

~~[As Working Draft dated January __, 2018. This document has not been approved by the Joint Committee on Statement of Opinion Practices on March 28, 2017 and by or its sponsoring organizations, the Board of the Working Group on Legal Opinions Foundation and the Legal Opinions Committee of the Business Law Section of the American Bar Association's Business Law Section on April 7, 2017, subject to approval by the Board of Directors of the Working Group on Legal Opinions Foundation]~~

STATEMENT OF OPINION PRACTICES¹

1 INTRODUCTION

Third-party legal opinion letters (“closing opinions”)² are delivered at the closing of a business transaction by counsel for one party (the “opinion giver”) to another party (the “opinion recipient”) to satisfy a condition to the opinion recipient’s obligation to close. A closing opinion includes opinions on specific legal matters (“opinions”) and, in so doing, serves as a part of the diligence of the opinion recipient.³

This Statement of Opinion Practices (this “Statement”)⁴ describes selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions.

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¹ This *Statement* has been published in *The Business Lawyer* [cite]. At the time of its publication, this *Statement* was approved by the bar associations and other lawyer groups identified in **Schedule I** (the “Schedule of Approving Organizations”). A current Schedule of Approving Organizations can be found at [URL]. Approval by a bar association or other lawyer group does not necessarily mean approval by individual members of that association or group.

² The terms “opinion letters” and “closing opinions” are commonly used to refer to third-party legal opinion letters, defined in this *Statement* as “closing opinions.”

³ References in this *Statement* to an opinion recipient mean the addressee of a closing opinion and any other person the opinion giver expressly ~~authorized~~authorizes to rely on the closing opinion.

~~⁴ This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass’n, *Legal Opinions Principles*, 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from their omission from this *Statement*. Each of the provisions of this *Statement* should be read and understood together with the other provisions of this *Statement*.~~

⁴ This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass’n, *Legal Opinion Principles*, 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from their omission from this *Statement*. Each provision of this *Statement* should be read and understood together with the other provisions of this *Statement*.

2 CUSTOMARY PRACTICE

Closing opinions ~~and the opinions included in them~~ are prepared and understood in accordance with the customary practice of lawyers who regularly give ~~them~~ those opinions and lawyers who regularly review them for opinion recipients.⁵ The phrase “customary practice” refers principally to the work lawyers are expected to perform to give opinions (“customary diligence”) and the way certain words and phrases commonly used in closing opinions are understood (“customary usage”).⁵ Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.⁶

3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When ~~they give~~ giving closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.⁷

4 GENERAL

4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

⁵ [See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 \(Aug. 2008\) \(the “Customary Practice Statement”\), which has been approved by the bar associations and other lawyer groups listed at the end of that Statement and by additional groups following publication that can be found at \[URL\].](#)

~~⁵ See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (Aug. 2008) attached as **Appendix A**, which has been approved by the bar associations and other lawyer groups listed at the end of that Statement.~~

⁶ See *infra* Section 10 (*Varying Customary Practice*).

⁷ These include ~~rules relating to~~ the duties ~~of an~~ opinion ~~giver~~ givers have to ~~its~~ their own ~~client~~ clients. Counsel ~~for an~~ opinion ~~recipient~~ recipients also ~~has~~ have duties to ~~its client~~ their clients, including duties relating to ~~a closing~~ opinion opinions.

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

Opinion recipients are entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion.⁸ In accepting a closing opinion, an opinion recipient ordinarily need not take any action to verify the opinions it contains. However, an opinion recipient is not entitled to rely on an opinion if it knows⁸ the opinion to be incorrect or if its reliance on the opinion is otherwise unreasonable under the circumstances.

4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to expect that the other is acting in good faith with respect to a closing opinion.

5 FACTS AND ASSUMPTIONS

5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the “opinion preparers”) typically will not have personal knowledge of all ~~of~~ the facts they need to support the opinions being given, ~~they~~an opinion giver ordinarily ~~are~~is entitled to base those opinions on factual information provided by others, including ~~their~~its client, and on factual assumptions.

5.2 Reliance on Facts Provided by ~~Third Parties~~Others

~~Opinion givers are~~An opinion giver is entitled to rely on factual information ~~provided by others~~from an appropriate source unless the ~~opinion preparers know that~~ information ~~to be false or unreliable. Information may be unreliable, for example, if it is~~appears irregular on its face or ~~has been provided by an inappropriate source~~the opinion preparers know that the

⁸ See the Customary Practice Statement. See also *infra* Section 10 (Varying Customary Practice).

⁸ “Knows” refers to “actual knowledge.”

information is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct ~~a factual~~ an inquiry of ~~the~~ other lawyers in their law firm or a review of the firm's records to ascertain factual matters, except to the extent they recognize⁹ that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.¹⁰⁹

5.4 Reliance on Representations That Are Legal Conclusions

An opinion should not be based on a representation that is tantamount to the legal conclusion it expresses. An opinion ordinarily may be based, however, ~~be based~~ on a legal conclusion in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. ~~Examples of factual~~ Factual assumptions that ordinarily do not need to be stated expressly ~~are~~ include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. ~~These include, for example,~~ Examples are assumptions that ~~copies of~~ (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know ~~to be incorrect or otherwise unreliable.~~¹¹ that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on

⁹ ~~"Recognize" refers to perceiving the relevance of information actually known.~~

¹⁰⁹ References in this Statement to a law firm also include apply to a law department of an organization.

notice of the particular matters being assumed.¹⁰ Stating expressly an assumption that could have been unstated does not imply the absence of other unstated assumptions.

~~5.6—Presumption of Regularity~~

~~Opinions may be based on a presumption of regularity for matters relating to the client (for example, actions taken at meetings during the period covered by a missing minute book) that are not verifiable from the client's records, if that presumption is not inconsistent with those records and reliance on it is not otherwise inappropriate under the circumstances.—Opinion givers may rely on the presumption without stating that reliance in the closing opinion unless the opinion preparers consider a reference to the presumption to be necessary because of the significance of the matters being presumed.~~

5.6 ~~5.7~~ Limited Factual Confirmations and Negative Assurance¹¹

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion preparers.¹² A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement ~~or the information in a disclosure document (except as indicated below)~~, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. ~~An exception is the confirmation sometimes requested regarding particular legal proceedings to which the client is a party.¹²~~ Negative assurance regarding ~~the adequacy of~~ disclosures in a prospectus or other disclosure ~~documents~~document may be provided in limited circumstances in connection with a sale of securities to assist the opinion recipient to establish a due diligence or similar defense.

~~¹⁴This is in contrast to a stated assumption, which need not be correct or reliable unless the opinion preparers recognize that it will cause an opinion based on it to mislead the opinion recipient with regard to a matter the opinion addresses.—See *infra*¹⁰ Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (No Opinion That Will Mislead Recipient). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.~~

¹¹ This Statement also applies, when appropriate in the context, to confirmations.

¹² A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings to which the client is a party.

~~¹²This Statement also applies, when appropriate in the context, to confirmations.~~

6 LAW

6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary-~~professional~~ diligence ~~in similar circumstances~~, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. A closing opinion does not cover some laws (for example, securities, tax and insolvency laws) that are otherwise applicable to the matters it addresses. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion so states or the opinion does so expressly.¹³

7 SCOPE

7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a matter not within the expertise of lawyers, an opinion giver ~~is entitled to~~ may rely on ~~a certificate~~ information from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver's client and the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction

¹³ See *infra* Section 10 (*Varying Customary Practice*).

and the opinions given can facilitate the opinion process by making the closing opinion more informative.

8 PROCESS

8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

8.2 Other Counsel's Opinion

Stating in a closing opinion reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion. An opinion giver should not be expected to express ~~its~~ concurrence in the substance of an opinion of other counsel.

8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

8.4 Client Consent and Disclosure of Information

~~When the~~If applicable rules of professional conduct require a client's consent to the delivery of a closing opinion ~~is required by the rules of professional conduct, an opinion giver may infer~~ that consent ~~can be inferred from the circumstances of the transaction and ordinarily is inferred~~ from a provision in the agreement making ~~the delivery of a closing opinion~~ a condition to closing. ~~If an opinion would require disclosure of information that~~ or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers ~~recognize the client would wish to keep confidential, the opinion should not be given unless, after discussion with the client, the client consents~~ know the client would not want to be disclosed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for ~~subsequent~~ events or legal developments occurring after its date.

10 VARYING CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or ~~any~~ particular opinion may be varied by a statement in the closing ~~opinion or~~ opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly ~~authorized~~ authorizes to rely.¹⁴

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to the matters it addresses.¹⁵

¹⁴ This section does not address the circumstances in which reliance by others may be permitted as a matter of law. *See also supra* note 3.

¹⁵ ~~For a general discussion of this subject, including the role of disclosure, see TriBar Op. Comm., Third Party “Closing” Opinions, 53 BUS. LAW. 591, 602-03 (§1.4(d)) (Feb. 1998) (noting that, in determining whether an opinion will mislead the opinion recipient, “[t]he question the opinion preparers must consider is whether under the circumstances the opinion~~ An opinion giver should not give an opinion, even if technically correct, if the opinion preparers recognize that it will cause the an opinion recipient to misevaluate the ~~specific opinion given.~~) matters addressed by the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver ~~is not precluded from limiting~~ may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Customary Practice*). The omission of information unrelated to the matters addressed by an opinion (for example, information about litigation if no confirmation is given about litigation) would not, for purposes of this section, be misleading.

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