Working Group on Legal Opinions—Fall 2018 Meeting

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The fall meeting of the Working Group on Legal Opinions Foundation (a group of opinion givers, opinion recipients, and opinion gurus from both coasts and a bit from the middle of the country) met in New York City on October 29 and 30, 2018. The seminar theme was "*Reflections on the 1998 Reports and Their Progeny.*" As most involved in issuing and receiving legal opinions for business transactions know, 1998 marked the publication of a number of seminal papers regarding third-party opinions, including:

- The 1998 Report of the TriBar Opinion Committee, *Third-Party "Closing" Opinions*,
- The Restatement (Third) of the Law Governing Lawyers, the ABA Legal Opinion Principles, and
- The ABA/ACREL Inclusive Real Estate Secured Transaction Opinion Report,

(collectively, the "1998 Reports"). Central to each of the 1998 Reports was the notion that the negotiation, preparation and interpretation of third-party opinions should be governed by principles of "customary practice" and that "customary practice" could serve as the foundation for building a national consensus among the many constituencies in the third-party opinion arena. Many of the 1998 Reports have been amended and added to, including adding reports regarding third-party legal opinions for limited liability companies, partnerships, no registration opinions, cross-border opinions, UCC security interest opinions, and a large number of other national and state opinions which are available at the ABA's Legal Opinion Resource Center (www.americanbar.org/groups/business_law/migrated/tribar/).

A debate started before the 1998 Reports and continuing today is the effect of customary practice on drafting opinions. Where assumptions, exclusions, and exceptions are "customary," do they have to be stated within the opinion itself or can these be incorporated into the opinion simply by a reference to "customary practice." Notwithstanding the effort of the Boston Bar Association's 2005 report suggesting that incorporation by reference is sufficient, even Boston practitioners include more expansive legal opinions. [For an extensive article on legal opinions and in addition to the Legal Opinion Resource Center, see *The Anatomy of a Legal Opinion* at https://ssrn.com/abstract=2261767.]

Two potentially significant steps were discussed in connection with third party legal opinions.

Statement of Opinion Practices Approved

The ABA Legal Opinions Committee and the WGLO Board approved the "*Statement of Opinion Practices*" and related "*Core Opinion Principles*". (This project commenced in October 2010.) The Colorado Bar Association Business Law Section's and the Real Estate Law Section's Executive Councils are among the many bar groups that have approved the Statement

of Opinion Practices for consideration by their members when giving or receiving third-party opinions.

The ABA Legal Opinions Committee and the WGLO Board also approved a "core opinion principles" which are drawn from and a summary of the *Statement of Opinion Practices*. A three-page summary of a seven-page document does not seem necessary.

The Statement of Opinion Practices along with the Core Opinion Principles and explanatory material and a list of the adopting groups (including the Colorado Bar Association's Business Law Section and Real Estate Section), has been posted on the ABA's Legal Opinion Resource under the tab "Multi-Bar Group Reports," and can be accessed at the following link: https://www.americanbar.org/groups/business_law/migrated/tribar/. A copy of the Statement of Opinion Practices is included at the end of this newsletter.

Forum Selection Clauses and Clauses Extending Statutes of Limitations.

Forum selection clauses always give pause to opinion givers when asked for an "enforceability opinion." Employer clients frequently try to avoid California law which is known to be favorable to employees, especially in the area of covenants not to compete. In *Oxford Global Resources, LLC v. Hernandez*, 106 N.E.3d 556 (Sept. 7, 2018) the Massachusetts Supreme Judicial Court held that Massachusetts courts could apply the doctrine of *forum non conveniens* to negate the parties' choice of Massachusetts courts as the exclusive forum for adjudicating their disputes. The Massachusetts trial court had previously dismissed an action to enforce a non-compete covenant against a California employee so that the dispute could be adjudicated in California, and the Massachusetts Supreme Court affirmed.

In *Quanta Computer In. v. Japan Communications Inc.*, 230 Cal. Rptr. 3d 438 (2018), the California Court of Appeals affirmed a trial court's dismissal of an action brought by a Taiwanese company alleging breach of contract by a Japanese entity, notwithstanding the parties' agreement that any dispute between the parties be resolved under California law in California courts. In a decision with a contrary result, the Ninth Circuit affirmed a dismissal of a diversity action that had been filed in Washington federal district court based on an agreement which had a forum selection clause requiring that any disputes related to the parties' agreements be adjudicated in a California state court.

The conclusion of these (and other) cases is that opinion givers should consider excluding mandatory forum selection clauses from coverage of enforceability opinions.

In an October 2018 decision by the New York Court of Appeals (*Deutsche Bank National Trust Co. v. Flagstar Capital Markets Corp.*, 2018 WL 49767774 (Oct. 16, 2018), the New York court considered whether the parties to a contract governed by New York law could agree to defer the commencement of the running of New York's six-year statute of limitations from the date of a breach of a representation and warranty to the date the breach was discovered. The court held that the parties could not do so under New York law and, therefore, the effort to extend the statute of limitations was unenforceable. Where contracts attempt to have a private agreement for a statute of limitations, opinion givers should review it carefully.

Legal Opinions Delivered in Resale Transactions

The Securities Law Opinions Subcommittee of the ABA Business Law Section's Federal Regulation of Securities Committee is circulating a draft report addressing issues on legal opinions delivered when a holder of restricted stock attempts to sell restricted securities in a private-to-private transaction. The Report includes an extensive discussion of the so-called Section 4(1½) exemption, the important assumptions that should be considered, and the legal analysis required.

As noted in the draft, the SEC has declined to issue any guidelines for the use of the Section 4(1½) exemption since several no-action letters issued by the Division of Corporation Finance prior to the adoption of Rule 144 in 1972. As noted in the draft, judicial opinions and administrative decisions discussing private-to-private resales of restricted securities are infrequent and contradictory in their legal analysis.

When finalized, this report will provide valuable insight into this complicated subject.

Foreign Investment Risk Review Modernization Act of 2018

The other significant issue raised at the WGLO meeting was the impact of the new (October 10, 2018) rules mandating preclearance with CFIUS (Committee on Foreign Investment in the US) of investments by foreign investors in, among other things, certain US real estate considered to be near "sensitive government property," many tech and life sciences companies, as well as other companies with foundational or emerging technologies. These new rules are a result of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) which expanded the authority of CFIUS. CFIUS issued rules which apply to non-controlling investments and to company's whose business does not implicate national security. Foreign investors could include not only foreign private equity funds but also domestic funds depending on the "say" foreign limited partners have over investments by a fund.

While arguments could be made that opinion letters opining on the enforceability of agreements do not cover compliance with the preclearance rules either as a result of customary practice or as a result of some standard exceptions already included in many opinion letters, in light of uncertainty over the need for any particular private equity investment to be precleared with CFIUS, the consensus of the WGLO was that pending further guidance from CFIUS firms should include a standard exception in their model opinion letters for compliance with the preclearance rules.

Conclusion

The world of opinion letters remains interesting.

[As approved by the Legal Opinions Committee of the Business Law Section of the American Bar Association on September 14, 2018 and the Board of the Working Group on Legal Opinions Foundation on October 29, 2018, and distributed to other bar groups and interested parties for 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 regularly 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

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[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*.

[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].

("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.

4.1 Bankruptcy Exception and Equitable Principles Limitation

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

4.2 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.

4.3 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.4 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.[8]

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[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.

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

4.5 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.

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 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.[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

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

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 preparers.[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.

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[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.

[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)*.

7.2 Matters Beyond the Expertise of Lawyers

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