

## Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions\*

At the closing of many business transactions, the lawyers for one party deliver to the other party a legal opinion letter covering matters the recipient has asked those lawyers to address. These opinion letters, also commonly known as closing or third-party legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give them and review them for clients.

Customary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.
2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.

By providing content to abbreviated opinion language, customary practice permits the omission from an opinion letter of descriptions of the procedures that the opinion giver has performed and of many definitions, assumptions, limitations, and exceptions. Thus, it reduces the number of words needed to communicate complex thoughts. As a matter of customary practice, the explicit inclusion in an opinion letter of some but not all of these matters does not exclude others customarily understood to apply. A departure from customary practice is not implied and should not be inferred unless the departure is clear in the opinion letter.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of the Law Governing Lawyers*\*\* states:

In giving "closing" opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain

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\* Editor's Note: This statement is published in the form approved by the authors, without any further editing by *The Business Lawyer*.

\*\* The references to the *Restatement* in this statement are to Sections 51, 52, and 95 of the *Restatement*. The references also include the following Comments, Illustrations, and Notes to those sections: Section 51, Comment e; Section 52, Comment b, Comment e, Illustration 2; and Section 95, Reporter's

assumptions, limitations, and standards of diligence because they are understood between counsel.

The *Restatement* also refers to customary practice as an element in determining the “meaning of the opinion letter.”

The *Restatement* identifies customary practice as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. Under the *Restatement* the “professional community whose practices and standards are relevant” in making that determination is that of “lawyers undertaking similar matters.” That professional community may vary based on, among other things, the subject of the opinion and the relevant jurisdiction.

The *Restatement* treats bar association reports on opinion practice as valuable sources of guidance on customary practice. Customary practice evolves to reflect changes in law and practice.

Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

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*This Statement is approved by the following bar and lawyer groups:*

- Legal Opinions Committee of the Section of Business Law of the American Bar Association
- Legal Opinions in Real Estate Transactions Committee of the Real Property, Trust and Estate Law Section of the American Bar Association
- American College of Commercial Finance Lawyers
- American College of Mortgage Attorneys
- Attorneys Opinions Committee of the American College of Real Estate Lawyers
- Business and Finance Section of the Atlanta Bar Association
- Business Law Section of the Boston Bar Association
- Business Law Section of the California State Bar
- Commercial Law Section of the Delaware State Bar Association
- Real & Personal Property Section of the Delaware State Bar Association
- Corporate Law Committee of The Bar Association of the District of Columbia
- Business Law Section of The Florida Bar
- Real Property, Probate and Trust Law Section of The Florida Bar
- Real Property and Financial Services Section of the Hawaii State Bar Association
- Business Law Section of the Maryland State Bar Association
- Real Property Section of the Maryland State Bar Association
- State Bar of Michigan Business Law Section

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*Note to Comment b, Reporter's Note to Comment c.* The *Restatement* sometimes refers to “custom and practice.” The *Restatement* uses the phrases “custom and practice” and “customary practice” to mean the same thing.

- TriBar Opinion Committee (consisting of members of (i) the Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) the Corporation Law Committee, The Association of the Bar of the City of New York, (iii) the Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association, and (iv) other state and local bar associations)
- Business Law Section of the North Carolina Bar Association
- Corporation Law Committee of the Ohio State Bar Association
- Business Law Section of the Oregon State Bar
- Business Law Section of the Pennsylvania Bar Association
- Business Law Section of the Philadelphia Bar Association
- Corporate, Banking and Securities Law Section of the South Carolina Bar
- Business Law Section of the State Bar of Texas
- Real Estate, Probate and Trust Law Section of the State Bar of Texas
- Business Law Section of the Washington State Bar Association
- Business Law Section of the State Bar of Wisconsin

