



## Chapter 13

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### Title Opinions Covering Mineral Properties

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#### Synopsis

§ 13.01.	<b>Introduction.</b> .....	466
§ 13.02.	<b>The Opinion or Certification from the Standpoint of the Preparer and the Recipient.</b> .....	467
§ 13.03.	<b>The Form of a Title Opinion.</b> .....	468
	[1] — Addressee. ....	468
	[2] — Description of Property. ....	469
	[3] — Records Examined. ....	469
	[4] — Scope of Examination. ....	470
	[5] — Chain of Title. ....	471
	[6] — Description of Tax Assessment and Report on Tax Delinquencies. ....	471
	[7] — Limitations on an Opinion of Title. ....	471
	[a] — Accuracy of Records. ....	472
	[b] — Matters of Survey and Visual Inspection. ....	472
	[c] — Monetary Limitation. ....	472
	[8] — Defects, Exceptions and Irregularities. ....	472
§ 13.04.	<b>Other Considerations in the Preparation and Receipt of Title Opinion Reports or Certifications.</b> .....	473
	[1] — Title Insurance. ....	473
	[2] — Professional Liability Insurance. ....	474
§ 13.05.	<b>Liability of Attorneys for Preparing Inaccurate Title Opinions.</b> .....	474
	[1] — Attorney's Duty of Care. ....	475
	[2] — Who May Bring Suit? ....	475
	[3] — Defenses to Liability. ....	476
	[4] — Damages. ....	477
§ 13.06.	<b>Conclusion.</b> .....	477
§ 13.07.	<b>Exhibit A.</b> .....	478

### § 13.01. Introduction.

The form of title opinion reports or title certifications<sup>1</sup> covering mineral properties is not uniform.<sup>2</sup> This lack of uniformity can create problems for the preparer of the title opinion in determining his or her liability in connection with the document provided and for the recipient thereof in completing a review of the report or certification to make a determination of how and on what basis the recipient can rely upon its contents.<sup>3</sup> This chapter will focus on what should be included in such a title opinion and how it should be reviewed and relied upon by the recipient, including an analysis of the liability of the preparer for errors encountered in either completing the necessary examination and due diligence for the title opinion or in legal conclusions contained therein.<sup>4</sup>

A title opinion is generally prepared by an attorney who has conducted an examination of the title to the mineral property involved to determine the extent and quality of the title of the purported owner thereof. The form of the report which is prepared is either a title opinion report wherein the preparer provides an opinion relative to the marketability of the title to the property, or a certification whereby the preparer certifies the current ownership of the property covered thereby.<sup>5</sup> From the preparer's standpoint, an opinion relative to the title to the property covered by the

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<sup>1</sup> Many descriptions have been used to describe written opinions of title rendered by attorneys. In this chapter, the generic term "title opinion" has been used to describe all forms of written opinions, excepting title insurance.

<sup>2</sup> See Cassidy, "Preparation and Use of Title Opinions," 6 *E. Min. L. Inst.* ch. 21 at 3 (1985).

<sup>3</sup> In August 1991, the Business Law Section of the American Bar Association adopted its *Third-Party Legal Opinion Report*, which includes a Legal Opinion Accord, thus making available for the first time a nationwide approach to giving legal opinions in general. The Accord does not, however, deal with real estate opinions, perhaps recognizing the peculiar problems real estate opinions present.

<sup>4</sup> For a general discussion of opinion letters in the real estate context see Thompson, "Opinions in Real Estate Transactions," in *Real Estate Opinion Letters, Outline Synopsis*, at 12 (PLI Real Estate Law and Practice Course Handbook Series No. 353, 1990).

<sup>5</sup> For a further discussion of the types of reports prepared from title examinations see McElwee, "Title Matters Associated with the Purchase and Sale of Coal Lands," 12 *E. Min. L. Inst.* ch. 3, at 5-7 (1991).

report should be preferable, because it may obviate the possibility that the preparer who “certifies” title could be considered as having acted as an insurer of the title to the property covered by the certification.

The recipient of a title opinion covering a mineral property has normally requested the opinion in connection with the pending acquisition or development of the subject property or a loan for which the property will be collateral security. Accordingly, the recipient must carefully review and evaluate the title opinion to ensure that the document contains all necessary and required information relative to the subject property for its purposes. This balancing between the needs of the recipient of the report and the desire of the preparer to limit his or her liability resulting from the opinion may require prior discussions or negotiations concerning minimum standards which are acceptable to both parties. From the standpoint of the preparer of a title opinion, he or she should include all relevant information and assumptions utilized in arriving at the title opinion or to limit his or her liability.<sup>6</sup>

**§ 13.02. The Title Opinion from the Standpoint of the Preparer and the Recipient.**

A title opinion should be considered by the preparer as a report on the current state of the title to the subject property based upon the due diligence he or she has undertaken in completing an examination of the public records, and also as an opportunity to limit his or her liability so as not to become an insurer of the title to the property.<sup>7</sup> To this end, a title opinion should, necessarily, contain information on all matters of record relating to the status of the title to the subject property which are discovered by an accurate and thorough examination.

The recipient of a title opinion desires to have an opinion or certification on the title to the subject property upon which it can rely for

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<sup>6</sup> See generally Thompson, “Opinions in Real Estate Transactions,” in *Real Estate Opinion Letters*, at 12 (M. John Sterba, Jr. ed., PLI Real Estate Law and Practice Course Handbook Series No. 353, 1990)(discussing the difficulties facing attorneys who prepare title opinions).

<sup>7</sup> See generally Meng, “Transfers of Title to Mineral Properties,” in *Acquisitions and Dispositions of Mineral Properties*, E. Min. L. Foundation Special Institute, ch. 8 (1993).