

Providing Enforceability Opinions

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In Ontario, the question of whether in-house counsel can provide enforceability opinions in the context of loan and purchase transactions is both a legal and practical matter, touching on professional responsibility, client expectations, and third-party reliance.

An enforceability opinion is a legal opinion typically delivered by a lawyer in a transactional context, such as a commercial mortgage loan or a purchase transaction, stating that the underlying transaction documents are legally valid and enforceable against the parties, often subject to customary qualifications and assumptions. These opinions are a key element of risk management for lenders and counterparties.

In Ontario, in-house counsel are licensed members of the Law Society of Ontario (LSO) and are authorized to practice law, but typically only for their employer. This means they may provide legal advice and opinions internally to their employer, including enforceability opinions in relation to transactions in which the employer is a party.

However, enforceability opinions are often required to be delivered to third parties, such as a commercial mortgage lender or a purchaser. This introduces a potential issue: can in-house counsel provide opinions to third parties, or does this constitute unauthorized practice of law or raise conflict and independence concerns?

The LSO permits in-house counsel to provide legal opinions to third parties, provided they are doing so on behalf of their employer and the opinion is not being provided as independent external legal counsel. However, in practice, many third-party recipients (such as banks, institutional lenders, purchase counterparties and investors) may require an opinion from external counsel, valuing the perceived independence and insurance coverage that accompanies it.

Additionally, in-house counsel who are not insured under the LSO's professional liability insurance may face restrictions or exclusions that make providing such opinions risky, both for themselves and the recipients.

Some practical considerations for in-house counsel when considering whether to provide an enforceability opinion are:

1. **Independence:** Third parties may be concerned about the objectivity of in-house counsel, given their employment relationship with one of the parties to the transaction.
2. **Insurance Coverage:** In-house lawyers may not carry the same level of liability insurance as external counsel, which can be problematic for high-value or risk-sensitive transactions.
3. **Standard Market Expectations:** For larger or syndicated financings, or transactions involving public companies, it is market practice to obtain enforceability opinions from external counsel.

While in-house counsel in Ontario can provide enforceability opinions in commercial mortgage loan and purchase transactions on behalf of their employer, counsel should carefully assess the risks, insurance issues, and expectations of transaction parties before deciding on whether to provide such opinions.

For any related questions or to suggest a topic, please contact the writer. To see my previous 1-Minute Reads for In-House Legal Counsel, please visit the Blog portion of my profile at <https://grllp.com/zzlotnick#media-insights>. A PDF version is available for download [here](#).

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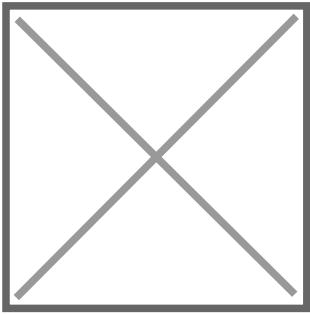
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