) the corporation's most recent annual report has been filed; (4) Articles of Dissolution for the corporation have not been filed.[11]

To insure that the corporation has not commenced dissolution proceedings, a certificate should be obtained from an officer of the corporation stating that no such action has been undertaken. The attorney should also confirm the officer's statements by examining and reviewing the records of the corporation.

The attorney should also review the minute books of the corporation to confirm that By-Laws have been adopted for the corporation and that officers and directors have been elected. Finally, the attorney is advised to check the corporate law in effect at the time the corporation was organized to confirm that all organizational steps required by the statute have been taken.

Limited Partnership

An attorney opining that a limited partnership is duly organized, validly existing and in good standing under the laws of the State of Florida, should:

(1) Obtain a certified copy of the entity's certificate of limited partnership from the Florida Secretary of State.

(2) Review the certificate of limited partnership to insure that it complies with the requirements of Florida Statute § 620.108 (1994).[12]

---

[11] Fla. Stat. § 607.0128 (1994), which authorizes the Department of State to furnish certificates of status provides as follows:

(1) Anyone may apply to the Department of State to furnish a certificate of status for a domestic corporation or a certificate of authorization for a foreign corporation.

(2) A certificate of status or authorization sets forth:

(a) The domestic corporation's corporate name or the foreign corporation's corporate name used in this state;

(b) 1. That the domestic corporation is duly incorporated under the law of this state and the date of its incorporation, or

2. That the foreign corporation is authorized to transact business in this state;

(c) That all fees and penalties owed to the department have been paid, if:

1. Payment is reflected in the records of the department, and

2. Nonpayment affects the existence or authorization of the domestic or foreign corporation;

(d) That its most recent annual report required by s. 607.1622 has been delivered to the department; and

(e) That articles of dissolution have not been filed.

(3) Subject to any qualification stated in the certificate, a certificate of status or authorization issues by the department may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state.

[12] Fla. Stat. § 620.108 FORMATION; CERTIFICATE OF LIMITED PARTNERSHIP.

(1) In order to form a limited partnership, a certificate of limited partnership must be executed and

(3) Obtain a good standing or active status certificate from the Florida Secretary of State. Confirm, by reviewing the certificate, that the limited partnership has filed its annual report and paid its annual fee for the current year.
(4) Confirm, by checking with the Florida Secretary of State, that the limited partnership has a registered agent and a registered office as required by Florida Statute § 620.105 (1994).
(5) Obtain a certificate from a general partner confirming that there is at least one active general partner and one active limited partner for the limited partnership. If the only general partner or only limited partner is an entity, obtain confirmation that the entity is properly organized and validly existing and is not subject to any bankruptcy proceeding.
(6) Confirm that there are no pending proceedings for dissolution of the limited partnership and that there are no circumstances that would trigger dissolution under the partnership agreement.

General Partnership

In order to render an opinion that a general partnership is "validly existing" under the laws of the State of Florida, the attorney must confirm that the partnership exists, either by reviewing the written partnership agreement or if there is no such agreement, by obtaining a certificate from the general partners confirming the existence of the partnership.

To opine that a general partnership is "duly organized" the attorney must confirm that there is a written partnership agreement and that there are at least two general partners. An opinion that a general partnership is "duly organized" should not be given unless there is a written partnership agreement. Finally, the attorney should also determine whether the partnership has complied with the

---

filed with the Department of State. The certificate must set forth:

(a) The name of the limited partnership.
(b) The address of the office and the name and address of the agent for service of process required to be maintained by s. 620.105.
(c) The name and the business address of each general partner. If the general partner is a corporation, is must be incorporated or qualified in this state pursuant to s. 607.0202 or s. 607.1503, must maintain an active status, and must not be dissolved, revoked or withdrawn.
(d) A mailing address for the limited partnership.
(e) The latest date upon which the limited partnership is to dissolve.
(f) Any other matters the general partners determine to include therein.

An affidavit declaring the amount of the capital contributions of the limited partners and the amount anticipated to be contributed by the limited partners must accompany the certificate of limited partnership.

Florida Fictitious Name Act.[13] Compliance with the Fictitious Name Act can be confirmed by obtaining a certificate from the Secretary of State's office.

Land Trust

If the client is a trustee, the attorney may be required to opine that the client is a "trustee of a land trust that is in compliance with the provisions of § 689.071 (1994) of the Florida Statutes, with full power and authority to protect, conserve, sell, lease, encumber or otherwise manage and dispose of property." To render this opinion, the attorney should determine that the deed (or other instrument conveying an interest in real property) into the trustee complies with the statutory requirements set forth in Fla. Stat. § 689.071 (1994).[14]

---

[13] The Florida Fictitious Names Act, Fla. Stat. §865.09 provides in part as follows:

(3) Registration.-A person may not engage in business under a fictitious name unless he first registers the name with the division by filing a sworn statement listing:

(a) The name to be registered.

(b) The mailing address of the business.

(c) The name and address of each owner and, if a corporation, its federal employer's identification number and Florida incorporation or registration number.

(d) Certification by the applicant that the intention to register such fictitious name has been advertised at least once in a newspaper as defined in chapter 50 in the county where the principal place of business of the applicant will be located.

(e) Any other information the division may deem necessary to adequately inform other governmental agencies and the public as to the persons so conducting business.

Such statement shall be accompanied by the applicable processing fees and any other taxes or penalties owed to the state.

. . .

(9) Penalties.-

(a) If a business fails to comply with this section, the business, its members, and those interested in doing such business may not maintain any action, suit or proceeding in any court of this state until this section is complied with. An action, suit or proceeding may not be maintained in any court of this state by any successor or assignee or such business on any right, claim, or demand arising out of the transaction of business by such business in this state until this section has been complied with.

(b) The failure of a business to comply with this section does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business and does not prevent such business from defending any action, suit, or proceeding in any court of this state. However, a party aggrieved by a noncomplying business may be awarded reasonable attorney's fees and court costs necessitated by the noncomplying business.

(c) Any person who fails to comply with this section commits a misdemeanor to the second degree, punishable as provided in s. 775.082 or s. 775.083.

[14] Florida Statute 689.071 (1994) requires that the instrument conveying an interest in real property be recorded and "confer on the trustee the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property described in said instrument."

If the conveyance into the trustee occurred after July 2, 1992 and the trustee is a corporation, the attorney should confirm that the corporation is validly organized and in good standing in the state of its incorporation. If the trustee was not organized in the State of Florida, the trustee should confirm that the corporation has been authorized to do business in Florida.[15]

Conveyances into a corporate trustee occurring before July 3, 1992, are subject to Fla. Stat. § 660.41 (1991),[16] which prohibited corporations without trust powers (other than national banks or federal associations) from acting as Trustees. In such a case, the attorney should obtain a certificate from the Department of Banking and Finance of the State of Florida confirming the existence of the corporation's trust powers.[17]

If the conveyance into the trustee does not comply with the Fla. Stat. §§ 689.071 or 689.07 (1994), then the trust instrument should be examined to insure that the trustee has complied with all of the trust requirements. Additionally, the attorney should require that the instrument be recorded. If the trust instrument creates a passive or dry trust, the attorney should confirm that the trustee and all of the beneficiaries executed the transaction documents.

To insure that the trustee has complied with all the requirements of the trust, the attorney should obtain: a certificate from the trustee identifying each beneficiary and the holder of any known security interests, certificates from each beneficiary confirming the identity of all beneficiaries of the trust and directing the trustee to take the actions necessary to finalize the transaction, and the consent of the holder of any known security interest.

Limited Liability Company

Limited Liability Companies are organized under Chapter 620 of the Florida Statutes. To render an opinion that the client is a limited liability company, duly organized, validly existing and in good standing under the laws of the State of Florida, the attorney should:

(1) Obtain a certified copy of the client's Articles of Organization from the Florida Secretary of State.

---

[15] *See* Fund Title Note 31.02.06 (1993).

[16] The portion of 660.41 which restricted a corporation's ability to act as a trustee was repealed effective July 3, 1992.

[17] If the trustee is a federally chartered financial institution, then confirmation of trust powers can be obtained by certificate from the Controller of the Currency, Southeastern District, Peachtree - Cain Tower, Suite 2700, 229 Peachtree Street, N.E., Atlanta, Georgia 30303.

(2) Review the certified copy of the Articles of Organization to insure their compliance with the requirements of Fla. Stat. § 608.407 (1994).[18]

(3) Confirm that the limited liability company has filed its annual report and paid its annual fees by obtaining a certificate of good standing or active status from the Florida Secretary of State.

(4) Confirm that the client has a registered agent and registered office as required by Fla. Stat. § 608.415 (1994). Confirmation of this fact can be obtained from the Florida Secretary of State.

(5) Confirm that there are no pending proceedings to dissolve the limited liability company and that there are no existing circumstances which would trigger the dissolution of the client under its Articles of

---

[18] Florida Statute § 608.407 (1994) provides as follows:

(1) In order to form a limited liability company, articles or organization of a limited liability company shall be executed and filed with the Department of State. The articles shall set forth:
   (a) The name of the limited liability company.
   (b) The period of its duration, which may be perpetual.
   (c) The mailing address and the street address of the principal office of the limited liability com pany.
   (d) The name and street address of its initial registered agent in the state together with a statement in writing in such form and manner as shall be prescribed by the Department of State accepting the appointment as a registered agent simultaneously with his being designated. Such statement of acceptance shall state that the registered agent is familiar with, and accepts, the obligations of that position.
   (e) The right, if given of the members to admit additional members and the terms and conditions of the admissions.
   (f) The right, if given, of the remaining members of the limited liability company to continue the business on the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a member of the occurrence of any other event which terminates the continues membership of a member in the limited liability company.
   (g) 1. If the limited liability company is to be managed by a manager or managers, a statement that the company is to be managed by a manager or managers and the names and addresses of such managers who are to serve as managers until the first annual meting of members or until their successors are elected and qualify.
   2. If the management of a limited liability company is reserved to the members, a statement to that effect and the names and addresses of the managing members.
   (h) Any other matters the members determine to include therein.

(2) An affidavit declaring that the limited inability company has at least two members and setting forth the amount of the cash and a description and agreed value of property other than cash contributed by the members and the amount anticipated to be contributed by the members shall accompany the articles of organization of a limited liability company.

(3) A limited liability company is formed at the time described in s. 608.409 if there has been substantial compliance with the requirements of this section.

(4) The articles of organization must be executed by at least one member of the authorized representative of a member.

Organization. To confirm the foregoing, the attorney should obtain a certificate from a manager of the limited liability company or, if there is no manager, from a member of the limited liability company.

(6) Confirm that the limited liability company has at least two members who are either individuals or entities duly organized, validly existing and not subject to any bankruptcy proceedings.

Clients - Qualification to do Business in Florida

If the client has been organized under the laws of a state other than Florida, the lender may require assurance that the foreign client is authorized under the laws of the State of Florida to transact business in Florida. Foreign corporations, limited partnerships and limited liability companies are required to qualify to do business in Florida in order to rent or develop property. Qualification is not required if the entity simply owns undeveloped real property.[19]

Foreign Corporations

To determine whether a client is qualified to transact business as a foreign corporation in the State of Florida, the attorney should obtain a certificate from the Florida Secretary of State confirming that the corporation is qualified to do business in Florida under Fla. Stat. § 607.0128 (1994). The attorney should also verify with the Florida Secretary of State that the corporation has a registered agent and a registered office under Fla. Stat. § 607.0505 (1994). It should be noted that even if the corporation is not required to qualify to do business in Florida, if it owns Florida real property or a mortgage on Florida real property, it must still appoint a registered agent and maintain a registered office under Fla. Stat. § 607.0505 (1994).

Foreign Limited Partnerships

In order to opine that a foreign limited partnership is qualified to transact business as a foreign limited partnership in the State of Florida, the attorney should obtain a certificate of authorization from the Secretary of State and verify that the limited partnership has a registered agent and an office under

---

[19] *See*, Fla. Stat. §§ 607.1501 (1994), 620.169 (1994) and 608.501 (1994).

Fla. Stat. § 620.192 (1994). As with a Florida corporation, a limited partnership which owns Florida real property or has a mortgage on Florida property is required to appoint a registered agent and maintain a registered office even if it is not required to qualify to do business in Florida.

Foreign General Partnerships

There are no requirements that a general partnership register to do business in Florida. However, the attorney should examine a copy of the partnership agreement to insure that there are no restrictions in the agreement on the partnership's ability to conduct business in Florida. The attorney should also verify that the partnership has complied with the Florida Fictitious Name Act (Fla. Stat. § 865.09(1994)).

Foreign Land Trust Agreements

Foreign land trusts are not required to qualify to do business in Florida. However, the attorney should examine the trust agreement to confirm that there are no restrictions in the agreement on the trustee's ability to conduct business in the State of Florida.

Foreign Limited Liability Company

In order to opine that a foreign limited liability company is qualified to transact business as a foreign limited liability company in the State of Florida the attorney should obtain a certificate of authorization from the Florida Secretary of State and confirm that the limited liability company has a registered agent and registered office.

Client - Power and Authority

Corporations, partnerships, limited partnerships, trusts and limited liability companies have all the power conferred on them by statute, unless that power is restricted by their organizational documents. Accordingly, to opine that the client has the power to own or mortgage property, borrow money, or execute and perform the obligations under the transaction documents the attorney must: i) examine the statutes under which the entity was organized or otherwise derives its powers; ii) examine the organizational documents of the entity (or conveyance into the trustee for a trust) to determine whether there are any

limitations imposed on its statutory power; and iii) confirm the accuracy and completeness of the documents being examined by obtaining certificates from the appropriate officer, general partner, managing member, or trustee of the entity. In the event the entity in question is a partnership with an unwritten partnership agreement, the attorney should obtain and examine a certificate signed by all the partners setting forth the essential terms of the partnership. If the entity is regulated by the federal government it may also be necessary to examine federal statutes for limitations to the entity's power.

To opine that an entity has taken all action necessary to authorize the execution, delivery and performance of documents required in connection with the transaction, the attorney must not only examine the statutes regulating the entity but also the documents which created the entity. The attorney should also obtain a certificate executed by the number of directors in the case of a corporation, general partners in the case of a partnership, trustees in the case of a trust and members in the case of a limited liability company, who are necessary to take the proposed action for the entity in question. The certificate should confirm that all necessary action has been taken to authorize the execution and delivery of the documents and the performance of the obligations required thereunder.

The Transaction Documents

In general, documents conveying an interest in real property and documents which need to be recorded in the public records have special requirements as to form and manner of execution. In order to determine whether a document is in an acceptable form for recording, the attorney must insure that the document complies with the various statutory requirements.

Conditions Precedent to Recording Instruments Affecting Real Property

Fla. Stat. § 695.26 (1994) requires that a document include the following before it can be recorded:

(1) The name of each person executing the document legibly printed, typewritten or stamped on the document immediately beneath the person's signature;
(2) The post office address of each grantor, legibly printed, typewritten or stamped on the document;

(3) The name and address of the natural person preparing the document or under whose supervision the document was prepared, legibly printed, typewritten or stamped on the face of the document;
(4) The name of each witness to the document, legibly printed, typewritten or stamped immediately beneath their signature;
(5) The name of the notary public or other officer acknowledging the instrument, legibly printed, typewritten or stamped upon the document immediately beneath their signature;
(6) The reservation for the exclusive use of the Clerk of the Circuit Court of a 3 inch square at the top right hand corner of the first page of each document and a 3 inch by 1 inch rectangle at the top right hand corner of each subsequent page of the document; and
(7) The name and post office address of any grantees, legibly printed, typewritten or stamped upon the document.

A document that does not comply with the foregoing will not be invalid but it may not be accepted for recording. Fla. Stat. § 695.26 (1994) does not apply to any decree, order, judgment or writ of any court, any document executed, acknowledged or proved outside of the State of Florida, or any will, plat or document prepared or executed by a public officer other than a notary public.

Acknowledgments and Proof

Fla. Stat. § 695.03 (1994) requires that before a document affecting real property can be recorded in the public records of the state, it must be acknowledged by the party executing it or proved by a subscribing witness. The statute does not, however, apply to UCC transactions and specifically sets forth the requirements for proofs and acknowledgments made within the State of Florida, those made outside the state but within the United States, and those made in a foreign country. The statute also sets forth acceptable short form acknowledgments.

Witnesses

Pursuant to Fla. Stat. § 689.01 (1994), any agreement transferring a freehold interest for a term of more than one year must be in writing and signed in the presence of two subscribing witnesses by the grantor or his authorized agent in order to be valid.

Deed Form

Fla. Stat. § 689.02 (1994) requires that a deed include a blank space for the Property Appraiser's Parcel Identification Number and the social security numbers of the grantees. The statute provides, however, that failure of the deed to comply with these requirements will not affect the validity or recordability of the deed.

DR-219 Recording Form

Fla. Stat. § 201.022 (1994) requires as a prerequisite to recording a deed transferring interest in real property that a return be filed with the Clerk of the Circuit Court stating the actual consideration paid for the transfer. The statute also provides that the failure of the grantee or her agent to comply with the statute will not affect the validity of the deed. The statute does, however, impose a penalty on those who fail to comply with the statute.

Balloon Mortgages

Except for certain mortgages excluded under Fla. Stat. § 697.05(4) (1994), all balloon mortgages[20] must include the legend specifically set forth in the statute. The failure of the mortgage to include the statutorily required legend will automatically extend the maturity date of the mortgage, as provided in the statute.

Conveyances by a Corporation

Under Fla. Stat. § 689.01 (1994), corporations may convey real property in the same manner as other persons or entities or in accordance with Fla. Stat. § 692.01 (1994). Fla. Stat. § 692.01 (1994) permits the corporation to execute documents conveying, mortgaging or affecting its interest in real property in the name of the corporation, where the documents are signed by its president, chief executive officer or any vice president, and have the corporate seal affixed. The statute also provides that when a document is executed in accordance with §

---

[20] Fla. Stat. § 697.05 (1994), defines balloon mortgages as "[e]very mortgage in which the final payment or the principal balance due and payable upon maturity is greater than twice the amount of the regular monthly or periodic payment of the mortgage."

692.01 (1994), it is not necessary to record a corporate resolution to evidence authority, and in the absence of fraud by the grantee, the document will not be deemed invalid even if the officer executing the deed was not authorized to execute the document. Documents executed in this manner do not need to be witnessed, and it is not necessary for the attorney to review the corporate books and records or obtain a corporate resolution indicating the person's authority to execute the document. The attorney should, however, at a minimum, obtain a certificate from the corporation that the person executing the document is, in fact, the president, chief executive officer or vice president of the corporation.

Title and Priority

In the majority of real estate transactions, the party requesting the opinion relies upon a title insurance commitment to determine the state of the title to any real property involved in the transaction or the priority of any security interest being granted to the lender. Unless the attorney conducts an independent investigation and analysis of title and/or priority, most practitioners try to avoid opining as to such matters. However, if such an opinion is given, the attorney issuing the opinion should condition it on the accuracy of the title information reflected in either the title insurance commitment or abstract examined by the attorney, and, when appropriate, the accuracy of any surveys, maps or plats relied on by the attorney. At a minimum, the attorney should carefully review the title information, compare the legal description in the title commitment or abstract with the survey and the instruments conveying the interest in real property, and obtain an affidavit from the grantor stating that there are no unrecorded liens, encumbrances, servitudes or easements on the property other than as shown on the title information or survey. The attorney might also consider obtaining a similar affidavit from the grantee.

Perfection

In order to opine that a mortgage properly recorded in the public records will create a valid and perfected lien against the real property, the attorney should review the mortgage and confirm that the legal description of the property being subjected to the mortgage is sufficient to identify the property intended to be encumbered. The attorney should also ensure that the mortgage contains appropriate granting language to create a security interest in real property and that value or consideration has in fact been given in exchange for

the granting of the lien on real property. It should be noted that an opinion on perfection does not address title or priority.

Miscellaneous

In addition to the matters addressed above, attorneys are frequently asked to render opinions concerning taxes, zoning and land use, environmental laws, usury and perfection of UCC liens. Opinions on these issues should be approached cautiously. The legal issues addressed by these opinions often fall outside the attorney's area of expertise and the cost of the due diligence necessary to render such an opinion may outweigh its economic benefit. Additionally, as is often the case, the legal issues in question may not have been satisfactorily settled by the courts.

Documentary Stamp and Intangible Tax

The determination of the amount of documentary stamp or intangible tax due on a transaction is normally a matter of simple mathematical calculation based on the formulas provided in Fla. Stat. §§ 201.02 (1994), 201.08 (1994) and 199.133 (1994). However, the procedure is different in those instances where the tax is not easily calculated, for example in a multi-state transaction where the tax may be apportioned based on the value of the Florida real property in relation to the value of all collateral. In those cases, the attorney should, at a minimum, review the appropriate statutes, all applicable rules promulgated by the Florida Department of Revenue and applicable case law construing the statutes and the rules.

If, after reviewing the above, the attorney is still unable to determine the appropriate amount of documentary stamp or intangible tax, the attorney should request a written, nonbinding letter of technical advice or a binding technical assistance advisement from the Florida Department of Revenue advising the attorney and the client on the proper amount of documentary stamp or intangible taxes due in connection with the transaction. If the attorney is relying upon either a nonbinding letter of technical advice or a binding technical assistance advisement to render the opinion, the attorney should be careful to limit the opinion to review and reliance upon these documents.

State Income Taxes

It is generally not recommended that an attorney render an opinion concerning the potential exposure of the opinion recipient to state income taxes. Under most circumstances, the attorney has no knowledge of the opinion recipient's activities within the state and the extent to which these activities may expose the opinion recipient to taxes based on income. Additionally, most real estate practitioners do not have the requisite expertise in state corporate tax law to render such an opinion.

UCC Opinions

On occasion, the attorney may be requested to render an opinion concerning the creation, perfection, and/or priority of liens on personal property. Opinions concerning the status of liens on personal property require extensive factual and legal investigations and because the UCC liens are often secondary issues in a real estate transaction, it is difficult to justify the cost of rendering the opinion. Accordingly, it is generally recommended that such an opinion not be given by the attorney unless it can be limited to security interests which can only be perfected by filing with the Florida Department of State and to information contained in a UCC-11 search (or other comparable computer search) of the records of the Florida Department of State.

Zoning and Land Use

Unless the attorney has actually represented the client in connection with zoning and land use issues which are the subject of the opinion or unless the client is willing to pay the costs involved in the attorney reviewing all of the land use records involving the property, the attorney should not render an opinion on zoning and land use. The attorney may do so, however, if the opinion is subject to and conditioned on information provided to the attorney by certificates or letters from the engineers, planners, architects, consultants or legal counsel retained by the client to deal directly with the land use and zoning issues and/or letters and certificates from the appropriate governmental agencies.

Environmental Laws

Opinions regarding environmental matters are generally outside the scope of the opining attorney's expertise and should only be given if the attorney has been directly involved in representing the client with regard to such matters and/or based solely upon the attorney's review and reliance upon appropriate environmental audits or certificates/letters from environmental consultants or engineers.

Usury

Fla. Stat. § 687.02 (1994) provides that all contracts for the payment of interest upon any loan in excess of 18% per annum are usurious unless the loan exceeds $500,000 in which event the maximum lawful rate is 25% per annum. Violation of the usury statute may result in a forfeiture of the lender's ability to collect interest and, in certain circumstances, the principal of the loan.

It is understandable that opinion recipients will often request the attorney to render a usury opinion; however, the attorney should be aware that the law in this area is extremely complex and is still open to judicial interpretation.

In order to render a usury opinion, the attorney should carefully examine Chapter 687 of the Florida Statutes, and all documents related to the transaction. The attorney should also take into consideration the effect of various state and federal statutes that provide exceptions or exemptions to the Florida usury statutes.[21] Additionally, the attorney should carefully consider the definition of interest which includes any compensation paid by the borrower to or for the benefit of the lender for the use of the money borrowed. Interest may include profit participations to the extent they are not covered by the provisions of Fla. Stat. § 687.03(4) (1994),[22] loan fees unless they are true commitment or

---

[21] Examples of exceptions or exemptions to the usury statute can be found in Chapters 665 and 687, Florida Statutes, Chapter 664, Florida Statutes (dealing with industrial savings banks), Chapter 657, Florida Statutes, (dealing with credit unions), Chapter 665, Florida Statutes (dealing with Florida savings associations), the National Bank Act (12 U.S.C. § 85 (1994)) and the Depository Institutions Deregulatory and Monetary Control Act of 1980 (Public Law #96-221, 94 STAT 132).

[22] Florida Statutes §687.03 (1994).

(4) If, as provided in subsection (3), a loan, advance of money, line of credit, forbearance, or other obligation exceeds $500,000, then, for the purposes of this chapter, interest on that loan, advance of money, line of credit, forbearance, or other obligation shall not include the value of property charged, reserved, or taken as an advance or forbearance, the value of which substantially depends on the success of the venture in which are used the proceeds of that loan, advance of money, line

standby fees, amounts paid by the client for the benefit of the opinion recipient which are in excess of the amounts necessary to cover reasonable and necessary expenses of making the loan such as recording costs, documentary stamp, intangible taxes, title insurance, etc., and any the other sums which a court determines are in reality monies paid for the use of the money borrowed. The attorney should take into account the effect of Fla. Stat. §§ 687.03 (1994) (the "Spreading Statute") and 687.12 (1994) (the "Parity Statute") on the calculation of the rate of interest.

Finally, the attorney should be aware of the danger of opining that a loan does not violate Florida's Criminal Usury Laws.[23] Existing judicial decisions in this area have done little to clarify the extent of the statute involving criminal usury and have not resolved issues concerning the effectiveness of savings clauses contained within the documents or the applicability of the statutory savings provision to criminal usury.

V. CONCLUSION

Third party legal opinions are not intended to provide lenders with any guarantees. They are, however, intended to provide factual and legal assurances which will be relied on by the lender and accordingly must be issued with great care. Both Florida law and the Florida Rules of Professional Conduct require a level of due diligence which, if followed, should result in the rendering of opinions which satisfy the client's needs while protecting the opinion recipient and the attorney.

---

of credit, forbearance, or other obligation. Stock options and interests in profits, receipts, or residual values are examples of the type of property the value of which would be excluded from calculation of interest under the precedent sentence.

[23] Florida Statute 687.071 CRIMINAL USURY, LOAN SHARKING; SHYLOCKING.

. . .

(2) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive interest thereon at a rate exceeding 25 percent per annum but not in excess of 45 percent per anum, or the equivalent rate for a longer or shorter period of time, whether directly or indirectly, or conspires so to do, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

. . .

(7) No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.