

[As approved by the Joint Committee on Statement of Opinion Practices on March 28, 2017 and by the Legal Opinions Committee 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 PRACTICES<sup>1</sup>

### 1 INTRODUCTION

Third-party legal opinion letters (“closing opinions”)<sup>2</sup> 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 ~~other party~~ 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 ~~of the opinion (the “opinion recipient”).~~<sup>3</sup>

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

### 2 CUSTOMARY PRACTICE

Closing opinions are prepared and understood in accordance with the customary practice of lawyers who regularly give them ~~(the “opinion giver”)~~ and lawyers who regularly review them for opinion recipients. The phrase “customary practice” refers principally to the work lawyers are

<sup>1</sup> 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.

<sup>2</sup> The ~~term~~ terms “~~opinion letter—often is~~ letters” and “closing opinions” are commonly used to refer to a third-party legal opinion letter ~~letters~~, defined in this *Statement* as a “closing opinion opinions.”

<sup>3</sup> References in this *Statement* to an opinion recipient ~~include~~ mean the addressee of a closing opinion and ~~when appropriate in the context,~~ any other persons person expressly authorized to rely on the closing opinion.

<sup>4</sup> 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*.

expected to perform to give opinions (customary diligence) and the way certain words and phrases commonly used in closing opinions are understood (customary usage).<sup>5</sup> ~~The provisions in this Statement describing customary practice apply to closing opinions whether or not this Statement is referred to, incorporated by reference in, or attached~~ Customary practice applies to a closing opinion, whether or not the closing opinion refers to it or to this Statement.<sup>6</sup>

### 3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When they give closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.<sup>7</sup>

### 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.

#### 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

<sup>5</sup> 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.

<sup>6</sup> See *infra* Section 10 (*Varying Customary Practice*).

<sup>7</sup> These include rules relating to the duties of an opinion giver to its own client. Counsel for an opinion recipient also has duties to its client, including duties relating to a closing opinion.

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

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 knows<sup>8</sup> 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 ~~they are giving~~being given, they ordinarily are ~~permitted~~entitled to base ~~their~~those opinions on factual information provided by others, including ~~the~~their client, and on factual assumptions.

#### 5.2 Reliance on Facts Provided by Third Parties

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

#### 5.3 Scope of Inquiry

Opinion preparers are not expected to conduct a factual inquiry of the other lawyers in their law firm or a review of the firm’s records, except to the extent ~~the opinion preparers~~they recognize<sup>9</sup> that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to ~~the opinion preparers~~them that they need to give an opinion. <sup>910</sup>

<sup>8</sup> ~~The term “knows” is understood to refer to a person’s “Knows” refers to “actual knowledge (see, e.g., Model Rules of Professional Conduct, §1.0(f)).”~~

<sup>9</sup> “Recognize” refers to perceiving the relevance of information actually known.

<sup>910</sup> ~~References in this Statement to a law firm also include, when appropriate in the context,~~ a law department of an organization.

#### 5.4 ~~Opinions Should Not Be Based~~ Reliance on Representations ~~of Law~~ That Are Legal Conclusions

An opinion should not be based on a representation that is tantamount to the legal ~~conclusions~~ conclusion it expresses. An opinion may, however, be based on a legal ~~conclusions~~ 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 assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include, for example, assumptions that copies of documents are identical to the originals, signatures are genuine, 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 the agreements those parties have entered into with the opinion giver's client are enforceable against them. ~~Opinion preparers~~ An opinion should not ~~rely~~ be based on an unstated assumption ~~they~~ the opinion preparers know to be incorrect or otherwise unreliable.<sup>4011</sup>

#### 5.6 Presumption of Regularity

~~Opinion givers~~ Opinions may ~~rely~~ 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 ~~their~~ reliance on it is not otherwise inappropriate under the circumstances. Opinion givers may rely on the presumption without stating ~~their~~ 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.

#### 5.7 Limited Factual Confirmations and Negative Assurance

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. A confirmation of factual matters, for example, the accuracy of

<sup>4011</sup> This is in contrast to a stated assumption, which ~~may be relied on so long as~~ need not be correct or reliable unless the opinion preparers ~~do not~~ 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* Section 12 (*No Opinion That Will Mislead Recipient*).

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 ~~the~~ 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.<sup>1112</sup> Negative assurance regarding the adequacy of disclosures in a prospectus or other disclosure documents 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.

## 6 LAW

### 6.1 Covered ~~Jurisdiction~~ Law

When a closing opinion states that ~~it~~ an opinion covers the law of a specific jurisdiction or particular laws ~~of a jurisdiction, it does not cover any, the~~ opinion covers no other law or laws.

### 6.2 Applicable Law

~~The law covered by an~~ An opinion ~~is limited to~~ on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction ~~whose law is covered~~, 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, ~~unless it does so expressly~~. A closing opinion also does not cover municipal and other local law, ~~unless it~~. An opinion may, however, cover law that would not otherwise be covered if the closing opinion so states or the opinion does so expressly.<sup>13</sup>

## 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 ~~by the opinion giver~~. A closing opinion covers only those matters it specifically addresses.

<sup>1112</sup> This *Statement* also applies, when appropriate in the context, to confirmations.

<sup>13</sup> See *infra* Section 10 (*Varying Customary Practice*).

## 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 ~~requiring that other~~ not within the expertise of lawyers, an opinion giver ~~may~~ is entitled to rely on a certificate 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 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 ~~concerning as it~~ applies to the opinions it is receiving from the opinion giver.

### 8.2 Other Counsel's 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 ~~they are giving~~ being given.

### 8.4 Client Consent and Disclosure of Information

When the client's consent to the delivery of a closing opinion is required by the rules of professional conduct, 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 the opinion preparers recognize the client would wish to keep confidential, ~~they~~ the opinion should ~~discuss the disclosure~~ not be given unless, after discussion with the client ~~and not give the opinion unless,~~ the client consents ~~to the disclosure.~~ .

## 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.

## 10 VARYING CUSTOMARY PRACTICE

The ~~customary meaning of an opinion and the work customarily required to support it~~ application of customary practice, including those aspects of customary practice described in this Statement, to a closing opinion or a particular opinion may be varied by a statement in ~~a~~ the closing opinion or opinion or by an understanding with the opinion recipient or ~~other person entitled to rely on the opinion or the recipient's or other person's~~ its counsel.

## 11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person expressly authorized to rely. <sup>12</sup>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 ~~addressed by that opinion.~~ <sup>13</sup>it addresses. <sup>15</sup>

<sup>12</sup>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.

<sup>13</sup>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 will cause the opinion recipient to miscalculate the specific opinion given.") An opinion giver is not precluded from limiting the matters addressed by an opinion through the use of specific language (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 Opinion Practices* Customary Practice).

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