

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0604

M.K. WEEDEN CONSTRUCTION, INC.,

Applicant and Appellee,

v.

SIMBECK AND ASSOCIATES, INC.,

Respondent and Appellant.

APPELLANT'S APPENDIX TO REPLY BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County,
Cause No. DV-21-204C, the Honorable John Brown Presiding

APPEARANCES:

Matthew A. Haus
TARLOW STONECIPHER
WEAMER & KELLY, PLLC
1705 West College St.
Bozeman, MT 59715
Telephone: (406) 586-9714
Facsimile: (406) 586-9720
mhaus@lawmt.com
Attorneys for Appellant
Simbeck and Associates, Inc.

Fred Simpson
JENKS & SIMPSON, P.C.
1821 South Avenue W., Suite 204
Missoula, MT 59801
Telephone: (406) 549-2322
Facsimile: (406) 549-2707
fsimpson@jenkssimpson.legal
Attorneys for Appellee M.K. Weeden
Construction, Inc.

APPENDIX TO REPLY BRIEF

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Black's Law Dictionary (11th ed. 2019), opinion

OPINION

Bryan A. Garner, Editor in Chief

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opinion (14c) **1.** A court's written statement explaining its decision in a given case, usu. including the statement of facts, points of law, rationale, and dicta. — Abbr. *op.* — Also termed *judicial opinion*. See [decision \(1\)](#). Cf. [judgment \(2\)](#); [ruling \(2\)](#).

- **advisory opinion.** (1837) **1.** A nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose. • Federal courts are constitutionally prohibited from issuing advisory opinions by the case-or-controversy requirement, but other courts, such as the International Court of Justice, render them routinely. See [case-or-controversy requirement](#).

“In English courts, the common-law power to issue advisory opinions was undisputed. The practice derived from a function of the King's Bench, which was composed of legally trained judges who provided opinions to the King, his Council, and the House of Lords. The English practice was firmly established early on, and the English government continued to rely on advisory opinions throughout the following centuries. Between 1827 and 1899, English judges issued 125 advisory opinions to the House of Lords, which were adopted by the majority in all but five cases. From this system emerged several ‘of the most canonical contributions to British and American common law.’

“But the convention wasn't generally accepted in the United States. In 1789, the delegates of the Constitutional Convention refused to approve a proposal giving the legislature and the executive authority to require an opinion of the Supreme Court Justices. Four years later came the Supreme Court's declination of President Washington to construe the Franco-American treaty. Later that year, the Supreme Court Justices refused to respond to questions from Secretary of State Thomas Jefferson, citing the case-and-controversy requirement and separation-of-powers concerns. Since that time, the federal prohibition on advisory opinions has been indisputable.” Bryan A. Garner et al., *The Law of Judicial Precedent* 270–71 (2016) (citations omitted).

2. A written statement, issued only by an administrator of an employee benefit plan, that interprets ERISA and applies it to a specific factual situation. • Only the parties named in the request for the opinion can rely on it, and its reliability depends on the accuracy and completeness of all material facts.

- **bench opinion.** (1914) **1.** A court's oral opinion delivered in open court. **2.** The text of a U.S. Supreme Court opinion disseminated to the public immediately after the Court announces the opinion in open court. • A bench opinion is distributed in a printed pamphlet prepared by the Court's Public Information Office and electronically through Project Hermes, the Court's system for distributing opinions to subscribers, usu. universities and media groups. A bench opinion may be corrected or amended by a slip opinion. See [project hermes](#). Cf. *slip opinion*.

- **concurring opinion.** See [concurrence \(3\)](#).

- **depublished opinion.** (1983) An intermediate appellate court's opinion that has been struck from the official reports, esp. by the highest court.

- **dissenting opinion.** (1817) An opinion by one or more judges who disagree with the decision reached by the majority. — Often shortened to *dissent*. — Also termed *minority opinion*.

- **extrajudicial opinion.** (17c) **1.** An opinion that is beyond the court's authority to render. • Such opinions are void. **2.** A judge's personal or scholarly opinion expressed in a medium other than a judicial opinion.

- **majority opinion.** (1882) An opinion joined in by more than half the judges considering a given case. — Also termed *main opinion*.

- **memorandum opinion.** (1912) A unanimous appellate opinion that succinctly states the decision of the court; an opinion that briefly reports the court's conclusion, usu. without elaboration because the decision follows a well-established legal principle or does not relate to any point of law. — Also termed *memorandum decision*; *memorandum disposition*; (slang) *memdispo*.

- **minority opinion.** See *dissenting opinion*.

- **per curiam opinion** (pər kyoor-ee-əm) (1860) An opinion handed down by an appellate court without identifying the individual judge who wrote the opinion. — Sometimes shortened to *per curiam* (per cur).

“The most controversial form of summary disposition is a *per curiam* opinion that simultaneously grants certiorari and disposes of the merits at some length, discussing both the facts and the issues involved. The result is usually a reversal of the judgment below ... The parties are given no opportunity to file briefs on the merits or to argue orally before the Court. Indeed, they are given no formal notice whatever of the Court's intention to dispose of the certiorari papers in this manner ...” Robert L. Stern et al., *Supreme Court Practice* 320 (8th ed. 2002).

- **plurality opinion.** (1908) An opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion.

- **seriatim opinions** (seer-ee-ay-tim) (1832) A series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole.

- **slip opinion.** (1940) **1.** An appellate-court opinion that is published individually after being rendered and then collectively in advance sheets before being released for publication in a reporter. • Unlike an unpublished opinion, a slip opinion can usu. be cited as authority. A slip opinion may be a corrected or amended version of a bench opinion. — Also termed *slipsheet*. Cf. *bench opinion*; *advance sheets*. **2. Archaic.** A preliminary draft of a court opinion not yet ready for publication. — Also termed *slip decision*. Cf. *unpublished opinion*.

- **unpublished opinion.** (1849) An opinion that the court has specifically designated as not for publication. • Court rules usu. prohibit citing an unpublished opinion as authority. Such an opinion is considered binding only on the parties to the particular case in which it is issued. Cf. *slip opinion*.

2. A formal expression of judgment or advice based on an expert's special knowledge; esp., a document, usu. prepared at a client's request, containing a lawyer's understanding of the law that applies to a particular case. — Also termed *opinion letter*. “The phrase *opinion letter* denotes a broad category encompassing many types of letters with various purposes and formats. Usury opinions in loan transactions, title opinions in real-estate transactions, closing opinions in securities offerings, and coverage opinions in insurance matters are just a few examples. As it's used here, *opinion letter* means a lawyer's written opinion of law — and perhaps other considerations — regarding a decision to be made or plan of action to be taken. An opinion letter should prepare the client to make an informed decision.” Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 20.1(a), at 451 (4th ed. 2018).

- **adverse opinion.** An outside auditor's opinion that a company's financial statements do not conform with generally accepted accounting principles or do not accurately reflect the company's financial position.

- **audit opinion.** (1973) A certified public accountant's opinion regarding the audited financial statements of an entity.

- **banker's opinion.** (1924) An assessment of a bank customer's relative creditworthiness and financial reliability given confidentially by one bank to another, or to a commercial enterprise.

- **comfort opinion.** (1974) *Securities.* An attorney's written opinion that there is no reason to believe that the registration statement contains any material misrepresentations or omissions that would violate section 11 of the Securities Act of 1933. • The attorney usu. participates in the registration statement's preparation and confers with the securities issuer's representatives, underwriters, and public accountants before writing the opinion. The comfort opinion's purpose is to reassure the parties that the registration statement complies with securities laws; it is not part of the statement and is usu. not included.

- **coverage opinion.** (1934) A lawyer's opinion on whether a particular event is covered by a given insurance policy.

- **fairness opinion.** (1975) *Securities.* A professional assessment by an investment bank or other financial or legal expert about whether the terms of a merger, acquisition, or other corporate deal are fair.

- **infringement opinion.** (1949) *Patents.* A patent attorney's opinion about the probable outcome of an infringement hearing or trial on whether a particular product or process infringes one or more claims of another's patent.

- **legal opinion.** (18c) A written document in which an attorney provides his or her understanding of the law as applied to assumed facts. • The attorney may be a private attorney or attorney representing the state or other governmental entity. Private attorneys frequently render legal opinions on the ownership of real estate or minerals, insurance coverage, and corporate transactions. A party may be entitled to rely on a legal opinion, depending on factors such as the identity of the parties to whom the opinion was addressed, the nature of the opinion, and the law governing the opinion. See *coverage opinion*.

- **patentability opinion.** (1970) *Patents.* A patent attorney's or patent agent's opinion on the patent office's probable holding about the allowability of a patent application's claims. • The opinion is almost a mini-examination report because it is based on consideration of the invention's subject matter, prior art, etc.

- **qualified opinion.** See [qualified opinion](#).

- **title opinion.** (1927) A lawyer's or title company's opinion on the state of title for a given piece of real property, usu. describing whether the title is clear and marketable or whether it is encumbered. See [title search](#).

- **unqualified opinion.** An audit opinion given by an accountant who is satisfied that the financial statements reviewed were fairly presented and consistent with the previous year, and that the audit was performed in accordance with generally accepted auditing standards.

- **unwritten opinion.** An opinion delivered orally from the bench and not reduced to writing by the judge (though it may have been transcribed by someone present).

- **validity opinion.** (1973) *Patents.* A patent attorney's opinion about the likelihood that a patent or patent claim will be invalidated in light of evidence suggesting obviousness, lack of invention, unenforceability, etc.

3. A person's thought, belief, or inference, esp. a witness's view about a facts in dispute, as opposed to personal knowledge of the facts themselves. — Also termed (in sense 3) *conclusion*. See [opinion evidence under evidence](#).

- **expert opinion.** (1866) An opinion offered by a witness whose knowledge, skill, experience, training, and education qualify the witness to help a fact-finder understand the evidence or decide a factual dispute. See [expert witness under witness](#).

- **fixed opinion.** (1807) A bias or prejudice that disqualifies a potential juror.

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APPENDIX K

Black's Law Dictionary (11th ed. 2019), findings of fact and conclusions of law

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bryan A. Garner, Editor in Chief

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findings of fact and conclusions of law (1854) **1.** After a bench trial or hearing on a motion, a judge's statement of the facts found to be true and the conclusions of law based on those facts. **2.** In arbitration, an arbitrator's award that explains the arbitrator's decision and formally sets forth the findings on factual issues, the conclusions on legal issues, or the determinations on mixed issues of law and fact.

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APPENDIX L

Black's Law Dictionary (11th ed. 2019), arbitration award

ARBITRATION AWARD

Bryan A. Garner, Editor in Chief

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arbitration award (18c) A final decision by an arbitrator or panel of arbitrators. — Also termed *arbitrament*.

- **findings of fact and conclusions of law arbitration award.** See [findings of fact and conclusions of law \(2\)](#).

- **foreign arbitration award.** (1931) An arbitration award that is made in a country other than the country in which enforcement of the award is sought. • For example, if France is the arbitral seat, the award is made in France. When a party seeks to enforce the award in the United States, the award is considered a foreign award in the United States.

- **nondomestic arbitration award.** (2004) An arbitration award that is made in the United States but involves property located abroad, performance or enforcement abroad, or some other reasonable relationship with at least one foreign country. See [9 USCA § 202](#).

- **partial arbitration award.** (1987) An arbitration award in which the arbitrators finally resolve some but not all of the issues before them.

- **reasoned arbitration award.** (1979) An arbitration award that announces the outcome and explains, based on the evidence and the law, why the arbitrators accepted or rejected the parties' contentions on claims, counterclaims, and defenses.

- **standard arbitration award.** (1988) An arbitral award unaccompanied by any explanation or rationale.

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