

**PRESENTED AT**

**52<sup>nd</sup> ANNUAL WILLIAM W. GIBSON, JR.  
MORTGAGE LENDING AND SERVICING INSTITUTE**

September 13-14, 2018  
Austin, TX

**ETHICAL ISSUES IN  
THIRD PARTY  
FINANCING OPINIONS**

**Marilyn C. Maloney**

Marilyn C. Maloney  
Liskow & Lewis  
1001 Fannin, Suite 1800  
Houston, TX 77002  
[mcmaloney@liskow.com](mailto:mcmaloney@liskow.com)  
713.651.2938

## TABLE OF CONTENTS

I.	Overview of Materials. ....	1
II.	Why Issue Financing Opinions to Third Parties? .....	1
III.	Ethical Issues in Rendition of Third Party Financing Opinions. ....	2
	A. Rule 2.02.....	2
	B. Rule 1.01.....	3
	C. Rule 1.05.....	3
	D. Rule 1.06.....	4
IV.	Local Counsel Issues.....	4
	A. Who is the Client. ....	4
	B. Limitation of Scope of Representation. ....	5
	C. Drafting.....	5
V.	Conclusion .....	6

## **I. Overview of Materials.**

Attorneys representing borrowers and lenders are often required to give or to review legal opinions in financing transactions. These materials will outline several common ethical considerations when rendering legal opinions. The primary focus will be on the following two opinion reports: *Real Estate Finance Opinion Report of 2012* prepared by the ABA Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers, Attorneys' Opinion Committee, and the American College of Mortgage Attorneys, Opinions Committee (the "**2012 Report**"), 47 Real Prop. Tr. & Est. J. 213 (2012), and *Local Counsel Opinion Letters – A Supplement to the Real Estate Finance Opinion Report of 2012*, prepared by the same groups (the "**Local Counsel Supplement**"), 51 Real Prop. Tr. & Est. J. 167 (2016).

## **II. Why Issue Financing Opinions to Third Parties?**

Most loan documents, such as credit agreements, mortgages, deeds of trusts, security agreements, guaranties, and other closing documents are forms drafted by and required by the lender. Yet, routinely borrower's counsel is required to render opinions to the lender on the lender's own forms. The negotiation and rendition of legal opinions can add substantially to the cost of the loan for the borrower. Why require the borrower's counsel to render these opinions? There are two answers to this question. The first is that an opinion of borrower's counsel may be a requirement of the lender's internal regulatory requirements. Whether or not the opinion actually adds value to the transaction, the borrower will have to furnish the opinion in order to receive the funds. In this case, borrower's counsel should attempt to work with his or her client to render the opinion as efficiently as possible, while bearing in mind the risks of the opinion to the opinion giver's firm. The second is that, particularly in multi-state transactions, the lender may not engage local counsel in the jurisdictions of the borrower or the collateral and is relying upon borrower's

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Ethical Issues in Third Party Financing Opinions

Also available as part of the eCourse

[2018 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

First appeared as part of the conference materials for the  
52<sup>nd</sup> Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session  
"Mortgage Lending Ethics"