7 DEADLY SINS OF OPINION LETTERS

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State Bar of Texas
ESSENTIALS OF BUSINESS LAW:
PROTECTING YOUR BUSINESS
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CHAPTER 15

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Hull's family has been a predominant force in the security and corrections industry for more than one hundred years. His great-grandfather founded the Southern Steel Company (world's largest manufacturer of jail/prison hardware) in 1897 in San Antonio, and it remained family-owned and run until 1981. Hull literally 'grew up' in the security industry, and has represented clients across the United States and internationally, in most every phase of public and private projects.

Government contracting, project finance and related disputes and litigation have been at the heart of Hull's international practice for more than three decades. The majority of Hull's work has been devoted to representing clients who do business with local, state and federal entities in the development, financing, construction, refinancing, dispute resolution and operations of public projects and their privatization across the United States, as well as in Israel, Great Britain, and Costa Rica.

Hull has been a leader in improving education for lawyers for 25 years, has served the State Bar of Texas in many leadership roles, and was one of the three founders of the San Antonio Bar Foundation. Hull also claims to be a "part-time professional" magician, and recently served as President of the Texas Association of Magicians.

Education & Honors

- Baylor University, Waco, Texas, BBA, 1974
- Baylor University School of Law, JD, 1976
  - 1st Place - Baylor Mock Trial Competition (1976)
  - Outstanding Advocate Award (1976)

Admissions

- Texas
- United States District Court, Western, Southern and Northern Districts of Texas
- United States Court of Appeals, Fifth Circuit
- U.S. Claims Court, Washington, D.C

Selected Professional Activities

- San Antonio Bar Foundation – Co-Founder and Fellow (1984 to date)
  - Trustee (1984 to 1987)
- State Bar of Texas –
  - Chair of Board of Directors (1987 -1988),
  - Director (1985 – 1988)
  - Executive Committee (1986 – 1989)
  - Chair – MCLE Committee (2000 – 2004)
  - Continuing Legal Education Committee (2008 – 2011)
  - Texas Young Lawyers Association – Chair of Board of Directors, 1998-1999
- Texas Center for Legal Ethics and Professionalism
  - Trustee (2004 - 2007)
  - Vice Chair, Board of Trustees (2005 - 2007)
  - Member (1995 to Date)
- Texas Bar Foundation
  - Chair of the Fellows (2006 -2007)
  - Vice Chairman of the Fellows (2005 – 2006)
  - Secretary of the Fellows (2004 - 2005)
  - Sustaining Life Fellow (1984 to date)
  - Fellow (1980 to date)

Other Activities

- Texas Association of Magicians (Member 1967 to date)
  - President 2009/2010
  - Chair – 2010 TAOM Convention
  - Vice President 2008 /2009
  - Order of Willard (Member 2009)
- Society of American Magicians (Member 2004 to date)
  - Chair – International Insurance Committee (2006 - 2009)
  - Member, Assembly #206 – Austin, Texas (2004 to date)
  - President (2008 & 2009)
- International Brotherhood of Magicians (Member 2005 to date)
  - Member, Ring 18 – San Antonio, Texas (2007 to date)
  - Member, Ring 60 – Austin, Texas (2005 to date)

Publications and Presentations

Hull is a prolific writer and speaker on legal topics including contract drafting, indemnification, financing, and ethics. He is one of the country's most sought after legal education speakers, having given more than 200 presentations in Texas, California, Florida, Hawaii, Colorado, Washington, Arkansas, Tennessee, and the District of Columbia. Selected publications and presentations during the last 10 year are listed below.

The 7 Deadly Sins Series (State Bar of Texas - webcasts and live seminar presentations**):**

- 7 *Deadly Sins of Indemnity*
- *7 Deadly Sins of Opinion Letters*
- *7 Deadly Sins of Conflict Waivers*
- *7 Deadly Sins of Boilerplate*
- *7 Deadly Sins of Contract Drafting*
- *7 Deadly Sins of Settlement Agreements*
- *7 Deadly Sins of NDAs (Non-Disclosure Agreements)*
- *7 Deadly Sins of Engagement Letters*
- *7 Deadly Sins of Recovering Attorney's Fees (with Mark White, Lubbock)*

2016: *"Contract Drafting 101", Baylor Business Boot Camp (May 2016); "7 Deadly Sins of Contract Drafting",* Corporate Counsel Review, Corporate Counsel Section of State Bar of Texas, Publisher -South Texas College of Law; *7 Deadly Sins of Boilerplate",* Essentials of Business Law Course, State Bar of Texas; 2015: *"7 Deadly Sins of Contract Drafting"*, 2015 Essentials of Business Law Course, State Bar of Texas 2014: "*Structuring Enforceable Nondisclosure Agreements",* Webinar panellist, Strafford Publications, Co-hosted with Katie Pfeifer; *"7 Deadly Sins of Opinion Letters"*, 2014 Essentials of Business Law Course, State Bar of Texas; "*Design/Build Handbook – with forms and checklists – 2014 Edition", Author, 2014.* 2013: "*Responsible Third-Parties and Settling Parties"*, 2013 Fiduciary Litigation Course, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements*", Advanced Litigation Strategies Seminar, State Bar of Texas; "*7 Deadly Sins of Boilerplate*" 11th Annual Advanced Business Law Seminar, State Bar of Texas; "*7 Deadly Sins of Contract Drafting*" Advanced Civil Trial Course, State Bar of Texas; *"7 Deadly Sins of Recovering Attorney's Fees"*, Webcast Panellist, State Bar of Texas, co-hosted with Mark White, Lubbock Texas; *"7 Deadly Sins of NDAs"*, 2013 Corporate Counsel Institute, UT CLE. 2012: "*7 Deadly Sins of Engagement Letters",* Live Webcast, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements",* Live Webcast, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements",* Advanced Trial Strategies, State Bar of Texas; "*7 Deadly Sins of Settlement Agreements";* Advanced In-House Counsel Institute, University of Texas CLE; "*Design/Build Handbook – with forms and checklists",* Author, 2012. 2011: "*7 Deadly Sins of Boilerplate",* Entertainment Law Institute 2011, State Bar of Texas; "*Landmines in Deal Documents",* Business Torts Institute 2011, State Bar of Texas; "*Update on Heavy Duty Contract Drafting",* Advanced In-house Counsel Institute 2011, State Bar of Texas; "7 *Deadly Sins of Boilerplate",* 29th Annual Colorado Advanced Real Estate Seminar, Real Estate Section of the Colorado Bar Association; *"Top 5 Things To Consider Before Building a Jail", Panellist,* Texas Jail Association; *"Risk Transfer Provisions in Commercial Contracts",* Webcast Panellist, Strafford Publications; "7 *Deadly Sins of Boilerplate",* Essentials of Business Law 2011, State Bar of

Texas. 2010: *"Risk Transfer Provisions in Commercial Contracts",* Webcast Panellist, Strafford Publications; *"Drafting and Enforcing Complex Indemnification Provisions",* The Practical Lawyer, August 2010 – Co Author; "7 *Deadly Sins of Boilerplate",* CLE Presentation, San Antonio Young Lawyers Association; "7 *Deadly Sins of Boilerplate",* Business Strategies (Dallas), State Bar of Texas; "*Drafting Indemnification Provisions for LLC's and Partnerships",* 2010 Partnerships and Limited Liability Companies, University of Houston Law Foundation; "*7 Deadly Sins of Boilerplate*", Webcast Presentation, State Bar of Texas. 2009: "*Drafting and Enforcing Complex Indemnification Provisions"*, Webcast Panellist & Course Director, ALI-ABA. 2008: "*Protecting and Piercing the Corporate Veil – How to Protect the Owners; How to Get the Responsible Party",* Advising Small & Mid-size Businesses (Dallas & Houston), University of Houston Law Foundation; "*Failure to Fund and Unfunded Obligations", S*uing, Defending and Negotiating with Financial Institutions, State Bar of Texas; *Indemnification: Drafting Complex Provisions,* Webcast Panellist & Course Director, State Bar of Texas. 2007: "*Developments in MRSA Related Liti*gation", American Corrections Association – Winter Meeting, Association of Private Corrections and Treatment Organizations. 2006: *Indemnification: Causes and Clauses, W*ebcast Panellist & Course Director, State Bar of Texas; *"Piercing the Corporate Veil and Successor Liability",* Advising Small/Start-Up Businesses (Dallas & Houston); *"Ethical Issues in Litigation – 2006 Update",* University of Houston Law Foundation. 2005: *"Piercing the Corporate Veil – 2005 Update",* Advanced Civil Litigation (Dallas & Houston), University of Houston Law Foundation; *"Piercing the Corporate Veil – 2005 Update",* Monthly Meeting, Houston Consumer Law Section; *"Ethical Issues in Litigation – 2005 Update",* The Jury Trial (Dallas & Houston), University of Houston Law Foundation; Seminar Advisory Committee, Advanced Civil Discovery, University of Houston Law Foundation; Seminar Advisory Committee, Advanced Evidence and Discovery, University of Houston Law Foundation.

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7 DEADLY SINS OF OPINION LETTERS

Although the classic Seven Deadly Sins[1] do not ordinarily impact the process of drafting an Opinion Letter for the closing of a transaction, the dramatic title of this article is appropriate since it will focus on seven issues that arise in the negotiation and drafting of Opinion Letters that can present significant difficulties for practitioners and their clients. An Opinion Letter can appear in many types of transactions from a settlement agreement, to a divorce decree, a bank loan, or a merger. An Opinion Letter can appear in a variety of formats, ranging from simple one-pagers to a 25-page long-form preferred by the public M&A practitioners with an astonishing array of disclaimers, carve-outs and attachments (not to mention the volumes of support documentation and affidavits).

Specifically, this paper will address seven topics regarding Opinion Letter that may assist the drafter in improving their clarity and predictability, while limiting the risk of unexpected consequences to the drafter of the Opinion Letter.

CAVEAT:

This paper is NOT a compendium of every issue that may arise in every situation in which an Opinion Letter may be requested. That topic requires a separate, and substantially longer treatise. This article will focus on a few issues that are common in many types of Opinion Letters, and provide research suggestions as starting points for the analysis of other issues.

I. THE STATUS OF OPINION LETTERS.

> The knowledge that someone is struck by lightning every year does not keep golfers off the golf course. Although the consequences are dire, the perceived risk is too small. Similarly, the knowledge that lawyers are now sued on opinions and that the damages sought can be catastrophic has not kept lawyers who work on financial transactions from giving third-party legal opinions. Lawyers see the risk to their careers of not giving opinions as large and the risk that they might be held liable for a substantial amount as small. Thus, they accept the risk of liability as going with the territory. Like golfers setting out on a rainy day, however, lawyers would do well to take what measures they can to protect themselves from the elements when they are proceeding, as they are now, under increasingly threatening skies.[2]

Blessedly, the demand for opinion letters is easing. It has not disappeared, but the tide is starting to turn. Whether it is the recognition that an ounce of due diligence (prevention) is worth a pound of opinion letter (cure), or whether the cost of an opinion letter is rapidly outstripping its value, those parties that have historically demanded Opinion Letters as part of the closing of a transaction, have reduced the frequency of those demands.

Rather than automatically requiring opinion letters as a closing condition, the parties should consider at the outset whether the opinions being requested provide sufficient value to the recipient to justify the time and expense of preparing and negotiating them. This cost-benefit analysis is treated as a fundamental consideration in legal opinion reports, including Section 1.2 of the ABA Business Law Section's Legal Opinions Committee's *Guidelines for the Preparation of Closing Opinions* found in 57 BUS. LAW. 875 (Feb. 2002) (the "ABA LEGAL OPINION GUIDELINES") and Section 1.3 of the TriBar Opinion Committee's *Third Party "Closing" Opinions: A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 592 (Feb. 1998) ("TRIBAR '98"). *See also* Lipson, *Cost-Benefit Analysis and Third-Party Opinion Practice*, 63 BUS. LAW. 1187 (Aug. 2008), and Opinions Committee of the California State Bar Business Law Section, *Toward a National Opinion Practice: The California Remedies Opinion Report*, Part II.B, 60 BUS. LAW 907 (May 2005).[3]

In an increasing number of acquisitions, parties are willing to dispense with the condition that the other party's lawyer deliver a closing opinion, and rely instead upon their own diligence, the representations of the other party, and the remedies in the acquisition agreement. Nontax legal opinions are rarely given in public company acquisitions, and even in private company acquisitions, the percentage is declining. The Deal Points Studies in 2004, 2006, and 2009 showed a continuing decline in the number of deals requiring closing opinions from 73% to 70% to 58%.[4]

Notwithstanding the decline in closing opinions in private target acquisitions, many buyers still see value

[1] Wrath, greed, sloth, pride, lust, envy, and gluttony.

[2] Donald W. Glazer and Jonathon C. Lipson, Courting the Suicide King: Closing Opinions and Lawyer Liability, 17 BUS LAW TODAY, Number 4 (March/April 2008).

[3] From Appendix F to the 463 page compendium of Bryon Eagan "M&A Agreements: Opportunities and Perils in Asset Acquisitions" available at the www.jw.com, http://images.jw.com/com/publications/1838.pdf

[4] Id.

in obtaining an opinion regarding the sellers and the target and may view the following as benefits:[5]

- Opinions on subjects such as legal status of an entity, corporate power, due authorization, and governmental consents are all within the special competence of the sellers' or target's lawyer, and, although representations from the sellers or target provide comfort and protection on these topics, the legal opinion provides additional comfort.
- In some transactions, the buyer may have more confidence in the thoroughness, sophistication, and integrity of the lawyer or firm delivering the legal opinion than in the individual officers of the party providing the representations and warranties; that is, the buyer may fear that the other party is making representations without the requisite care or based on a business risk analysis and that its lawyers will likely be more focused and careful.
- When target's counsel has a long-standing relationship with the target and, as is often the case, also serves as sellers' counsel, the opinion provides a buyer with additional assurance that representations on some topics that the target or sellers may not be capable of making without legal advice have, in fact, been carefully considered.
- A buyer may anticipate the need for an opinion regarding the target for the benefit of a lender that is providing acquisition financing.
- Tradition and habit – "we always get an opinion."

II. COMMON SUBJECTS OF AN OPINION LETTER[6].

Opinion letters delivered in an acquisition by counsel for the sellers and the target (which sometimes are different counsel) generally cover the following, but not typically all of them:

- valid existence of the target and its corporate power to enter into the transaction;
- authorization, execution, and delivery of the transaction documents by the opinion giver's client;
- the transaction does not violate the target's organizational documents (i.e., corporate charters and bylaws) or breach or result in a default under specific agreements to which the target is a party;
- no governmental consents or filings are required in connection with the transaction;
- the transaction documents are valid, binding, and enforceable obligations of the opinion giver's client;
- the capitalization of the target and certain characteristics of its issued and outstanding stock; and
- less frequently, the effect of the receipt of the target stock by the buyer (but not as to title to that stock).[7]

III. SUGGESTED FORMS FOR OPINION LETTERS.

Comprehensive forms for Opinion Letters would unnecessarily lengthen this article. The Legal Opinions Committee of the ABA Business Law Section is probably the most widely accepted resource on opinion letters, and the TriBar Committee (comprised of members of the Start Bar of New York, The New York County Bar, and the Bar Association of New York City) is also highly regarded. The following sources are suggested as a starting point for drafting a "form" for a closing opinion letter:

1. Appendix F to the 463 page compendium of Bryon Eagan "M&A Agreements: Opportunities and Perils in Asset Acquisitions" available at the www.jw.com, http://images.jw.com/com/publications/1838.pdf
2. The Legal Opinion Resource Center, is a general source for business forms. It is co-sponsored by the Legal Opinions Committee of the Business Law Section of the ABA and the TriBar Opinions Committee. http://apps.americanbar.org/buslaw/tribar/
3. The Collected ABA and TriBar Legal Opinion Reports 2009, available at http://apps.americanbar.org/abastore/index.cfm?pid=5070619&section=main&fm=Product.AddToCart
4. Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, Third Party Legal Opinions in Business Transactions, Second Edition 55-56, 57 (March 30, 2004, as supplemented in February 2009); this report is available electronically at the website of the Business Law Section of the ABA Legal Opinion Resource Center, http://www.abanet.org/buslaw/tribar/home.shtml.

IV. SIN #1

A. The "Duly" Sin.

The impetus for this article was a simple question from a partner who was reviewing an opinion letter being drafted (more discussion on the need for partner review later). One of the opinions in the letter being

[5] Id.

[6] Id.

[7] Id.

drafted was the all too customary conclusion that: "*The corporation is duly organized under the laws of the State of Texas*". Upon reading that one sentence, the reviewing partner paused, and after a delay that seemed too long and certainly unnecessary, he asked "Just what does 'duly' mean? Take out that word". The partner's question was a surprise. Doesn't everybody give this opinion, all the time? Why would the reviewing partner object to the use of the word "duly"? We all know what "duly" means. The 2014 Random House Dictionary defines the word "duly" as "in a due manner; properly; fittingly." But the partner was right.

Either a corporation is formed under the laws of a state or it is not. It is not "duly" formed. It is either formed or not formed. The corporation exists or it does not exist. The corporation is in good standing and existence, as determined by the Texas Secretary of State, or it is not. There may be arguments with the Secretary of State about a determination made by that office, but until that office changes the status of a corporation, it is what the Secretary of State says it is. There is no basis for giving an opinion that a process has been 'duly' followed. Either the process was followed or it was not.

The purpose of this personal retrospective is to highlight the fact that every single word in an Opinion Letter matters, no matter how common, customary or seemingly insignificant, and could be a material part of a claim regarding an Opinion Letter arising from a transaction or project that has gone wrong. Every word in an Opinion Letter deserves careful consideration, and choose each word thoughtfully and wisely, especially considering the fact that the writer of the Opinion Letter has actual knowledge that the recipient will be relying upon each and every opinion contained in that letter.[8]

B. Know the Complex Rules and Expert Guidance of the Road.[9]

There has been a significant amount of recent activity in the bar's continuing discussion of legal opinion practices. Beginning in October of 2006, a number of the leading opinion experts in the country have participated in twice-yearly seminars sponsored by the ABA Working Group on Legal Opinions (the "WGLO"). The bar associations have also been active on the legal opinions front. The Florida Bar now is in the last stages of preparing a report on legal opinions.

In 2007, the Maryland Bar issued a new legal opinion report. In 2004, both the California and North Carolina Bars issued new legal opinion reports. In 2006, the Legal Opinions Committee of the Business Law Section of the Texas State Bar (the "Texas Legal Opinions Committee") issued a statement regarding legal opinions on indemnification and exculpation provisions.

As an initial matter, it should be noted that many of the recent claims against laws firm based upon legal opinions are related to facts assumed or stated, to negative assurances, and to the wording of the opinions as to qualifications and limitations, rather than to alleged mistakes of law in the opinions that are actually expressed.

The references mentioned above can be found as follows:

1. Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc., 2007 Report on Lawyers' Opinions in Business Transactions (June 14, 2007, revised as of October 6, 2009), which is available electronically at the website of the Maryland State Bar Association, Inc., http://msba.org/docs/opinionmatters.asp.
2. State Bar of California, Business Law Section, Report on Third-Party Remedies Opinions (September 2004, updated in 2007) (hereinafter referred to as the "California Remedies Opinion Report"), which is available electronically at the website of the ABA Legal Opinion Resource Center, http://www.abanet.org/buslaw/tribar/home.shtml
3. Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, Third Party Legal Opinions in Business Transactions, Second Edition 55-56,57 (March 30, 2004, as supplemented in February 2009); this report is available electronically at the website of the Business Law Section of the ABA Legal Opinion Resource Center, http://www.abanet.org/buslaw/tribar/home.shtml
4. Legal Opinions Committee of the Business Law Section of the State Bar of Texas, Statement on Legal Opinions Regarding

[8] In Continental Sav. Ass'n v. Collins, 814 S.W.2d 829 (Tex.App. —Houston [14 Dist.] 1991) attorney Collins gave an opinion letter to the Lender for his borrower client, stating that the loan was not usurious. Collins then represented his client in suing the lender for usury. The Client lost the usury case. The Bank sued Collins under Section 522 of Restatement 2nd of Torts. Because the borrower lost the suit, the letter of Collins (stating that the loan was not usurious) did not supply false information and did not violate Section 522 of the Restatement 2nd of Torts.

[9] This summary is taken from the erudite article of Stephen C. Tarry, "Primer on Legal Opinions", Essentials of Business Law Seminar, State Bar of Texas, 2011.

Indemnification and Exculpation Provisions under Texas Law, 41 TEX. J. BUS L. 271 (Winter 2006).

C. Texas Statement on the ABA Principles and Guidelines

In April of 2009, the Texas Legal Opinions Committee issued a Statement on the ABA Principles and Guidelines (the "Texas Principles and Guidelines Statement"). A copy of the Texas Principles and Guidelines Statement is attached as Appendix A to this Article. The Texas Principles and Guidelines Statement contains three attachments as follows:

(a) Annex I, Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (the "Customary Practice Statement"),
(b) Annex II, the Guidelines for the Preparation of Closing Opinions (the "ABA Guidelines) adopted by the Committee on Legal Opinions of the Section of Business Law of the American Bar Association (the "ABA Legal Opinions Committee"), and
(c) Appendix A to the ABA Guidelines, which are the Legal Opinion Principles (the "ABA Principles" and, together with the ABA Guidelines, the "ABA Principles and Guidelines") adopted by the ABA Legal Opinions Committee.

The ABA Principles and Guidelines are among the most important pronouncements by bar associations with respect to legal opinions. In the Texas Principles and Guidelines Statement, the Texas Legal Opinions Committee approves the ABA Principles and Guidelines. Also, the Tri-Bar Report is a common resource referred to by many practitioners when requesting or writing Opinion Letters. The references mentioned above can be found as follows:

1. Legal Opinions Committee of the Business Law Section of the State Bar of Texas, Supplement No. 4 to the Report of the Legal Opinions Committee Regarding Legal Opinions In Business Transactions: Statement on ABA Principles and Guidelines, 43 TEX. J. BUS L. 1 (Spring 2009).
2. The Committee on Legal Opinions of the Business Law Section of the American Bar Association, Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875 (2002).
3. The Committee on Legal Opinions of the Business Law Section of the American Bar Association, Legal Opinion Principles, 53 BUS. LAW. 831 (1998).
4. TriBar Opinion Committee, Third-Party Closing Opinions, A Report of The TriBar Opinion Committee, 53 BUS. LAW. 591, 600 (1998)

This is just a small part of the complex set of conflicting suggested practices, recommended policies and practice guidelines related to the drafting of Opinion Letters. Once again, complex Opinion Letters should not be undertaken until the writer of the Opinion is familiar with the applicable published standards of practice in this subject area.

D. Caveat Regarding Not Misleading Opinion Recipients.

Above and beyond the specific language of the opinions and qualifiers, an opinion giver should not give an opinion that the opinion giver knows will mislead the recipient with regard to the matters addressed. This overriding concept is covered in the ABA and TriBar reports (*see* ABA LEGAL OPINION GUIDELINES § 1.5 and TRIBAR '98 § 1.4(d)). Examples of matters that may mislead an opinion recipient are: (1) a "no litigation" confirmation that is limited to claims asserted in writing, but does not point out that the opinion giver (and not the recipient) knows of a substantial and serious claim made orally with sufficient formality, and (2) an opinion ignoring adopted legislation that is not yet effective. TRIBAR '98 §§ 1.4(d) and 1.2(a), n.11.[10]

E. Suggested Practices for Opinion Letters.

1. Start Early.
2. Set up a separate file.
3. Get draft from opposing party (determine obligation for letter to be satisfactory, approved or 'not unreasonably withheld".
4. Get written statements from lawyers in firm regarding knowledge of claims, facts, etc.
5. Get affidavits from clients about facts, background, searches and statements.
6. Document the lack of knowledge when applicable.
7. Get certificates from public agencies and officials to establish public records.
8. Drafts (not just final draft) reviewed by a partner or third party, not involved in the transaction.
9. Consider engaging outside firm to issue opinion or to ghost write the opinion and create the back-up documentation for the opinion letter.

[10] Eagan, Supra at 5.

V. SIN #2

A. Sin of Unintentional Inclusion.[11]

The issue of who can rely upon your Opinion Letter should be considered in drafting every letter. Clearly, the writer will address the letter to the intended recipient. No doubt, that addressee is entitled to rely upon your opinion letter. The big issues arise when your letter is addressed to a third-party, such as is typically required in the closing of a merger, acquisition or a material loan.

Lawyers providing legal opinions are subject to many duties. A lawyer who fails to meet his ethical obligations may be subject to disciplinary proceedings; a lawyer who fails to meet the duty of care to his client may be liable for malpractice. *See* Charles E. McCallum and Bruce C. Young, *Ethics Issues in Opinion Practice*, 62 BUS. LAW. 417, 417 (2007). While there are no statistics related to third party opinion liability, the trend shows that claims on based on closing opinions are on the rise. *Id.* Further, such claims can be the basis for criminal charges as well. As discussed later in this paper, it is clear that attorneys in some jurisdictions can be liable for damages if they fail to exercise the skill and care ordinarily possessed by lawyers acting in similar circumstances. *See* McCallum and Young, at p. 418.

The role of an attorney in preparing information for the use of a third person does not fit into the "normal" attorney-client privilege. A lawyer undertaking such role "must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client." Tex. Disciplinary R. Prof'l Conduct 2.02, Comment 5.

A lawyer has the duty to advise the client of the implications of potential results of the evaluation, particularly the attorney's responsibilities to third persons and the duty to disseminate findings. *Id.* Importantly, the third party to whom the opinion is rendered does not develop an attorney/client relationship with the lawyer providing the opinion, but such attorney owes a duty to the third party to use care when the actual client has invited the third party to rely on their lawyer's evaluation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) (2000).

Texas lawyers are also guided by Texas Disciplinary Rule 4.01; Truthfulness and Statements to Others:

> In the course of representing a client a lawyer shall not knowingly:
>
> a) make a false statement of material fact or law to a third person; or
>
> b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Tex. Disciplinary R. Prof'l Conduct 4.01.

The stakes are high, and attorneys must treat third party opinions with the respect they deserve and require.

B. Negligent Misrepresentation

Texas recognizes a cause of action for negligent misrepresentation, as defined by RESTATEMENT (SECOND) OF TORTS § 552 (1977). *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex.1991). RESTATEMENT (SECOND) OF TORTS § 552(1), (2) (1977) provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

A negligent misrepresentation claim is not equivalent to a professional malpractice claim. "Under [a negligent misrepresentation] theory, liability is not based on the breach of duty a professional owes his clients or others in privity, but on an independent duty to plaintiff based on [the defendant's] manifest awareness of plaintiff's reliance [on the misrepresentation] and intention that the plaintiff so rely." *Horizon Financial, F.A. v. Hansen,*

[11]From the well written article of Slater Ezra, "Duties, Obligations, and Potential Liability for Signing Opinion Letters; or Are you a Lawyer or a Gambler?", 2011 Summer Conference, Texas Association of City Attorneys.

791 F.Supp. 1561, 1574 (N.D.Ga.1992). "Privity is not a necessary element of a claim for negligent misrepresentation." *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.,* 892 P.2d 230, 236 (Colo.1995). Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which he is not subject to a professional malpractice claim. Id. at 235-40; *Kirkland Constr. Co. v. James,* 39 Mass.App.Ct. 559, 658 N.E.2d 699, 700-02 (1995).

The basis for a negligent misrepresentation claim is the relationship of trust created when an attorney makes representations to a third party in order to induce the third party's reliance. For example, in Kirkland, Kirkland agreed to renovate office space for Write Now after being assured by Choate, Hall, & Stewart, Write Now's law firm, that Write Now had the ability to pay for the renovation. After Write Now failed to pay for the renovation, Kirkland brought suit against Choate, Hall, & Stewart, alleging negligent misrepresentation. In reversing the trial court's dismissal of Kirkland's case for failure to state a claim, the appeals court stated:

> First, Kirkland does not allege that it sought legal advice from Choate, Hall; it sought assuring information from the lawyers about their client. Second, the complaint may be read to allege that Choate, Hall made factual representations about arrangements its client "had made to ensure payment to Kirkland." Choate, Hall's objective was to induce Kirkland to enter into a contract for the benefit of its client, itself, and, incidentally, Kirkland. That combination, if Kirkland can prove it, may well be significant. Third, Kirkland alleges that Choate, Hall knew and intended that Kirkland would rely on the representations in its letters, and Kirkland reasonably so relied. And fourth, the representations were allegedly false, careless, and harmful. Those allegations, if they are proven, are the stuff of liability. Kirkland, 658 N.E.2d at 701 (citations omitted).

When an attorney undertakes such a course, he assumes a relationship with the third party that is similar to privity:

> When a lawyer at the direction of her client prepares an opinion letter which is addressed to the third party or which expressly invites the third party's reliance she engages in a form of limited representation. Although the attorney is paid by and represents her client, in the opinion letter she expressly states (with her client's consent) that she is rendering a legal service to the third party. Commentators have agreed that the attorney owes a duty to the third party if the opinion letter is either addressed to the third party or expressly authorizes his reliance. *Crossland Sav. FSB v. Rockwood Ins. Co.,* 700 F.Supp. 1274, 1282 (S.D.N.Y.1988) (citation omitted).

For example, in New York, courts impose liability for negligent misrepresentation when the attorney and third party have "a relationship so close as to approach that of privity." *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood,* 80 N.Y.2d 377, 590 N.Y.S.2d 831, 605 N.E.2d 318, 320 (1992). Such a relationship exists if three criteria are present:

> (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance. Id. at 321-22.

These criteria, which are similar to the requirements of RESTATEMENT (SECOND) OF TORTS § 552, can create a duty when an attorney provides an opinion letter to a third party at the request of his client. Prudential, 590 N.Y.S.2d 831, 605 N.E.2d at 320; see *Petrillo v. Bachenberg,* 139 N.J. 472, 655 A.2d 1354, 1359 (1995).

By recognizing a cause of action for negligent misrepresentation, we do not undermine the requirement of strict privity that is usually required for a third party to assert a claim against an attorney.[12]

In evaluating this risk, the issue of reliance by the non-client recipient appears to the key factor that courts consider.[13]

C. What about Assignees (and other interlopers)?

In many syndicated bank loan transactions and other financing transactions, it is not unusual for the agent's counsel to request that language similar to the following be included in the opinion letter of the borrower's counsel so that assignees of the lenders may be permitted to rely on the opinion:

> This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you

[12] This section is quoted from Appling Interests v. McCamish Martin Brown & Loeffler 953 S.W.2d 405 (Tex.App., Texarkana 1997)

[13] See Kastner v. Jenkins & Ghilchirst, PC, 231 SW3rd 571 (Tex.App. – Dallas 2007, no pet.) and Blankinship v. Brown, 399 Sw3rd 303 (Tex.App.-Dallas 2013)

> for any other purpose. This opinion letter may not be relied on by or furnished to any other Person without our prior written consent. Notwithstanding the foregoing, we agree that the Lenders (as such term is defined in the Credit Agreement) and any permitted assignee of any Lender (as described in Section 12.04(a) of the Credit Agreement) may rely on this opinion letter.

Some large, well-known New York law firms that act as borrower's counsel are now evidently refusing, as a matter of policy, to include language allowing assignees of the lenders to rely on the opinion, even in the context of syndicated bank loans. The following concerns have been cited in allowing assignees to rely on opinions:

1. The loans may ultimately be assigned to "vulture funds" that specialize in acquiring defaulted loans and that may then look for anyone in the transaction (including borrower's counsel) against which they might potentially assert a claim and extract a settlement. The thought is that such a "vulture fund" might be much more likely to assert a claim than a large money center agent bank with which borrower's counsel may have a pre-existing relationship.
2. An assignee may be unsophisticated, may not be represented by counsel and may not be familiar with customary practice.
3. The original opinion letter may not be correct as applied to an assignee—for example, in some jurisdictions (such as California), usury exemptions may apply only to certain types of lenders.
4. The assignees may be located in different jurisdictions, thus potentially exposing the borrower's counsel to claims in more than one jurisdiction.

Notwithstanding the evident refusal of some high profile New York law firms to permit assignee reliance, in recent statements at the WGLO seminars and in other contexts, in-house counsel to some large money center banks have indicated that the language permitting assignees to rely on the legal opinion of the borrower's counsel is both customary and expected in syndicated bank loan.

D. Certain Alternatives for Addressing the Assignee Reliance Issue.

Various proposals have been made to address the assignee issue, including the following:

1. Limit the time period during which assignees could come into reliance to between 30 and 90 days after the original closing. In-house counsels representing some large money center banks have indicated that such a limitation may not be acceptable in the syndicated loan market.
2. Allow only the agent bank, on behalf of the lenders and their successors and assigns, to rely on the opinion.
3. Include express language stating that the opinion letter has been prepared in accordance with customary practice.
4. Include language developed by Wachovia, as follows:

> At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section 12.04(a) of the Credit Agreement, on the condition and understanding that (a) this letter speaks only as of the date hereof, (b) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (c) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

VI. SIN #3

A. Sin of Customary Practice.[14]

There have been several attempts to streamline the Opinion Letter writing process by compiling agreed upon standard exceptions, carve outs and limitations, that are applicable to all Opinion Letter without

[14] This section relies entirely upon Tarry, Primer on Legal Opinions at p. 1-2

reference, or can be adopted by reference in bulk[15]. One of those efforts is the "customary practice standard".

Many of the most recent legal opinion reports take the position that the factual and legal diligence required to deliver a legal opinion and that the meaning of the words used in the opinion should be governed by the customary practice of lawyers similarly situated.[16]

The TriBar Report describes customary practice as follows:

> Customary practice establishes the ground rules for rendering and receiving opinions and thus allows communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed definitions of the terms used and laborious recitals of standard, often unstated, assumptions and exceptions. Thus, in opinion practice, customary practice is an important professional tool.

According to certain of the legal opinion reports, customary practice allows an opinion giver to omit a statement of certain "standard" qualifications and exceptions, such, as for example, the bankruptcy exception and equitable principles limitation for remedies opinions. Moreover, if an opinion giver wishes to vary the customary meaning of an opinion, the opinion giver should generally include an express statement in the opinion letter to that effect. In addition, many of the legal opinion reports impose a duty upon opinion recipients to be familiar with customary practice.

In an attempt explicitly to recognize the role of customary practice in rendering and receiving legal opinions, the ABA Legal Opinions Committee, the Business Law Section of the State Bar of Texas, the Real Estate, Probate and Trust Law Section of the State Bar of Texas and numerous other state bar groups have approved the Customary Practice Statement. According to the Customary Practice Statement, customary practice permits opinion givers and opinion recipients to have common understandings about a legal opinion without having to spell them out. Customary Practice identifies the work (factual and legal) that opinion givers are expected to perform to give legal opinions and also provides guidance on how certain words and phrases used in opinions should be understood.

Some law firms have now begun including in their legal opinions an express statement about the role of customary practice, such as the following:

> This opinion has been prepared in accordance with the customary practice of lawyers who regularly give and lawyers who regularly advise recipients regarding opinions of this kind.

Because these efforts have not been widely adopted, the writer of an Opinion Letter who relies upon "customary standards" does so at their peril.[17]

VII. SIN #4

A. The No "No" Sin.

Parties and their counsel that regularly request opinion letters are finally scaling back their demands for opinions stating that there is "No Litigation". Typically, such an opinion contains the following terms, including the "no knowledge" qualifier.

> To our knowledge, there are no actions or proceedings against the Company, pending or threatened in writing, before any court, governmental agency or arbitrator that (a) relate to the Transaction Documents, or (b) could reasonably be expected to have a material adverse effect on the business, operations or financial condition of the Company.[18]

Many lawyers refuse to give a no litigation confirmation, even one that is limited to litigation involving the transaction. In the past, buyers often requested broad confirmations that no material proceedings of any nature were pending or threatened against the Company either (1) by reason of its operations or (2) by reason of the proposed transaction. Recent decisions – specifically Nat'l Bank of Canada v. Hale & Dorr, LLP, 17 Mass. L. Rptr. 681, 004 WL 1049072 (Mass. Super. Ct. Apr. 28, 2004) and Dean

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[15] In 1991, the Section of Business Law of the American Bar Association published the *Third-Party Legal Opinion Report*, which includes the *Legal Opinion Accord* (the "Accord") (47 BUS. LAW. 167 (Nov. 1991)). The Accord proposed a different approach to establishing the meaning of legal opinion letters. Instead of attempting to describe customary practice, the Accord was designed to be adopted by the opinion giver and agreed to by the opinion recipient by incorporating the Accord by reference. The Accord, however, has not been generally accepted, and it is not commonly used in current opinion practice. See Eagan Supra.

[16] E.g., TriBar Opinion Committee, Third-Party Closing Opinions, A Report of The TriBar Opinion Committee, 53 BUS. LAW. 591, 600 (1998) (herein referred to as the "TriBar Report"); ABA Principles, Part I.B.

[17] See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (2008)

[18] Tarry, Primer on Legal Opinions Supra at p. 4

Foods Co. v. Pappathanasi, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004) – together with the "no misleading opinion" admonition of ABA LEGAL OPINION GUIDELINES § 1.5 and TRIBAR '98 § 1.4(d) – have heightened concerns of increased exposure from no litigation confirmations. *See* GLAZER & FIELD, *No Litigation Opinions Can Be Risky Business*, 14 BUSINESS LAW TODAY (July/Aug. 2005) for a more detailed account of *Dean Foods* and cautions regarding no litigation confirmations. TRIBAR '98 § 6.8 states that "*. . . in most cases the no litigation opinion could be omitted with no real loss to opinion recipients . . . .*" The TriBar Opinion Committee reached that conclusion before *Nat'l Bank of Canada* and *Deans Foods* were decided.[19]

As a further caution, TRIBAR '98 § 1.4(d) specifically discusses a no litigation confirmation that is limited to written claims and concludes that an opinion would be "misleading" and thus should Appendix F – Page 23 not be given if it does not disclose a substantial and apparently serious claim made orally in a formal manner (*e.g.*, at a lawyers' conference at which a draft complaint was discussed but not delivered) but not yet threatened in writing on the date of the opinion letter.[20]

Under customary practice, what is the factual diligence that an opinion giver is expected to conduct in rendering a "no litigation" opinion? If the opinion giver is a member of a law firm, must the opinion giver consult the law firm's files or any of the other lawyers in the firm?[21] In connection with these questions, the ABA Principles and Guidelines[22] state as follows:

> As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual investigation of the other lawyers in the firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular law or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.[23]

One of the issues of factual due diligence in "no litigation" opinions the TriBar Report states:

> As a matter of customary diligence the opinion does not require that the opinion preparers check court or other public records or review the firm's files (and an express disclaimer to that effect in the opinion letter is not necessary). . . . Nevertheless, the opinion preparers may check the firm's litigation docket (if one exists) and, if they are not themselves familiar with the litigation the firm is handling for the Company, may seek the advice of a litigator or other lawyer in the firm who is.[24]

The Texas Principles and Guidelines Statement[25] contains the following discussion of these issues[26]:

> 3. As to *Guideline 3.4* and the other *Principles* and *Guidelines* that address an opinion giver's knowledge of factual matters, the Committee agrees that it is preferable to clarify the meaning of the phrase "to our knowledge" in connection with factual inquiries. However, in the absence of clarification, the phrase "to our knowledge" is customarily understood by Texas attorneys to refer to the conscious awareness of facts and information of those attorneys actively involved in the transaction or in rendering the legal opinion, without having made any inquiry.
>
> 4. To the extent that *Principle III.B.* and footnote 16 to *Guideline 4.4* address "confirmations" regarding an opinion giver's knowledge of legal proceedings to which the opinion giver's client is a party, the appropriateness of delivering such "confirmations" has been coming under increasing scrutiny and, if given by Texas attorneys, such confirmations frequently are expressed and accepted with a careful narrowing in scope, including a "to our knowledge" qualification as described in the second sentence of paragraph 3 above. Furthermore, in giving such "confirmations", an opinion giver in Texas is not expected to her firm's own files, including its litigation docket (or analogous record), unless an express agreement is reached between the opinion giver and the opinion recipient to do so and the legal opinion expressly states that the opinion giver has conducted such a review.

If an opinion giver relies on a "to our knowledge" qualifier in rendering a "no litigation" opinion, some of the opinion reports recommend that the opinion giver

[19] Eagan Legal Opinions Supra at p. 22

[20] Id.

[21] Tarry, Primer on Legal Opinions, at p 4

[22] ABA Principles and Guidelines, § 3.4.

[23] Tarry, Primer on Legal Opinions, at p. 4

[24] Id.

[25] Texas Principles and Guidelines Statement at 2

[26] Tarry, Primer on Legal Opinions, at p. 4

either define "to our knowledge" or expressly set forth the scope of his or her factual diligence. On the other hand, the TriBar Report[27] takes the position that a knowledge qualifier is unnecessary:

> The presence or absence of the phrase "to our knowledge" does not change the meaning of the opinion. With or without "to our knowledge", the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable. If an opinion giver elects to render a "no litigation" opinion and wants to use a knowledge qualification, something like the following might be considered:
>
> In rendering our opinion set forth in paragraph [__] above, we have not undertaken any investigation whatsoever or conducted any searches or reviews of the records of any court or other Governmental Authority or reviewed any of our Firm's files or records. Rather, our opinion in paragraph [__] above is limited solely to the conscious awareness of the lawyer who signs this opinion letter and any other lawyer in our Firm who has devoted substantive attention to the matters evidenced by the Transaction Documents.[28]

B. "No Litigation" Language as a Statement of Fact Rather Than a Legal Opinion[29]

Some opinion givers have sought to avoid having the "no litigation" statement characterized as a legal opinion by inserting the statement at the end of the opinion letter and not in the part of the letter containing the legal opinions and the qualifications and exceptions relating thereto. An example of such language taken from a recent opinion letter is as follows:

> Except as listed on Schedule 8.5 to the Credit Agreement, we advise you that we are not representing the Company in any litigation, arbitration, governmental investigation or proceeding, pending or threatened in writing against the Company or any of its properties with respect to the Transaction Documents or that could reasonably be expected to result in a Material Adverse Effect.[30]

VIII. SIN #5

A. Sin of Being Special[31]

Sometime lawyers are asked to give opinions (such as a local counsel opinion) that are limited to particular aspects of a transaction in situations in which the opinion giver has only superficial knowledge about the whole transaction and may have only limited contact with the client. In rendering limited role opinions, opinion givers sometimes refer to themselves as "special" counsel which, in subsequent litigation, may cause a judge or jury to attribute specialized knowledge to the opinion giver even though the opinion giver intended the term to indicate the limited scope of the opinion giver's role.

Thus, an opinion giver should carefully consider how the opinion giver's role is described in the opinion. The opinion giver may also want to include express statements about its role, such as the sample language that is set forth below.

B. Sample Language Regarding the Limited Role of the Opinion Giver

We were engaged on ________________, 2014, by [Lead Counsel] on behalf of [Client] for the sole purpose of providing this opinion letter. Our engagement has been limited in scope solely to our review of the [Transaction Documents] [Organizational Documents] provided to us by [Lead Counsel], and solely for the purpose of rendering the opinions expressed herein. We have not participated in any other matters related to the [Transaction Documents] [Organizational Documents] or the transactions contemplated thereby, and we have not acted as counsel to the [Client] in any matter other than this opinion.

We have not reviewed any documents other than the [Transaction Documents] [Organizational Documents] and, in particular, we have not reviewed any document (other than the [Transaction Documents] [Organizational Documents]) that is referred to in or incorporated by reference into any [Transaction Document] [Organizational Documents]. In addition, we have assumed that there exists no provision in any document that we have not reviewed that is inconsistent with the opinions set forth herein.

We have conducted no independent factual investigation of our own but rather have relied solely upon the [Transaction Documents] [Organizational Documents], the statements and information set forth therein and the additional [factual and informational] matters recited or assumed herein, all of which we have

[27] TriBar Report, § 6.8 at 664.

[28] Tarry, Primer on Legal Opinions, Supra at p. 4

[29] Id.

[30] Id.

[31] Tarry, Primer on Legal Opinions, at p.7.

assumed to be true, complete and accurate [in all material respects].

[Further, in connection with our preparation of this opinion letter, [we have not communicated directly with the [Client], but only with its agent, [Lead Counsel]] [our communications regarding factual and informational matters relevant to the Client and to our opinions rendered herein have been conducted [solely][substantially] with Lead Counsel on behalf of the Client].

IX. SIN #6

A. Sin of Overwhelming Resource Confusion

When facing the prospect of issuing an occasional closing Opinion Letter, the scope, volume and complexity of Reports, Guidelines, Best Practices, Commentators and Bloviators on the subject of what is the correct wording for an Opinion Letter can be overwhelming. One suggested method to handle, wrangle and manage these conflicting resources, is to start with the local (Texas) pronouncements on writing Opinions. It is suggested that the process of Opinion Letter drafting should begin with observance of these local declarations, and then branch out to the national resources for guidance on resolution of specific or unique issues that are not resolved by the Texas pronouncements.

In April of 2009, the Texas Legal Opinions Committee issued a Statement on the ABA Principles and Guidelines (the "Texas Principles and Guidelines Statement").[32] A copy of the Texas Principles and Guidelines Statement is attached as Appendix A to this Article. The Texas Principles and Guidelines Statement contains three attachments as follows:

(a) Annex I, Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (the "Customary Practice Statement"),

(b) Annex II, the Guidelines for the Preparation of Closing Opinions (the "ABA Guidelines) adopted by the Committee on Legal Opinions of the Section of Business Law of the American Bar Association (the "ABA Legal Opinions Committee"), and

(c) Appendix A to the ABA Guidelines, which are the Legal Opinion Principles (the "ABA Principles" and, together with the ABA Guidelines, the "ABA Principles and Guidelines") adopted by the ABA Legal Opinions Committee.

The ABA Principles and Guidelines are among the most important pronouncements by bar associations with respect to legal opinions. In the Texas Principles and Guidelines Statement, the Texas Legal Opinions Committee approves the ABA Principles and Guidelines.[33]

Utilizing the ABA Principles and Guidelines (as approved by the Texas Principles and Guidelines Statement) as a negotiating tool for the scope of an Opinion Letter, can provide the opinion letter writer with leverage to manage the breadth and risk of an Opinion Letter.

Even minor errors in Opinion Letters can have a big impact. In In re: SONICblue Inc.,[34] Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") had acted as long time counsel to SONICblue Incorporated ("SONICblue"). In April of 2002, SONICblue issued in a private placement $75 million in 7¾% senior secured subordinated convertible debentures (the "Debentures"). Three hedge funds (the "Bondholders") acquired the Debentures at a discount for $62.5 million. In its capacity as counsel to SONICblue, Pillsbury issued to the Bondholders a legal opinion as to the enforceability of the Debentures and the other transaction documents.

Numbered paragraph 2 of the opinion letter addressed the enforceability of the Purchase Agreement, the Registration Rights Agreement, the Indenture, the Pledge and Security Agreement and the Option Agreement, while numbered paragraph 3 of the letter addressed the enforceability of the Debentures. Pillsbury took a standard bankruptcy/insolvency qualification as to enforceability, but this qualification stated that "[o]ur opinion in paragraph 2 above is subject to and limited by the effect of applicable bankruptcy . . . laws…" As the bankruptcy court noted, "[i]n what may have been a scrivener's error, the bankruptcy limitation referenced only paragraph 2 and not paragraph 3 of the opinion letter."

On March 21, 2003 (less than a year after the Debentures were issued), SONICblue and its subsidiaries filed a Chapter 11 bankruptcy petition. Pillsbury was hired to represent SONICblue as debtor's counsel in the bankruptcy proceedings. In its capacity as debtor's counsel, Pillsbury subsequently notified the Bondholders that their bankruptcy claims for payment of an original issue discount of approximately $43 million (significantly more than half of the

[32] Legal Opinions Committee of the Business Law Section of the State Bar of Texas, Supplement No. 4 to the Report of the Legal Opinions Committee Regarding Legal Opinions In Business Transactions: Statement on ABA Principles and Guidelines, 43 TEX. J. BUS L. 1 (Spring 2009).

[33] Tarry, Primer on Legal Opinions, p. 1

[34] 2007 Bankr. U.S. Dist. LEXIS 1057 (Bankr. N.D. Cal. March 26, 2007); (summary quoted from Tarry, Primer on Legal Opinions, at p.9)

Bondholder's total $75 million in claims) might be subject to partial disallowance under the federal Bankruptcy Code.

Counsel to the Bondholders then notified Pillsbury that, since the bankruptcy/insolvency exception in the legal opinion did not by its terms apply to the opinion paragraph covering the enforceability of the Debentures, the opinion letter should be interpreted to mean that the Bondholders' claims for the original issue discount would be allowed in bankruptcy. Based on this analysis of Pillsbury's opinion letter, the Bondholders also demanded in writing that Pillsbury indemnify them for any losses resulting from the partial disallowance of the original issue discount. Pillsbury denied the Bondholders' claims for an indemnity from Pillsbury, but immediately turned over to the law firm representing the creditors' committee the task of objecting to the Bondholders' claim for the original issue discount.

More than six months later, Pillsbury filed a supplemental disclosure advising the bankruptcy court of the potential conflict of interest resulting from the Bondholders' claims against Pillsbury. Based on the alleged conflict of interest, the U.S. Trustee moved to disqualify Pillsbury as counsel for the debtor and for an order requiring Pillsbury to disgorge the attorneys' fees it had received for acting as debtor's counsel in the bankruptcy.

In the introduction to its decision, the bankruptcy court noted that the genesis of the alleged conflict of interest "arose from the pre-petition issuance of an opinion letter, undisclosed by debtor's counsel, assuring payment to certain bondholders who effectively controlled the creditor's committee."[35].

Relying heavily on Pillsbury's failure to make a timely disclosure of the conflict of interest resulting from the Bondholders' indemnity claim, the court held that the U.S. Trustee had "satisfied its burden of establishing that [Pillsbury] must be disqualified from its representation in this case . . . ." Id. The court reserved for a later hearing the issue of whether Pillsbury should be required to disgorge its fees.

Under a settlement the U.S. Bankruptcy Court Pillsbury paid the SonicBlue estate $7.65 million and waived $2.3 million in unpaid fees and costs for its tarnished services in the bankruptcy proceeding.

In connection with analyzing the In re: SONICblue decision, it should be noted that TriBar Report39 and the ABA Principles and Guidelines40 both recognize that, as a matter of customary practice, a remedies opinion is subject to the standard bankruptcy/insolvency qualification even if that qualification is not expressly stated in the opinion.

X. SIN #7

A. Sin of Procrastination

The Procrastinator's creed

I believe that if anything is worth doing, it would have been done already.

I will never rush into a job without a lifetime of consideration.

Tomorrow holds the possibility for new technologies, astounding discoveries, and a reprieve from my obligations.

All deadlines are unreasonable regardless of the amount of time given.

Never forget that the probability of a miracle, though infinitesimally small, is not exactly zero.

If at first I don't succeed, there is always next year.

I shall always decide not to decide, unless of course I decide to change my mind.

I obey the law of inverse excuses which demands that the greater the task to be done, the more insignificant the work that must be done prior to beginning the greater task.

I will never put off until tomorrow, what I can forget about forever.

There are many articles and pontificators focusing on lawyers and procrastination, and the fact the lawyers regularly report that they observe other lawyers procrastinating. While the psychological implications of procrastination may be of interest to some, this portion of this article will only focus on the need to avoid procrastination when an Opinion Letter is required.

A complex Opinion Letter requires a complex effort, and that effort should start with a clarification of the expectations of each party to a transaction as to the scope of Opinion Letters that will be requested/demanded from opposing counsel. This may first arise in the drafting of the "Closing Checklist" or it may arise in informal discussions. Regardless of the way in which it arises, immediately after a 'deal' is on the horizon (such as the signing of a Letter of Intent), the

[35] Id

lawyers should be discussing Opinion Letters, though they seldom do.

Third party legal opinions date back to the 1800's. Donald W. Glazer and Jonathon C. Lipson, *Courting the Suicide King: Closing Opinions and Lawyer Liability*, 17 BUS. LAW TODAY, Number 4 (March/April 2008). In those days, the railroad bond underwriters hired lawyers to provide legal opinions regarding the bonds, with such opinions actually printed on the bonds themselves. *Id.* Today, these opinions can have the effect of guaranteeing the accurateness and completeness of a transaction, seemingly replacing the due diligence of the opinion recipient. *See* Koley Jensen, P.C., *Third-Party Legal Opinions: an Introduction to "Customary Practice"*, 35 CRLR 153, 154. This is especially scary for a municipal lawyer who shows up to a Council meeting to a stack of contracts, each tabbed for his signature at the bottom of a pre-drafted opinion letter.[36]

Whether the letter writer is a city attorney, private practitioner or in-house counsel, the risk laden circumstances described above can be avoided, if the writer begins the drafting and documentation tasks early on. For example:

1. Create a separate file for the Opinion Letter and the documentation supporting that Opinion Letter. This will allow the writer to separate the 'deal' documents from the 'opinion' documents.
2. Assume that your Opinion Letter file is Exhibit 2 (the Opinion Letter is Exhibit 1) in a lawsuit attacking your Opinion Letter and seeking damages from you/your firm. This sort of focus will allow the writer to assemble background and supporting documentation that establish the reasonableness of every aspect of the Opinion Letter.
3. Most Opinion Letters contain the following statement as to the sources of information relied upon:

   As to certain matters of fact relevant to the opinions in this opinion letter, we have relied on certificates of officers of Buyer and on factual representations made by the Buyer in the Stock [Asset] Purchase Agreement. We also have relied on certificates of public officials. We have not independently established the facts, or in the case of certificates of public officials, the other statements, so relied upon.

   This statement provides the opinion letter writer with a roadmap as to what is needed in the special Opinion Letter file as to factual matters. Certificates (sworn) from officers of the writer's client, and factual representations by the client, as well as certificates from public sources, are the key substantiation required. Every factual statement in the Opinion Letter should have at least one (preferably more) affidavit, representation or certificate, from a qualified and reputable source.

   While Certificates, affidavits and other back-up documentation are critical to manage the risk of an opinion letter, reliance on those items does have its limitations. An opinion giver cannot rely on factual certificates if either (1) "*reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion givers to be false*" (TRIBAR '98 § 2.1.4; see also § 2.2.1(c)) or (2) "*the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source*" (ABA LEGAL OPINION PRINCIPLES § III.A). In addition, the opinion giver cannot rely on certificates that make statements or certifications that are tantamount to the legal conclusion in an opinion (other than in limited respects on a certificate of a governmental official). ABA LEGAL OPINION PRINCIPLES § III.C; TRIBAR '98 § 2.2.1(b). For example, an opinion that the entering into and the consummation (or performance) of the Transaction Documents does not breach or result in a default under specified agreements cannot be made solely on the basis of an officer's certificate to that effect, but rather must be made on the basis of the opinion preparers' review of the specified agreements.[37]

4. Get a draft of the expected opinion from the party requesting the opinion, or at least a summary of the topics to be addressed in the Opinion Letter. Many times the Letter of

[36] Elza, Slater, Supra. FN 10

[37] Eagan at p. 10

Intent will list the basic coverage of the expected opinion.

5. **<u>Many of the recent claims against laws firm based upon legal opinions are related to facts assumed or stated, to negative assurances, and to the wording of the opinions as to qualifications and limitations, rather than to alleged mistakes of law in the opinions that are actually expressed</u>**.[38] Keep factual statements to confirmations of facts, rather than legal opinion as to facts.

6. Limit the scope of the Opinion Letter. Use the limitations that have been crafted upon customary Opinion Letters, so as to reduce the work, cost and risk of the Opinion Letter. For example:

   (a) Do not give an opinion as to "No Litigation" – discussed in this article.
   (b) Pursue a Cost Benefit analysis of the requested opinion letter, as is reflected in many of the resources mentioned above.
   (c) Use the "Customary Practices" authorities to negotiate a lesser scope of the Opinion Letter.
   (d) Use the "golden rule" admonition of ABA LEGAL OPINION GUIDELINES § 3.1 and TRIBAR '98 § 1.3, that requests for letters be reasonable, and the terms of the letter be reasonable.
   (e) Keep the letter limited to matters of professional judgment, and avoid the wish list of opposing counsel. See ABA LEGAL OPINION GUIDELINES § 1.2; ABA LEGAL OPINION PRINCIPLES § I.D.; and TRIBAR '98 § 1.2(a).
   (f) Use the ABA Principles and Guidelines, adopted by the Texas Legal Opinions Committee to limit the scope of the opinion letter.
   (g) Opinion Letter writers should not be asked for opinions on broad-ranging topics regarding the client's general business. ABA LEGAL OPINION GUIDELINES § 4.3 (titled "Comprehensive Legal or Contractual Compliance") states that **<u>an opining lawyer should not give "an opinion that its client is not in violation of any applicable laws. . . ."</u>**

7. Discussing the above matters with all counsel early in a transaction, and providing these suggested publications between counsel who are not familiar with them, will result in a fewer, if any, last minute surprises, reasonable expectations of all parties as to the contents of the opinion letter, and a substantially reduced need for midnight doses of antacids.

8. Know the impact of the terms of your professional liability insurance. Are you now involved in securities related matters, that require disclosure to your carrier? Are you required to have a partner (or outside counsel) not involved in the transaction review and/or approve your opinion letter?

9. Get help early on. Recruit a partner or outside counsel to assist, in the drafting, proofing, documentation, back-up and execution of the Opinion Letter.

10. Price your work properly. Understand the risks, communicate those risks to the client and agree upon a reasonable fee that provides compensation for the effort and the ongoing risk.

[38] Tarry, Primer on Legal Opinions, at p. 1

EXHIBIT A
TO 7 DEADLY SINS OF OPINION LETTERS [40]

SUPPLEMENT NO. 4 TO THE REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS:

STATEMENT ON ABA PRINCIPLES AND GUIDELINES

LEGAL OPINIONS COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS

April 20, 2009

The Legal Opinions Committee of the Business Law Section of the State Bar of Texas (the "*Committee*") and the Business Law Section of the State Bar of Texas recently approved the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* (the "*Customary Practice Statement*").[41] As part of the Committee's continuing efforts to clarify customary legal opinion practice in Texas,[42] the Committee has now approved the *Legal Opinions Principles* (the "*Principles*")[43] and the *Guidelines for the Preparation of Closing Opinions* (the "*Guidelines*"),[44] each published by the Committee on Legal Opinions of the Business Law Section of the American Bar Association.[45] For ease of reference, the *Customary Practice Statement* and the *Principles* and *Guidelines* are set out in full in the Appendices attached hereto.

In approving the *Principles* and *Guidelines,* the Committee notes the following:

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40 This Exhibit A is quoted from Tarry, Primer on Legal Opinions, at p. 17

41 63 BUS. LAW. 1277 (2008). The *Customary Practice Statement* was also approved by the Business Law Section of the American Bar Association, the Real Estate, Probate and Trust Law Section of the State Bar of Texas, and various bar organizations from other states. A copy of the *Customary Practice Statement* is attached as Annex I hereto.

42 In 1992, the Committee published a report on legal opinions. Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, (Special Issue) June-September 1992, at 1 (herein referred to as the "*Texas Legal Opinion Report*"). The Texas Legal Opinion Report has been supplemented on three occasions (collectively, the "*Supplements*"): Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, December 1994, at 1 (addressing certain Texas usury law issues); Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, Spring 2001, at 1 (addressing Texas legal opinions regarding security interests in investment property collateral); and Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 3 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions under Texas Law*, 41 TEX. J. BUS. L. 271 (Winter 2006) (addressing Texas legal opinions regarding indemnification and exculpation provisions). The Texas Legal Opinion Report and the Supplements are available electronically at the website of the Business Law Section of the State Bar of Texas at http://www.texasbusinesslaw.org.

43 The Committee on Legal Opinions of the Business Law Section of the American Bar Association, *Legal Opinion Principles,* 53 BUS. LAW. 831 (1998). A copy of the *Principles* is included in Annex II hereto.

44 The Committee on Legal Opinions of the Business Law Section of the American Bar Association, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002). A copy of the *Guidelines* is included in Annex II hereto.

45 In 1991, the Section of Business Law of the American Bar Association published its *Third-Party Legal Opinion Report*, which included the *Legal Opinion Accord* (the "*Accord*"). Section of Business Law, American Bar Association, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 BUS. LAW. 167 (1991) (herein referred to as the "*1991 ABA Report*"). The *1991 ABA Report* concluded with Certain Guidelines for the Negotiation and Preparation of Closing Opinions (the "*1991 Guidelines*"). *1991 ABA Report* at 224. In the original *Texas Legal Opinion Report*, the Committee adopted the *1991 ABA Report* (including the *1991 Guidelines* and the *Accord*) as part of the *Texas Legal Opinion Report*. *Texas Legal Opinion Report* at 3. The *Guidelines*, which were published by the ABA in 2002, replaced the *1991 Guidelines* and reflected developments in customary practice in the decade since 1991; the *Guidelines* were intended to complement, and are to be read and applied with, the *Principles* for closing opinions that do not adopt the *Accord*. 57 BUS. LAW. at 875.

1. The *Principles* and *Guidelines* are in all respects subject to, and should be understood and applied consistently with, the professional responsibilities and ethical obligations of Texas attorneys, including rules regarding client confidentiality.[46]

2. With respect to *Guideline 1.7*, permission for an assignee or other party to rely on a legal opinion should not be understood to constitute an agreement or acknowledgement that the assignee has, in fact, justifiably relied on the opinion.[47]

3. As to *Guideline 3.4* and the other *Principles* and *Guidelines* that address an opinion giver's knowledge of factual matters, the Committee agrees that it is preferable to clarify the meaning of the phrase "to our knowledge" in connection with factual inquiries. However, in the absence of clarification, the phrase "to our knowledge" is customarily understood by Texas attorneys to refer to the conscious awareness of facts and information of those attorneys actively involved in the transaction or in rendering the legal opinion, without having made any inquiry.

4. To the extent that *Principle III.B.* and footnote 16 to *Guideline 4.4* address "confirmations" regarding an opinion giver's knowledge of legal proceedings to which the opinion giver's client is a party, the appropriateness of delivering such "confirmations" has been coming under increasing scrutiny and, if given by Texas attorneys, such confirmations frequently are expressed and accepted with a careful narrowing in scope, including a "to our knowledge" qualification as described in the second sentence of paragraph 3 above. Furthermore, in giving such "confirmations", an opinion giver in Texas is not expected to review court or other public records or his or her firm's own files, including its litigation docket (or analogous record), unless an express agreement is reached between the opinion giver and the opinion recipient to do so and the legal opinion expressly states that the opinion giver has conducted such a review.[48]

5. As to *Guideline 4.6*, the Committee is not aware of any compelling justification that would support a request that an opinion giver render an opinion on fraudulent transfer laws.

6. As to *Principle I.C.*, while departures from customary practice should be expressed in an opinion, such departures need not be identified by an express statement that the opinion giver is departing from customary practice. This understanding is consistent with the *Customary Practice Statement*.

7. *Principle I.E.* does not override the obligations that an attorney representing an opinion recipient may have to his or her own client with respect to the review and evaluation of a third-party legal opinion.[49] Further, an opinion recipient may not rely on an opinion if the recipient or its counsel has knowledge that the opinion is incorrect or if the recipient's reliance is otherwise unreasonable under the circumstances.[50]

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46 *Cf. Texas Legal Opinion Report*, Part III. (discussing professional responsibilities and ethical considerations). *See generally* Charles E. McCallum and Bruce R. Young, *Ethics Issues in Opinion Practice*, 62 BUS. LAW. 417 (2007).

47 *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 552 (1977).

48 To the extent that the *Texas Legal Opinion Report* (at pages 98-99 and footnote 281) may be read to require that an opinion giver conduct a review of his or her firm's litigation docket (or analogous record), the Committee is of the view that customary practice has evolved since the date of that *Report* such that the text to which this footnote is appended reflects current customary practice in Texas.

49 *See, e.g.*, Reade H. Ryan, Jr., *Recipient Counsel Responsibilities and Concerns*, 62 BUS. LAW. 401 (2007).

50 *See* TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591, 604 (1998). *See also* McCamish v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999); RESTATEMENT (SECOND) OF TORTS § 552 (1977).

ANNEX I TO SUPPLEMENT NO. 4

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*[1] 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 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.

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[1] 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 *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.

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

* * * * *

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

• 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

ANNEX II TO SUPPLEMENT NO. 4

GUIDELINES FOR THE PREPARATION OF CLOSING OPINIONS

By the Committee on Legal Opinions of the Section of
Business Law of the American Bar Association,
Donald W. Glazer, Chair, Steven O. Weise, Reporter

The Section of Business Law of the American Bar Association has adopted the following *Guidelines* for preparing legal opinions delivered at the closing of a business transaction by counsel for one party to another party (or parties) ("closing opinions").[1] These *Guidelines* replace the *Guidelines* included in the Section's 1991 *Third- Party Legal Opinion Report*[2] and reflect developments in customary practice in the decade since 1991.[3] These *Guidelines* complement and are intended to be read and applied with the Section's *Legal Opinion Principles*[4] adopted in 1998 for closing opinions that do not adopt the *Legal Opinion Accord* included in the Section's 1991 *Report*.[5]
Like the *Legal Opinion Principles*, these *Guidelines* provide guidance[6] regarding closing opinions whether or not referred to in an opinion letter.

1. PURPOSE, SCOPE, AND RELIANCE

1.1 Purpose

The agreement for a business transaction will often condition a party's obligation to close on its receipt of a closing opinion covering specified legal matters from counsel for another party. When received, the closing opinion serves as a part of the recipient's diligence, providing the recipient with the opinion giver's professional judgment on legal issues concerning the opinion giver's client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.

1.2 Coverage

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. The benefit of an opinion to the recipient should warrant the time and expense required to prepare it.[7]

1.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the transaction. Closing opinions should not include assumptions, exceptions, and limitations that do not relate to the transaction and the opinions given.

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[1] These *Guidelines* use "closing opinion" and "opinion letter" interchangeably. "Opinion" refers to a legal conclusion expressed in a closing opinion.

[2] Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991).

[3] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51(2), 95 (2000) [hereinafter RESTATEMENT]; TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter 1998 TriBar Report].

[4] Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). A copy of the *Legal Opinion Principles* is included with these *Guidelines* as Appendix A.

[5] These *Guidelines* also apply to opinions that adopt the *Accord*. In the event of any inconsistencies between these *Guidelines* and the *Accord,* the *Accord* controls for opinions that adopt it. The adoption of the *Legal Opinion Principles* and these *Guidelines* is not intended to discourage use of the *Accord*.

[6] In appropriate circumstances opinion givers and opinion recipients (or their counsel) may together decide not to follow these *Guidelines* in particular respects

[7] When the benefit of an opinion to the recipient is not sufficient, depending on the circumstances, the scope of the particular opinion could be limited (*e.g.*, the opinion on an agreement could be limited to due authorization, execution and delivery) or the opinion could be omitted entirely (*see infra* § 4.2 (opinion on all of a company's outstanding equity securities may not be cost justified)).

1.4 Professional Competence

Opinion givers should not be asked for opinions that are beyond the professional competence of lawyers. To the extent a matter such as financial statement analysis, economic forecasting, or valuation is relevant to an opinion, an opinion giver may properly rely on a factual certificate or assumption.

1.5 Misleading Opinions

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.[8]

1.6 "Market" Opinions

An assertion that a specific opinion is "market"—i.e., that lawyers are rendering it in other transactions—does not make it appropriate to request or render such an opinion if it is inconsistent with these *Guidelines*.

1.7 Reliance

An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as—but to no greater extent than—the addressee.

2. PROCESS

2.1 Opinion Request and Response

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed exceptions, providing, to the extent practicable, the form of its proposed opinions. Both sides should work in good faith to agree on a final form of opinion letter. Discussion of opinion issues while the transaction documents are being prepared can produce constructive adjustments in the documents and the transaction structure and help to avoid delays in closing the transaction. Should a problem be identified that might prevent delivery of an opinion in the form discussed, the opinion giver should promptly alert counsel for the opinion recipient.

2.2 Other Counsel's Opinion

When the opinion giver lacks the legal expertise to render a requested opinion, consideration should be given to whether that opinion should be sought from other counsel. An opinion of other counsel should be sought by the opinion recipient only when the opinion's benefits justify its costs. A primary opinion giver normally should not be asked to express its concurrence in the substance of an opinion of other counsel.

2.3 Financial Interest in or Other Relationship with Client

Lawyers preparing a closing opinion do not normally attempt to determine whether others in their firm have a financial interest (including an equity or prospective equity interest) in, or other relationship with, the client nor do they ordinarily disclose in an opinion letter any such interest or relationship that they or others in the firm may have. Although some lawyers may choose to make such disclosures, disclosure does not excuse those preparing a closing opinion from considering whether a financial interest in, or relationship with, the client that is known to them will compromise their professional judgment in delivering the closing opinion.

2.4 Client Consent and Confidential Information

When the client's consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

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[8] For a general discussion of this subject (including the role of disclosure), *see* 1998 TriBar Report, *supra* note 3 at 602-03, 607. This *Guideline* does not preclude limiting the matters addressed by an opinion through the use of specific language if the limitation itself will not mislead the recipient. *See Legal Opinion Principles* §§ I.B, I.C. For an opinion giver's ethical obligations to its client, *see infra* § 2.4.

3. CONTENT

3.1 Golden Rule

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these *Guidelines* and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

3.2 Materiality

When possible, an opinion giver should avoid use of a materiality standard by using objective criteria (for example, a particular dollar amount, a specific category, or inclusion on a specified list) when limiting the matters addressed by an opinion.

3.3 Presumption of Regularity

An opinion giver may rely upon the presumption of regularity[9] for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book, that are not verifiable from the client's records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.[10]

3.4 Use of the Phrase "To our Knowledge"

Certain factually-oriented opinions, such as the opinions on the existence of legal proceedings,[11] ordinarily are expressed as being to the opinion giver's knowledge.[12] To avoid a possible misunderstanding over the meaning of "knowledge," the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend "to our knowledge" to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).[13]

3.5 Explained Opinions; "Would/Should"

Although closing opinions ordinarily do not set forth any legal analysis, opinion givers may include their legal analysis in an opinion when they believe it involves a difficult or uncertain question of professional judgment and have decided that the conclusions expressed should not be stated without setting forth the underlying reasoning. Such an opinion, which is commonly referred to as an "explained" or "reasoned" opinion, may be unqualified or qualified (*i.e.*, subject to exceptions that are not customary for opinions of the type involved). Opinions have the same meaning whether stated as "would" or "should."[14] Either way they express the opinion giver's professional judgment in the circumstances.

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[9] *See* Rogers v. Hill, 289 U.S. 582, 591 (1933).

[10] An exception is when, based on the available facts, the lawyers preparing the opinion conclude that the deficiency in company records is likely to be significant.

[11] Because these opinions lack legal analysis, some lawyers prefer to refer to them as "confirmations."

[12] "To our knowledge" is also sometimes used in opinions that address other factual matters, such as the no breach or default opinion. The trend today in many types of transactions is away from using "to our knowledge" to limit the scope of the opinion. Instead, for example, when giving a no breach or default opinion, lawyers often prefer to identify the contracts covered by referring expressly in the opinion to an existing list or a list prepared specifically for opinion purposes.

[13] Such a description would not be required if the opinion preparers have conducted the inquiry described in the 1998 TriBar Report, *supra* note 3, at 618-19, 659, 664-65, or there otherwise is no risk of misunderstanding.

[14] *See* TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717, 733 (1991); 1998 TriBar Report, *supra* note 3, at 607 n.37. Closing opinions may be different in this regard from tax opinions.

4. SPECIFIC OPINIONS

4.1 Foreign Qualification and Good Standing

An opinion giver should not be asked for an opinion that the opinion giver's client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the client. Analysis of the "doing business" requirements of each jurisdiction in which the client has property or conducts activities would require an extensive factual inquiry and a review of the law of jurisdictions as to which the opinion giver cannot reasonably be expected to have expertise. This analysis rarely would be cost-justified. Because an opinion on qualification to do business or good standing in foreign jurisdictions is based solely on certificates of public officials, delivery of those certificates without an opinion ordinarily should be sufficient to satisfy the needs of the opinion recipient.

4.2 Outstanding Equity Securities

An opinion that all outstanding equity securities of the client are duly authorized, validly issued, fully-paid, and non-assessable can require an extensive legal and factual inquiry (for example, when the client has been in existence for a long time and has had many stock issuances). Consideration should be given to whether the benefit of the opinion to the opinion recipient justifies the cost and time required to support it.

4.3 Comprehensive Legal or Contractual Compliance

An opinion giver should not be asked for an opinion that its client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client's business. Similarly, an opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client's contractual obligations.[15] Neither a materiality exception nor a knowledge limitation makes these opinions appropriate.

4.4 Lack of Knowledge of Particular Factual Matters

An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters.[16] Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document (subject to section 4.5 below) do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.

4.5 Negative Assurance

Opinion recipients sometimes seek negative assurance from the opinion giver regarding the adequacy of the disclosure in the prospectus or other disclosure documents furnished to investors in connection with a sale of securities. Such negative assurance is not an opinion in the traditional sense. Rather, the practice of providing negative assurance is unique to securities offerings and is intended to assist the opinion recipient in establishing a due diligence or similar defense. A request for negative assurance is appropriate only when it is requested for that purpose in connection with a registered securities offering or, depending on the nature of the disclosure document and the process by which it was prepared, an offering of securities exempt from registration.[17]

4.6 Fraudulent Transfer

An opinion on the enforceability of an agreement does not address the effect of fraudulent transfer laws on the other party's rights under the agreement.[18] Although a party to a transaction may be concerned about the effect of fraudulent transfer laws, an opinion giver could not render an opinion on those laws without relying heavily on assumed facts. Because opinions on the effect of fraudulent transfer laws are of limited value, they should not be requested absent a compelling justification.

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[15] This *Guideline* is not intended to preclude a request for an opinion, otherwise appropriate, on a specific matter, for example, on whether specified activities of the client comply with the requirements of a specific statute.

[16] The principal exception is the "confirmation" often included in closing opinions regarding the opinion giver's knowledge of legal proceedings to which the client is a party. *See* supra § 3.4.

[17] A request for negative assurance will be appropriate, for example, in many Rule 144A and Regulation S offerings.

[18] The "bankruptcy exception" (which is implied even when not stated) excludes the effect of fraudulent transfer laws from the enforceability opinion. *See* 1998 TriBar Report, *supra* note 3, at 624.

4.7 Litigation Evaluation

The opinion giver ordinarily should not be asked to express an opinion on the expected outcome of pending or threatened litigation.[19]

4.8 Matters of Public Policy

Because public policy is a principal basis for invalidating contractual provisions, opinion givers should not qualify their opinions as a whole with a general exception for "matters of public policy."[20] When appropriate, however, an opinion giver may include an exception for matters of public policy with respect to a particular provision (such as a provision releasing the other party from liability without excluding liability for willful misconduct or fraud).

4.9 When Law Covered by Opinion and Law Selected to Govern Agreement are Different

When a closing opinion does not cover the law of a jurisdiction whose law is selected as the governing law in an agreement, the opinion giver should explore with counsel for the opinion recipient how best to respond to a request for an opinion on the agreement's enforceability. When an opinion of local counsel is not cost justified, an acceptable alternative may be an opinion of the opinion giver that is limited to the enforceability of the governing law clause under the law covered by the opinion. Another acceptable alternative (which might be combined with the first) may be an opinion that the entire agreement would be enforceable if the law covered by the opinion were to apply (notwithstanding the governing law clause).

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[19] *See generally* American Bar Association, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 1709 (1976).

[20] *See supra* note 6.

APPENDIX A TO GUIDELINES FOR THE PREPARATION OF CLOSING OPINIONS

LEGAL OPINION PRINCIPLES

By the Committee on Legal Opinions of the Section of
Business Law of the American Bar Association,
Thomas L. Ambro, Chair, and
Donald W. Glazer and Steven O. Weise, Co-Reporters

In the Committee's 1991 *Third Party Legal Opinion Report*[1] the Committee undertook to monitor developments respecting the *Report* and the *Legal Opinion Accord* contained in the *Report*. It also undertook in due course to take such further action as might seem appropriate. These *Legal Opinion Principles* are a product of those undertakings.

The *Report* and the *Accord* have made an important contribution to the learning on legal opinions. While the *Accord* has not gained the national acceptance the Committee had hoped, the *Guidelines* in the *Report* are frequently looked to for guidance regarding customary legal opinion practice. In section 152 of the recently adopted *Restatement (Third) of the Law Governing Lawyers*, the American Law Institute affirmed the importance of customary practice in the preparation and interpretation of legal opinions. The Committee has prepared these *Principles* to provide further guidance regarding the application of customary practice to third-party "closing" opinions that do not adopt the *Accord*. The Committee hopes that these *Principles* will prove useful both to lawyers and their clients and to courts that from time to time are called upon to address legal opinion issues.

The Committee intends to consider the possible extension of these *Principles* to issues they do not now address. The Committee would welcome the assistance of all who are interested in participating in that effort.

I. GENERAL

A. At the closing of many business transactions legal counsel for one party delivers legal opinion letter(s) to one or more other parties. Those opinion letters, often referred to as third party opinion letters, are the subject of these *Legal Opinion Principles*.

B. The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. These *Legal Opinion Principles* are intended to provide a ready reference to selected aspects of customary practice.

C. An opinion giver may vary the customary meaning of an opinion or the scope and nature of the work customarily required to support it by including an express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel.

D. The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.

E. In accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains.

F. The lawyer or lawyers preparing an opinion letter and the opinion recipient and its legal counsel are each entitled to assume that the others are acting in good faith with respect to the opinion letter.

II. LAW

A. Opinion letters customarily specify the jurisdiction(s) whose law they are intended to cover and sometimes limit their coverage to specified statutes or regulations of the named jurisdiction(s). When that is done, an opinion letter should not be read to cover the substance or effect of the law of other Jurisdiction(s) or other statutes or regulations.

[1] Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991).

B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter[2] exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.

C. An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.

D. Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.

III. FACTS

A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.

B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.

C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily 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 assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction.

IV. DATE

An opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments.

[2] *See* § II.A.

Home > ABA Groups > Business Law Section > Migrated > Legal Opinion Resource Center

- **Legal Opinion Resource Center**

The purpose of this site is to provide easy access to reports and other materials useful in opinion practice, without charge, for non-commercial use.

The ABA Business Law Section Legal Opinions Committee and the TriBar Opinion Committee have issued influential reports that have shaped opinion practice for over two decades. In recent years the Federal Securities Law Subcommittee of the Section's Committee on Federal Regulation of Securities has begun issuing authoritative reports, and other Section committees may issue reports in the future of interest to the practice. Law firms and law departments are encouraged to link their internal websites permanently to this resource.

- **Reports of the ABA Business Law Section**
- Exchange Act Rule 14e-1 Opinions for Debt Tender Offers, 72 *The Business Lawyer*, 1047 (Fall 2017)
- Cross-Border Closing Opinions of U.S. Counsel, 71 *The Business Lawyer*, 139 (Winter 2015/2016)
- No Registration Opinions (2015 Update), 71 *The Business Lawyer*, 129 (Winter 2015/2016)
- Legal Opinions in SEC Filings (2013 Update), 68 *The Business Lawyer* 1149 (2013)
- Report on the 2010 Survey of Law Firm Opinion Practices, 68 *The Business Lawyer* 785 (2013)
- Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties, 67 *The Business Lawyer* 99 (2011)
- Model Stock Purchase Agreement with Commentary (Second Edition) - Exhibits 8.6(a) and 9.5(a), Legal Opinions, ABA Business Law Section, Mergers and Acquisitions Committee (2010)
- *Negative Assurance in Securities Offerings (2008 Revision)*, 64 *The Business Lawyer* 395 (2009), Business Law Section, Securities Law Opinions Subcomittee, Federal Regulation of Securities Committee
- *Statement on Effect of FIN 48 on Audit Response Letters*, ABA Business Law Section Subcommittee on Audit Responses (October 16, 2008)
- Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 *The Business Lawyer* 1277 (2008)
- No Registration Opinions, 63 *The Business Lawyer 187* (2007)
- Law Office Opinion Practices, 60 *The Business Lawyer* 327 (2004)
- Legal Opinions in SEC Filings, 59 *The Business Lawyer* 1505 (2004)
- Negative Assurance in Securities Offerings, 59 *The Business Lawyer* 1513 (2004)
- Closing Opinions of Inside Counsel, 58 *The Business Lawyer*1127 (2003)
- Guidelines for the Preparation of Closing Opinions (including Legal Opinion Principles), 57 *The Business Lawyer* 875 (2002)
- Legal Opinion Principles, 53 *The Business Lawyer* 831 (1998)
- **TriBar Opinion Committee Reports**
- Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws, 68 *The Business Lawyer* 1161 (2013)
- Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests, 66 *The Business Lawyer* 1065 (2011)
- Special Report of the TriBar Opinion Committee--Opinions on Secondary Sales of Securities, 66 *The Business Lawyer* 625 (2011)
- Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock, 63 *The Business Lawyer* 921 (2008)
- Third-Party Closing Opinions: Limited Liability Companies, 61 *The Business Lawyer* 679 (2006)
- The Remedies Opinion – Deciding When to Include Exceptions and Assumptions, 59 *The Business Lawyer* 1483 (2004)
- UCC Security Interest Opinions – Revised Article 9 Report, 58 *The Business Lawyer* 1449 (2003)
- Third-Party "Closing" Opinions, 53 *The Business Lawyer* 592 (1998)
- **Other ABA Publications and Articles of Interest**
- Local Counsel Opinion Letters in Real Estate Finance Transactions
  A Supplement to the Real Estate Finance Opinion Report of 2012
- Real Estate Finance Opinion Report of 2012 by the ABA Section of Real Property, Trust and Estate Law Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers Attorneys' Opinions Committee, and the American College of Mortgage Attorneys Opinions Committee
- Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions , 70 *The Business Lawyer*, 121 (Winter 2014/2015)
- Auditor's Letter Handbook, Second Edition
- Auditor's Letter Handbook, Second Edition
- The Collected ABA and Tribar Opinion Reports 2009
- Cost-Benefit Analysis and Third-Party Opinion Practice, 63 *The Business Lawyer*, 1187 (August 2008)
- Courting the Suicide King, 17 *Business Law Today*, 4 (2008)
- The Legal Opinion Risk Seminar Papers, 62 *The Business Lawyer*, 397 (2007)
- Ethics Issues in Opinion Practice, 62 *The Business Lawyer*, 417 (2007)
- No-Litigation Opinions Can Be Risky Business, 14 *Business Law Today*, 6 (2005)
- Annual Review of the Law on Legal Opinions, 60 *The Business Lawyer*, 1057 (2005)
- Statement on Updates to Audit Response Letters—Exposure Draft dated October 22, 2014, Business Law Section, Audit Responses Committee
- **Meetings and Other Materials**
- Exposure Draft of the California Report on Third Party Closing Opinions for Limited Liability Companies and Partnerships
- *Why Are We Asked to Give These Opinions?*
  Materials | Audio
  Program presented by the ABA Business Law Section Legal Opinions Committee, Annual Meeting, San Francisco, CA (August 8, 2010)

- *Crossing the Threshold: Why Ask for an Opinion at All?*
  Materials |
  Audio Program presented by the ABA Business Law Section Legal Opinions Committee, Annual Meeting, San Francisco, CA (August 12, 2007)
- **State and Other Bar Reports**

Over the years, various state and local bar organizations have issued reports on legal opinions. Below are links to certain recent reports, as a research aid to those engaged in opinion practice. In establishing these links, the Legal Opinions Committee does not represent that these are all reports that exist, is not undertaking to update these links as reports are modified or re-issued, and does not necessarily endorse the content of these reports.

- **Arizona**
  - Arizona Model Legal Opinion, (October 20, 2004)
- **Boston**
  - Boston Bar Association Streamlined Form of Closing Opinion, 61 *The Business Lawyer* 389 (2005)
- **California**
  - Report on Legal Opinions Concerning California Partnerships and Limited Liability Companies (December, 2016)
  - Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions, 70 *The Business Lawyer*177 (Winter 2014/2015)
  - California Sample Third-Party Legal Opinion for Business Transactions (2014)
    - Sample Opinion With Footnotes
    - Sample Opinion Without Footnotes
  - Report of the Opinions Committee of the Business Law Section of the State Bar of California on Selected Legal Opinion Issues in Venture Capital Financing Transactions (November 2009)
  - The Corporations Committee of the Business Law Section of the State Bar of California Legal Opinions in Business Transactions (Excluding the Remedies Opinion) 2005 Report (October 2007 Printing - as revised)
  - State Bar of California Business Law Section Report on Third-Party Remedies Opinions 2007 Update
  - Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Legal Opinions in Personal Property Secured Transactions (June 2005)
- **Florida**
  - Report on Third-Party Legal Opinion Customary Practice in Florida by the Legal Opinion Standards Committee of the Florida Bar Business Law Section and the Legal Opinions Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (December 3, 2011)
- **City of London Law Society**
  - A Guide to the questions to be addressed when providing opinion letters on English law in financial transactions
- **Maryland**
  - Maryland Reports
- **Michigan**
  - Report of the Michigan Ad Hoc Committee on Legal Opinions of the State Bar of Michigan Business Law Section (September 15, 2010)
- **New York**
  - Special Report on the Preparation of Substantive Consolidation Opinions Committee on Structured Finance and the Committee on Bankruptcy and Corporate Reorganization of The Association of the Bar of the City of New York, 64 *The Business Lawyer*, 411 (2009)
- **North Carolina**
  - Supplement to Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association: Third-Party Legal Opinions in Business Transactions, Second Edition (February 2009)
  - Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association: Third-Party Legal Opinions in Business Transactions, Second Edition (March 30, 2004)
- **Pennsylvania**
  - Pennsylvania Third-Party Legal Opinion Report of the Legal Opinion Committee of the Business Law Section of the Pennsylvania Bar Association
  - Model Closing Opinion Letter (Annotated)
- **South Carolina**
  - The South Carolina Third Party Legal Opinion Report by the Legal Opinion Ad Hoc Committee of the Corporate, Banking and Securities Law Section of the South Carolina Bar
- **Tennessee**
  - Tennessee Bar Association Report on Third Party Closing Opinions by the Tennessee Bar Association Joint Opinion Committee of the Sections of Real Estate Law and Business Law
- **Texas**
  - Regarding Legal Opinions in Business Transactions: Statement on ABA Principles and Guidelines, Supplement No. 4, Legal Opinions Committee of the Business Law Section, State Bar of Texas
- The 501(c)(3) Opinion in Qualified 501(c)(3) Bond Transactionsby the National Association of Bond Lawyers
- National Venture Capital Association Model Venture-Backed Preferred Stock Financing Legal Opinion by the National Venture Capital Association
- **Opinions Filed in Registered Securities Offerings**
- Securities and Exchange Commission Division of Corporation Finance Staff Legal Bulletin No. 19 (CF), *Legality and Tax Opinions in Registered Offerings* (October 14, 2011)
- *Questions and Answers on the SEC's Opinion Guidance*
  Donald W. Glazer and Stanley Keller
- New York State Bar Association Tax Section Report on Tax Opinions in Registered Offerings (April 4, 2012)