Lawyers and law firms have been acting as lead counsel in syndicated lending transactions for many years, but without much guidance, written or unwritten, concerning the duties and responsibilities of being lead counsel. In this Article, the author sets forth his understanding, based on his own experience and his own opinions, of those duties and responsibilities. The author responds to the following questions related to lead counsel’s duties and responsibilities:

- Which lenders does the lead counsel represent?
- How does the lead counsel handle the differing interests and views of the various lenders?
- What legal opinions, if any, does the lead counsel render?
- What action does the lead counsel take if a legal problem arises?
- To which lenders is the lead counsel liable for malpractice?

In the author’s view, many, if not all, of these questions can be resolved if the lead counsel prepares, and has the appropriate lenders execute, a representation letter that sets forth the basis on which the lead counsel will act. An example of such letter is attached as Annex A.

In syndicated lending, the counsel who advises the lenders and prepares the credit documents is generally referred to as the “lead counsel.” The function of a
lead counsel is principally to prepare the credit documents—the credit agreement and the forms of promissory notes, guarantees, security agreements, intercreditor agreements, and other documents that support or otherwise relate to the credit agreement—and to conduct a legal review of the transaction under the law in which the lead counsel is expert (generally the governing law of the credit documents). The lead counsel also tries to ensure that the various local counsel, if any, conduct a legal review of the transaction, and of the credit documents, under local law. The lead counsel would expect to assist in the negotiation of the provisions of the credit documents and to review drafts of, and approve the final copies of, the closing documents.

**Which Lenders Does the Lead Counsel Represent?**

1. **Representing the Lead Lender.** If there is a single or one strong lead lender in a syndicated lending transaction, it will choose the lead counsel. A lead lender generally views its lead counsel as primarily representing the lead lender. In turn, the lead counsel generally reciprocates the lead lender’s views by thinking that counsel’s role is to represent the lead lender or, more precisely, the institution that selected the counsel and all of such institution’s affiliates in any of their capacities. The client-attorney relationship is seldom documented in a syndicated loan transaction. It is described neither in the credit agreement nor in any agreement among the lenders. Any reference to such relationship in the syndication is unusual.

2. The lead lender normally is the “lead arranger” and the “administrative agent.” The lead arranger is the lead institution that “arranges” the transaction: that is, the institution that ultimately negotiates and agrees to the transaction structure and its terms and that syndicates the transaction. The administrative agent is appointed by the syndicate members in the credit agreement to handle all the funds advanced by the syndicate members to the borrower and all the funds paid by the borrower to the syndicate members and to monitor and enforce the provisions of the credit documents.

Often the lead lender assumes the lofty title of bookrunner: the lead lender who runs the “books” for syndication of the transaction.

3. In contrast, the lead counsel for a securities (stocks or bonds) underwriting represents each individual underwriter, as a matter of legal and practical necessity. As a legal necessity, each underwriter expects a law firm to represent it in doing due diligence on the issuer and its affiliates, in order to allow such underwriter to have a due diligence defense under the Securities Act of 1933. See Securities Act of 1933 § 11, 15 U.S.C. § 77 (2006). See also Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 682–83 (S.D.N.Y. 1968); In re WorldCom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 656–78 (S.D.N.Y. 2004). As a practical necessity, the issuer of the underwritten securities wants to have only one law firm do the due diligence on behalf of the underwriters. Even the U.S. Securities and Exchange Commission has “approvingly noted the increased designation of one law firm to act as underwriters’ counsel, which ‘facilitates continuous due diligence by ensuring on-going access to the registrant on the underwriters’ behalf.’” WorldCom, 346 F. Supp. 2d at 670.
credit documents should, however, disclose to the syndicate members that the lead counsel will be representing the interests of the lead lender and its affiliates and that if a syndicate member wants to have its own interests analyzed, asserted, or argued in the transaction, it must retain its own counsel, often inside counsel. The lead counsel does protect, although it does not technically represent, the various syndicate members by preparing credit documents that meet the professional standards of such counsel and the interests of the lead lender. Ordinarily, the lead counsel will review and listen to, and ultimately respond to, the comments by each syndicate member or its counsel with respect to the draft credit documents, but, except in a situation where there is a very small syndicate, will not represent the entire syndicate. Any differences of views will be worked out, and resolved, by the lead lender as advised by its lead counsel.

Large lending syndications do not have just one lead lender. There may be an administrative agent, who does have legal duties and responsibilities, together with combinations of two or more bookrunners, lead arrangers, syndication agents, and documentation agents, who generally have no legal duties or responsibilities but are given titles to reward them for taking a large participation. Each lead institution may be powerful enough to insist that the lead counsel represent it as well as the other “leads.” The more the number of lead financial institutions, the more lead counsel may run into differing interests and views. How does the lead counsel handle the differing interests and views of the various lead banks? In any given transaction, lawyers can debate whether those differing interests and views should affect the lead counsel’s representation of the various lead lenders, but such interests and views do raise questions for counsel under the applicable professional standards set forth in the American Bar Association Model Rules of Professional Conduct and the Restatement (Third) of the Law Governing Lawyers and, in New York (where many law firms representing lead lenders

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4. References are to the Model Rules of Professional Conduct as amended through 2008 [hereinafter “MODEL RULES”]. Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.

5. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 (2000) [hereinafter “RESTATEMENT”] provides:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation
are located, in whole or in part), the new New York Rules of Professional Conduct.\(^6\)

To handle the different interests and views, the lead counsel might prepare, and have each such lead institution execute, a representation letter setting forth (a) the basis on which counsel represents each such institution—generally representing the lead institutions as a group; (b) how the lead counsel will take instructions to act—generally, from a majority of the lead institutions; and (c) if differing interests and views arise, how they will be resolved—generally, by the lead counsel reserving its right to withdraw from representing one or more lead institutions. An example (not a form) of such a representation letter is attached to this Article as Annex A. A representation letter would set forth the implications of the simultaneous representation, including how the lead counsel will respond to any future differing interests or views, and would require each syndicate member to consent to such representation and to waive any actual or potential conflict of interests.\(^7\)

If no such representation letter is prepared and executed, the lead counsel will have to work out with each lead institution the basis for its representation and the method of handling the various differing interests and views. Doing

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6. References are to the New York Rules of Professional Conduct available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm (effective Apr. 1, 2009) [hereinafter “N.Y. RULES”]. Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.0(f) defines “differing interests” to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”

Rule 1.0(e) defines “confirmed in writing” to denote:

(i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

7. See Model Rules, supra note 4, R. 1.7(b)(4); Restatement, supra note 5, § 130; N.Y. Rules, supra note 6, R. 1.7(b)(4).
so informally (i.e., without a writing) may present significant difficulties for the lead counsel.

Even if the lead counsel is seen, and sees its role, as representing only the lead institutions, there is the issue of when such representation ends. How long does the representation last? Until closing? The final payoff? When the lead institution says that the representation ends? There is no customary practice to answer the question. Lead counsel could answer the question itself, and resolve any confusion by or misunderstanding with the lead institution and its syndicate, by stating in the lead counsel’s representation letter exactly when its representation ends.

Generally the lead counsel is not dismissed at closing, but rather is expected to continue helping with the transaction, and interpreting and amending the credit documents, at least until the extensions of credit are repaid in full and the lenders’ commitments terminate. If, then, during the term of the credit agreement, some lead institutions want to assert a claim against a lead institution as administrative agent for mishandling the transaction and asks the lead counsel to represent them in bringing an action against the agent (or even to investigate the conduct of the agent), lead counsel would have to withdraw and suggest to those institutions that they retain other counsel.8 At the outset of the representation of two or more lead institutions, the lead counsel might protect the interests of the client that introduced it to the matter (and its own interests) by preparing, and having each lead institution execute, a representation letter setting forth when lead counsel can withdraw from its representation.9

2. Representing Every Lender? The lead counsel could represent every lender in the lending syndicate. Such representation may occur when smaller syndicates are involved. If the lead counsel represents every lending institution, such representation would be convenient for each such institution in that such representation would avoid the necessity for any such institution to retain its own counsel in the transaction.10 Such representation may, however, present to the lead counsel some uncomfortable issues.

Representing each member of a lending syndicate would not pose any ethical issues if all the lending institutions had the same view of the transaction and its terms. Typically, though, they do not. Some institutions might want tight restrictions on the borrower, and others might want, or at least are willing to live with, relaxed restrictions. Some institutions might be eager to lend, and others might not be so eager and might even want to find excuses not to lend. The lending institution that acts as the administrative agent might want protective exculpatory provisions and narrow areas of responsibility, whereas some syndicate members

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8. See Model Rules, supra note 4, R. 1.7(b)(3); Restatement, supra note 5, § 130; N.Y. Rules, supra note 6, R. 1.7(b)(3).
9. Such a representation letter will also assist counsel in complying with the professional rules for terminating representation. See Model Rules, supra note 4, R. 1.16(b)(7); N.Y. Rules, supra note 6, R. 1.16(c)(10).
10. If a lender has an exposure to the borrower other than under the proposed transaction, it will likely use separate counsel to analyze its unique circumstances, unless the lead counsel is familiar with such exposure.
might want to impose broad discretion and broad responsibility. To handle the differing interests and views, counsel might have each lender execute a representation letter at the outset of a transaction, as discussed above.

3. The Ethics of Group Representation. The description of lead counsel as counsel to the lenders as a group has merit, and that description is what is customarily meant when a lead counsel is “counsel to the lenders.” The description of lead counsel assumes that the syndicate members will act, and will see themselves, as a group and that, with regard to the applicable professional standards, there are no “differing interests”\(^{11}\) and no “significant”\(^{12}\) or “substantial”\(^{13}\) risk that the lawyer’s representation of one or more of the clients would be “materially limited”\(^{14}\) or “materially and adversely affected”\(^{15}\) by the lawyer’s duties to one or more of the other clients.\(^{16}\) In most cases, however, members of a lending syndicate do not see themselves as a group, but rather (as explicitly stated in most multi-lender credit agreements) as several lenders lending separately to the borrower.

In addition, many counsel are uncomfortable with representing all the lenders in a lending syndicate, even if such counsel is protected by a representation letter. The modern lending syndicate is a heterogeneous collection of lenders, each with its own regulatory scheme, views of credit analysis, tolerance for risk, understanding of the issues, and financial sophistication. Thus, the lead counsel in a modern lending syndicate knows from the outset that, with a diverse group of lenders, the interests and views of each of the lenders will rarely be the same. As a result, the lead counsel will usually choose to represent the one lead lender that selected it, and will put the other lenders on notice of such representation by designation of the lead counsel as (for example) “counsel to the Agent” in the credit documents, thereby indicating that if such other lenders want their own counsel, they should retain separate counsel.

WHAT DOES THE LEAD COUNSEL DO?

Once the lead counsel knows what lender or lenders it is representing and has negotiated and prepared the credit documents, it will be expected to review the closing documents: that is, the various executed credit and supporting documents and the related documents from the borrower and any guarantors and other supporting parties (the “Borrower Parties”). Those documents include charters and bylaws or other organizational documents, good standing certificates, certified corporate resolutions or other evidences of authorizations and signing authorities, incumbency certificates, U.C.C. financing statements, U.C.C. searches, and legal opinions from counsel for the various Borrower Parties. The lead counsel for a syndicated lending transaction will prepare drafts of the credit documents

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11. N.Y. Rules, supra note 6, R. 1.7(a)(1).
12. Model Rules, supra note 4, R. 1.7(a)(2).
13. Restatement, supra note 5, § 130.
14. Model Rules, supra note 4, R. 1.7(a)(2).
15. Restatement, supra note 5, § 130.
16. Model Rules, supra note 4, R. 1.7(a)(2); Restatement, supra note 5, § 130.
DOES THE LEAD COUNSEL RENDER A WRITTEN LEGAL OPINION?

In syndicated lending transactions in the United States, the answer to that question is generally “no.” Few lead lenders require their lead counsel to render written closing opinions; such lenders are satisfied to rely on the closing opinions from counsel for the Borrower Parties. If, however, counsel for the Borrower Parties is not qualified to practice, and is not an expert in, the law chosen to govern the credit documents, then the lead lender could request its counsel to render an opinion under the chosen law covering the enforceability of the credit documents (a “remedies opinion”) and, in a secured transaction, the creation of the security interest under the applicable security agreement (a “security interest opinion”). Such a security interest opinion would be especially appropriate if the lead counsel has prepared the security agreement. If the lead counsel does render such an opinion, counsel for the Borrower Parties would give an opinion covering the


18. In England, the answer is generally “yes.” English practice is for the lead counsel who prepares the credit documentation to render an opinion covering such credit documentation, and for counsel for the Borrower Parties to render an opinion generally covering only the internal authorizations and conflicts. See generally Geoffrey Yeowart, Principles for Giving Opinion Letters on English Law in Financing Transactions, 18 BUTTERWORTHS J. INT’L BANKING & FIN. L. 164 (2003). Mr. Yeowart is an attorney at Lovells practicing in their London office.

19. In securities underwritings in the United States, however, the lead counsel for a securities underwriting does invariably render a written legal opinion to each of the underwriters, in addition to the (somewhat similar) opinion of counsel for the issuer. Such split of customary practice seems to have arisen from the differences between the substantial due diligence done by the lead counsel for a securities underwriting and the minimal due diligence done by the lead counsel for a syndicated lending transaction.

20. See TriBar Opinion Comm., Report: Third-Party “Closing” Opinions, 53 BUS. LAW. 591, 619–31 (1988) [hereinafter “TriBar Report”]. Such a remedies opinion of lead counsel would customarily make assumptions as to (a) the due incorporation or organization, and valid existence and good standing, of each Borrower Party; (b) each Borrower Party’s power to execute, deliver, and perform the credit documents to which it is a party; (c) the due authorization of each Borrower Party’s execution, delivery, and performance of the credit documents to which it is a party; (d) each Borrower Party’s execution, delivery, and performance of the credit documents to which it is a party not (i) contravening any law, rule, or regulation (except those imposed by the chosen law), or (ii) violating any law, rule, or regulation (except those imposed by the chosen law), or (iii) resulting in any conflict with or breach of any agreement or document binding on it; and (e) no authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body or any other third party.

opinion matters not governed by the chosen law, including the matters assumed by the lead counsel in the lead counsel’s opinion.22

On those occasions when the lead counsel does render a written opinion, such opinion would be addressed either to the lenders and the agents, or to the administrative agent for the benefit of the lenders and the agents, and would contain a remedies opinion23 and, in the case of a secured transaction, a security interest opinion.24 If counsel for the Borrower Parties is not expert in the law governing the perfection of the security interest, but the lead counsel is so expert, the lead counsel may be asked by its client to render that opinion.

In addressing the opinion, lead counsel will confront the issue of whether to state in the opinion that future lenders or assignees may rely on the opinion. There is no consensus here. Some lead counsel do address their opinions to future lenders or assignees, or state that future lenders or assignees may rely. Some lead counsel permit future lenders that become parties to the credit agreement from time to time to rely. Some permit future lenders that become parties to the credit agreement to rely, but include a condition that reliance by such future lenders must be “actual and reasonable under the circumstances existing at the time of assignment.”25 Other lead counsel permit future lenders to rely but only if such lenders become parties to the credit agreement within a specified period of time after closing (generally the primary post-closing syndication period). And still others do not permit lenders or assignees to rely at all. Lead counsel are concerned about opinion reliance by future lenders or assignees because such reliance potentially may subject the opinion giver to (a) claims by lenders or assignees not familiar with customary opinion practices, (b) multiple claims in multiple jurisdictions under the laws of multiple jurisdictions, and (c) claims by “rogue” or “vulture”

22. See supra note 20.
23. The remedies opinion is to the effect that each of the specified credit documents is the legal, valid, and binding obligation of each Borrower Party that is a party thereto, enforceable against such Borrower Party in accordance with its terms. See TriBar Report, supra note 20, at 620.
24. The security interest opinion is to the effect that the security agreement is effective to create in favor of the collateral agent for the benefit of all the lenders and the agents, as security for the payment of the Secured Obligations (as defined in the security agreement), a security interest in the collateral described in the security agreement. See TriBar U.C.C. Article 9 Report, supra note 21, at 1464–68, 1505.
25. Such a condition, as set forth in Mark Adcock’s article contained in the materials for the fall 2007 seminar of the Working Group on Legal Opinions, held on October 30, 2007, might read as follows:

At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [___] (Reference to the Assignment Section of the Credit Agreement) of the Credit Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

lenders or assignees that buy loans with a view to suing the opinion giver, among others. However, lead institutions generally object to any opinion assignability restrictions that would adversely affect the marketability of the loans; and so, in giving closing opinions, lead counsel generally permit future lenders that become parties to the credit agreement to rely.

Sometimes the lead counsel’s opinion will include “no violation of law” and “no approvals” opinions under the law relating to the transaction, but such opinion will generally not cover, and will customarily assume, due incorporation or organization, valid existence and good standing, and power and authority, of each Borrower Party, no violation of and no approvals under any other law, and no breach or default under any other agreement binding on or affecting any Borrower Party.

When the lead counsel in a syndicated lending transaction does give a written opinion, some opinions of lead counsel add an opinion covering the closing documents. Such an opinion typically is to the effect that the closing documents are “substantially responsive to the requirements of the credit agreement.” If the closing documents include that local law governed supporting documents, the lead counsel either would rely on local counsel with regard to those documents or exclude such documents from the opinion of lead counsel. It is possible for the lead counsel, in reliance on the opinion of local counsel, to render an “umbrella opinion” covering all credit documents (both those governed by the law of the lead counsel and those governed by local law), but modern practice is for all opinions to be “unbundled” in separate opinions by separate counsel.

Some years ago lead counsel used to give a so-called “expert’s opinion,” to the effect that the credit documents are “in substantially acceptable legal form.” By such opinion, counsel was understood to be saying that, as an expert in the kind of transaction in question, such counsel was of the opinion that each credit document on its face (a) was not illegal or invalid; (b) was complete, and was able to function, as an agreement of the kind it is; and (c) contained provisions that were within the range of provisions customarily acceptable, in the experience of such counsel, in transactions of similar nature and purpose. Such an opinion is not given today, as such, except for those lead counsel who have an understanding with their clients as to what such opinion means.

There is another opinion that bank clients sometimes request: an opinion to the effect that the credit documents reflect the bank client’s credit policy memo-

26. Such “rogue” or “vulture” lenders will have to worry about a violation of the applicable champerty statute or law. See, e.g., N.Y. JUDICIARY LAW § 489(1) (McKinney 2008); Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates, Series 1999-C1 v. Love Funding Corp., 556 F.3d 100, 109–13 (2d Cir. 2009).
27. Although such opinion does not cover the credit agreement itself, it is thought to mean that the closing documents on their face satisfy the requirements specified by the credit agreement.
29. See id. at 638.
It is a courageous lawyer who renders such an opinion, since (a) the bank language describing the credit policy requirements is usually bank jargon and therefore difficult for a lawyer to interpret; (b) such credit policy requirements are typically unconditional (for example, a requirement for a “first priority fully perfected security interest in all the assets of the borrower”) and therefore are difficult to be reflected in the credit documents, which need to take account of the various legal and factual exceptions and other qualifications to the credit policy requirements; and (c) in the course of most negotiations for financing transactions, numerous compromises occur with regard to the stated credit policy requirements.

**What if a Legal Problem Arises that the Lead Counsel Cannot Resolve?**

Suppose, for example, that there is some uncertainty whether a consent of a regulatory authority is required for the transaction, but the lead lender wants to do the transaction without such consent. Having pointed out the uncertainty, counsel for the Borrower Parties might understandably refuse a request to render an unqualified opinion covering need for the regulatory consent. The lead lender might request its lead counsel to render the opinion, but the lead counsel might also think that the issue is too uncertain for an opinion. The lead counsel might prepare a legal memorandum, describing such uncertainty and the risks of not obtaining the consent of the regulatory authority, to be distributed to all syndicate members. There would have to be time for the lead counsel to prepare such a memorandum, distribute the memorandum to the various parties, and allow the various parties to review, and respond to, such a memorandum. If time is short, the lead counsel might call for a meeting, in a conference or by telephone, of the syndicate members to explain the uncertainty and risks of not obtaining the consent of the regulatory authority. The lead lender might, however, object to such a meeting, to avoid alarming the syndicate members. The lead counsel could, in that case, suggest that the lead lender itself prepare a memorandum, which the lead counsel would review, to explain the issue and to recommend proceeding to close the transaction.

A lawyer is expected to disclose to the client that information, and to conduct that measure of research, sufficient to allow the client to make an informed decision. If the client of the lead counsel is only the lead institution, as is customarily the case, the lead counsel is still expected to help that institution disclose to the syndicate members, in an accurate and fair manner, information sufficient to allow the syndicate members to make an informed decision.

No matter what party the lead counsel represents in this transaction, the lead counsel would customarily ensure disclosure to the syndicate members, prior

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31. See Model Rules, supra note 4, R. 1.4(b), and N.Y. Rules, supra note 6, R. 1.4(b), both which state:

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
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to closing, of any material adverse issue: in this case, the issue of the regulatory consent and its absence. If the lead institution will not disclose, or allow the lead counsel to disclose, the material adverse issue, the lead counsel might withdraw from the representation. Again, a representation letter would help by setting forth the kind of relationship that would entail either disclosing or withdrawing.

TO WHICH LENDERS, IF ANY, IS THE LEAD COUNSEL LIABLE FOR MALPRACTICE?

A recent case in the Supreme Court of Minnesota addresses this question. In McIntosh County Bank v. Dorsey & Whitney, LLP the lead law firm, Dorsey & Whitney LLP, was retained by an investment banking firm, Miller & Schroeder, Inc. (“M&$”), to assist in structuring, documenting, and securing the proposed loans, which were to be made to President R.C.-St. Regis Management Company (“St. Regis”), the developer and future manager of a proposed casino to be owned by the St. Regis Mohawk Tribe (the “Tribe”), to fund the construction and furnishing of the Tribe’s casino. M&$ made the loans, but then sold participation interests (totaling 100 percent) in the loans to thirty-two banks, with M&$ or its assignee retaining the loan servicing function (for a fee). The loans were to be secured by a pledge by St. Regis of all amounts payable by the Tribe to St. Regis, payable by reference to the casino revenues. During Dorsey’s preparation of the loan documentation, an issue arose as to whether the approval of the National Indian Gaming Commission (“NIGC”) was required for the pledge of the amounts payable by the Tribe to St. Regis. Dorsey did submit the pledge agreement to the NIGC for a determination on the issue, but the NIGC indicated that it would need additional time, time that the lead lender, M&$, thought it did not have. Dorsey advised M&$ that the NIGCs approval was not required for the pledge, and so, wishing to close the loans to start the construction of the casino for its scheduled grand opening, M&$ sent a memorandum to the participants recommending that the loans be closed without NIGC approval of the pledge, while also expressing an opinion that NIGC approval was imminent. When the participants voted to close the loan despite the absence of NIGC approval, M&$ so instructed Dorsey. There were no communications between Dorsey and the bank participants regarding the loan documentation or the closing, and Dorsey did not know the identities of the bank participants.

32. Counsel needs to be careful in withdrawing from the representation, since withdrawing from representing a client should be done in compliance with the applicable rules of professional conduct. See MODEL RULES, supra note 4, R. 1.16(b); N.Y. RULES, supra note 6, R. 1.16(c).
33. 745 N.W.2d 538 (Minn. 2008).
34. Id. at 541.
35. Id. at 541-42.
36. Id.
37. Id. at 542.
38. Id. at 542-43.
39. Id.
40. Id. at 543.
41. Id.
Within a year, St. Regis defaulted on the loans. M&S as lead lender sued St. Regis for repayment of the loans and received a judgment that was uncollectible, since St. Regis had no assets. The bank participants sued the Tribe to try to collect the amounts covered by the pledge, but the Tribe asserted, and sought a court declaration, that the pledge was void and unenforceable because it had not received NIGC approval. Having exhausted their efforts to collect on the loans from St. Regis and the Tribe, the bank participants brought a malpractice action against Dorsey in the Minnesota state district court on theories of third-party beneficiary, negligent representation, breach of contract, and breach of fiduciary duty. The district court granted summary judgment for Dorsey; but on appeal the state court of appeals reversed on the theories of third-party beneficiary and implied contract. On further appeal, the Supreme Court of Minnesota reversed the court of appeals in favor of Dorsey. The Supreme Court considered two theories of liability for Dorsey: one, that the bank participants have standing to sue Dorsey for legal malpractice as third-party beneficiaries of the attorney-client relationship between M&S and Dorsey; and two, that an implied contract for legal services existed between the bank participants and Dorsey. As to the third-party beneficiary theory, the Supreme Court of Minnesota reaffirmed the existing rule of law in Minnesota, taken from the California case of Lucas v. Hamm and the Minnesota case of Marker v. Greenberg that “in order for a third party to proceed in a legal malpractice action, that party must be a direct and intended beneficiary of the attorney’s services.” The court held that the bank participants were not direct intended beneficiaries of the attorney-client relationship between M&S and Dorsey, and placed emphasis on there being no direct communication between Dorsey and the bank participants. The court also held that there was no implied agreement between Dorsey and the bank participants and again placed emphasis on there being no communication between the bank participants and Dorsey before the closing.

Is the Dorsey case right? It seems that the Dorsey case was right, but for the wrong reason. The court should have concluded that Dorsey was not counsel to the participants even if the lawyers at Dorsey had communicated with the participants and rendered an opinion to the participants. Such communications

42. Id.
43. Id.
44. Id.
45. Id. at 543–44.
46. Id. at 544.
47. Id.
48. Id.
49. Id. at 545.
51. 313 N.W.2d 4, 5–6 (Minn. 1981).
52. McIntosh County Bank, 745 N.W.2d at 547.
53. Id. at 548.
54. Id. at 549. A case similar to the Dorsey case, with the same outcome of no liability of lead counsel but dealing with an assignee of a loan instead of bank participants, is California Public Employees’ Retirement System v. Shearman & Sterling, 741 N.E.2d 101, 104–06 (N.Y. 2000).
and opinions are customary parts of a normal syndicate lending transaction in which the lead counsel represents the lead lender only. The Dorsey case was right because the modern view of the role of lead counsel in a syndicated lending transaction is that lead counsel represents the lead lender only, unless the lead counsel otherwise indicates. 55

Dorsey is an unusual case. In it lead counsel did not communicate with the other lenders. Presumably it did not supervise the closing; if it did, it would have had to communicate with the other lenders. In the usual case, lead counsel does supervise the closing and, in so doing, communicates with the syndicate lenders in connection with various matters, from the collection of signature pages to the distribution of legal opinions. Such communications do not indicate that lead counsel represents the syndicate lenders.

The moral of the Dorsey story is not that the lead counsel should not communicate with syndicate members or their respective counsel, or that lead counsel should not render an opinion to syndicate members. Otherwise the lead counsel would not be doing its job in helping the lead institutions to manage the various issues that arise in any lending transaction. And the moral of the Dorsey story is not that the lead counsel should be careful about whom the lead counsel represents, although the lead counsel should sort out such representation at the start of the transaction. The moral of the Dorsey story is for the lead counsel to prepare the credit documents in a professional manner and to be alert to the transaction issues, as Dorsey was, and to be diligent in analyzing the transaction issues and advising the client accordingly, as Dorsey did. The ultimate protection for lead counsel is not giving no opinion or giving only a limited opinion. The ultimate protection is for lead counsel to be responsive to the demands of the transaction.

**Conclusion**

Generally, the lead counsel represents the lead lender that selects, and appoints, the lead counsel. However, if the lead counsel does represent two or more lenders in a syndicated lending transaction, such counsel should give serious consideration to preparing, and having each such lender execute, a representation letter setting forth the basis on which counsel represents each such institution, as in the example representation letter set forth in Annex A to this Article.

The lead counsel that does render an opinion at closing will generally render an opinion to all the lenders or to the administrative agent for the benefit of the lenders, and such opinion will generally include the remedies opinion covering the transaction documents and, if the transaction is secured, a securities interest

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55. See supra notes 2–9 and accompanying text. In a parallel case brought by the bankruptcy trustee of M&S and a (later) participant of M&S against Dorsey in the U.S. federal courts, the U.S. Court of Appeals for the Eighth Circuit also decided that the participant did not have standing to sue Dorsey for legal malpractice or breach of contract, but based its decision on the arm’s-length relationship between the lender, M&S (Dorsey’s only client, according to the Eighth Circuit), and the participant under the related participation agreement. Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 628–31 (8th Cir. 2009).
opinion. In a secured transaction, the lead counsel sometimes accommodates the lenders (and counsel for the Borrower Parties) by giving a perfection opinion as well.

If a material legal problem arises in connection with the syndicated lending transaction, the lead counsel should see that such legal problem is reported accurately and fairly to the lenders as well as to the lead institution.
ANNEX A

Dated: __________, 20___

To the Institutions listed on
Schedule I hereto (the “Lead Arrangers”)

[Name of the Borrower]

Ladies and Gentlemen:

We are pleased to confirm our willingness to act as special counsel to you as the Lead Arrangers for, and lenders to, [Name of the Borrower] (the “Borrower”) in connection with the proposed financing to be arranged and provided by you for the Borrower, as contemplated by the commitment letter dated __________, 20___, from the Lead Arrangers to the Borrower, including the preparation of a credit agreement and related loan documents in connection with such financing (such agreement and documents being hereinafter referred to as the “Loan Documents” and such financing being hereinafter referred to as the “Financing”).

Such special representation by us of the Lead Arrangers is limited to the joint efforts of the Lead Arrangers as a group and does not include representing any of the Lead Arrangers individually as a lender, arranger, agent, or otherwise. We anticipate that each Lead Arranger will continue to use other counsel on these matters to the extent that it deems appropriate, and we will be happy to consult with such counsel from time to time as appropriate. [As you are aware, we have in the past represented [Name of Institution] in connection with the Borrower, but with the consent of [Name of Institution], we have withdrawn from such representation in order to represent the Lead Arrangers in connection with the Financing. In addition, we have represented, and will continue to represent to the extent they desire, [Names of Institutions] and other Lead Arrangers and their respective affiliates in connection with matters that do not involve the Borrower or the Lead Arrangers in the Financing.]

We recognize that negotiations in connection with the Loan Documents or the Financing generally may be complicated or protracted. While we do not anticipate that the Lead Arrangers would have different or opposing views with respect to various components of the Loan Documents or the Financing (because of their common roles as Lead Arrangers and as lenders), we would like to set forth our mutual understanding upon which we will act in connection with the Loan Documents and the Financing:

- We will make reasonable efforts to accord each Lead Arranger a reasonable opportunity to participate in all negotiations in connection with the preparation of the Loan Documents. If a duly authorized representative from any Lead Arranger is not able to be present for any particular negotiation (either in person or otherwise), we will make reasonable efforts to provide such Lead Arranger a reasonable opportunity to review and
approve any material modifications to the Loan Documents, through the use, for example, of a circulated blacklined copy highlighting such modifications or by other appropriate means.

• During the course of negotiations for and the preparation of the Loan Documents, to the extent that the Lead Arrangers (or any of them) are not in unanimous agreement concerning any particular provision or other matter with respect to the Loan Documents or the Financing, then[, except as provided below,] we will act upon the instructions of a majority of the Lead Arrangers with respect to such provision or matter.

• Notwithstanding the foregoing, with respect to the preparation of the Loan Documents setting forth the Borrower’s financial obligations (such as relating to debt covenants, leverage and coverage ratios, or loan subordination) [or ________________], we will act upon the instructions of [at least ___ of] the Lead Arrangers.

• Furthermore, to the extent that any Lead Arranger participates in the Financing in a role (other than as a Lead Arranger) that is accorded particular rights and obligations in the Loan Documents separate from the other Lead Arrangers (such as the position of Administrative Agent), we will act upon the instructions of [at least ___ of] the Lead Arrangers.

The Lead Arrangers hereby acknowledge and understand that we represent the Lead Arrangers as a group, and not individually, in connection with the Loan Documents and the Financing; and, accordingly, in the event of any dispute between or among the Lead Arrangers relating to the Loan Documents or the Financing, our firm will represent none of the Lead Arrangers, individually or collectively, in any litigation arising out of such dispute. Further, the Lead Arrangers hereby acknowledge and understand that the attorney-client privilege with our firm is shared by the Lead Arrangers as a group and, therefore, there is no attorney-client privilege with our firm as between or among the Lead Arrangers.

If the current common interest or purpose of the Lead Arrangers were to diverge significantly, the Lead Arrangers or we might decide in such circumstances that our representation of the Lead Arrangers is no longer appropriate. In this regard, we understand that our representation of the Lead Arrangers will continue for so long as Lead Arrangers holding at least 66-2/3 percent of the aggregate lending commitments in respect of the Financing desire that such representation continue. Notwithstanding the foregoing, our representation with respect to any particular Lead Arranger will terminate, but will continue with respect to all other Lead Arrangers, if our representation of such particular Lead Arranger would not be permitted under Rule 1.7 of the New York Rules of Professional Conduct without the written consent of such Lead Arranger, unless such Lead Arranger consents in writing to our continued representation of it in its capacity as a Lead Arranger.

If the foregoing correctly represents your understanding, we would appreciate your confirmation by signing in the appropriate place below and returning a signed copy to our firm at [address], attention of __________. We look forward
to working with you in connection with the Financing and the Loan Documents. If you have any questions on the foregoing, we would be pleased to discuss them with you.

Very truly yours,

[Name of Law Firm]
By: _____________________
   Name: _____________________
   Title: _____________________

The foregoing terms and conditions are hereby accepted and agreed as of the date first above written:

[Institution 1]
By: _____________________
   Name: _____________________
   Title: _____________________

[Institution 2]
By: _____________________
   Name: _____________________
   Title: _____________________

[Institution 3]
By: _____________________
   Name: _____________________
   Title: _____________________

[Institution 4]
By: _____________________
   Name: _____________________
   Title: _____________________

[Institution 5]
By: _____________________
   Name: _____________________
   Title: _____________________

[Institution 6]
By: _____________________
   Name: _____________________
   Title: _____________________
SCHEDULE I

LEAD ARRANGERS

[Name of Institution 1]
[Name of Institution 2]
[Name of Institution 3]
[Name of Institution 4]
[Name of Institution 5]
[Name of Institution 6]
READE H. RYAN, JR.

Reade H. Ryan, Jr. is of counsel to Shearman & Sterling LLP in New York City. He represents financial institutions in various types of asset securitization and other structured transactions, as well as unsecured and secured bank financings generally. Mr. Ryan joined Shearman & Sterling LLP in 1965, became a partner in 1973, and became “of counsel” to the firm in 2002. He is the president of the Law Firm Advisory Board of the American Bar Association’s Working Group on Legal Opinions. He is also the author of various articles on legal opinions, including his articles, *Recipient Counsel Responsibilities and Concerns*, 62 BUS. LAW. 401 (Feb. 2007), and *Opinions Covering Personal Property Security Agreements*, in BANKING AND COMMERCIAL LENDING LAW (ALI/ABA 2001).