

Explanatory Note to Statement of Opinion Practices

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 sponsored 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 Opinions¹ 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." That effort has resulted in the attached Statement of Opinion Practices, which has been approved by the two sponsoring organizations and by the bar and other groups identified at the end of the Statement.

Accompanying the Statement and drawn from it is a document called the Core Opinion Principles, which is designed for use by those who want a separate 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 Principles² 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), set forth below 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).

* * * * *

**STATEMENT OF OPINION PRACTICES -
SOURCES FROM PRINCIPLES AND GUIDELINES**

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 (2 ^d 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 (1 st 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 (1 st 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 (2 ^d 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