Report Regarding Legal Opinions in Personal Property Secured Transactions

Russell A. Hakes
Uniform Commercial Code Committee of the Business Law Section of the State Bar of California, Uniform Commercial Code Committee of the Business Law Section of the State Bar of California

Available at: https://works.bepress.com/russell_hakes/7/
Report Regarding Legal Opinions in Personal Property Secured Transactions

By the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California*

INTRODUCTION

This is a report by the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California ("Committee") on the use of legal opinions in personal property secured transactions, with particular consideration to the impact of California law on such opinions. It is intended to supplement the Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions issued in August 1982 by the Business Law Section of the State Bar of California ("Business Law Report").

This report focuses upon the form and meaning of opinions commonly requested and given in secured transactions involving personal property. In particular, this report discusses opinions of counsel concerning the attachment, enforceability, effectiveness, perfection, and priority of consensual security interests in personal property. California has adopted the 1972 and 1977 amendments to the Official Text of Article 9. The California Uniform Commercial Code ("Code") does vary, however, in some instances from the Official Text of Article 9. The Committee believes that this report’s discussion of the Code should be valuable for lawyers in the other forty-eight states that have adopted some version of article 9 of the Uniform Commercial Code ("U.C.C."). However, this report makes no attempt to provide a comprehensive survey of all relevant state variations or judicial decisions. Accordingly, lawyers in other jurisdictions should review their jurisdictions’ version of article 9 to determine any variations from the Code before relying on this report. Although a discussion of opinions in real property secured transactions is beyond the scope of this report, the discussion in this report is also applicable to opinions regarding the Code requested and given in mixed collateral secured transactions. A Joint

*Richard N. Frasch, chair, Subcommittee on Legal Opinions; subcommittee members: Audrey J. Barris, Russell A. Hakes, and John B. Power. This report has been revised and updated through 1988 from an earlier version originally prepared as of December 31, 1986.

1. Reprinted in 14 Pac. L.J. 1001 (1983) [hereinafter Business Law Report]. The Business Law Report is currently being revised and updated by the Committee on Corporations. The Uniform Commercial Code Committee has reviewed a draft of the revised Business Law Report and believes that the substance of the revisions does not affect the discussion in this report.
The Business Lawyer; Vol. 44, May 1989

Committee of the Real Property Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association has prepared a report on opinions in real estate transactions ("Real Estate Report"), which should be consulted in connection with issues relating to real property secured transactions.

GENERAL CONSIDERATIONS

COORDINATION WITH THE BUSINESS LAW REPORT

The Business Law Report provides a discussion of the definition and purpose of legal opinions, the legal standards applicable to the preparation of opinions, and many of the common problems found in their preparation. It discusses inappropriate subjects for opinions, including opinions that are not cost effective and factual opinions. It also addresses the issue of when to negotiate opinions. The Business Law Report specifically describes and comments upon various forms of opinions commonly found in business transactions.

This report is a supplement to the Business Law Report; accordingly, the Business Law Report should be read carefully in order to understand the context in which this report is provided. Most of the Business Law Report is directly applicable to the discussion in this report. Although this report focuses only on legal opinions relating to consensual personal property security interests under divisions 8 and 9 of the Code, many of the issues that are confronted in considering these opinions are covered by the Business Law Report.

JUSTIFICATION FOR REQUESTING AN OPINION

The request for an opinion concerning a personal property security interest most commonly arises in the context of the closing of a secured loan transaction. The secured party’s lawyer will often draft the initial form of the opinion which the secured party wishes to receive from the debtor’s lawyer. Unfortunately, discussion or negotiation of the final form of this opinion is often left until the end of the transaction. The secured party’s lawyer and the debtor’s lawyer may spend a significant amount of time in negotiating the form of the opinion. During these discussions or negotiations, the debtor’s lawyer (or the debtor) may inquire as to the justification for the delivery of an opinion by the debtor’s lawyer. Such an inquiry is really composed of two questions: (i) Should an opinion be delivered? (ii) If an opinion should be delivered, who should deliver the opinion?


With respect to whether an opinion should be requested or delivered, there are two primary considerations. First, a lawyer should not be requested to provide an opinion in areas of legal uncertainty. Second, as discussed later in this report, certain opinions (especially priority opinions) may be costly or cumbersome to give because of the extensive qualifications which must be drafted and the due diligence review which must be undertaken. For example, because of the costs of providing a priority opinion, the amount of money involved in the underlying secured transaction may not justify delivery of such an opinion. In some circumstances, the secured party should be willing to forgo the requirement of a priority opinion and rely upon a U.C.C. search certificate and other evidence available to it indicating the existence of competing filed financing statements or other impediments to priority.

With respect to the identity of the party who should deliver an opinion, the lawyer who is in the best position to provide the opinion should be determined. The debtor’s lawyer may argue that the secured party’s lawyer is in a better position to deliver the requested opinion. The loan documents are often drafted by the secured party’s lawyer without significant change or input from the debtor’s lawyer. Moreover, the secured party’s lawyer is often more knowledgeable than the debtor’s lawyer regarding personal property secured transactions. Nevertheless, the debtor’s lawyer is most often the appropriate party to deliver the closing opinion. Frequently, there are factual matters which the secured party’s lawyer cannot easily confirm for purposes of rendering an opinion, and the requirement for the delivery of an opinion from the debtor’s lawyer may be the principal practical method of confirming such matters.

Often, the foregoing considerations will lead to the conclusion that the debtor’s lawyer should deliver an opinion to the secured party. For example, a security agreement may purport to grant to a secured party a perfected security interest in specified personal property of the debtor. A representation or warranty by the debtor may not provide the secured party with sufficient assurance that the security interest is perfected. The secured party may appropriately desire the independent judgment of a lawyer to confirm in an opinion that the security interest is perfected. The debtor’s lawyer is usually in the best position to provide such an opinion because the attorney-client relationship provides for an exchange of information between the debtor’s lawyer and the

---

4. Between lawyers, the golden rule should be followed: A lawyer should not request an opinion from another lawyer in circumstances where the requesting lawyer would not be willing to provide a similar opinion. See Business Law Report, supra note 1, at 8–9, reprinted in 14 Pac. L.J. at 1010–12. The reference in the text to an opinion is meant to refer to a bond or clean opinion. In circumstances involving legal uncertainty, a reasoned opinion may sometimes be appropriate. For a discussion of bond and reasoned opinions, see Bermant, The Role of the Opinion of Counsel: A Tentative Reevaluation, 49 Cal. St. B.J. 132 (1974); Real Estate Report, supra note 2, at 15–17, reprinted in 42 Bus. Law. at 1151–53.

5. See infra text accompanying notes 155–74.

6. The delivery of an opinion letter by the debtor’s lawyer to the secured party should not be used to eliminate the obligation of the secured party’s lawyer to the secured party to undertake the proper analysis, structuring, and documentation of a secured transaction.
debtor, which information might not otherwise be readily available to the secured party’s lawyer. Moreover, the secured party may wish to know the view of the debtor and the advice of the debtor’s lawyer to the debtor as to the security interests which the debtor grants, and to lay some foundation for estoppel against the debtor from taking a view contrary to that held by the secured party.

In summary, an opinion of a lawyer may not always be justified. Even where an opinion is warranted, the scope of the opinion should often be limited for reasons of cost or fairness.7 The remainder of this report proceeds on the basis that the parties to a personal property secured transaction have concluded that an opinion is required from the lawyer for the debtor or the secured party.

THE LEGAL CONTEXT

To many lawyers, the law relating to personal property security interests seems mysterious. While mystery may not appropriately describe this area of the law, it certainly has a structure and terminology of its own. This structure and terminology should be familiar to any lawyer proposing to render an opinion on personal property secured transactions. This report does not purport to undertake an exhaustive review of the law relative to personal property security interests. Extensive writings are available regarding the uniform versions of articles 8 and 9 and problems arising under them.8 However, some general observations about the legal context are appropriate.

Divisions 8 and 9 of the Code provide the basic legal structure relating to consensual security interests in personal property and fixtures.

Personal Property Security Interest Scheme

With respect to security interests in most types of tangible and intangible personal property, division 9 provides a comprehensive statutory scheme. This scheme includes definitions for various types of personal property, the concept of attachment, the concept of perfection, a priority system regarding certain contests involving personal property, and provisions for realization on default.

Categories of Collateral

Initially, division 9 divides personal property into different categories by a series of definitions.9 For example, goods are all things which are movable at the time the security interest attaches or which are fixtures, with specified exceptions. Goods are then broken down into subcategories called consumer goods,

7. See infra text accompanying notes 118–211.
equipment, farm products, and inventory. Any personal property not covered by other definitions or exclusions is in the category of general intangibles. The various categories of personal property thus established are treated differently for such important subjects as the method of perfection and the choice of law applied for perfection issues.

**Creation and Attachment**

Although division 9 does not directly address the question of how a security interest is created in collateral, division 9 does explicitly address the important question of when the security interest attaches to collateral. For non-possessory security interests, other than growing crops or timber to be cut, attachment occurs (absent an agreement of postponement) when the debtor has signed a security agreement containing a description of the collateral, value has been given, and the debtor has rights in the collateral. The terms “enforceable” and “attachment” are both used in the Code with respect to security interests and are closely related. When attachment has occurred with respect to collateral, the security interest is enforceable against the debtor with respect to the collateral. Moreover, the security interest is not enforceable against the debtor or third parties if it has not attached. Perfection cannot occur unless there is attachment.

**Perfection**

Following the provisions relating to attachment, division 9 turns to the question of perfection. Perfection is a concept used to determine the priority of a security interest against the competing interests of certain third parties in the collateral. Two primary techniques for perfection are established; their applicability depends upon the category of the collateral. These techniques are filing and possession. Filing is normally effected with the secretary of state, although in the cases of consumer goods, crops, timber, minerals, and certain other collateral, it is with the county recorder. In addition, with respect to some kinds of collateral, neither filing nor possession is the correct method for

10. Id. §§ 9105(1)(h), 9109.
11. Id. § 9106.
12. The elements of the creation of a security interest can be inferred from the context. E.g., id. §§ 1201(37), 9105(1)(l), 9201, 9203(1), (2) (West 1964 & Supp. 1989).
14. Id. § 9203(1), (2). See also Uniform Commercial Code § 9203 comment 1 (“When all of these elements exist, the security agreement becomes enforceable between the parties and is said to ‘attach.’ ”).
16. Id.
17. Id. § 9203(1).
18. Id. § 9303(1).
19. See id. § 9303.
20. Id. §§ 9302 (perfection by filing), 9305 (perfection by possession).
21. See id. § 9401(1).
perfection. For example, in the case of motor vehicles that are not inventory, registration with the Department of Motor Vehicles is generally the correct technique for perfection.\(^{22}\)

**Priority**

Division 9 establishes a priority scheme which is designed to determine who will prevail in contests among various identified persons with interests in the collateral.\(^{23}\) For example, with specified exceptions, as between secured parties with security interests perfected by filing under division 9, the first party to file wins; if at least one party perfects by a means other than filing, the first party to file or perfect prevails; if all security interests in the collateral are unperfected, the first security interest to attach has priority.\(^{24}\) Special priorities are established, for example, for a purchase money security interest.\(^{25}\) These priority sections also address, to a limited extent, who will prevail in contests between persons with Code-created security interests and those claiming interests in collateral which are not created under the Code.\(^{26}\) For example, a buyer in the ordinary course of business takes free of a security interest created by its seller,\(^{27}\) and an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected.\(^{28}\) Many priority contests are not addressed in the Code.

**Remedies**

Finally, division 9 establishes and limits remedies, rights, and duties of the parties in the event of a default.\(^{29}\) Special complications exist on foreclosure where a debt is secured by both real and personal property.\(^{30}\)

**Investment Securities**

Division 8 deals with a variety of questions relating to investment securities. It includes provisions relating to the attachment and perfection of security interests in certificated and uncertificated securities.\(^{31}\) Other issues regarding security interests in investment securities are covered by division 9.

\(^{24}\) *Id.* § 9312(5).
\(^{25}\) *Id.* § 9312(3), (4).
\(^{26}\) *E.g.*, *id.* §§ 9301, 9307, 9308.
\(^{27}\) *Id.* § 9307(1).
\(^{28}\) *Id.* § 9301(1)(b).
\(^{29}\) *Id.* §§ 9501 (default procedure), 9502 (collection rights of secured party), 9503 (secured party's rights to take possession after default), 9504 (disposition of collateral after default, notification, publication, and effect of disposition), 9505 (compulsory disposition of collateral), 9506 (debtor's right to redeem collateral), 9507 (secured party's liability for failure to comply with chapter 5 of division 9), 9508 (renunciation or modification by debtor).
\(^{30}\) *Id.* § 9501(4).
\(^{31}\) *Id.* § 8321. *See id.* § 8102 for definitions of certificated and uncertificated securities.
Fixtures

Division 9 also addresses the question of security interests in fixtures, which are goods so related to particular real estate that an interest in them arises under real estate law. Further definition of the term “fixtures” is left to California law outside of division 9.

The division 9 priority system for determining rights of parties in fixtures as personal property is the same as for personal property generally. In addition, division 9 sets forth a priority system for contests between those parties claiming security interests under the Code and persons claiming interests in the fixtures on account of their rights in the real estate to which the fixtures are affixed. By making a fixture filing in the real estate records, a secured party with a perfected security interest in the fixtures under the Code establishes its priority as against certain persons with interests in the real estate. In effect, the provisions of division 9 recognize real estate recordings in deciding contests between those with security interests in fixtures as personal property and those with rights in the real estate.

Other Divisions of the Code

Other divisions of the Code cover a variety of other subjects, some of which have a direct relationship to, or at least refer to, division 9. For example, division 1 contains definitions of terms generally used throughout the Code. Division 2 covers sales of personal property and provides for security interests in limited circumstances. Division 2 also addresses the question of consignments and refers to the filing provisions of division 9 to protect certain rights of the consignor. Division 4 covers the security interests of a collecting bank.

The Laws of Other States

Because tangible personal property and a debtor’s location can be moved across state boundaries and because intangible property may not be related only to California, the provisions of California law may not be the controlling law applicable to a particular issue relating to collateral.

The Code provides that the parties may agree as to the state or nation whose law will govern their rights and duties, if the transaction bears a reasonable relation to the state or nation whose law is chosen. If the parties do not agree,

32. Id. § 9313(1)(a).
35. Id. § 9313(4), (5), (6), (7).
36. Id. § 9313(4). See id. §§ 9313(1)(b), 9402(5).
38. See, e.g., id. §§ 2401(1), 2505(1).
39. Id. § 2326(3)(c) (West Supp. 1989).
40. Id. § 4208 (West 1964 & West Supp. 1989).
41. Id. § 1105(1) (West Supp. 1989).
the Code applies to transactions bearing an appropriate relation to California. However, division 9 sets forth a series of rules, which are not changeable by agreement, as to the law that will govern perfection of a security interest and the effect of perfection or non-perfection thereof.

Rules in the Code relating to the relationship between laws in California and in other jurisdictions are complex. In general, perfection or non-perfection in most categories of goods is governed by the law of the jurisdiction where the collateral is located when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. For accounts and general intangibles, the law (including conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection or non-perfection of the security interest. The law of the jurisdiction of the organization of the issuer governs the perfection and the effect of perfection or non-perfection of a security interest in uncertificated securities. If goods arrive in California after perfection of a security interest in another jurisdiction, the security interest remains perfected for up to four months in California, but action must be taken in California to continue the perfection before the applicable period elapses.

The laws of every state except Louisiana include some version of article 9 of the Uniform Commercial Code and in most cases the substantive provisions and the choice of law rules are similar. The U.C.C. provisions of the various states are readily available in loose-leaf services.

**Other California and Federal Laws**

The priority system set forth in the Code only addresses contests between or among specified parties and does not address numerous other contests. In addition, section 9104 of the Code excludes certain transactions and situations altogether from the coverage of division 9. These exclusions include, for example, mechanics’ liens, material and service liens, transfers of claims for wages, loans by insurance companies secured by their policies, and assignments of tort claims. In the case of mechanics and suppliers of materials, the Code expressly grants priority in certain circumstances.

Even though specified security interests are not completely excluded from the coverage of the Code, the Code expressly defers to other statutes to determine the method for perfection. For example, section 9302(3) defers to treaties, the

42. Id.
43. Id. § 9103. See id. § 1105(2).
44. Id. § 9103(1)(b).
45. Id. § 9103(3)(b).
46. Id. § 9103(6).
47. Id. § 9103(1)(d).
51. Id. § 9310 (West 1964).
statutes of the United States, the California Vehicle Code, the California Health and Safety Code, and provisions for certificates of title in other jurisdictions to determine perfection in specified cases. Similarly, section 8321(5) defers to federal statutes or regulations governing security interests in a security issued by the federal government or any agency or instrumentality thereof. Further, even though not referred to in division 8 or 9, various California statutes provide liens and priority systems that override the provisions of the Code. Similarly, federal statutes and statutes in other states may have the same effect.

Division 9 identifies certain California statutes which may govern transactions covered by division 9 and expressly provides that in the case of conflict between division 9 and the other statutes, the other statutes control. For example, various consumer protection laws may override provisions in division 9.

**Conclusion**

A lawyer faced with an opinion relating to a security interest must first understand the basic structure of the Code. The lawyer must then be sure that California law is applicable to the question being examined. The lawyer must then determine whether, within California law, the Code covers the transaction or issue and whether any provision outside division 8 or 9 of the Code bears on the transaction or issue. The next question is whether a statutory or other provision of law outside the Code overrides it, either as expressly required by the Code or otherwise. The lawyer must then review the rules within divisions 8 and 9. This analysis must be conducted with the understanding that divisions 8 and 9 are only designed to deal with a limited number of contests and leave the rest to other laws.

52. *Id.*, § 9302(3) (West Supp. 1989).
OPINIONS RELATING TO THE ENFORCEABILITY OF A SECURITY AGREEMENT

FORM AND MEANING OF ENFORCEABILITY OPINIONS

An opinion that a security agreement is "enforceable" or "enforceable in accordance with its terms" \(^{58}\) is frequently requested in the context of a secured transaction. It is important that a clear distinction be drawn between enforceability of the provisions of the security agreement as a matter of contract law, and the ability of the secured party to enforce successfully its security interest in the collateral against the debtor or third parties. An enforceability opinion with respect to the security agreement does not give assurance to the secured party that attachment of the security interest to particular collateral has occurred, that the security interest has been perfected, or that the secured party has priority over third parties with respect to the collateral. These matters normally should be specifically addressed in other sections of the opinion. In addition, an opinion as to enforceability of the provisions of the security agreement against the debtor may not be relied upon by the secured party as an opinion as to the ultimate disposition of the collateral in the secured party's favor.

The Code provides no guidance as to the meaning of "enforceable in accordance with its terms" in relation to the security agreement. The word used by the drafters of the Code in the section addressing the security agreement is the term "effective." \(^{59}\) Notwithstanding the Code terminology, the typical opinion requested is that the security agreement is "enforceable in accordance with its terms." It is unclear whether, when the Code draftsmen used the phrase "effective in accordance with its terms," the draftsmen intended a meaning different from "enforceable in accordance with its terms." Under division 9 of the Code, "effective" may mean that a security agreement has been executed containing language sufficient to provide for a security interest as well as a description of the collateral, but may not include any assurance as to the availability of specific remedies. The Committee believes that the phrase "enforceable in accordance with its terms" subsumes the term "effective" and, therefore, an additional opinion as to the "effectiveness" of the security agreement is unnecessary.

Because the Code does not prove helpful in determining the meaning of "enforceable," other sources should be consulted. The Business Law Report is one such source. The Committee agrees with the conclusion of the Business Law Report that enforceability with respect to remedies available means that:

Some remedy is available if a party to the contract does not comply with its terms generally. This does not mean that specific enforcement is available as a remedy, or that every provision in the agreement, such as the right to

\(^{58}\) See generally Business Law Report, supra note 1, at 33-34, reprinted in 14 Pac. L.J. at 1037-38.

accelerate indebtedness in the event of a default, will be upheld by a court.\textsuperscript{60}

An enforceability opinion with respect to a security agreement also means (in addition to assurance of legal capacity, due authorization, execution, and delivery\textsuperscript{61}) that the prerequisites for the creation of a security interest are present in the security agreement.\textsuperscript{62} Specifically, the enforceability opinion does give assurance that the security agreement contains language sufficient to grant or reserve a security interest to the secured party in the collateral.

As stated earlier, an enforceability opinion does not by itself give assurance as to the attachment of the security interest to the collateral. If an opinion as to perfection or priority is not being given, a specific opinion as to the attachment of the security interest to collateral is necessary to obtain such assurance.\textsuperscript{63}

**DUE DILIGENCE, ASSUMPTIONS, AND QUALIFICATIONS**

The Business Law Report should be consulted for guidance as to opinions on the enforceability of the security agreement generally as a contract.\textsuperscript{64} In addition to reviewing the general contract principles discussed in the Business Law Report, the lawyer rendering the opinion should review the appropriate sections of the Code\textsuperscript{65} to be sure that all prerequisites to an effective\textsuperscript{66} security agreement, as outlined in the Code, are satisfied. Consequently, the lawyer rendering the opinion should review the written security agreement to be sure that the security agreement: (i) meets the general requirements of contract law,\textsuperscript{67} (ii) contains language that creates or provides for a security interest,\textsuperscript{68} (iii) provides that the security interest secures the payment of certain obligations of the

\textsuperscript{60} See Business Law Report, *supra* note 1, at 34, *reprinted in* 14 Pac. L.J. at 1038. The proposed revision to the Business Law Report states:

Some remedy is available if a party to the contract does not comply with its material terms. This does not imply that any particular type of remedy is available, or that every provision in the agreement, such as the right to accelerate indebtedness in the event of a default, will be upheld or enforced by a court under any and all circumstances.

The Committee agrees with the conclusion of the proposed revision to the Business Law Report.

\textsuperscript{61} Id.

\textsuperscript{62} A security agreement means an agreement which creates or provides for a security interest. Cal. Com. Code § 9105(1)(l) (West Supp. 1989).

\textsuperscript{63} Id. § 9203.


\textsuperscript{66} Except as otherwise provided by the Code, a security agreement is effective according to its terms between parties, against a purchaser of the collateral, and against creditors. Id. § 9201 (West 1964).

\textsuperscript{67} For example, the following elements of contract formation should be verified: capacity, offer and acceptance, consideration, execution and delivery, mutuality, and legality.

debtor, (iv) contains a sufficient description of the collateral, and (v) is signed by the debtor. Because the Code does not specifically outline those events which will constitute a default under the security agreement, a well drafted security agreement should specify those events. The secured party’s remedies under chapter 5 of division 9 will only arise when a debtor is in default under the security agreement.

The lawyer rendering an enforceability opinion often includes certain qualifications. The two most common qualifications are the bankruptcy exception and the equitable principles limitation. Also often included are qualifications relating to general laws which would affect the enforceability of the security agreement or relating to the unenforceability of certain provisions of a security agreement in certain circumstances.

If the lawyer rendering the opinion wishes to exclude any opinion as to the effect of the bankruptcy or insolvency laws on the rights and remedies of the secured party under the security agreement, the bankruptcy exception should be drafted to apply to all terminology utilized in the enforceability section of the opinion (for example, to the terms “legal, valid, binding, and enforceable”). Although the Business Law Report considers the terms to be synonymous, this precaution should be taken to prevent a very literal interpretation of the qualification.

There is considerable debate as to exactly what the bankruptcy exception is meant to exclude from the general enforceability opinion. Many articles expressing differing viewpoints have been written. One view is that the exception excludes any opinion about the enforceability of the security agreement or the security interest if the debtor becomes the subject of a bankruptcy case. Another view is that the bankruptcy exception only excludes from the enforceability opinion some aspects of bankruptcy law such as the automatic stay of lien enforcement, possibly some of the other administrative powers granted to a trustee in bankruptcy, and treatment of claims in a plan of reorganization.

69. Id. § 9110. See infra text accompanying notes 103–05.
71. Id. § 9501.
73. See Texas Bar Report, supra note 72, at 27.
75. See id. at 34, reprinted in 14 Pac. L.J. at 1037.
77. Subchapter IV of chapter 3 of the Bankruptcy Code sets forth the administrative powers, which include: the automatic stay of security interest enforcement, 11 U.S.C.A § 362(a)(4) (West 1979); the sale of property free of security interests, id. § 363(f) (West 1979 & Supp. 1988); and the
but does not exclude from the enforceability opinion lien avoidance\textsuperscript{79} or equitable subordination.\textsuperscript{80} In determining the appropriate interpretation of the bankruptcy exception, the Committee considered the lack of expertise of lawyers generally in the bankruptcy area, the expectations of the parties to a secured transaction, and the fairness of imposing certain responsibilities on the lawyer rendering the opinion.

For the reasons discussed below, the Committee believes that the bankruptcy exception excludes any opinion about the enforceability of provisions of the security agreement or the extent to which the security interest created thereby may be avoided or subordinated through the exercise of the rights and powers granted to parties in interest by the Bankruptcy Code or under state law relating to rights of creditors generally.\textsuperscript{81} The standard bankruptcy exception would, therefore, exclude any opinion respecting defenses to enforcement such as fraudulent conveyance, preference, and equitable subordination arising under state law or the Bankruptcy Code.\textsuperscript{82}

The Committee believes that a contrary view of the bankruptcy exception would encourage lawyers either to: (i) expand substantially the bankruptcy exception, (ii) attempt to enumerate the ways in which state law relating to creditor's rights generally or bankruptcy law might limit the enforceability of the security agreement or result in the avoidance of the security interest, or (iii) base the opinion upon broadly stated factual assumptions which would permit the giving of the opinion but which would not provide the secured party with assurance that the assumptions are accurate at the time the opinion is delivered or that they will be accurate in the future. Notwithstanding the Committee's position, the Committee recognizes that it is the current practice of some lawyers to undertake such enumeration, and the Committee believes that this practice is reasonable, even though unnecessary.

The area of federal bankruptcy and state creditors rights law is complex and makes the giving of a bankruptcy-related opinion a perilous task. In addition, before a legal determination or conclusion can be made, such opinions require the evaluation of financial concepts and complex factual issues,\textsuperscript{83} for example,
unreasonably small capital, insolvency, reasonably equivalent value, possible changes in value, and the discernment of the state of mind of the debtor. The Committee does not believe that it is appropriate for the lawyer rendering an enforceability opinion to have to make such determinations. If a specific opinion on bankruptcy issues is being rendered, the determination of these issues generally would be covered by appropriate assumptions, unless the lawyer has knowledge contrary to the assumptions.

The Committee also believes that it is not reasonable for the recipient of an enforceability opinion to believe that he or she has received an unqualified opinion with respect to fraudulent conveyance, preference, or equitable subordination matters. More often than not, neither party discusses these subjects in considering such opinions. For example, the lawyer rendering the opinion often believes that the bankruptcy exception excludes such opinions and the recipient of the opinion may believe that he or she has received the implied opinion by the failure of the lawyer to exclude specifically fraudulent conveyance, preference, or equitable subordination issues. It does not serve the interest of either the debtor or the secured party to extract an opinion on a complex issue by inadvertence or implication. If a secured party desires specific assurance about the effects of a debtor’s bankruptcy on the transaction, the secured party should request a separate opinion on these matters. A separate request would serve to bring possible problems to the attention of the lawyer rendering the opinion and cause him or her to focus on and research relevant issues.

The level of disclosure to be undertaken with respect to potential unenforceable provisions of the security agreement presents a problem for the lawyer rendering an enforceability opinion. There are many ways for the lawyer rendering the opinion to approach this problem. The Real Estate Report

\[(a)\] was the transfer made with actual intent to hinder, delay, or defraud creditors; or
\[(b)\] was the transfer made for less than reasonably equivalent value and, if so, at the time of the transfer:
\[(i)\] was the transferor insolvent or rendered insolvent thereby;
\[(ii)\] was the transferor engaged in business for which any property remaining was unreasonably small capital; or
\[(iii)\] did the transferor intend or believe that it would incur debts beyond its ability to pay as they mature.


Reasonably equivalent value requires a factual determination of the realizable values of the property transferred by the transferor and the property received by the transferor in exchange. Insolvency requires the determination of the fair valuation of all of the assets and liabilities (including contingent and disputed claims) of the transferor.

85. Id. § 548(a)(2)(A).
86. A valid, perfected, and otherwise unavoidable security interest in accounts or inventory may be avoided as a preferential transfer to the extent there has been a decrease in the amount by which the debt exceeded the value of the collateral on the date of bankruptcy compared to the amount by which the debt exceeded the value of the collateral 90 days before the date of bankruptcy. Id. § 547(c)(5); Cal. Civ. Proc. Code § 1800(c)(5) (West Supp. 1989).
suggests that all material provisions of an agreement that may be unenforceable be clearly disclosed in the opinion. The Committee does not believe that the lawyer rendering an enforceability opinion should be expected to provide an exhaustive list of those provisions that may be unenforceable. On the other hand, the recipient of the opinion should expect that his or her attention will be directed toward provisions that so clearly vitiate the purpose and meaning of the security agreement as to affect severely the secured party’s rights under the agreement. The Committee believes that it would also be useful to the recipient of the opinion if the provider of the opinion were to highlight other significant provisions of the security agreement that may be unenforceable. For example, the security agreement may provide that the debtor waives certain of its rights upon default thereunder. The opining lawyer should consider disclosing the specific waivers, if any, that might be unenforceable under existing law.

Security agreements also often contain definitions of, or standards for, such concepts as the commercially reasonable manner for collection from account debtors or obligors, breach of the peace, commercially reasonable disposition, and reasonable notification. A court could find the standards contained in the security agreement to be manifestly unreasonable, unconscionable, or against public policy. The failure of the drafter of the opinion to point out material provisions of the security agreement that may be unenforceable should not lead to an inference that every provision of the security agreement is specifically enforceable.

**OPINIONS RELATING TO THE SECURITY INTEREST**

The legal concepts under the Code that are critical to a determination of the nature of a secured party’s rights in collateral are attachment, perfection, and priority of the security interest in the collateral. As discussed in the previous section, opinions relating to the enforceability of the security agreement do not provide assurance that the secured party has any of the rights arising from these legal concepts. Therefore, lawyers requesting or rendering opinions in secured transactions can more appropriately address the relevant legal issues with opinions relating to the status of the security interest in specified collateral rather than with opinions relating to the enforceability of the security agreement. The remainder of this report will focus on the form, content, and meaning of opinions on the attachment, perfection, and priority of the security interest in specified collateral.

Occasionally in connection with an opinion that a security agreement is enforceable, an opinion is requested that a security interest in the collateral has

88. See Real Estate Report, supra note 2, at 28–37, reprinted in 42 Bus. Law. at 1162–70.
90. Id. § 9502(2).
91. Id. § 9503 (West 1964).
92. Id. § 9504(3) (West Supp. 1989).
93. Id.
94. Id. § 9501(3).
been created. Divisions 8 and 9 do not refer to the concept of the creation of a security interest in a context that includes a definition of the term "create." Thus, the terminology is somewhat imprecise and the level of assurance given by such an opinion is not clear. If an opinion on the creation of a security interest is given, the Committee believes that such an opinion does not provide assurance that the security interest has attached or will attach in the future, but only that a security agreement which contains operative language creating a security interest and contains an adequate description of collateral has been executed and delivered.

**ATTACHMENT OPINIONS**

Historically, lawyers have rarely, if ever, been asked to render an opinion that a security interest in certain collateral has attached. In view of the foregoing discussion relating to opinions on the enforceability of security agreements, however, certain basic assurances are not included in the typical opinion that a security agreement is enforceable in accordance with its terms. Therefore, a secured party obtaining an opinion on the enforceability of the security agreement may also want to consider requesting an opinion that the security interest in specific collateral has attached to that collateral. Because the attachment of a security interest requires either a written security agreement or possession of the collateral by the secured party pursuant to agreement, an attachment opinion usually includes an implied opinion on the existence of an effective security agreement. Such an implied opinion, however, does not provide assurance that the secured party can enforce any provisions of the security agreement. Therefore, attachment opinions should supplement rather than replace opinions that a security agreement is enforceable. Whether or not opinions on the attachment of a security interest become customary, an opinion on the perfection of a security interest cannot be given unless a lawyer determines that a security interest in the collateral has attached, because attachment is a condition to perfection of a security interest.

**Meaning of Attachment Opinions**

Because “attachment” of a security interest and the “enforceability” of that security interest occur upon the happening of the same events pursuant to section 9203 of the Code,97 there may be a tendency to interchange the two terms in an opinion. Use of the “enforceable” in reference to a security interest, however, may be thought to imply that the security interest can be successfully enforced against all other claimants and, therefore, may be misleading. Moreover, attachment, not enforceability, is the legal concept used in the Code to establish the rights of the secured party in collateral. Therefore, attachment is

95. See supra note 12.
97. See supra text accompanying notes 15–18.
the more precise legal term in the context of the security interest, and it is preferable to use the term "attach" in opinions relating to the security interest.

An opinion that a security interest has attached to collateral only provides assurance that the security interest is enforceable against the debtor and certain other limited classes of claimants with respect to that collateral.\textsuperscript{98} For example, an attached but unperfected security interest does not survive a challenge by a trustee in bankruptcy.\textsuperscript{99} Therefore, an opinion limited to the attachment of the security interest will not provide a high level of assurance to a secured party. To obtain assurance that the secured party has rights protectable in a broader range of circumstances against third parties with claims to the collateral, an opinion on the perfection of the security interest should be requested.

Because a security interest cannot attach until the debtor has rights in the collateral, an attachment opinion, which addresses only the legal effect of facts existing at the time it is rendered, does not cover the attachment of a security interest in any after-acquired personal property or proceeds. An attachment opinion also does not necessarily provide assurance that the security interest will attach at a future time when the debtor obtains rights in after-acquired personal property or proceeds included in the collateral description. This assurance is not provided because subsequent facts, such as an intervening bankruptcy case,\textsuperscript{100} may preclude attachment. Opinions on the attachment of a security interest should be read to include these limitations, whether or not they are expressly stated in the opinion. If an opinion on after-acquired personal property or proceeds is desired, it should be given expressly and should include as assumptions the occurrence of future events necessary for attachment and the absence of future events which would preclude attachment.

The following is a suggested opinion as to the attachment of a security interest in the collateral:

\begin{quote}
The secured party’s security interest has attached to the collateral described in the security agreement.
\end{quote}

An opinion that a security interest in certain collateral has been perfected is also an opinion that the security interest in that collateral has attached, even though it is not expressly stated.\textsuperscript{101}

\textsuperscript{98} Cal. Com. Code § 9203(2) (West Supp. 1989) provides that a security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Although § 9203(1) provides that attachment is a necessary condition to enforcement of a security interest against a third party with respect to collateral, § 9301 (West Supp. 1989) gives priority over an attached but unperfected security interest to any perfected secured party, lien creditor (defined to include an assignee for the benefit of creditors, a receiver in equity, or a trustee in bankruptcy), and certain transferees without knowledge.


\textsuperscript{100} 11 U.S.C.A. § 552.

\textsuperscript{101} See supra text accompanying note 96 and infra text accompanying note 115.
Due Diligence, Assumptions, and Qualifications

The Security Agreement

When a lawyer expressly or implicitly renders an opinion on attachment, due diligence steps are in order and some assumptions are appropriate. With certain limited exceptions, attachment of a security interest requires either that a written security agreement describing the collateral be signed by the debtor or that the secured party have possession of the collateral pursuant to agreement.\textsuperscript{102} If attachment is based on the existence of a written security agreement, an attachment opinion requires the lawyer to be satisfied as to the due authorization, execution, and delivery by the debtor of an effective security agreement.

The security agreement must also adequately describe the collateral.\textsuperscript{103} The Code expressly permits description of collateral by general kind or class if the description permits reasonable identification of the property.\textsuperscript{104} Courts analyzing the adequacy of collateral descriptions under the Code have used the reasonable identification test to validate general descriptions by collateral type.\textsuperscript{105} Very broad descriptions such as “all property” or “all personal property” which are not limited to a kind or class, therefore, may be inadequate. If the security agreement describes the collateral in terms such as “all property” or “all personal property,” the lawyer is well advised to decline to render an opinion as to the collateral so broadly described.

To the extent possible, the adequacy of the collateral description should be addressed in drafting the security agreement rather than in qualifying the lawyer’s opinion. It is common for security agreements to use generic Code descriptions such as accounts, equipment, inventory, and chattel paper. It is generally assumed that generic Code descriptions are classes which provide a reasonable basis for identification and are, therefore, adequate. The Code uses the generic term “goods” for a broad range of collateral but breaks goods into four subcategories which are the generic Code descriptions commonly used in collateral descriptions to describe goods. General intangibles is another broad generic term used in the Code to describe any personal property not included within the other Code categories.\textsuperscript{106} Because the term “general intangibles” includes property as diverse as partnership interests, patents, contract rights, and trade names without any subcategories defined in the Code, some lawyers are concerned that the term “general intangibles” may be a generic Code description which does not permit reasonable identification. Careful lawyers

\textsuperscript{103} Id. §§ 9203(1)(a), 9110.
\textsuperscript{104} Id. § 9110.
\textsuperscript{105} See, e.g., In re Munger, 495 F.2d 511 (9th Cir. 1974) (the description “crops and proceeds” included federal subsidy payments); Biggins v. Southwest Bank, 490 F.2d 1304 (9th Cir. 1973) (sales and service of new and used automobiles adequately described automobiles as inventory under flooring security agreements); National Equip. Rental v. United States, 25 U.C.C. Rep. Serv. (Callaghan) 566 (C.D. Cal. 1978) (docks, equipment, machinery, and tangible personal property adequately described a steel floating dry dock).
often use generic Code descriptions followed by illustrative, but not exclusive, lists of common names of collateral which come within those generic Code descriptions.\textsuperscript{107} Although such descriptions may be the preferred approach, they should not always be necessary in order to enable an attorney to be satisfied that the collateral description is adequate.

The lawyer is almost never responsible for providing assurance that the collateral described in the security agreement corresponds to the personal property owned by the debtor. The use of generic Code descriptions helps avoid this issue, because, except in unusual circumstances, personal property within that description in which the debtor has rights would be covered by the security agreement. If descriptions consisting of specific items of personal property rather than generic Code descriptions are involved, however, then the secured party may want to obtain, by its own investigation or by representations and warranties of the debtor, any required assurance as to the correspondence between the collateral description and the property in which the secured party intended to obtain a security interest.

\textit{Security Interests Under Division 9}

Section 9203, in addition to the requirement for an agreement, requires that the debtor have rights in the collateral and that value be given before the security interest in collateral governed by division 9 attaches. These other requirements for attachment involve facts that may not be verifiable by the lawyer rendering an opinion. To the extent that they are not verifiable without undue expense and effort, an assumption as to the existence of the essential facts is appropriate.

The most difficult of these facts to establish adequately is that the debtor has rights in the collateral. An opinion that the debtor has rights in the collateral is almost never appropriate. California lawyers do not give title opinions in real estate transactions.\textsuperscript{108} yet title to real property is verifiable with effort and expense. No system exists for determining rights in most personal property. Even if a lawyer could verify that the debtor has possession of the collateral, a determination that in most circumstances cannot readily be made, possession does not establish rights in the collateral without resolution of other issues such as entrustment.\textsuperscript{109} In virtually all situations, a secured party should be satisfied with warranties of the debtor rather than an opinion of counsel for assurance that the debtor has rights in the collateral. Except in very limited circumstances,

\textsuperscript{107} See, \textit{e.g.}, B. Clark, The Law of Secured Transactions Under the Uniform Commercial Code ¶ 2.9[5][d] (1980 & Supp. 1988); 1A P. Coogan, W. Hogan, D. Vagts & J. McDonnell, supra note 8, at § 6C.05[7][f].

\textsuperscript{108} See Real Estate Report, supra note 2, at 37–42, \textit{reprinted in} 42 Bus. Law. at 1170–75.

\textsuperscript{109} For example, a buyer, not a purchaser, of entrusted goods is protected by Cal. Com. Code § 2403(2) (West Supp. 1989), and secured parties are purchasers not buyers, \textit{id.} § 1201(9), (32), (33). \textit{See also} id. §§ 2326, 9114 for circumstances under which a secured party of a consignee cannot obtain a security interest on the consigned goods.
an assumption by the lawyer that the debtor has rights in the collateral, similar to the following example, is justified:

In rendering our opinion, we have assumed that the debtor has rights in the collateral described in the security agreement.

The lawyer not making such an assumption should consider specifying each fact and document relied upon in determining the debtor’s rights in the collateral and enumerating all assumptions made in relying on each such document. Collateral governed by a statutory procedure for registering title, such as property governed by certificate of title statutes, patents, copyrights, registered trademarks, or trademark applications, are sometimes thought to be more readily covered by an implied opinion that the debtor has rights in the collateral. This type of opinion, however, also deserves extreme caution. Care must be taken to ensure that the statutory procedures for registering title create appropriate presumptions regarding rights in the collateral. If any statutory procedure is relied upon to establish rights in the collateral, assumptions specific to that particular statutory procedure will be necessary and appropriate.

If the lawyer rendering an express or implied attachment opinion has not been involved in the closing to the extent necessary to have independent knowledge that value was given, the lawyer should be permitted to assume that fact. Because the secured party will have knowledge of whether value is given, this assumption should be readily acceptable.

**Attachment and Perfection of Security Interests in Investment Securities**

Section 8321(1) of the Code governs the attachment of security interests in investment securities, unless preempted by federal law. Attachment of a security interest in investment securities requires, in addition to a written security agreement or possession of the securities by agreement, a transfer to the secured party or its designee pursuant to Code section 8313(1). Section 8321(2) of the Code requires for perfection that, in addition to attachment, value be given and the debtor have rights in the collateral. Although conceptually distinct, the attachment requirements of section 8321(1) and the perfection requirements of section 8321(2) are so closely intertwined that, as a practical matter, attachment and perfection of security interests in investment securities should be addressed together in an opinion.

114. The statutory system governing aircraft registration does not create appropriate presumptions about rights in the collateral. See 49 U.S.C.A. §§ 1403, 1406 (West 1976).
Several alternative means of transfer are available under section 8313(1) in order for a security interest in investment securities to attach. Some of these means apply only to certificated securities, some only to uncertificated securities, and some to both. Assumption of the facts essential to the particular type of transfer that is being relied upon are generally appropriate.

**Other Considerations**

Another issue to consider in rendering an opinion on attachment is whether a consensual security interest can be obtained in the collateral. A common area of concern on this question is a non-purchase money, non-possessory security interest in inventory of a retail merchant. Of course, other types of collateral also present this issue. The lawyer should make appropriate assumptions or qualifications to exclude from the scope of the opinion collateral described in the security agreement that cannot be subject to a consensual security interest.

**PERFECTION OPINIONS**

It is generally not unduly burdensome for a secured party to require an opinion that the security interest has been perfected. In most situations, the facts which must be established to give an opinion on perfection can be appropriately assumed or readily verified and the applicable legal requirements can be readily determined.

A lawyer rendering an opinion on the perfection of a security interest must first determine what types of collateral are covered by the opinion. If the collateral covered by the opinion is unspecified, broadly described, complex, or extensive, the due diligence required to render the opinion may not be cost justified when compared to the benefit conferred by the opinion or may be unduly burdensome. It is appropriate, therefore, for the lawyer rendering the opinion and the party requiring the opinion to agree upon the limitation of the scope of the perfection opinion to specified items or categories of collateral.

**Meaning of Perfection Opinions**

Perfection of a security interest is a Code concept which, generally speaking, involves taking the steps necessary to provide a means of notice of the security

116. Id. § 9102(4)-(7) (provides detailed limits on this type of security interest).
117. E.g., id. § 9104(k). Certain governmental permits are also not transferable.
118. As used in this report, the phrase "unspecified, broadly described, complex, or extensive" not only includes the descriptions "all property," "all personal property," or "general intangibles," but also includes other generic descriptions that, in the context of the complexity and size of the debtor's business, do not permit the lawyer to ascertain without undue effort the facts necessary to determine what steps are required to perfect a security interest in the collateral.
119. For example, a broad collateral description for a simple business with one location may require much less due diligence than a narrower collateral description for a complex business in which equipment includes automobiles, rolling stock, and aircraft. The question is what cost and effort are involved for the lawyer to subcategorize the collateral description into all subcategories that require different actions to perfect a security interest.
interest to third parties. Perfection has the legal consequence of reducing the number of competing claims to the collateral that will prevail in a priority contest. An opinion that a security interest in collateral is perfected gives a generalized assurance that the security interest has priority over unperfected security interests and certain other claims to the collateral that the security interest would not have if it had only attached. However, an opinion that a security interest in certain collateral has been perfected gives no assurance as to the relative priority of the secured party's rights in relationship to the rights of other secured parties with perfected security interests and certain other claimants. The perfected security interest, for example, is subordinate to the interests of certain third party purchasers of the collateral.

Bankruptcy Considerations

Perfection is a state law concept and only certain rights under state law flow from the legal concept of perfection. In addition, an opinion only provides assurance of the legal consequences of facts existing at the time the opinion is rendered. A perfection opinion does not provide assurances regarding the impact of a later bankruptcy of the debtor, except the assurance that the security interest will not be subject to the trustee’s powers under section 544(a)(1) and (2) of the Bankruptcy Code. A security interest that is perfected at the time the opinion is rendered may be voidable in a later bankruptcy proceeding as a preference or a fraudulent transfer. Therefore, an opinion on perfection is not an implied opinion that the creation of the security interest does not constitute a preference or a fraudulent transfer or is not otherwise voidable under laws affecting the rights of creditors generally.

Perfection of a Security Interest in Fixtures

Division 9 of the Code provides for the perfection of a security interest in goods which are or become fixtures by the filing of a financing statement with the secretary of state. A fixture filing with the county recorder, although relevant to certain priority contests, is ineffective to perfect a security interest

123. Id. § 548.
124. Cal. Com. Code § 9302 (West Supp. 1989) requires the filing of a financing statement to perfect a security interest in goods, unless they are in the possession of the secured party. Section 9313 provides that goods become fixtures when they are so related to real estate that an interest in them arises under real estate law, but they are still included in the definition of goods contained in § 9105(1)(h). Section 9401 provides that the appropriate place of filing to perfect a security interest in goods which are not consumer goods, standing timber, or growing crops is in the office of the secretary of state.
125. See infra text accompanying notes 204–06.
in fixtures. An opinion on the perfection of a security interest in fixtures, therefore, gives no assurance that the necessary steps have been taken to establish the priority of the security interest against certain persons having claims to the fixtures under real estate law.

**Form of Perfection Opinions**

The following are examples of opinions on the perfection of a security interest in collateral:

1. The secured party has a perfected security interest in the collateral described in the security agreement.
2. The financing statement to be filed in the Office of the Secretary of State of the State of California is sufficient in form to perfect the security interest in the collateral described therein, to the extent that a security interest in such collateral can be perfected by the filing of a financing statement in the State of California.
3. The proper place to file a financing statement for collateral of the type described in the security agreement, to the extent that a security interest in such collateral may be perfected by the filing of a financing statement in the State of California, is in the Office of the Secretary of State of the State of California.
4. Upon taking possession of the collateral, the secured party will have perfected its security interest in the collateral, to the extent that such collateral is of the type described in section 9304 of the California Uniform Commercial Code.

The first opinion set forth above is the only affirmative opinion that the security interest is perfected. The lawyer rendering such an opinion should use caution to ensure that the collateral description in the security agreement is not unduly broad. In contrast, opinions 2, 3, and 4 illustrate directive opinions which describe the actions required to perfect the security interest. Opinions 2, 3, and 4 also limit the opinion to certain general types of collateral. However, the limitation on collateral contained in those opinions does not provide the recipient with any specific guidance as to what types of collateral are covered, without an analysis of the permissible methods of perfection set forth in the Code. An alternative approach to limiting the scope of the opinion with respect to the types of collateral covered would be to describe specifically by generic Code types or otherwise the collateral in which the security interest has been perfected.

**Perfection Governed by the Laws of Another State**

An opinion as to which state's laws govern perfection, based on section 9103 of the Code, is generally appropriate for a California lawyer. Occasionally,

126. See supra text accompanying notes 118–19.
however, California lawyers are requested to render an opinion on the perfection of a security interest when, pursuant to section 9103 of the Code, perfection is governed by the laws of another jurisdiction. When a definitive opinion on perfection under the laws of the other jurisdiction is crucial to the secured party, such an opinion should be obtained from lawyers practicing in that jurisdiction. If, however, a secured party desires only the limited assurance that can be provided about the laws of the other jurisdiction by a California lawyer, the opinion normally should be limited to the review of specific provisions of that jurisdiction's law and limited inferences therefrom. Such an opinion could take the following form:

Based solely upon a review of the provisions of sections ___, ___, ___, and ___ of the Uniform Commercial Code as reported by [name of publisher] to be in effect in the State of [name of state], the financing statements being filed by the secured party in the offices of the [name of appropriate office] appear to be in appropriate form to perfect a security interest in that state in the collateral described therein.

**Due Diligence, Assumptions, and Qualifications**

An opinion that a security interest is perfected involves a determination of which state's laws govern perfection. Such an opinion, however, requires a determination of such factors as the nature of the collateral, the location of the collateral, the events upon which perfection is based, whether any goods that are collateral will be moved to another jurisdiction, the location of the debtor's places of business or chief executive office, and similar matters. Because of the many necessary factual determinations in some transactions, a choice of law opinion may be so involved that it is not cost justified. Consequently, a perfection opinion under those circumstances cannot be rendered unless its scope is limited to those items or categories of collateral for which it can be established which state's laws will govern perfection.

The essential question for rendering a perfection opinion is whether the act or acts necessary to perfect a security interest in the collateral have been taken. Unless the opinion is expressly limited to types of collateral that can be perfected by taking specific actions described in the opinion, the lawyer rendering a perfection opinion must analyze each type or category of collateral involved and determine that the necessary actions have been taken to perfect a

128. See supra text accompanying notes 43–49.
130. Id. §§ 9301–9306, 9312–9315 (West 1964 & West Supp. 1989) govern the procedures for perfecting or obtaining priority for a security interest in various types of collateral. A security interest in certain types of collateral can only be perfected by possession, while a security interest in other types of collateral can only be perfected by filing a financing statement. A security interest in some types of collateral can be perfected by either filing or possession. Finally, some types of collateral require an action other than the filing of a financing statement or possession to perfect a security interest.
security interest in that type of collateral. It is generally appropriate to avoid rendering opinions relating to unspecified, broadly described, complex, or extensive collateral.

**Perfection by Filing a Financing Statement**

Because not all financing statements in California are to be filed with the secretary of state,\(^\text{131}\) the appropriate location should be determined and any facts necessary to that determination should be established or assumed. The lawyer rendering the opinion should consider having the financing statement prefiled\(^\text{132}\) so that either the acknowledgment copy of the financing statement or a certificate from the secretary of state showing evidence of filing is available when the opinion is rendered. In the absence of prefileing, an assumption similar to the following is appropriate:

The opinion set forth below is based on the assumption that the Financing Statement has been duly filed with the Secretary of State.

Of course, the lawyer must be satisfied that all other requisites to an effective financing statement under section 9402 of the Code have been satisfied.

A second area of concern in rendering a perfection opinion based upon filing a financing statement is the collateral description. It is generally assumed that generic Code descriptions are adequate.\(^\text{133}\) The Code requirements for the collateral description in the financing statement are not the same as for the collateral description in the security agreement.\(^\text{134}\) Courts construing the Code analyze the adequacy of the collateral description in financing statements by determining whether it would put an interested third party on notice that there may be a prior encumbrance on the collateral.\(^\text{135}\) It is important to ensure that a financing statement does not describe less collateral than the security agreement (to the extent that perfection is effected by filing) and, if the opinion refers to collateral described in the financing statement, that such description does not

---

131. See id. § 9401(1)(a), (1)(b), (7) (West Supp. 1989).

132. Because of the time delay involved in obtaining confirmation from the secretary of state that the financing statement has been filed, prefileing is necessary to ensure that filing has occurred. Section 9402(1) permits filing before the security interest has attached or before the security agreement is made without prejudicing the debtor’s rights. Because § 9312(5)(a) establishes the priority of certain conflicting security interests based upon the time or date of filing or perfection, whichever occurs first, prefileing may enhance the secured party’s priority claim.

133. See supra text accompanying notes 103–07.

134. Cal. Com. Code § 9110 (West Supp. 1989) applies generally to collateral descriptions, but § 9402(1) only applies to collateral descriptions in financing statements. The conceptual difference is that a financing statement only has to put a third party on notice to make an inquiry, while the security agreement must adequately identify the collateral. See supra text accompanying notes 103–07.

include collateral not described in the security agreement. The adequacy of the description should, to the extent possible, be addressed in drafting the financing statement rather than in qualifications to the opinion.

**Perfection by Possession**

If the secured party perfects by possession and is receiving an opinion on perfection, it is appropriate for the lawyer rendering the opinion to assume that the secured party has obtained possession of the collateral. Section 9305 of the Code permits possession to be accomplished through a bailee. Courts in analyzing whether possession through a third party perfects the security interest appear to combine the concepts of agency and bailment and require that the third party not be an agent of the debtor and have received notice of the secured party's security interest. Therefore, in rendering an opinion when possession is required for perfection and the possession is accomplished through a third party, the lawyer should consider assumptions about the relationships with that third party which are appropriate to the context and could include the following:

> In rendering the opinion set forth below, we have assumed that [name of bailee] which has possession of the collateral has notice of the secured party's security interest, is holding the collateral subject to instructions from the secured party in connection with transfer of possession of the collateral, and is not the agent of the debtor.

If the security interest is in investment securities and possession is accomplished through a financial intermediary or other person, section 8313(1) of the Code describes the specific factual circumstances required to constitute a transfer which is necessary for perfection. If the collateral is certificated securities, assumptions regarding rights in the collateral (as discussed in the section on attachment), possession, and priority may be covered by the same assumption under certain circumstances.

136. Failure to describe collateral in the financing statement that was described in the security agreement results in the security interest in that collateral not being perfected, to the extent that perfection was to be achieved by filing a financing statement. *See, e.g.*, *In re Miguel*, 30 Bankr. 896, 898 (Bankr. E.D. Cal. 1983). On the other hand, if collateral is included in the financing statement that is not described in the security agreement, there is no security interest in that collateral.


138. *See, e.g.*, Landmark Land Co. v. Sprague, 529 F. Supp. 971 (S.D.N.Y. 1981) (construes California law to hold that possession by senior secured party with instructions from debtor to deliver collateral to junior secured party constitutes possession by junior secured party by agent or bailee); *In re Dillon*, 18 Bankr. 252 (Bankr. E.D. Cal. 1982) (no perfection by notice to an automobile repair garage which was held to be the agent of the debtor not the agent of the secured party); *In re Phillips*, 24 Bankr. 712 (Bankr. E.D. Cal. 1982) (no perfection through possession by a receiver—the receiver was not the agent of the secured party).

139. *See infra* text accompanying notes 195–203.
Perfection by Other Methods

Several important types of collateral require actions other than filing or possession to perfect a security interest—140—for example, automobiles, boats, mobile homes, commercial coaches, deposit accounts, policies of insurance, aircraft, patents, and trademarks. The appropriate due diligence, assumptions, or qualifications for these types of collateral will depend upon the required method of perfection.

Subsequent Events Defeating Perfection

It is an increasingly common practice for lawyers to specify in their opinions circumstances under which a perfected security interest can become unperfected. Because an opinion only addresses the legal consequences of the facts existing or assumed at the time it is rendered, failure to include such disclosures does not render an opinion misleading. Such disclosures, however, may be useful as means of highlighting the fragile nature of perfection or of providing the secured party with guidance in future administration of the security interest. Although including the disclosures serves the purpose of more fully informing the recipient of the opinion, such disclosures should be understood to apply even if they are not expressly stated. The disclosures often address, but are not necessarily limited to, the following problems: (i) A financing statement lapses after five years;141 (ii) a secured party's rights can be defeated by the rights of certain subsequent purchasers or holders of chattel paper and negotiable documents when the security interest is perfected only by filing;142 (iii) loss of possession terminates the perfection of a security interest perfected only by possession of the collateral;143 (iv) the Code creates certain limitations on the rights to proceeds;144 (v) removal of most tangible collateral from the state will defeat the perfection of the security interest unless appropriate steps are taken;145 (vi) change in location of the debtor to another state will result in the security interest in mobile goods, accounts, general intangibles, and chattel paper (unless perfected by possession) becoming unperfected unless appropriate steps are taken;146 (vii) if certain changes occur which cause the financing statement to become seriously misleading, it may no longer be effective to perfect the security interest in certain collateral;147 and (viii) a secured party's rights are subject to the rights of certain purchasers of the collateral to acquire the collateral free of the security interest.148

141. Id. § 9403(2).
142. Id. §§ 9308-9309.
143. Id. § 9303(2).
144. Id. § 9306.
145. Id. § 9103.
146. Id.
147. Id. § 9402.
148. Id. § 9307.
PRIORITY OPINIONS

Meaning of Priority Opinions

Opinions as to the priority of security interests relative to other liens and security interests may be requested of lawyers in secured transactions. A priority opinion may be requested by the secured party to obtain legal assurance as to the ability of the secured party to satisfy the secured obligation from the collateral. In most cases when a priority opinion is requested, the secured party requests an opinion to the effect that the security interests are "first priority."

Questions exist, however, as to what "first priority" means. Interpreted most broadly, "first priority" could mean that no third party in the world could, under any law or circumstance, acquire an interest in the collateral that is superior to the security interest of the secured party. Even assuming the ability of the lawyer to list all qualifications to such an opinion, such an interpretation would impose an impossible due diligence obligation on the lawyer. For example, the laws of every jurisdiction in which the collateral might in the future be located would have to be reviewed.

Another possible interpretation of "first priority" is that no third party could acquire an interest in the collateral that would be superior in bankruptcy proceedings. Even such a more limited opinion could not be given without numerous qualifications. For example, the first priority status of the secured party could be primed under post-petition financing and by charges for preservation of collateral. In addition, the Bankruptcy Code would prevent the security interest of the secured party from attaching to any collateral acquired by the debtor after the commencement of a bankruptcy case. For these and other reasons, including the broad equitable powers of a bankruptcy court, many lawyers do not give opinions on the status of security interests in bankruptcy proceedings.

In light of the foregoing, the meaning of "first priority" should be limited to the laws of the jurisdictions that govern the perfection of the security interest. Consequently, unless an opinion expressly provides to the contrary, a "first priority" or similar opinion should be interpreted to mean that, under California and applicable federal law, the secured party would have the right to apply the collateral to its secured obligations prior to the holder of other security or similar interests in the collateral. Consequently, a priority opinion goes

149. Ryan, supra note 76, at 179.
150. Id. at 186–87.
152. Id. § 506(c).
154. The reference to federal law is meant only to include those laws which relate to the perfection of a security interest as discussed in the preceding sentence in the text. For example, federal law governs the perfection and priority of security interests in trademarks and patents. See infra note 158. Consequently, bankruptcy laws should not be comprehended within the limited meaning of federal law because bankruptcy laws do not provide for the perfection of security interests.
beyond the legal assurance provided in a perfection opinion (i.e., that the secured party has priority over unperfected security interests and certain other claims to the collateral) and informs the secured party as to the identities of some or all of the third parties, if any, who may have a prior legal right to the collateral under California and applicable federal law.

**Form of Priority Opinions**

A secured party should generally not request, and a lawyer should generally not give, a broad priority opinion with respect to collateral. For the reasons discussed below, the due diligence burden on the lawyer in the preparation of a broad priority opinion may be immense or impossible. Moreover, the size of the transactions may not justify the legal expense or effort incurred in providing any priority opinion.

First, when the identity of the collateral is unspecified, broadly described, complex, or extensive, the lawyer may find it difficult or impossible to determine and comply with the appropriate methods for perfection of a security interest in the collateral. As a result, many lawyers do not render priority opinions with respect to unspecified, broadly described, complex, or extensive items of collateral.

Second, even when the identity of the collateral is specified and limited in scope, determining the existence of competing security interests or liens with respect to the collateral may often be difficult or impossible. Although certain security interests or liens will be disclosed by official searches with the secretary of state, many security interests and liens will not. Some security interests and

---

155. See the discussion of various methods of perfection of security interests accompanying notes 118–48.

liens are not of record.157 Other security interests and liens are of record under

157. State law may not require the recording of certain liens and security interests. E.g., Cal. Civ. Proc. Code § 488.395 (West Supp. 1989) (attachment on inventory may be obtained by taking possession); Cal. Com. Code § 9302 (West Supp. 1989) (exceptions to U.C.C. perfection by filing and other specified liens); id. §§ 8313(1)(i), 8321(2), 8321(4), 9304(4)–(5), 9306(3) (temporary perfection of security interests); id. §§ 8313, 8321 (manner of perfecting security interest in securities); Cal. Civ. Proc. Code § 697.710–750 (West 1987 & Supp. 1989) (execution liens); id. §§ 708.110, 708.120, 708.205 (order of examination), 708.250 (creditor’s suit), 708.320 (charging order), 708.410 (lien in pending action or proceeding), 708.510 (West 1987) (assignment order); id. § 708.780 (West Supp. 1989) (money owed to judgment debtor by public agency); Cal. Food & Agric. Code §§ 5431 (pest abatement), 5632 (removal of plants and crops which are nuisances), 7301–7305 (camelthorn abatement), 9331 (expenses for treating cattle or sheep), 10152 (expenses for confinement of cattle), 10355 (expenses for vaccination of calves), 10385 (expenses of testing cattle in brucellosis control area), 16907 (lien of railroad for expenses associated with transportation of animals), 17041 (West 1986) (lien for care of stray animals); id. §§ 55631–55633 (West 1986 & Supp. 1989) (producer’s lien); id. §§ 55702–55704 (West 1986) (livestock seller’s lien); Cal. Bus. & Prof. Code § 9852 (West Supp. 1989) (electronic and appliance repair dealers); Cal. Civ. Code §§ 1856 (depository’s lien), 1861 (hotelkeeper’s lien), 1861a (apartment keeper’s lien), 2144 (carrier’s lien for freightage), 2191 (West 1985) (common carrier’s lien); id. §§ 3045.1 (hospital lien for emergency services), 3046 (lien for seller of real property), 3050 (West 1974) (purchaser’s lien on real property); id. § 3051 (West Supp. 1989) (liens for services); id. §§ 3052a (jeweler’s lien), 3053 (West 1974) (factor’s lien); id. § 3054 (West Supp. 1989) (banker’s lien); id. §§ 3060 (mining claimant’s lien), 3061 (West 1974) (threshermen’s lien); id. § 3061.5 (West Supp. 1989) (agricultural laborer’s lien); id. §§ 3065 (loggers’ and lumbermens’ lien), 3066 (West 1974) (cleaners’ and launderers’ lien); id. §§ 3068 (garageman’s lien), 3080–22 (West Supp. 1989) (livestock servicer’s lien); id. §§ 3110–3112 (West 1974) (mechanics’ lien); Cal. Civ. Proc. Code § 1174 (West Supp. 1989) (disposition of personal property remaining on leased premises recovered by landlord in unlawful detainer proceeding); id. §§ 1203.52–66 (oil and gas liens), 1204 (preferred labor claims in assignments for the benefit of creditors), 1205 (West 1982) (preferred labor claims in bulk transfers); id. § 1206 (West Supp. 1989) (preferred labor claims after levy under writ of attachment or execution); id. § 1208.61 (West 1982) (aircraft lien law); Cal. Com. Code §§ 2711 (buyer’s security interest in rejected goods), 4504 (West 1964) (lien of presenting bank); id. § 7209 (West Supp. 1989) (warehouseman’s lien); id. § 7307 (West 1964) (lien of carrier); id. § 8103 (West Supp. 1989) (issuer’s lien); Cal. Corp. Code § 15039 (West 1977) (rescinding partner’s lien on partnership); Cal. Fin. Code § 14856 (West Supp. 1989) (credit union’s lien on member’s shares); id. § 17631 (West 1981) (lien of conservator of escrow agent); Cal. Gov’t Code § 6602 (West 1980) (safekeeping of funds or property of inmate after death, escape, discharge, or parole); id. §§ 25831(d) (lien for fees for waste disposal services), 38773 (abatement of nuisances), 39501 (removal of dirt, rubbish, wees, etc.), 39502 (West 1988) (removal of obstructions or noxious materials), 39577 (West 1988) (special assessment for weed and rubbish abatement); id. § 53829 (West 1983) (lien on tax receipts for money borrowed by county, city, municipal corporation, etc.); Cal. Harb. & Nav. Code §§ 450–462 (bottomry), 490–495 (West 1978) (actions against vessels); id. § 501 (West Supp. 1989) (service lien on vessel); Cal. Health & Safety Code § 5061 (West 1970) (unpaid charges for services rendered upon leased sanitation facilities); id. §§ 5463, 5464 (West Supp. 1989) (lien for connection of dwelling house with sewer); id. § 14912 (West 1984) (unpaid hazardous weed abatement); id. § 2864 (West Supp. 1989) (abatement of a nuisance by pest abatement districts); id. § 28718 (West 1984) (property stored at frozen food locker plant); id. § 32204 (West Supp. 1989) (local hospital district taxes); id. §§ 40273 (taxes levied by the Bay Area Air Quality Management District), 42406 (West 1986) (penalties for polluting vessel); Cal. Ins. Code § 11656 (West 1988) (employee’s lien on proceeds paid to employer from workmen’s compensation policy); Cal. Lab. Code §§ 3720 (lien for providing worker’s compensation policy upon finding that employer is illegally uninsured), 3727 (West Supp. 1989) (unpaid penalty assessment for failure to provide worker’s compensation insurance); Cal. Mil. & Vet. Code § 987.9
the name of the debtor but not with the secretary of state.\textsuperscript{158}

(West 1988) (lien on crops of a disabled veteran for operation of farm by Department of Veterans' Affairs); id. §§ 1191–1192 (West 1988 & Supp. 1989) (memorial district taxes); Cal. Penal Code §§ 11233 (fine for contempt when building used for prostitution in violation of order of abatement), 11310 (West 1982) (plaintiff's costs in abatement action to enjoin operation of gambling ship); Cal. Prob. Code § 1105 (West 1981) (expenses of heirs with undivided interests in property); Cal. Pub. Res. Code §§ 3423 (taxes and charges on gas production), 3772 (unpaid charges and penalties in connection with geothermal resources drilling), 4608 (corrective actions with respect to timber harvesting), 5003.7 (West 1984) (lien for furnishing utility services); Cal. Pub. Util. Code § 12904 (West 1965) (taxes levied by municipal utility district); id. §§ 16470 (charges for light, water, and other utilities), 21640 (West Supp. 1989) (repairs and storage of personal property in connection with the operation of airports); id. § 22908 (West 1965) (taxes levied by airport districts); id. § 29131 (West 1973) (taxes levied by San Francisco Bay Area Transit District); id. § 98289.3 (West Supp. 1989) (taxes by the Santa Cruz Metropolitan Transit District); Cal. Rev. & Tax. Code §§ 6757 (unpaid sales and use taxes), 7872 (West 1987) (unpaid tax for vehicle fuel license taxes); id. §§ 8991–8997 (West 1970 & Supp. 1989) (use fuel excise tax); id. §§ 12491–12495 (West 1970) (taxes on insurers); id. §§ 16063 (unpaid gift taxes), 18881 (unpaid personal income taxes), 30322 (unpaid cigarette taxes), 32363 (West Supp. 1989) (unpaid alcoholic beverage taxes); id. § 38523 (West 1979) (unpaid timber yield taxes); Cal. Sts. & High. Code § 3115 (West Supp. 1989) (special assessments for street and highway improvements); id. § 5373 (West 1969) (street improvements under the 1911 Street Improvement Act); id. § 5890 (West Supp. 1989) (special assessments for sidewalk and curb improvements); id. § 18403 (West 1969) (special assessments for city street lighting); id. § 19184 (West Supp. 1989) (taxes levied by highway lighting districts); id. §§ 22134 (special assessments for tree planting), 27205 (West 1969) (taxes for benefit of bridge and highway districts); Cal. Unemp. Ins. Code § 1703 (West 1986) (unpaid unemployment compensation taxes); Cal. Veh. Code §§ 8162 (highway use taxes), 9800 (West 1987) (lien for fees, taxes, and penalties); id. §§ 22851 (storage of vehicle which has been towed), 23303 (West 1985) (unpaid toll fees); Cal. Water Code § 46280 (West 1966) (charges assessed by water storage districts); id. § 55501.1 (West Supp. 1989) (delinquent water service standby and availability charges); Cal. Welf. & Inst. Code §§ 14124.74–.75 (West 1966 & Supp. 1989) (liens for payments due under Medi-Cal Program); id. § 14173 (West Supp. 1989) (lien for overpayment by state to health care providers).

Similarly, federal law may not require the recording of certain liens. E.g., 31 U.S.C.A. § 3713 (West 1983) (priority for debts owed to the United States in the event of the insolvency of the debtor); Marine Midland Bank v. United States, 687 F.2d 395, 397, 404 (Ct. Cl. 1982), cert. denied, 460 U.S. 1037 (1982) (an agency procurement contract purporting to vest title in the federal government to property purchased with progress payments creates a security interest in favor of the federal government to secure such progress payments that has priority over the liens of private creditors); 7 U.S.C.A. § 196 (West 1980) (a statutory trust in favor of unpaid suppliers of livestock); id. § 197 (West Supp. 1988) (statutory trust in favor of unpaid suppliers of poultry).

Difficulties in determining competing security interests or liens arise even when the types of competing interests are limited to security interests arising under divisions 8 and 9 of the Code. First, the lawyer may find it difficult to determine the existence of competing security interests arising under the Code because the filing of a financing statement may not be the sole method available for the perfection of a security interest in the collateral. The filing of a financing statement will not defeat security interests previously perfected by another available means. For example, a secured party may agree to advance money to a debtor upon receiving a perfected security interest in the inventory of the debtor. After properly filing a financing statement naming the debtor and describing the inventory, the secured party may obtain a U.C.C. search certificate from the secretary of state showing no financing statements prior to the financing statement of the secured party. Based upon such U.C.C. certificate, the secured party may conclude, and may even have a legal opinion concluding, that the security interest of the secured party is “first priority.” Nevertheless, the security interest of the secured party may be junior in right to a security interest of another secured party who had earlier perfected a security interest in the inventory of the debtor by possession through a field warehousing arrangement. Consequently, unless a lawyer physically inspects the collateral, a lawyer may often have no practical means of determining whether, for example, some other secured party has possession of an item of collateral. Second, some consensual security interests may be perfected without filing or possession. For example, temporarily perfected security interests may be effective without


Even with respect to the foregoing statutes which purport to direct the lawyer to the appropriate office for a search of security interests, the lawyer may want to search several offices for a particular security interest. For example, the law governing the appropriate location to file or search for a security interest in either patents or trademarks is less than clear, and careful lawyers often file with the secretary of state and with the Patent and Trademark Office. See, e.g., In re Roman Cleanser Co., 43 Bankr. 940 (Bankr. E.D. Mich. 1984), aff'd, 802 F.2d 207 (6th Cir. 1986) (trademarks). In re Transportation Design & Technology, Inc., 48 Bankr. 635 (Bankr. S.D. Cal. 1985) (patents). In the case of a federal tax or ERISA lien, there is a trap for the unwary: The lien notice is to be filed for personal property (whether tangible or intangible) within the state in which the property is situated, but such property is deemed situated at the residence of the taxpayer at the time the notice is filed. See 26 U.S.C.A. § 6323(f)(2) (West Supp. 1988).


filing or possession from ten days to four months. 162 Third, a search of financing statements may not discover a security interest in collateral perfected under a method other than filing when the collateral was subject to a prior use. 163 Fourth, other security interests may not be filed under the name of the debtor. For example, a search of U.C.C. financing statements under the name of the debtor will not reveal security interests of creditors of previous owners of the collateral, 164 financing statements filed under a previous name of the debtor, 165 or financing statements filed against other debtors who have the power to grant a

162. See, e.g., id. §§ 9306(3) (perfected security interest in original collateral remains a continuously perfected security interest in proceeds for at least 10 days), 9312(4) (purchase money security interest may be perfected without filing for 20 days after debtor receives possession of collateral), 9304(5) (a security interest in instruments or negotiable documents may be perfected without filing or possession for up to 21 days), 9103(1)(c) (a purchase money security interest in goods may remain perfected for 30 days after debtor receives possession of collateral when a filing is made in the jurisdiction of intended destination of the goods), 9103(1)(d) (four months for goods moved into another jurisdiction).

163. Under id. § 9401(3), a “filing which is made in the proper place in this state continues effective even though . . . the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.” Consequently, because § 9401(3) never requires a refiling by the secured party when the use of collateral changes, a security interest perfected other than by filing on the basis of a previous use may not be discovered. For example, a purchase money security interest in consumer goods is perfected without filing. Id. § 9302(1)(d). If the consumer goods are later used as equipment in the consumer’s business, the purchase money security interest will not be discovered in a search of financing statements by a subsequent creditor of the business. One commentator concludes, however, that such “change of use” problems should not pose a significant problem for most commercial lenders because consumer goods converted to business equipment should not represent a significant part of the debtor’s equipment collateral. McLaughlin, “Seek But You May Not Find”: Non-UCC Recorded, Unrecorded and Hidden Security Interests Under Article 9 of the Uniform Commercial Code, 53 Fordham L. Rev. 953, 980 (1985).


165. See infra text accompanying note 181.
security interest in the debtor's collateral. Finally, problems may arise with respect to misindexed and misfiled financing statements.

Third, even if all competing liens and security interests could be discovered with respect to specified and limited items of collateral, the relative priority of such liens and security interests may not be easily determined. The statutes governing the priority of liens and security interests are scattered throughout federal and state statutes. For example, in priority conflicts involving the United States government, federal statutes may give priority to the federal government. Because the federal statutes are complex and often difficult to

166. This problem may arise in several contexts. For example, a partnership of which the debtor is a member or a spouse of the debtor who also has rights in the collateral may grant a security interest in the collateral. See 1A P. Coogan, W. Hogan, D. Vagts & J. McDonnell, supra note 8, at § 6C.05[2][iii] (a searcher looking for filings on an individual must also search under the names of partnerships of which the individual is a member). Similarly, the owner of the collateral may have consented to the creation of a security interest in the collateral in favor of a creditor of a third party. In such circumstances, the law is somewhat unclear as to whether the financing statement must be filed under the name of the owner of the collateral, the name of the obligor whose obligation is being secured, or both. Cal. Com. Code §§ 9105(1)(d), 9402(1), 9402(3) (West Supp. 1989); K.N.C. Wholesale, Inc. v. AWMCO, Inc., 56 Cal. App. 3d 315, 128 Cal. Rptr. 345 (1976) (suggests that a financing statement naming both the obligor and owner as debtors is required); McLaughlin, supra note 163, at 977-79; Nickles, A Localized Treatise on Secured Transactions—Part II: Creating Security Interests, 34 Ark. L. Rev. 559, 594-602 (1981). One commentator suggests that the “different obligor-different owner” dichotomy should not pose a serious problem to subsequent creditors conducting a U.C.C. search because prudent secured parties will presumably list the names of both the obligor and the owner of the collateral as “debtors” in the financing statement. Accordingly, a subsequent creditor searching the files under either name should discover the earlier filing. McLaughlin, supra note 163, at 978.

167. See infra text accompanying note 179.


169. See, e.g., 10 U.S.C. §§ 2307 (1982 & Supp. IV 1986), 7521 (1982) (priority for progress payments made on defense contracts); 31 U.S.C. § 3713 (1982) (priority for debts owed to the United States in the event of the insolvency of the debtor). In the absence of a special priority statute favoring the United States government, there is still a potential for subordination of consensual security interests to federal government secured claims even after United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), which held that courts should adopt nondiscriminatory state laws (such as the U.C.C.) as a source of federal common law governing the priority of security interests held by
locate, many lawyers attempt to exclude any opinion as to priority conflicts with the federal government. In other instances, the statutes may not provide a scheme of priority. Consequently, in order to determine the relative priority of many liens and security interests, a case by case review of court decisions under the specific statutes must be undertaken.

Because of the foregoing reasons, some lawyers refuse to provide any form of priority opinion. Although other lawyers may provide some form of priority opinion, the opinion may be significantly qualified as to the types of collateral and competing interests covered by the opinion. As a result, a well-drafted opinion will often contain qualifications and assumptions regarding so many items that the substantive meaning of the opinion is very slight or is incomprehensible to anyone who is not a specialist in personal property transactions. When an opinion becomes so qualified as not to be understandable to most readers, the motivating purpose of the opinion (i.e., to provide assurance to the secured party) is often lost. On the other hand, once the lawyer begins to list all the qualifications and assumptions to an opinion, the possibility of missing one or more possible issues is present. Consequently, priority opinions may be, on the one hand, uninformative because they tell the reader nothing or very little or, on the other hand, wrong or misleading because they fail to describe all exceptions. A secured party should weigh the difficulties and costs associated with the lawyer providing a broad priority opinion against the marginal benefits accruing from such an opinion.

A secured party should limit its requested priority opinion, if any, to specific and limited types or items of collateral and to specific types of competing interests. Qualifications and assumptions that cause an opinion to focus upon specified and limited collateral, the types of competing interests, or a method of perfection can be cost-effective methods of identifying those risks deemed material by the secured party while at the same time not causing the lawyer to incur unwarranted expense in conducting the due diligence necessary for a broad priority opinion.

With respect to collateral subject to perfection by filing under the Code, a secured party should only request, in most circumstances, an opinion limited to priority as evidenced by a U.C.C. search certificate, and in many transactions (for example, those not involving a significant dollar amount), a secured party should not request any priority opinion and should be willing to rely upon the secured party's own review of the U.C.C. search certificate. For example, a priority opinion in a transaction involving a significant dollar amount might read as follows:

The security interests so perfected are prior to any other security interest in the collateral granted by the debtor, that is or would be perfected solely by the federal government and its agencies. *Kimbell* may only apply to consensual security interests given to the United States or its agencies in connection with governmental lending or loan guarantee programs and may not apply to nonconsensual liens in favor of the government where the extension of credit was not on a selective, commercial, basis. *Ryan, supra* note 76, at 184–85.
the filing of a financing statement with the Secretary of State of the State of California.

This opinion does not state that the secured party's rights are senior to those of all third parties, such as third parties who hold liens arising outside of the Code or third parties who hold security interests previously perfected by another available method. Instead, this opinion covers only the priority of the security interest against other security interests and certain liens that are filed with the Secretary of State. Nevertheless, even such a limited opinion requires careful preparation by the opining lawyer.

If the secured party identifies collateral subject to different perfection methods, such methods can be individually addressed. With respect to collateral that is specifically identified, a limited priority opinion may be justifiable, for example, a priority opinion as to a pledge of shares, a security interest in a specific item of equipment, or a lien on a specific item of collateral subject to a national recording system. A priority opinion for a security interest in certificated securities that have been delivered to the secured party might appear as follows:

The pledge agreement conveys to the secured party a security interest in the shares free of any adverse claim.

This opinion provides the secured party with assurance as to the priority of the security interest, without imposing an unreasonable due diligence burden on the lawyer rendering the opinion.

**Due Diligence, Assumptions, and Qualifications**

The following discussion is not intended as an exhaustive list of all due diligence procedures necessary for priority opinions. Rather, this part of the report addresses several common problems associated with the due diligence

170. See liens described supra note 157.
171. See, e.g., Cal. Com. Code § 9304 (perfection by possession as alternative method of perfection for certain types of collateral) (West Supp. 1989). The debtor's lawyer may have no practical means of determining whether, for example, some other secured party has possession of an item of collateral. See supra text accompanying note 159.
173. See text accompanying notes 175–206 for the due diligence, assumptions, and qualifications for such an opinion. In order to deliver such an opinion, the opining lawyer should, among other things, take the following actions: (i) confirm the legal name of the debtor, see infra text accompanying note 182; (ii) confirm that the U.C.C. search request contains the proper spelling of the debtor's name, see infra text following note 190; (iii) qualify the opinion for misindexed and misfiled financing statements, see infra text accompanying notes 179–80; (iv) search for any financing statements under similar names, partnerships of which the debtor is a member, and the name of a spouse, if any, see infra text accompanying notes 190–93; and (v) prefile the financing statement(s), see infra text accompanying notes 176–78.
174. For appropriate due diligence procedures for such an opinion, see infra text accompanying notes 195–203.
necessary for priority opinions, with special emphasis on problems unique to California.

If given, a priority opinion assumes that the security interest of the secured party is perfected. If not perfected, the security interest of the secured party would be subordinate to the perfected security interests of other secured parties and to the rights of some other parties. Consequently, the assumptions and qualifications for opinions concerning the attachment and perfection of security interests that have been previously discussed are also applicable to a priority opinion.

Prefiling of Financing Statements

The opinion letter from the lawyer will usually be delivered at the closing of a transaction. In order to provide a priority opinion, however, the lawyer must be able to conduct a search of other security interests. With respect to U.C.C. financing statements, a time delay will often occur. A certificate from the secretary of state showing the filing of the secured party’s financing statement will often not be available until several days or weeks after the filing of the financing statement. Consequently, in order to enable the lawyer to deliver a priority opinion at a closing, a financing statement should be filed sufficiently ahead of closing to permit a U.C.C. search to disclose the filing of the financing statement, preclude the existence of certain temporarily perfected security interests, and confirm the secured party’s priority.

Misindexing and Misfiling of Financing Statements

A financing statement presented in compliance with the Code is effective even if misindexed by the filing officer. A similar problem arises when a prior secured party has misfiled a financing statement in the wrong jurisdiction or with the wrong office within a jurisdiction (for example, a financing statement is filed with the county recorder instead of the secretary of state). Such a misfiled financing statement may be effective with respect to any collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement. Consequently, in order to avoid the risk of a wild

176. See id. §§ 9402(1) (authorizes filing of financing statements prior to the attachment of a security interest), 9312(5)(a) (filing of financing statement establishes priority over most other security interests perfected by filing, even if the security interest has not attached at the time of filing).
177. See supra note 162.
178. See generally McLaughlin, supra note 163, at 963–73.
180. Id. § 9401(2). The rules of priority under 9312(5) are silent on the effect of knowledge of the secured party regarding previous but unfiled financing statements. The orthodox view is that the knowledge of the secured party is irrelevant. Todsen v. Runge, 211 Neb. 226, 236, 318 N.W.2d 88, 93 (1982). Note, Special Project—The Priority Rules of Article Nine, 62 Cornell L. Rev. 834, 848 (1977) [hereinafter Special Project]. A few cases, however, have held that the good faith require-
financing statement, the lawyer will often include a qualification in an opinion letter to the following effect:

In our examination of the U.C.C. search certificate described above, we have assumed that all financing statements, other than the financing statements in favor of the secured party described above, have been properly filed and indexed with the Secretary of State of the State of California; such certificate is accurate and complete; and you do not have knowledge of the contents of any other financing statements covering the collateral or the existence of other security interests (perfected or unperfected) in the collateral.

Because of the difficulty in confirming the absence of misindexed or misfiled financing statement, such a qualification should be understood to apply even if it is not expressly stated. Of course, the lawyer cannot rely upon such an express or implied qualification when, for example, the lawyer has knowledge of misindexed or misfiled financing statements.

Financing Statements Not Filed Under the Name of the Debtor

A U.C.C. search certificate from the secretary of state will not reveal financing statements filed under a previous name of the debtor; nevertheless, such financing statements may still be effective. Consequently, a lawyer will often include a qualification in an opinion letter to the following effect:

Our opinion below as to the priority of security interests does not apply to security interests in the collateral created by the debtor and perfected by the filing of a financing statement under any name other than the present name of the debtor.

In the absence of contrary knowledge, such a qualification by a lawyer is reasonable with respect to noncorporate debtors. A secured party will sometimes request that the lawyer add certain language to the qualification to the effect that the lawyer is not aware of any financing statement under any name other than the present name of the debtor with respect to the collateral. Such a request for additional language is reasonable.


182. With respect to corporate debtors, the debtor's lawyer, if requested, can review the debtor's articles of incorporation and amendments as certified by the secretary of state.
A U.C.C. search certificate from the secretary of state will also not reveal financing statements filed under the name of a previous owner of the collateral; nevertheless, such financing statements may still be effective. Consequently, a lawyer may include a qualification in an opinion letter disclaiming responsibility for security interests created by previous owners of the collateral. Because of the difficulty in determining the identity of previous owners of the collateral, such a qualification should be understood to apply even if it is not expressly stated. Of course, the lawyer cannot rely upon such an express or implied qualification when the lawyer has contrary knowledge.

A U.C.C. search certificate from the secretary of state under the name of a debtor may not reveal financing statements filed under the name of a spouse, a partnership of which the debtor is a member, or a third-party obligor for whom the debtor has consented to the grant of security interest in the debtor’s property in favor of a creditor of the third-party obligor. A lawyer should either make appropriate inquiries of the debtor to determine the possible existence of such security interests or include an appropriate qualification in the opinion.

**Financing Statements Not Filed in the Jurisdiction or Locality**

A U.C.C. search certificate from the secretary of state will not reveal financing statements filed by another secured party in another jurisdiction with respect to collateral previously located in the other jurisdiction; nevertheless, such financing statements filed in the other jurisdiction may still be effective. Consequently, a lawyer may include a qualification in an opinion letter disclaiming responsibility for security interests perfected by filings in other jurisdictions or localities. In the absence of contrary knowledge, such a qualification by a lawyer may be reasonable in appropriate circumstances. A secured party will sometimes request that the lawyer add certain language to

183. Except where the Code provides otherwise, a security interest continues in collateral notwithstanding sale or other disposition unless the sale or other disposition was authorized by the secured party. Cal. Com. Code §§ 9306(2), 9402(7) (West Supp. 1989). Other Code sections provide that certain transferees of collateral take free of any perfected security interests. See, e.g., §§ 9307–9309. However, § 9307 only provides protection against a security interest created by the seller of the collateral; consequently, a buyer in the ordinary course of business may purchase, in certain circumstances, collateral subject to a security created by the seller’s transferor of the collateral.

184. Cal. Com. Code §§ 9103(1)(d), 2(d), 3(e) (West Supp. 1989). For example, a secured party in another state may perfect a security interest in goods located in that state by filing a financing statement. A debtor may move the goods into California. Under the Code, the foreign secured party will continue to have a perfected security interest in those goods under California law even though a financing statement describing the goods is not on file in California. Id. § 9103(1)(d). The security interest will remain perfected for up to four months after the date upon which the goods were brought into California. Moreover, the foreign secured party can continue the perfection of the security interest in the goods by filing a financing statement in accordance with the Code. If timely filed, the new financing statement will have priority from the date of the filing of the related financing statement in the other state.

185. Id. § 9401(3).
the qualification to the effect that the lawyer is not aware of any financing statements filed in other jurisdictions or localities with respect to the collateral. Such a request for additional language is reasonable.

Searching for Financing Statements and Other Liens

When commencing a search for U.C.C. financing statements and certain other liens, a lawyer will confront three problems: (i) where should the search be conducted, (ii) under what names should the search be conducted, and (iii) how much time should be provided for a thorough search. The answer to each problem can be complex.

(i) Where should the search be conducted? The location for a search will depend upon the identity of the debtor, the type of collateral, the type of competing interests to be discovered, and the state where the collateral or the debtor is (or was) located. The identity or type of the debtor and the type of competing interest to be discovered will dictate where certain security interests or liens will be filed or recorded. For example, federal tax liens, certain state tax liens, and abstracts of judgment respecting individuals are filed or recorded in the county recorder's office for the county in which the debtor resides. Consequently, a search of the records of the secretary of state with respect to an individual will not reveal all federal and state tax liens and abstracts of judgment. Therefore, a lawyer should conduct both a search of the records of the secretary of state and a search of the relevant county recorder's offices in order to obtain a complete report on security interests, tax liens, and judgment liens filed or recorded against an individual. A lawyer should also consider searching the county recorder's office in counties where the debtor previously resided.

The type of collateral will also dictate the location of a search. With respect to collateral consisting of fixtures, timber to be cut, minerals or the like (including oil and gas), and crops growing or to be grown, a lawyer must search the offices where a mortgage on the underlying real estate would be recorded in order to determine the existence of competing financing statements or fixture filings filed against a debtor. Similarly, when the collateral is consumer goods, a lawyer must search the records of the county recorder's office in the county of the debtor's residence or, if the debtor is not a resident of California, in the records of the county recorder's office in the county in which the consumer goods are kept. In order to protect against problems arising from the change of use of collateral, the lawyer may include an appropriate qualification in the opinion. Because of the difficulty in determining whether there has been a change of use of collateral and the relatively few instances where such collateral should constitute a material portion of a debtor's collateral, such a qualification should

186. See supra note 158 for examples of liens filed with the county recorder.
188. Id. § 9401(1)(a).
189. See supra text accompanying note 163.
be understood to apply even if it is not expressly stated in an opinion. Of course, the lawyer should not rely upon an implied qualification when, for example, the lawyer has knowledge of “change of use” collateral and such collateral constitutes a material portion of the collateral securing the debtor’s obligation.

Finally, the location of the collateral will dictate the location of a search. With respect to collateral consisting of goods, the records of the jurisdiction in which the goods are (or were) located must be searched. In some states, both central filings and local filings must be searched.

(ii) Under what names should the search be conducted? The secretary of state maintains all records on a computer. The names of debtors are maintained on two indexes on the U.C.C. computer: a personal index and a business index. The U.C.C. computer is programmed to read search requests very literally and will often not recognize similar names. For example, a search on SMITH, JIM JR. will not necessarily reveal filings on SMITH, JIM M. JR., or SMITH, JAMES JR., even though it is the name of the same man at the same address. Similarly, a corporation may be known under various names such as AIR FRESNO, AIRFRE, or AIR-FRE (with and without a hyphen). Not all the filings under the various names may appear on a search request indicating only one form of the name. A U.C.C. search certificate may contain a similar name statement showing some filings under similar names, but the similar name statement does not necessarily show all filings under similar names. Similar problems arise in the indexing of filings against professional corporations such as doctors, dentists, and lawyers. A filing against a dentist, JAMES SMITH DDS, could appear in several different ways:

SMITH, JAMES DDS, INC. .... (business index under J)
SMITH, JAMES ................. (personal name index)
JAMES SMITH DDS, INC. ..... (business name index under J)
DR. JAMES SMITH DDS ....... (if a federal tax identification number is provided, then business name index under Dr.) (if a social security number is provided, then personal name index under Smith, James only) (if no number is provided, then personal name index under Smith, James only)

Also of importance is the spacing of letters when the debtor’s name contains initials. For example, ABC Corporation may not appear to the U.C.C. computer as A B C Corporation.

In order to ensure that a search of the records of the secretary of state does not exclude similar names, a search request should be carefully drafted to include various permutations and commonly-used trade names. Even though the filings of financing statements under trade names should not be effective, a secured

party often does not want to advance funds to a debtor with outstanding financing statements filed under trade names such that a priority dispute may develop. In addition, when reviewing search certificates, the lawyer should keep in mind that a “minor” misspelling of a debtor’s name may not prevent a previously filed financing statement from being effective. Accordingly, a lawyer should consider reviewing various spellings of the name of the debtor in order to reduce the possibility of the existence of previous filings under a misspelled name. A lawyer must also be certain to conduct a search under prior names of the debtor. Financing statements filed under a prior name of a debtor may still be effective. Finally, a search under the name of previous owners of the collateral may also be necessary.

(iii) How long will a search take? In general, a U.C.C. search certificate (without copies of disclosed financing statements) can be obtained in an average of two-to-four working days. The U.C.C. search certificate is a computer printout showing all effective filings for a debtor through the date given at the end of the listing. It also gives secured party information and time and dates of amendments and continuation statements. No collateral information is shown.

The only way to discover collateral is to request copies of financing statements shown on the U.C.C. search certificate. Depending on the number of files to be copied, it takes several working days to receive copies ordered separately by file number. The exact number of days will vary depending upon numerous factors, and it is advisable to check at the beginning of a secured transaction with the office of the secretary of state to determine the current processing time for obtaining copies of financing statements. The copies received are termed certified, but in order to be used as evidence, the copies must be under gold seal. A gold seal requires an extra two-to-three working days.

In order to avoid problems and delays in obtaining U.C.C. search certificates and copies of financing statements, specialized search firms are available. The firms will have access to microfiche reproductions of the records of the secretary of state and can conduct a search or help prepare a comprehensive search request which will contain all similar names of a debtor. Also, such firms can expedite document retrieval.

Investment Securities

When the secured party specifically identifies investment securities that are being delivered to it as collateral, the lawyer will often be requested to provide a

191. See cases cited in McLaughlin, supra note 163, at 985 n.180; 1A P. Coogan, W. Hogan, D. Vagts & J. McDonnell, supra note 8, § 6C.05[2][b].


193. See supra text accompanying note 183.

194. See supra text accompanying note 176 for problems associated with the delays involved in the search process.
priority opinion with respect to such securities. A common form of priority opinion states:

The pledge agreement conveys to the secured party a security interest in the shares free of any adverse claim.

The opinion follows the terminology used in division 8 of the Code. Sometimes a lawyer will be requested to provide an opinion to the effect that the security interest is prior to a litany of items, including security interests, encumbrances, charges, liens, and other claims. Terms other than "security interest" and "claim" should be avoided in an opinion because such other terms have no defined meaning under the Code.

When conducting the investigation necessary for an opinion as to adverse claims, a lawyer can often rely on certain provisions of division 8 of the Code for a priority opinion. With respect to priority against a lien in favor of the issuer of the securities, division 8 may provide some protection to the lawyer who is requested to provide a priority opinion. Assuming that the secured party does not have actual knowledge of issuer restrictions on the pledge of the securities, then the secured party will take the securities free of any lien or restriction against a pledge in favor of the issuer unless: (i) in the case of certificated securities, the existence of such lien or restriction is conspicuously noted on the certificates; or (ii) in the case of uncertificated securities, a notation of such lien or restriction is contained on the initial transaction statement. It is for this reason that the initial transaction statement or the certificates should be inspected by the lawyer. If an inspection of the initial transaction statement or the certificates does not indicate the existence of a restriction or lien in favor of the issuer, a lawyer should be confident in providing a priority opinion with respect to liens in favor of the issuer.

Under most circumstances, a lawyer should be permitted to rely upon the priority status afforded bona fide purchasers of a security under section 8302 in order to provide a priority opinion with respect to securities. A lawyer should be able to assume in the opinion letter, with the permission of the secured party, that the secured party is a purchaser for value in good faith and without notice of any adverse claim. These assumptions permit the lawyer to address whether the secured party has obtained a prior perfected security interest in the

197. With respect to shares of stock in a Delaware corporation, lawyers should be aware that Delaware law authorizes the attachment of such shares without a seizure of the share certificates; therefore a search of the docket of the Delaware Court of Chancery is required to be assured that the shares are free of liens and encumbrances. Del. Code Ann. tit. 8, §§ 169, 324 (1983); id. tit. 6, § 8-317 (Supp. 1988). Consequently, a lawyer should consider how this law may affect transactions negotiated and consummated outside Delaware.
199. Id. § 8302.
securities instead of determining whether the debtor has given one. Because the former depends on current instead of historical information, it is easier for the lawyer to determine and obtain comfort on the relevant facts. It is fair for the lawyer to assume these facts because they are within the knowledge of the secured party or will occur at the closing. The assumed facts will eliminate the need to research the history of all security transfers back to the original issuance of the securities. If the secured party is a bona fide purchaser and has taken delivery of the securities—and if certain other facts are described and true—the lawyer will be able to opine that the secured party acquired a valid security interest in the securities free of adverse claims (including otherwise prior perfected security interests), including defects in prior transfers.

**Priority of a Security Interest in Fixtures**

Division 9 of the Code permits the perfection of a security interest in goods that are fixtures by filing a financing statement with the secretary of state. Liens on fixtures are also obtainable under real estate law. In order for a secured party obtaining rights in fixtures under the Code to obtain priority over the rights of certain parties with an interest in the real property, the recording of a fixture filing with the appropriate county recorder is necessary. Unless a title report or other review of the real estate records is obtained and relied upon, it may be appropriate to include in an opinion on priority an explanatory paragraph regarding the relative rights of a party with an interest in the real estate similar to the following:

Although the secured party has a perfected security interest in those goods that are or may become fixtures, the relative priority of that security interest in relationship to persons claiming rights to the fixtures under real estate law will not be determined solely by the time of perfection, but may be based upon a fixture filing in the real estate records in the county in which the real estate is located.

**Subsequent Events Affecting Priority**

Recently, some lawyers have begun the practice of disclosing in their opinion letters certain subsequent events that may affect the continued priority of the

200. *Id.* § 8302(1).
201. *Id.* § 1201(32), (33).
202. *See id.* § 8302(2).
203. *Id.* § 8302(3). The priority apparently even applies with respect to stolen securities in the proper circumstances. *Id.* §§ 8302, 8304. *See generally Weise & Duncan, Loan Transactions*, in Opinion Letters of Counsel 367 (PLI 1985).
204. *See supra* text accompanying notes 124–25.
206. Cal. Com. Code § 9313(4) (West Supp. 1989) requires a fixture filing to obtain rights for a perfected security interest in fixtures prior to the rights of an owner or encumbrancer of real estate. Section 9313 defines a fixture filing as a filing made in the office of the appropriate county recorder which conforms to § 9402(5).
secured party's security interest. Similar disclosures with respect to the perfection of a security interest have been previously discussed. Although including the disclosures serves the purpose of more fully informing the recipient of the opinion, such disclosures should be understood to apply even if they are not expressly stated. The disclosures often address the following problems: (i) A subsequent purchase money financer may acquire a perfected security interest prior in right to a previously perfected secured party; (ii) the Code grants priority over existing security interests to certain materialmen's liens; (iii) the Code provides that a perfected security interest may become subordinate to another security interest in the event the collateral is processed or commingled; and (iv) the secured party's priority to the collateral may not be maintained with respect to certain future advances.

CONCLUSION

The Committee has endeavored to provide some general assistance to lawyers in the preparation of a legal opinion in a personal property secured transaction. For the lawyer not regularly engaged in such transactions, the Committee hopes this report will provide a greater understanding of the function of an opinion letter in a personal property secured transaction, its various components, procedures which may be followed in rendering the opinion, and some guidelines about matters normally appropriate for inclusion in an opinion letter.

207. See supra text accompanying notes 141-48.
211. See, e.g., id. § 9301(4) (West Supp. 1989); 26 U.S.C.A. § 6323 (West 1988); 26 C.F.R. § 301.6323(a)-1, (b)-1, (c)-1, (c)-3, (d)-1, (e)-1 (1988).