STATEMENT ON OPINION PRACTICES – CUSTOMARY PRACTICE AND GUIDANCE IN UNDERSTANDING THIRD - PARTY LEGAL OPINION LETTERS

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Joining the firm in 1975, Frank was a partner in the Houston office of Fulbright & Jaworski from 1983 until his retirement from the firm in 2013. Immediately following his retirement, he became Of Counsel to Norton Rose Fulbright US LLP. During his 43 years of practice, Frank has focused his practice in the areas of corporate debt financings, commercial finance, project finance and general commercial transactions. He has worked on behalf of parties extending financing and parties receiving financing, on numerous documentation and counsel matters related to unsecured and secured financings, including:

- Publicly and privately placed debt
- High yield, investment grade and commercial paper financings
- Public financings
- Credit and loan agreements – syndicated, secured and unsecured
- Institutional private placements
- Hedging and swap contracts
- Intercreditor agreements
- Personal property collateral agreements
- Oil and gas secured financings
- Cogeneration project financings
- International project financings
- Letter of credit transactions
- Restructure of problem financings
- Credit enhancement

Practices

- Projects
- Corporate and commercial finance

Key industries

- Financial institutions

- Energy

Education

JD, University of Houston School of Law, 1975

BBA, University of Houston, 1971

While attending the University of Houston School of Law, Frank was a member of the Order of the Barons and the *Houston Law Review*. He was admitted to practice law in Texas in 1975.

Admissions

- Texas State Bar

Rankings and recognitions

- Texas Top Rated Lawyer, LexisNexis Martindale-Hubbell, 2013 - 2014
- Chambers USA, Texas: Banking & Finance, Chambers and Partners, 2010 - 2012
- The Best Lawyers in America, Best Lawyers, 1987 - 2019
- Texas Super Lawyer, corporate finance, Thomson Reuters, 2003 - 2004, 2007 - 2011
- Who's Who in American Law, Marquis

Publications

- "Borrowers Should Review Their Credit Agreement in Relation to Ailing Financial Participants," *Fulbright & Jaworski L.L.P. Briefing*, October 3, 2008
- Speaker on various legal opinion topics at Working Group on Legal Opinion Programs

Memberships and activities

- American Bar Association
- Houston Bar Association
- State Bar of Texas – Vice Chairman, Legal Opinions Committee of the Business Law Section
- Working Group on Legal Opinions
- Houston Commercial Finance Lawyer Forum

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I. INTRODUCTION

The timely and efficient delivery of a third-party closing opinion letter[1] requires the transaction parties to agree upon (i) the topics and scope of opinions to be given, (ii) the formulation of the requested opinions and their related qualifications, assumptions, exceptions, limitations, and exclusions (collectively, "***qualifications***"), and (iii) the framework in which opinions are prepared, including the diligence expected to be performed in connection with, and a common understanding of the words and phrases used in, a closing opinion. Within the developed, and the continually developing, principles of customary practice and other practices generally followed by opinion practitioners in the preparation and delivery of closing opinions, this presentation addresses the framework of the opinion letter process.

II. THE DEVELOPED FRAMEWORK

The role of "customary practice" in the closing opinion process had often been referred to in opinion literature, but without common agreement on its principal meaning. In 2008, the "*Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*"[2] (the "***Customary Practice Statement***") was published. The Customary Practice Statement provides that closing opinions "… are prepared and understood in accordance with the customary practice of lawyers who regularly give them and review them for clients", and that customary practice permits opinion givers and opinion recipients a common understanding of opinions through 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 opinion being given and the difficulty and extent of the work required to support them.
>
> 2. It provide guidance on how certain word and phrases commonly used in opinion should be understood. Customary practice may expand or limit the plain meaning of those words."[3]

The Customary Practice Statement has been approved by a substantial number of recognized local and national bar associations and groups.[4] When customary practice is employed, detailed descriptions of the diligence performed for the preparation of, and definitions of words and phrases used in, the closing opinion are eliminated and, in turn, are replaced by common understandings of those opinion aspects.[5]

The Customary Practice Statement does not purport to prescribe the specific substance of the expected diligence or the meanings of words and phrases used in a closing opinion, but, instead, it refers to opinion-practice reports[6] of bar associations and bar

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1 In the Statement (as herein defined), and, in this presentation, (i) the reference to a "***closing opinion***" means a third-party closing opinion letter that is delivered at the direction of a client to a third party to satisfy a closing condition on a transaction. and (ii) the reference to an "***opinion***" means each opinion expressed therein.

2 *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008) (the "***Customary Practice Statement***").

3 Customary Practice Statement, *supra* note 2, at 1277.

4 Customary Practice Statement, *supra* note 2, at 1278-1279. In addition to the 28-approving bar groups and associations listed therein, many other bar groups and associations have subsequently approved the Customary Practice Statement.

5 Customary Practice Statement, *supra* note 2, at 1277. *See also*, TriBar Opinion Committee, *Third-Party Closing Opinions. A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 591 (February 1998) (herein, the "***TriBar Report***"), § 1.4(a), at 600-601. An electronic copy of the TriBar Report is available at the Legal Opinion Resource Center, *infra* note 6 (second paragraph).

6 The Legal Opinions Committee of the Business Law Section of the State Bar of Texas (the "***Committee***") has published a report and a statement regarding third-party legal opinions under Texas law. See Legal Opinions Committee of the Business Law Section of the State 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 (the "***Texas Legal Opinions Report***"). The Texas Legal Opinions Report has been supplemented on six 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.*

groups as valuable sources on customary practice – what diligence is expected and what words and phrases are understood to mean. In addition to local bar association reports, two national reports that preceded the publication of the Customary Practice Statement were commonly recognized for their generally-accepted guidance on opinion practice: (i) the "*Legal Opinion Principles*"[7] (the "***Principles***"); and (ii) "*Guidelines for the Preparation of Closing Opinions*"[8] (the "***Guidelines***"). The Customary Practice Statement, the Principles, and the Guidelines provided a general framework of customary practice guidance for the opinion practice, and were substantively augmented by the detailed substance of reports of bar association and bar groups.

III. THE DEVELOPING FRAMEWORK

The Customary Practice Statement astutely remarks that "[c]ustomary practice evolves to reflect changes in law and practice."[9] After years of thoughtful and hard work, a joint committee (the "***Joint Committee***") of bar group representatives formulated

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 opinions regarding security interests in investment property collateral); 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); 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) (addressing the Legal Opinion Principles and the Guidelines for the Preparation of Closing Opinions published by the Committee on Legal Opinions of the Business Law Section of the American Bar Association); Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 5 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Entity Status, Power and Authority Opinions Regarding Pre-Code Texas Entities and Pre-Code Registered Foreign Entities under the Texas Business Organizations Code*, 45 TEX. J. BUS. L. 1 (Fall 2012) (addressing whether the application of the Texas Business Organizations Code has affected certain legal opinions commonly given in commercial transactions as such opinions relate to entities formed or registered to transact business in Texas prior to January 1, 2010); and Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 6 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Changes to the Procedure for Good Standing Certificates issued by the Texas. Comptroller of Public Accounts,* 45 TEX. J. BUS. L. 201 (Fall 2013) (addressing the Texas Comptroller of Public Accounts' revision, in 2013, of the definition of "good standing" for franchise tax purposes and the discontinuance of "good standing certificates" by that Office, in relation to the giving of a Texas "good standing" opinion). The Committee also published a statement regarding the Texas Supreme Court's decision in 1999 concerning the liability of Texas lawyers for negligent misrepresentation, Limiting Negligent-Misrepresentation Liability for Third-Party Legal Opinions, 38 TEX. J. BUS. L. 20 (Winter 2003). 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/committees/legal-opinions.

The Committee on Legal Opinions of the ABA Business Law Section maintains a website, the Legal Opinion Resource Center (***the "Legal Opinion Resource Center***"), that contains links to electronic copies of substantially all significant bar association reports and other materials on opinion topics: https://apps.americanbar.org/groups/business_law/migrated/tribar.html. Also, a seminal opinion report not listed at that site is the *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, Committee on Legal Opinions, 47 BUS. LAW. 167 (1991) (collectively, the "***Accord***"). Unlike the evolving, changing, flexible, and generalized nature of customary practice, the Accord used an "incorporate by reference" approach toward opinion practice guidance; that is, if a closing opinion adopted the Accord, it incorporated by reference the substance of the Accord, in total, or, if it did not, it specified the Accord aspects it did not incorporate. Because of that approach, the Accord was not adopted in opinion practice, in the manner in which it originally was planned. However, the individual rules, commentary, and definitions set forth and discussed in the Accord remain widely accepted, and have formed, and form, the bases of many significant aspects of numerous bar association reports, in opinion practice.

7 The Committee on Legal Opinions of the Business Law Section of the American Bar Association, *Legal Opinion Principles*, 53 BUS. LAW. 831 (May 1998).

8 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 (Feb. 2002)

9 Customary Practice Statement, *supra* note 2, at 1278.

the "*Statement of Opinion Practices*"[10] in order to establish a national basis for the preparation and understanding of opinion letters. In doing so, the Statement will update, in its entirety, the Principles and update, in part, the Guidelines.[11] The Statement, as submitted for approval to the Legal Opinions Committee of the Business Law Section of the American Bar Association (the "***Legal Opinions Committee***") and the Working Group on Legal Opinions (the "***WGLO***") is attached hereto as Appendix A.

To assist its implementation, the Statement is accompanied by (i) the Core Principles (the "***Core Principles***"), (ii) an Explanatory Note, and (iii) a chart captioned "Statement of Opinion Practices -- Sources from the Principles and Guidelines", that cross references the sections of the Statement that replaced sections of the Principles and that replaced or revised certain sections of the Guidelines (such accompanying documents, collectively, the "***Ancillary Documents***"). The Ancillary Documents, as submitted for approval to the Legal Opinions Committee and the WGLO are attached hereto as Appendices B through D, respectively.

The Core Principles are drawn from the Statement, are intended to have the same meaning as the provisions of the Statement from which they are drawn, and are designed for use by opinion givers[12] who wish to incorporate or attach to their opinion letters a more concise statement of some of the opinion principles included in the Statement. The use of the Core Principles as a separate attachment to an opinion letter does not, however, eliminate or otherwise modify the application of the remaining principles from the Statement that may be applicable to the opinion letter.[13]

The Joint Committee expects to continue its efforts and to evaluate whether the Statement should be expanded to cover other provisions of the Guidelines and additional opinion practice matters.

IV. OVERVIEW OF THE STATEMENT

A. The Framework

The principle-based Statement provides a framework and approach to evaluate the preparation and substance of a closing opinion, rather than providing the specific substance of a closing opinion. Bar reports covering opinion matters often include annotated forms of closing opinions that cover customarily-given opinions and set out thoughtfully-crafted opinion formulations and suggested qualifications. Many law firms maintain templates with comparable forms of annotated closing opinions, opinion formulations, and related qualifications. Those forms and templates enable lawyers efficiently to prepare their closing opinions and to evaluate, and advise on, opinions received by their clients. The Statement, on the other hand, enables opinion givers, opinion recipients, and lawyers that counsel opinion givers on the closing opinion (collectively, the "***opinion participants***") to evaluate the specific substance of a closing opinion against a commonly-accepted framework for closing opinions.

In preparing or reviewing closing opinion, the Statement's guidance principles offer an evaluation framework of the following aspects[14] of a closing opinion:

(i) Statement's guidance on the scope of the closing opinion:

- the application of customary practice and other accepted opinion practices;[15]
- an opinion warrants its time and expense;[16]
- the inquiry of opinion giver's lawyers;[17]

10 *Statement of Opinion Practices*, __ BUS. LAW. __ (20__) (herein, the "***Statement***"). Following the approval of the Statement and the Ancillary Documents (as herein defined), the Statement and the Ancillary Documents will be published in The Business Lawyer, the publication of the Business Law Section of the American Bar Association. Bar groups, including the State Bar of Texas, Business Law Section, will be asked to approve the Statement; however, such approval will not affect the approval of the Statement by the Legal Opinions Committee and the WGLO.

11 Provisions of the Guidelines that were not updated "are unaffected, and no inference should be drawn from omissions from the Guidelines in [the] Statement." Statement, *supra* note 10. at its footnote 4.

12 The Statement refers to the law firm (whether consisting of a solo practitioner or more than one lawyer) as the "***opinion giver***", and to the individual lawyers in that firm who prepare the closing opinion as "***opinion preparers***", and this presentation uses those terms herein as they are referred to in the Statement.

13 Introductory paragraph to the Core Principles.

14 "Aspects" of a closing opinion may be evaluated in a number of ways. The above characterization of "aspects" of a closing opinion is provided only to illustrate an application of the Statement's guidance to a closing opinion, and is not intended to represent the only means to illustrate the application of those principles or the nature of "aspects" affected in a closing opinion. Further, this discussion's reference to a specific Section in the Statement is not intended to imply that such Section has only that limited effect on a closing opinion. "Each provision of [the] Statement should be read and understood together with the other provisions of [the] Statement." Statement, *supra* note 10, at footnote 4.

15 Statement, *supra* note 10, at Section 2.

16 Statement, *supra* note 10, at Section 4.3.

17 Statement, *supra* note 10, at Section 5.3.

- addressing confirmations and negative assurances;[18]
- law that is applicable to a closing opinion;[19]
- matters addressed[20] and not addressed[21] by, and relevance of matters[22] to, a closing opinion; and
- effect of the date of a closing opinion.[23]

(ii) Statement's guidance on the meaning of a closing opinion:

- an expression of professional judgment;[24]
- inclusion of bankruptcy and equitable principles limitation;[25]
- regarding facts not independently derived: the reliance on facts and assumptions,[26] representations,[27] and third-party sources;[28]
- reliance on, or assurances regarding, another counsel's closing opinion;[29]
- varying the application of customary practice;[30] and
- avoidance of misleading opinions.[31]

(iii) Statement's guidance on the responsibility and interaction of the opinion participants:

- adherence to legal obligations and rules of professional conduct;[32]
- professionalism guides the opinion process, and the golden rule of opinions requested and given;[33]
- effect of financial interest in client;[34] and
- client consent to deliver opinion and disclosure of client information.[35]

(iv) Statement's guidance on the expectations of the opinion participants:

- nature of recipient's reliance on a closing opinion;[36]
- opinion parties are acting in good faith;[37]
- presumption that all opinion participants are familiar with customary practice;[38] and
- persons who may rely on a closing opinion.[39]

B. The Guidance of the Statement

1. Introduction **--** Section 1 of the Statement.

The Statement is intended to provide guidance "regarding *selected aspects* of customary practice and *other practices generally followed throughout the United States* in the giving and receiving of opinion letters[40] [emphasis added]; the Statement is not intended to be an exhaustive formulation on customary practice and other opinion practices.

Interestingly, the stated scope and nature of the Statement's guidance goes beyond the traditional principal boundaries of "customary practice" (i.e., (i) the diligence expected to be performed in connection with the delivery of, and (ii) the commonly understood meaning of words and phrases used in, a closing opinion, in accordance with the customary practice of lawyers who regularly give opinions and who regularly review them for opinion recipient); it expands its scope to include selected aspects of "other practices" generally followed in giving and receiving opinions ("***other practices generally followed***").[41] In doing so, the Statement recognizes that its guidance addresses, and needs to address, significant aspects of opinion practice that are outside the scope of expected diligence and meanings of words and phrases.

The Statement's guidance is intended to establish a national, rather than local, basis for the preparation and understanding of opinion letters. This intention raises the issues of whether customary practice is determined -- solely, predominantly, or otherwise -- on a national basis or local (State) basis, and, if there are two such distinct bases, whether a national approach should prevail in multi-state transactions. Opinion practice practitioners are unresolved on this issue; some practitioners point to the efficiency and uniformity of supporting a national standard, while others practitioners point to the practicality and fairness of supporting a local level standard.[42] The presenter is not aware of case law guidance on whether a Texas court

18 Statement, *supra* note 10, at Section 5.6.
19 Statement, *supra* note 10, at Sections 6.1 and 6.2.
20 Statement, *supra* note 10, at Section 7.1.
21 Statement, *supra* note 10, at Section 7.2.
22 Statement, *supra* note 10, at Section 7.3.
23 Statement, *supra* note 10, at Section 9.
24 Statement, *supra* note 10, at Section 4.1.
25 Statement, *supra* note 10, at Section 4.2
26 Statement, *supra* note 10, at Sections 5.1 and 5.5.
27 Statement, *supra* note 10, at Section 5.4.
28 Statement, *supra* note 10, at Section 5.2
29 Statement, *supra* note 10, at Section 8.2.
30 Statement, *supra* note 10, at Section 10.
31 Statement, *supra* note 10, at Section 12.
32 Statement, *supra* note 10, at Section 3.
33 Statement, *supra* note 10, at Section 4.4.
34 Statement, *supra* note 10, at Section 8.3.
35 Statement, *supra* note 10, at Section 8.4.
36 Statement, *supra* note 10, at Section 4.5
37 Statement, *supra* note 10, at Section 4.6
38 Statement, *supra* note 10, at Section 8.1.
39 Statement, *supra* note 10, at Section 11.
40 Statement, *supra* note 10, at Section 1.
41 Statement, *supra* note 10, at Section 1.
42 *See, e.g.,* 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, *Report on Third-*

would apply customary practice in relation to litigation involving a closing opinion. If the Statement, as it evolves, retains its approach of providing general guidance, then it seems that a national basis developed on such a general approach can co-exist with each local basis, in a complementary and beneficial relationship. If, however, the Statement provides for guidance that, for example, purports to specify requisite diligence procedures or meanings of significant opinion words and phrases,[43] then the issue will be further heightened.

The provisions of the Statement are presented and grouped, where possible, by common theme. Nevertheless, "[e]ach provision of [the] Statement should be read and understood together with the other provisions of [the] Statement."[44] Some provisions of the Statement expressly footnote other sections of the Statement, and this seemingly is done solely for emphasis and not for the purpose of diminishing the importance of reading together all provisions of the Statement, as applicable.

2. <u>Customary Practice **--** Section 2 of the Statement.</u>

The Statement re-confirms the principal meaning of "customary practice": the customary practice of practitioners who regularly give, and advise those who receive, closing opinions, related to the expected diligence and understood meaning of terms. In addition, the Statement makes clear that customary practice applies to closing opinion whether or not the closing opinion refers to customary practice or the Statement.[45] Following the publication of the Customary Practice Statement, some law firms included a statement in their closing opinions to the effect that the closing opinion was prepared in accordance with customary practice. The Statement negates the need for any such provision. If, however, law firms desire to continue such practice, they may desire to add the phrase "and other practices generally followed throughout the United States in the giving and receiving of opinions".

3. <u>Legal Obligations and Rules of Professional Conduct **--** Section 3 of the Statement</u>

Neither the Statement nor customary practice is intended to supplant legal obligations and rules of professional conduct that are applicable when a lawyer gives an opinion.[46] Opinion givers need to be mindful not only of their duties to the opinion recipient but also to their client. The Statement notes that counsel to the opinion recipient (the "***recipient counse***l") also has duties to its client that relate to the opinion letter.[47]

Party Legal Opinion Customary Practice in Florida (December 3, 2011) (the "***Florida Report***") at 9; (". . . opinions regarding matter of Florida law addressed by a Florida attorney to a third party" opinion recipient are governed by Florida customary practice, whether or not the opinion letter so states). An electronic copy of the Florida Report is available at the Legal Opinion Resource Center, *supra* note 6

43 For example, regarding the common understanding of words and phrases, the Business Law Section of the California Bar affords a meaning to a remedies opinion that differs from the meaning given to that term by substantially all other reported bar groups: California maintains that a remedies opinion covers the enforceability of the "essential" undertakings of the client, while the prevalent view of other bar groups is that is covers "each and every" undertaking of the client. Regarding the approach of the California Bar, *see*, State Bar of California, Business Law Section, *Report on Third-Party Remedies Opinions* (September 2004, updated in 2007) (the "***California Remedies Report***") at 7. Regarding the more expansive approach of other bar groups, s*ee, e.g.*, TriBar Report, *supra* note 5, at § 3.1 at 621; Texas Legal Opinions Report, *supra* note 6, at 67. An electronic copy of the California Remedies Report is available at the Legal Opinion Resource Center, *supra* note 6

44 Statement, *supra* note 10, at footnote 4.

45 Statement, *supra* note 10, at Section 2.

46 Statement, *supra* note 10, at Section 3. As distinguished from duties owed to its own client, the opinion giver's duties and standard of care to a third-party opinion recipient are separately defined; nevertheless, in relation to a closing opinion, an opinion giver has a duty of care to the opinion recipient -- the duty to "exercise competence and diligence normally exercised by lawyers in similar circumstances". *See*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51, 52 and 95. *See also*, *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); (non-client may sue an attorney for negligent misrepresentation); Texas Legal Opinions Report, supra note 6, at Part III, Professional Responsibilities and Ethical Considerations (pp 13-33) and Part IV, Standards of Case and Liabilities in Connection with Legal Opinions (pp 33-43); RESTATEMENT (SECOND) OF TORTS, § 552). *See generally*, Jay M. Feinman, *Liability of Lawyers and Accountants to Non-Clients: Negligence and Negligent Misrepresentation*, 67 Rutgers U.L.Rev. 127 (2015).

47 Statement, *supra* note 10, at its footnote 7 (referred to in Section 3). For additional discussions on the role of counsel to the opinion recipient, *see*, Reade H. Ryan, Jr., *Recipient Counsel Responsibilities and Concerns*, 62 BUS. LAW 401 (Feb. 2007); Reade H. Ryan, Jr., *The Role of Lead Counsel in the Syndicated Loan Transaction*, 64 BUS. LAW. 783 (May 2009). *See also, Taylor v. Bell*, 340 P.3d 951 (Wash. App. 2014). In *Taylor*, plaintiff was a party to a stock redemption agreement that involved an Idaho corporation and was governed by Idaho law. Plaintiff was represented by a Washington State law firm, did not retain its own Idaho counsel, and received a closing opinion from Idaho counsel that was counsel to the redeeming entity. Among other things, the engagement letter between plaintiff and it Washington counsel provided, in part, that the Washington law firm

4. General -- Section 4 of the Statement

As overall guidance to the opinion letter, the Statement provides that:

- an opinion is an expression of professional judgment on legal issues and is not a guarantee;[48]
- the bankruptcy and equitable principle limitations are applicable to opinions whether or not they are expressly stated;[49]
- an opinion should warrant the expense and time required to give it;[50]
- professionalism, and not business negotiations, should guide opinion givers and recipient counsel in the opinion process;[51]
- opinion givers (i) should not be expected to give opinions that counsel to the opinion recipient would not give in similar circumstances if it was the opinion giver and it had the requisite competence to give the opinion and (ii) should not decline to give opinions without considering whether a lawyer in similar circumstances would ordinarily give the opinion;[52]
- the opinion recipient may rely on the opinion unless it knows the opinion is incorrect or that reliance is thereon is unreasonable under the circumstances, and it may expect that the opinion giver has exercise opinion diligence in accordance with customary practice;[53] and
- the opinion participants may presume that each of them is acting in good faith with respect to the closing opinion.[54]

5. Facts and Assumptions -- Section 5 of the Statement

An opinion expresses a legal conclusion on specified facts, and an opinion giver typically may not have personal knowledge of all facts necessary to render the opinion.[55] To assist the factual development of an opinion, the opinion giver (i) may rely on factual information (a) provided by a third party, (b) set forth in representations, certifications, or provision of documents, or (c) represented otherwise,[56] or (ii) may rely on factual assumptions expressly stated in the closing opinion (“***stated assumptions***”) or not stated in the closing opinion (“***unstated assumptions***”).[57] Unstated assumptions typically include factual assumptions that apply generally to all transactions or parties; e.g., signatures are genuine, and agreements are enforceable against non-clients, or, in some instances, against all parties.[58] Conducting an inquiry of other lawyers in the opinion giver’s firm or organization, or its records, is not expected unless the opinion giver recognizes that either is reasonably likely to provide information not known by the opinion giver that is needed to give the opinion.[59]

The reliance on such information and on unstated assumptions is limited, however, to whether the opinion preparer knows that they are incorrect or recognizes that reliance thereon, under the circumstances, is unwarranted.[60] Relying on a stated assumption, on the other hand, is not subject to these limitation since expressly stating the assumption places the opinion recipient on notice of the assumption that is used as the basis of the related opinion.[61] Nevertheless, basing an

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would represent it in the transaction and did not exclude areas of Idaho law. The Idaho closing opinion was incorrect in its opinion on compliance with applicable Idaho law, and, as a result, the transaction was unenforceable. Plaintiff brought an action against its Washington counsel, and, at trial court, the action was dismissed in a summary judgment. On appeal, the appellate court dismissed the trial court’s judgment and concluded that the opinion recipient’s counsel was subject to a malpractice claim for failure to discharge its duty to its client in ensuring that the transaction governed by foreign state’s law was enforceable under such law, and further noted that obtaining and solely relying on a related closing opinion (which, among other things, was incorrect and did not permit opinion recipient’s counsel to rely on it) was insufficient to discharge that duty.

48 Statement, *supra* note 10, at Section 4.1.

49 Statement, *supra* note 10, at Section 4.2. It is interesting to note that the Statement does not limit the application of the bankruptcy and equitable principle limitations solely to the remedies opinion, but makes the limitations applicable to all opinions in the closing opinion. Although such application is technically overbroad, it has been noted that “those [bankruptcy and equitable principles] limitations are understood as a matter of customary usage to apply to all opinions that raise the concern to which they are addressed (but no others).” TriBar Report, *supra* note 5, § 1.2(c) at 597-598.

50 Statement, *supra* note 10, at Section 4.3.

51 Statement, *supra* note 10, at Section 4.4.

52 Statement, *supra* note 10, at Section 4.4.

53 Statement, *supra* note 10, at Section 4.5.

54 Statement, *supra* note 10, at Section 4.6.

55 Statement, *supra* note 10, at Section 5.1.

56 Statement, *supra* note 10, at Sections 5.1 and 5.4.

57 Statement, *supra* note 10, at Sections 5.1 and 5.5.

58 Other unstated assumptions referred to in Section 5.5 of the Statement include: “(i) the documents reviewed are accurate, complete and authentic; (ii) copies are identical to the originals; [and (iii)] the parties to the transaction other than the opinion giver’s client (or non-client whose obligations are covered by the opinion) have the power and taken the necessary action to enter into the transaction; ….” The Statement does not purport to set out an exhaustive list of unstated assumptions that are supported by customary practice.

59 Statement, *supra* note 10, Section 5.3.

60 Statement, *supra* note 10, Sections 5.2 and 5.5.

61 Statement, *supra* note 10, Section 5.5.

opinion on a stated assumption is subject to the principle that an opinion giver should not give an opinion that it recognizes will mislead the opinion recipient regarding the matter the opinion addresses.[62] These limitations and restrictions emphasize, in part, the lawyer's responsibility to exercise professional judgment in rendering an opinion.

Information and assumptions upon which an opinion may rely are limited to information and assumptions that are solely factual in nature and scope. An opinion giver should not base an opinion on a representation that is tantamount to a legal conclusion; however, an opinion giver may rely on a legal conclusion in a certificate of an appropriate governmental official.[63] If, for the purpose of the factual development of an opinion, an opinion giver intends to rely on an officer's certificate or other similar certification, or a representation that contains a mixture of factual statements and legal conclusions, the opinion giver should distinguish between the nature of the statements upon which it is relying, or, to the extent possible, it should re-write the certification or representation so that it reflects a factual statement.

Ordinarily, an opinion giver should not be asked to confirm factual matters, as such confirmations do not involve the exercise of professional judgment, and, therefore, are outside the scope of an opinion.[64] However, providing a negative assurance regarding a disclosure document that is given to assist a recipient in establishing a due diligence or similar defense in connection with a securities offering is considered an exception to the application of the limitation on confirming factual matters.[65]

6. Law -- Section 6 of the Statement

When a closing opinion states that an opinion covers the law of a specified jurisdiction or particular law or laws (the "***opinion coverage law***"), the opinion covers no other law or laws (the "***opinion coverage law limitation")***.[66] Where the law covering an opinion in a closing opinion is not intended to cover all opinions in the closing opinion, the preferred practice is either to (i) specify in the opinion the opinion coverage law for that opinion[67] or (ii) in a single expression of opinion coverage law, specify the opinion coverage law applicable to each applicable opinion.[68] The Statement does not address the effect of a closing opinion's failure to express the opinion coverage law.

Even within the opinion coverage law, not all law is covered by the closing opinion: the law covered is "only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion".[69] Even when recognized as applicable, the Statement provides that some laws (for example, tax, securities, insolvency, and municipal and other local laws) are not covered by a closing opinion.[70]

Despite customary practice limitations on covered law, an opinion "may, however, cover law that would

62 Statement, *supra* note 10, Section 5.5 of the Statement, footnote 10; see, also, Statement, *supra* note 10, Section 12.

63 Statement, *supra* note 10, Section 5.4. Regarding an opinion giver's reliance on an opinion of another counsel, see statement, *supra* note *10,* Section 8.2.

64 Statement, *supra* note 10, Section 5.6.

65 Statement, *supra* note 10, Section 5.6. For a substantive discussion regarding negative assurances in securities offerings, see Report of the Subcommittee on Federal Regulation of Securities, ABA Section of Business Law, *Negative Assurance in Securities Offerings (2008 Revision)*, 64 BUS. LAW. 395 (Feb. 2009).

66 Statement, *supra* note 10, Section 6.1.

67 For example, "The Company is a corporation validly existing in good standing under the Delaware General Corporation Law."

68 For example, "The opinions expressed herein are limited as follows: (i) in paragraph 1, are limited to Delaware General Corporation Law; (ii) in paragraphs 2 through 6, are limited to the law of the State of Texas; (iii) in paragraph 7, the UCC as adopted and amended in the State of Delaware; and (iv) in paragraphs 3, 4 and 8, federal law of the United States."

69 Statement, *supra* note 10, at Section 6.2. Some practitioners state their limitation on opinion coverage law as the "law that, *within their experience*, is normally applicable" [emphasis added] to the client and transaction (or phrases of similar import) on the basis that they intend, believe, or understand that such limitation will limit the scope of law covered by their closing opinion to only such law with which the opinion giver is familiar and not include law that more experienced opinion givers in their jurisdiction may recognize as being applicable. Some commentators have noted, however, that such alternative language may inadvertently subject an opinion giver to recognize laws not "reasonably required" to be recognized by lawyers in their jurisdiction, but may require such opinion giver to expand its examination to the experiences of all lawyers in its firm in relation to each transaction covered by its closing opinion; in other words, by altering the commonly-accepted, non-specific "reasonably recognized by lawyers in the jurisdiction" standard to a "recognized in our experience" standard, the laws covered may include the laws recognized by any lawyer in the opinion giver's firm, or, perhaps even more problematic, may result in an uncertainty on what laws are covered by the closing opinion. If opinions on specialized areas of law are required, they should be expressly addressed, rather than inadvertently addressed through a generalized expression.

70 Statement, *supra* note 10, Section 6.2.

not otherwise be covered if the closing opinion does so expressly".[71] Recognizing that it provides "aspects of customary practice", the Statement's preceding guideline illustrates its guideline on varying customary practice by a statement in the closing opinion.[72]

7. Scope **--** Section 7 of the Statement

The Statement addresses the general scope on matters covered by an opinion as follows:

- opinions should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment; and
- a closing opinion covers only those matters it specifically addresses.[73]

In keeping with the guidance that an opinion is an expression of professional judgment on legal matters, opinions should not cover matters that are not within the expertise of lawyers, and, if an opinion depends on matters not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or a stated assumption regarding the matter.[74]

Regarding the relevance of opinions and the qualifications that may accompany them:

- opinion requests should be limited to matters reasonably related to the opinion giver's client or the transaction, in each case, that are subject of the closing opinion; and
- limiting qualifications to those reasonably related to the client, transaction, or opinion given can facilitate the opinion process.[75]

8. Process **--** Section 8 of the Statement

The Statement addresses four (4) aspects of the opinion process:

- application of customary practice to the opinion recipient;[76]
- an opinion of another counsel;[77]
- relationships with client that is the subject of the opinion;[78] and
- client consent and disclosure of information.[79]

The opinion giver may presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving.[80] This presumption complements the opinion giver's compliance with customary practice by permitting it to prepare the closing opinion with the understanding that elements provided by customary practice are read into the closing opinion consistent with the principles of customary practice, without having to make a detailed and lengthy explanation of those matters. Some practitioners may insert in their closing opinion a separate paragraph to the effect that the opinions are governed by customary practice; but whether such a statement is made, customary practices "applies to a closing opinion, whether or not [it] refers to it or the Statement".[81]

To establish a basis for an opinion, an opinion giver may use assumptions (stated and unstated) or rely on statements of another. In transactions involving multi-jurisdictions and the delivery of closing opinions from lawyers on the varying jurisdiction, an opinion giver may choose to rely on opinions expressed in another counsel's opinion as a basis of one of its opinions, rather than relying on an assumption. Stating reliance on another counsel's opinion does not imply concurrence in the substance of that opinion. Further, an opinion giver should not be expected to express concurrence with the opinion of another counsel.[82]

The determination and disclosure of an opinion giver's financial or other special interests with the client ordinarily are not undertaken by an opinion giver in connection with the preparation and delivery of its closing opinion.[83] If the opinion giver recognizes any such relationships exist, it should consider whether that will compromise its professional judgment with respect to the opinions it gives.[84]

The Texas Disciplinary Rules of Professional Conduct (the "***Texas DRPC***") provide, in part, that a lawyer should not undertake an evaluation of a matter affecting a client for the use of someone other than its client unless the client consents, after consultation.[85]

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71 Statement, *supra* note 10, Section 6.2.
72 *See* footnote 13 accompanying Section 6.1 of the Statement; *see also*, of the Statement, *supra* note 10, Section 10.
73 Statement, *supra* note 10, Section 7.1.
74 Statement, *supra* note 10, Section 7.2.
75 Statement, *supra* note 10, Section 7.3.
76 Statement, *supra* note 10, Section 8.1.
77 Statement, *supra* note 10, Section 8.2.
78 Statement, *supra* note 10, Section 8.3.
79 Statement, *supra* note 10, Section 8.4.
80 Statement, *supra* note 10, Section 8.1.
81 Statement, *supra* note 10, Section 2, last sentence.
82 Statement, *supra* note 10, Section 8.2.
83 Statement, *supra* note 10, Section 8.3.
84 Statement, *supra* note 10, Section 8.3.
85 Texas Disciplinary Rules of Professional Conduct, Rule 2.02. Third-party evaluations may be performed at the request of the client or as a requirement of a third-party. Examples of such evaluations that are subject to this rule include an opinion concerning real property title rendered at the behest of a seller for the information of a prospective purchaser or at the behest of a borrower for the information of a prospective lender, evaluations

Requisite "consultation" denotes the communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.[86] The Texas DRPC do not purport to describe all specific means of receiving the requisite consent to perform and to provide the evaluation. In most transactions in which a closing opinion is delivered, the governing document to which the client is a party requires, as a condition to closing the transaction, the delivery of one or more closing opinions by counsel to the client. In these situations, the Statement provides the guidance that if applicable rules of professional conduct require a client's consent to the delivery of a closing opinion, then an opinion giver may infer that consent from a provision in an agreement requiring such delivery or from other circumstances.[87]

Regarding the disclosure of information in connection with the delivery of a closing opinion, the opinion giver is restricted from disclosing information that it knows the client would not want to be disclosed or as to which it is subject to a duty of non-disclosure under applicable rules of professional conduct.[88]

9. <u>Date -- Section 9 of the Statement</u>

Regarding the date specified, and as specified, in a closing opinion, a closing opinion speaks as of its date, and the opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.[89]

10. <u>Varying Application of Customary Practice -- Section 10 of the Statement</u>

The application of customary practice to a closing opinion benefits the opinion giver, opinion recipient, and counsel to the opinion recipient by providing guidance to each of them on the understood meaning of opinion phraseology and the expected opinion diligence, without requiring the need to state each of those understandings; and, accordingly, opinion participants commonly assume that customary practice has been applied to, and governs, the closing opinion that is delivered in the transaction. Nevertheless, the application of customary practice to a closing opinion may be varied, as long as such variance is accomplished by either a statement in the closing opinion or an understanding with the opinion recipient or its counsel.[90]

11. <u>Reliance -- Section 11 of the Statement</u>

Only an addressee of a closing opinion, and a person expressly authorized to rely on a closing opinion may rely on a closing opinion.[91] In its "Introduction", the Statement separately notes that references in the Statement to the term "opinion recipient" means "the addressee of a closing opinion and any other person the opinion giver expressly authorizes to rely on the closing opinion".[92]

12. <u>No Opinion that will Mislead Recipient -- Section 12 of the Statement</u>

The preparation of a closing opinion requires adherence to requisite diligence procedures, a recognition of relevant legal and factual issues, the competent application of law to those issues, and the careful drafting of the closing opinion, including the selection and use of related qualifications. However, a technically correct closing opinion may contain an opinion that misleads if it will cause the opinion recipient, under the circumstances, to misevaluate the opinion.

Regarding the prospect of a misleading opinion, the Statement provides:

> "An opinion giver should not give an opinion that the opinion preparers recognize will

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required by a governmental agency in connection with an offering of securities, and evaluations required by a purchaser of a business. See Comment 1 to Rule 2.02.

86 Texas Disciplinary Rules of Professional Conduct, "Terminology "section.

87 Statement, *supra* note 10, Section 8.4. The phrase "or from other circumstances" affords the opinion giver greater flexibility in satisfying a consent requirement. Further, comment 1 to Rule 2.3 of the ABA Rules of Professional Conduct, which rule is substantially the same as Rule 2.02 of the Texas DRPC, more generally states "[A]n evaluation may be performed at the client's direction or when *impliedly authorized* in order to carry out the representation". [Emphasis added]

88 Statement, *supra* note 10, Section 8.4. See also, Texas Disciplinary Rules of Professional Conduct, Rule 1.05 (Confidentiality of Information).

89 Statement, *supra* note 10, Section 9. *But cf., Santo Nostrad, LLC v. Cozzen O'Connor*, Index No. 602415/08 (N.Y.Sup.Ct. July 14, 2009)(2009 NY Slip Op 33260(U)); (where opinion giver of third-party closing opinion failed to check for recorded pending changes in zoning laws and such pending laws were of record on date of closing opinion, a malpractice claim (negligence) for failure of duty of care was sustainable against third-party opinion giver, and "… [d]efendant's reliance on disclaimers" [language in retainer agreement and in closing opinion] … is insufficient to defeat the malpractice claim").

90 Statement, *supra* note 10, Section 10.

91 Statement, *supra* note 10, Section 11. The Statement further states, in a footnote accompanying its Section 11, that this "section does not address whether anyone else might be permitted to rely as a matter of law".

92 Statement, *supra* note 10, at its footnote 3.

> mislead the opinion recipient with regard to a matter the opinion addresses."[93]

This guidance focuses on an "opinion preparer" -- and not the opinion giver -- as the person who is responsible for recognizing whether an opinion may be misleading, and restricts that focus to whether an opinion is misleading "with respect to a matter the opinion addresses". If an opinion is so recognized as misleading, the risk of misleading can be mitigated by an appropriate disclosure in the closing opinion, whether through an express exception, qualification, assumption, exclusion, limitation, or otherwise.[94]

V. CROSS-BORDER TRANSACTIONS

In cross-border transactions (i.e., a transactions involving U.S. and non-U.S. parties and affected by the laws of more than one country or sovereign state), closing opinions prepared by U.S. counsel, in accordance with customary practice, are addressed and delivered to foreign opinion recipients who are more familiar with the opinion practice of counsel from their own jurisdiction. In circumstances where a foreign opinion recipient is not represented by U.S. counsel and neither it nor its counsel is familiar with customary practice, misunderstandings might occur because customary practice, and not the recipient's reading and interpretation, governs the meaning of essential terms used in the opinion and the expected and understood diligence. Recognizing that such misunderstanding may occur and attempting to mitigate the related risk, the excellent bar report, "*Cross-Border Closing Opinions of U.S. Counsel*"[95] suggests use of the following paragraph in such closing opinion:[96]

> "This opinion letter shall be interpreted in accordance with the Legal Opinion Principles prepared by the Legal Opinion Committee of the American Bar Association's Business Law Section as published in 53 BUS. LAW. 831 (1998) [, a copy of which is attached to this opinion letter]".[97]

Alternatively, the Cross-Border Opinion Report provides the following language:[98]

> 'Instead of incorporating the ABA Principles expressly in their opinion letters, some U.S.. lawyers refer to U.S. customary practice generally using language such as the following:
>
> > This opinion letter shall be interpreted in accordance with the customary practice of United States lawyers[99] who regularly give, and lawyers who regularly advise, recipients regarding opinions of the kind included in this opinion letter."

In any event, The Cross-Border Opinion Report provides that (i) customary practice governs the preparation and interpretation of U.S. closing opinions in cross-border transactions, whether or not it contains such a statement, unless, and, to the extent, it otherwise states, and (ii) it is not the role of opinion giver U.S.

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93 Statement, *supra* note 10, Section 12.

94 Statement, *supra* note 10, note 15.

95 Subcommittee on Cross-Border Legal Opinions of the Legal Opinions Committee, ABA Business Law Section, *Cross-Border Closing Opinions of U.S. Counsel*, 71 BUS. LAW. 139 (Winter 2015-2016) (herein, "***Cross-Border Opinion Report***"). The Cross-Border Opinion Report is the initial attempt of U.S. bar representatives to address cross-border opinion matters, and the scope, insights, and substance of that report --- which go far, far beyond customary practice considerations -- comprise an invaluable source of information and guidance on this emerging topic.

96 Cross Border Opinion Report, *supra* note 95, at 146.

97 Since the publication of the Cross Border Opinion Report, the Statement has been prepared to replace, among other customary practice source, the Legal Opinion Principles, and, it is the presenter's expectation that the suggested paragraph will replace the phrase "Legal Opinion Principles" with the phrase "Statement of Opinion Practices", and the Business Lawyer reference cite will be replaced with [___] BUS. LAW. [____] 20[__]". Also, the original language refers to the possibility of attaching a copy of the Legal Opinion Principles. If an attachment with respect to the Statement is made, consider whether to attach the Statement or the Core Principles, the latter consisting of most but not all of the guidance principles of the Statement.

98 Cross Border Opinion Report, *supra* note 95, at 146.

99 As with the Statement, this alternative language employs the concept of a national basis of customary practice: "… customary practice of United States lawyers". The Explanatory Note to the Statement (see Appendix C hereto) provides, in part, that the Statement "could be endorsed by a broad range of bar groups and others to establish a national basis for the preparation and understanding of third -party legal opinion letters,….". On the other hand, some state bar groups refer to customary practice as the customary practice of its state (see, e.g., the Florida Report, and excerpted portion therefrom *supra* note 42). As a result, the reference to "customary practice of United States lawyers" might be replaced by some practitioners with the reference, "customary practice pf lawyers of the Subject State/Jurisdiction".

counsel to advise the opinion recipient, or its counsel, on customary practice.[100]

[100] Cross Border Opinion Report, *supra* note 95, at 146. *Cf.* Statement, *supra* note 10, at Section 8.1.

APPENDIX A

[This document has been approved by the Joint Committee on Statement of Opinion Practices on May 29, 2018 for submission to its sponsoring organizations, the Board of the Working Group on Legal Opinions Foundation and the Legal Opinions Committee of the Business Law Section of the American Bar Association, for their approval]

STATEMENT OF OPINION PRACTICES[1]

1 INTRODUCTION

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

This Statement of Opinion Practices (this "*Statement*") provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions. [4]

2 CUSTOMARY PRACTICE

Closing opinions and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regular-

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

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

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

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

ly give those opinions and lawyers who regularly review them for opinion recipients.[5] The phrase "customary practice" refers principally to the work lawyers are expected to perform to give opinions ("customary diligence") and the way certain words and phrases commonly used in closing opinions are understood ("customary usage"). Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.[6]

3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

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

4 GENERAL

4.1 Expression of Professional Judgment

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

4.2 Bankruptcy Exception and Equitable Principles Limitation

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

4.3 Cost and Benefit

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

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar

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

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

[7] These include the duties opinion givers have to their own clients. Counsel to opinion recipients also have duties to their clients, including duties relating to closing opinions.

circumstances if that counsel were the opinion giver and had the requisite competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion.[8]

4.6 Good Faith

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

5 FACTS AND ASSUMPTIONS

5.1 Reliance on Factual Information and Use of Assumptions

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

5.2 Reliance on Facts Provided by Others

An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm's records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasona-

[8] *See* the *Customary Practice Statement. See also infra* Section 10 *Varying Customary Practice.*

bly likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.[9]

5.4 Reliance on Representations That Are Legal Conclusions

An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed.[10] Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

5.6 Limited Factual Confirmations and Negative Assurance[11]

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion prepar-

[9] References in this *Statement* to a law firm also apply to a law department of an organization.

[10] Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (*No Opinion That Will Mislead Recipient*). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.

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

ers.[12] A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. This limitation does not apply to negative assurance regarding disclosures in a prospectus or other disclosure document given to assist a recipient in establishing a due diligence defense or similar defense in connection with a securities offering.

6 LAW

6.1 Covered Law

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

6.2 Applicable Law

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

7 SCOPE

7.1 Matters Addressed

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

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a

[12] A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings against the client.

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

matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

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

8 PROCESS

8.1 Opinion Recipient and Customary Practice

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

8.2 Other Counsel's Opinion

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

8.3 Financial Interest in or Other Relationship with Client

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

8.4 Client Consent and Disclosure of Information

If applicable rules of professional conduct require a client's consent to the delivery of a closing opinion, an opinion giver may infer that consent from a provision in the agreement making delivery a condition to closing or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers know the client would not want to be disclosed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

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

10 VARYING APPLICATION OF CUSTOMARY PRACTICE

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

11 RELIANCE

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

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.[15]

[14] This section does not address whether anyone else might be permitted to rely as a matter of law. *See also supra* note 3.

[15] An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to misevaluate the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Customary Practice*). Omissions from a closing opinion of information unrelated to the opinions given do not mislead.

APPENDIX B

[This document has been approved by the Joint Committee on Statement of Opinion Practices on May 29, 2018 for submission to its sponsoring organizations, the Board of the Working Group on Legal Opinions Foundation and the Legal Opinions Committee of the Business Law Section of the American Bar Association, for their approval]

CORE OPINION PRINCIPLES

The following *Core Opinion Principles* are drawn from the *Statement of Opinion Practices,* ___ BUS. LAW. ___ ( ) (the "*Statement*"), and are intended to have the same meaning as the provisions of the *Statement* from which they are drawn. The *Statement*, which has been approved by the bar associations and other lawyer groups identified in Schedule I to the *Statement*, provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions. In doing so, it amplifies the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008). The *Core Opinion Principles* are designed for use by opinion givers (both law firms and law departments of organizations) who wish to incorporate or attach to their opinion letters a more concise statement of some of the opinion principles included in the *Statement*.

CORE OPINION PRINCIPLES

1. General

1.1 *Customary Practice.* Third-party legal opinion letters given at the closing of a business transaction ("closing opinions," and the opinions included in them, "opinions") by counsel for one party (the "opinion giver") to another party (the "opinion recipient," which term includes any other person the opinion giver expressly authorizes to rely on the closing opinion) are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion recipients. The phrase "customary practice" refers principally to the work lawyers are expected to perform to give opinions and the way certain words and phrases commonly used in closing opinions are understood.

1.2 *Varying Application of Customary Practice.* The application of customary practice to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

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

1.4 *Reliance by Recipients.* An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion (unless varied as provided in §1.2).

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

1.6 *Opinion Recipient and Customary Practice.* An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

1.7 *Only Matters Specifically Addressed.* A closing opinion covers only those matters it specifically addresses.

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

2. Facts and Assumptions

2.1 *Reliance on Factual Information and Use of Assumptions.* Because the lawyers preparing a closing opinion (the "opinion preparers") typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

2.2 *Reliance on Facts Provided by Others.* An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

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

2.4 *Reliance on Representations That Are Legal Conclusions.* An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

2.5 *Factual Assumptions.* Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

3. Law

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

3.2 *Applicable Law.* An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly.

4. Miscellaneous

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

4.2 *Reliance.* A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.

APPENDIX C

Explanatory Note

The Legal Opinions Committee of the American Bar Association's Business Law Section and the Working Group on Legal Opinions Foundation, through a Joint Committee of bar group representatives and other opinion practitioners, have worked for several years on a project to formulate a Statement of Opinion Practices. The project builds upon the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions[1] by preparing a document that could be endorsed by a broad range of bar groups and others in order to establish a national basis for the preparation and understanding of third-party legal opinion letters, or "closing opinions." The attached Statement of Opinion Practices has been approved by the two sponsoring organizations and by the other bar groups identified at the end of the Statement.

Accompanying the Statement and drawn from it is a statement called the Core Opinion Principles, which is designed for use by those who want a document they can incorporate by reference or attach to a closing opinion. A separate introductory note accompanies the Core Opinion Principles.

The Statement (and the provisions of the Core Opinion Principles drawn from it) is derived principally from the Legal Opinion Principles[2] and the Guidelines for the Preparation of Closing Opinions.[3] As indicated in note 4 of the Statement, the Statement updates the Principles in their entirety and selected provisions of the Guidelines. As an aid to understanding the source of the provisions of the Statement derived from the Principles and Guidelines (and those provisions of the Guidelines that are not addressed by the Statement), attached is a table of sources. The provisions of the Guidelines updated by the Statement are as follows:

- §1.1 explaining the purpose of closing opinions is reflected in §1 of the Statement (Introduction).
- §1.2 dealing with opinion coverage is reflected in §7.1 (Matters Addressed) and §4.3 (Cost and Benefit) of the Statement.
- §1.3 dealing with relevance of opinions requested and correspondingly of assumptions, exceptions and qualifications included is reflected in §7.3 of the Statement (Relevance).

[1] 63 Bus. Law. 1277 (Aug. 2008).
[2] 53 Bus. Law. 831 (May 1998).
[3] 57 Bus. Law. 875 (Feb. 2002).

- §1.4 dealing with matters beyond the professional competence of lawyers is dealt with in §7.2 of the Statement (Matters Beyond the Expertise of Lawyers).
- §1.5 on avoiding opinions that will mislead a recipient is reflected in §12 of the Statement (No Opinion That Will Mislead Recipient).
- The first two sentences of §1.7 dealing with recipient's presumed familiarity with customary practice and reliance by recipients and others are reflected, respectively, in §8.1 (Opinion Recipient and Customary Practice) and §11 (Reliance) of the Statement.
- §2.2 on use of other counsel's opinion is reflected in §8.2 of the Statement (Other Counsel's Opinion).
- §2.3 addressing treatment of financial interests in or other relationships with the client appears as part of §8.3 of the Statement (Financial Interest in or Other Relationship with Client).
- §2.4 regarding ethics considerations is included in §8.4 of the Statement (Client Consent and Disclosure of Information).
- §3.1 appears as §4.4 of the Statement (Golden Rule).
- §§4.4 and 4.5 dealing with limitations on factual confirmations and negative assurance are addressed in §5.6 of the Statement (Limited Factual Confirmations and Negative Assurance).
- Note 18 recognizing the bankruptcy exception is reflected in §4.2 of the Statement (Bankruptcy Exception and Equitable Principles Limitation).

The Joint Committee expects to continue its efforts and evaluate whether the Statement should be expanded to cover other provisions of the Guidelines and additional opinion matters.

APPENDIX D

Statement Text		Source Text	
§	Caption	Principles §	Guidelines §
1	Introduction	I.A.	1.1
2	Customary Practice	I.B.	
3	Legal Obligations and Rules of Professional Conduct		
4	General		
4.1	Expression of Professional Judgment	I.D.	
4.2	Bankruptcy Exception and Equitable Principles Limitation		Fn. 18
4.3	Cost and Benefit		1.2 (2d sent.)
4.4	Golden Rule		3.1
4.5	Reliance by Recipients	I.E.	
4.6	Good Faith	I.F.	
5	Facts and Assumptions		
5.1	Reliance on Factual Information and Use of Assumptions	III.A. (first 2 sent.)	
5.2	Reliance on Facts Provided by Third Parties	III.A. (last sent.)	
5.3	Scope of Inquiry	III.B.	
5.4	Opinions Should Not Be Based on Representations of Law	III.C.	
5.5	Factual Assumptions	III.D.	
5.6	Limited Factual Confirmations and Negative Assurance		4.4, 4.5

Statement Text		Source Text	
§	Caption	Principles §	Guidelines §
6	Law		
6.1	Covered Jurisdiction	II.A.	
6.2	Applicable Law	II.B., II.C., II.D.	
7	Scope		
7.1	Matters Addressed		1.2 (1st sent.)
7.2	Matters Beyond the Expertise of Lawyers		1.4
7.3	Relevance		1.3
8	Process		
8.1	Opinion Recipient and Customary Practice		1.7 (1st sent.)
8.2	Other Counsel's Opinion		2.2
8.3	Financial Interest in or Other Relationship with Client		2.3
8.4	Client Consent and Disclosure of Information		2.4
9	Date	IV	
10	Varying Customary Practice	I.C.	
11	Reliance		1.7 (2d sent.)
12	No Opinions That Will Mislead Recipient		1.5

MATTERS FROM GUIDELINES NOT ADDRESSED IN STATEMENT OF OPINION PRACTICES

§ 1.6 Market" Opinions
§1.7 Reliance (third sentence only)
§ 2.1 Opinion Request and Response
§ 3.2 Materiality
§ 3.3 Presumption of Regularity
§ 3.4 Use of the Phrase "To Our Knowledge"
§ 3.5 Explained Opinions; "Would/Should"
§ 4.1 Foreign Qualification and Good Standing
§ 4.2 Outstanding Equity Securities
§ 4.3 Comprehensive Legal or Contractual Compliance
§ 4.6 Fraudulent Transfer
§ 4.7 Litigation Evaluation
§ 4.8 Matters of Public Policy
§ 4.9 When Law Covered by Opinion and Law Selected to Govern Agreement are Different