

~~EXPOSURE DRAFT dated March 31, 2016~~

~~(As approved by the Legal Opinions Committee of the American Bar Association's Business Law Section and the Board of Directors of the Working Group on Legal Opinions Foundation for distribution as an exposure draft)~~

STATEMENT OF OPINION PRACTICES<sup>1</sup>

1 INTRODUCTION

Third-party legal opinion letters (“closing opinions”)<sup>2</sup> are ~~given~~ 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’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’s diligence.<sup>3</sup>

This Statement of Opinion Practices (this “Statement”)<sup>24</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 and lawyers who regularly review them for opinion recipients. 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

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

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

<sup>24</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*.

commonly used in closing opinions are understood (customary usage).<sup>35</sup> ~~The customary practices~~ Customary practice applies to a closing opinion whether or not the closing opinion refers to it; accordingly, those aspects of customary practice that are described in this *Statement* apply to a closing opinions ~~opinion~~ whether or not this *Statement* is referred to, incorporated by reference in, or attached to a closing opinion.<sup>46</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>57</sup>

### 4 GENERAL

#### 4.1 Expression of Professional Judgment

An ~~opinion in a closing~~ opinion expresses the professional judgment of ~~an~~ the opinion giver ~~about how the highest court of the jurisdiction whose law is covered by that opinion would resolve~~ 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 ~~whether or not~~ 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 ~~it requires~~ 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 ~~terms-~~ in 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

<sup>35</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>46</sup> See *infra* Section 10 (*Varying Customary Practice*).

<sup>57</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, ~~the recipient~~, including ~~with regard~~ duties relating to the closing opinion.

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

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

~~The lawyer or lawyers preparing a closing~~ An opinion (~~the “opinion preparers”~~) giver and ~~the~~ an opinion recipient and its counsel are each entitled to expect that the ~~others are~~ other is acting in good faith with respect to ~~the~~ 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-ordinarily” )~~ typically will not have personal knowledge of all of the facts they need to support the opinions they are giving, ~~opinions they~~ ordinarily are ~~based~~ permitted to base their opinions on factual information ~~obtained from~~ provided by others, including the client, and on factual assumptions.

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

Opinion preparers are entitled to rely on factual information ~~obtained from~~ provided by others unless they 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 recognize that a particular lawyer ~~has~~ is reasonably likely to have or a particular record ~~contains~~ is reasonably likely

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

to contain information not otherwise known to the opinion preparers that they need to give an opinion.<sup>69</sup>

#### 5.4 Opinions Should Not Be Based on Representations of Law

An opinion should not be based on a representation that is tantamount to the legal conclusions ~~being expressed~~ it expresses. An opinion may be based on legal conclusions 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, ~~and~~ the parties to the transaction other than the opinion giver's client have the power and have taken the necessary action to enter into the transaction, and the ~~documents~~ agreements those parties have entered into with the opinion giver's client are enforceable against them. Opinion preparers should not rely on an unstated assumption they know to be incorrect or otherwise unreliable.<sup>710</sup>

#### 5.6 Presumption of Regularity

Opinion ~~preparers~~ givers may rely 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 ~~such~~ their reliance on it is not otherwise inappropriate under the circumstances. Opinion ~~preparers~~ givers may rely on the presumption without stating their reliance in the closing opinion unless ~~they~~ 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

<sup>69</sup> References in this *Statement* to a law firm also include, when appropriate in the context, a law department of an organization.

<sup>710</sup> This is in contrast to a stated assumption, which may be relied on so long as the opinion preparers do not recognize that it will mislead the opinion recipient. See *infra* Section 12 (*No Opinion That Will Mislead Recipient*).

preparers. 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 ~~require~~[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>811</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

When a closing opinion states that it covers the law of a specific jurisdiction or particular laws of a jurisdiction, it does not cover any other law or laws.

### 6.2 Applicable Law

An opinion ~~addresses~~[covers](#) only ~~the~~ law of ~~a~~[the](#) jurisdiction whose law is ~~being~~ covered that lawyers practicing in that 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, unless it does so expressly. A closing opinion also does not cover municipal and other local law, unless it does so expressly.

## 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 ~~addresses~~[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](#)

<sup>811</sup> This *Statement* also applies, when appropriate in the context, to confirmations.

on a matter requiring that other expertise ~~is needed to give an opinion, the~~ an opinion preparer ~~giver~~ may rely on a certificate from an appropriate source or an express assumption with regard to ~~those matters~~ 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, ~~the value of a closing opinion can be furthered by~~ limiting assumptions, exceptions and qualifications to those reasonably related to the client ~~and~~ 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 the opinions it is receiving.

### 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. ~~In addition, closing opinions~~ Nor do they ordinarily ~~do not~~ disclose any such financial interest or other relationship that ~~the opinion preparers~~ they or others in their firm ~~may~~ have. If the opinion preparers ~~know of~~ recognize that such a financial interest or relationship, ~~even if they plan to disclose it exists~~, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions they are giving.

### 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 a disclosure of information that the

opinion preparers recognize ~~would likely affect~~ the client's interest ~~materially and adversely~~ would wish to keep confidential, they should ~~discuss the disclosure, 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~~ Customary practice, including those aspects of customary practice described in this Statement, may be varied by a statement in ~~the~~ closing 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 counsel.

## 11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person expressly authorized to rely. <sup>912</sup>

## 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>1013</sup>

<sup>912</sup> This section does not address the circumstances in which reliance by others may be permitted ~~by~~ as a matter of law. See also supra note 3.

<sup>10</sup> ~~See~~ <sup>13</sup> 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) ~~for a general discussion of this subject, including the role of disclosure.~~ ~~An opinion giver may limit~~ (noting that whether an opinion will mislead the opinion recipient "...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 with 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 Customary Practice Opinion Practices).