

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

STATEMENT ON ABA PRINCIPLES AND GUIDELINES

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

April 20, 2009

The Legal Opinions Committee of the Business Law Section of the State Bar of Texas (the “Committee”) and the Business Law Section of the State Bar of Texas recently approved the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* (the “Customary Practice Statement”).¹ As part of the Committee’s continuing efforts to clarify customary legal opinion practice in Texas,² the Committee has now approved the *Legal Opinions Principles* (the “Principles”)³ and the *Guidelines for the Preparation of Closing Opinions* (the “Guidelines”),⁴ each published by the Committee on Legal Opinions of the Business Law Section of the American Bar Association.⁵ For ease of reference,

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

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

³ The Committee on Legal Opinions of the Business Law Section of the American Bar Association, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). A copy of the *Principles* is included in Annex II hereto.

⁴ The Committee on Legal Opinions of the Business Law Section of the American Bar Association, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002). A copy of the *Guidelines* is included in Annex II hereto.

⁵ In 1991, the Section of Business Law of the American Bar Association published its *Third-Party Legal Opinion Report*, which included the *Legal Opinion Accord* (the “Accord”). Section of Business Law, American Bar Association, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 BUS. LAW. 167 (1991) (herein referred to as the “1991 ABA Report”). The 1991 ABA Report concluded with Certain Guidelines for the Negotiation and Preparation of Closing Opinions (the “1991 Guidelines”). 1991 ABA Report at 224. In the original *Texas Legal Opinion Report*, the Committee adopted the 1991 ABA Report (including the 1991 Guidelines and the Accord) as part of the *Texas Legal Opinion Report*. *Texas Legal Opinion Report* at 3. The *Guidelines*, which were

the *Customary Practice Statement* and the *Principles* and *Guidelines* are set out in full in the Appendices attached hereto.

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

1. The *Principles* and *Guidelines* are in all respects subject to, and should be understood and applied consistently with, the professional responsibilities and ethical obligations of Texas attorneys, including rules regarding client confidentiality.⁶

2. With respect to *Guideline 1.7*, permission for an assignee or other party to rely on a legal opinion should not be understood to constitute an agreement or acknowledgement that the assignee has, in fact, justifiably relied on the opinion.⁷

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

4. To the extent that *Principle III.B.* and footnote 16 to *Guideline 4.4* address "confirmations" regarding an opinion giver's knowledge of legal proceedings to which the opinion giver's client is a party, the appropriateness of delivering such "confirmations" has been coming under increasing scrutiny and, if given by Texas attorneys, such confirmations frequently are expressed and accepted with a careful narrowing in scope, including a "to our knowledge" qualification as described in the second sentence of paragraph 3 above. Furthermore, in giving such "confirmations", an opinion giver in Texas is not expected to review court or other public records or his or her firm's own files, including its litigation docket (or analogous record), unless an express agreement is reached between the opinion giver and the opinion recipient to do so and the legal opinion expressly states that the opinion giver has conducted such a review.⁸

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

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

published by the ABA in 2002, replaced the 1991 *Guidelines* and reflected developments in customary practice in the decade since 1991; the *Guidelines* were intended to complement, and are to be read and applied with, the *Principles* for closing opinions that do not adopt the *Accord*. 57 BUS. LAW. at 875.

⁶ Cf. *Texas Legal Opinion Report*, Part III. (discussing professional responsibilities and ethical considerations). See generally Charles E. McCallum and Bruce R. Young, *Ethics Issues in Opinion Practice*, 62 BUS. LAW. 417 (2007).

⁷ See, e.g., RESTATEMENT (SECOND) OF TORTS § 552 (1977).

⁸ To the extent that the *Texas Legal Opinion Report* (at pages 98-99 and footnote 281) may be read to require that an opinion giver conduct a review of his or her firm's litigation docket (or analogous record), the Committee is of the view that customary practice has evolved since the date of that *Report* such that the text to which this footnote is appended reflects current customary practice in Texas.

7. *Principle I.E.* does not override the obligations that an attorney representing an opinion recipient may have to his or her own client with respect to the review and evaluation of a third-party legal opinion.⁹ Further, an opinion recipient may not rely on an opinion if the recipient or its counsel has knowledge that the opinion is incorrect or if the recipient's reliance is otherwise unreasonable under the circumstances.¹⁰

⁹ See, e.g., Reade H. Ryan, Jr., *Recipient Counsel Responsibilities and Concerns*, 62 BUS. LAW. 401 (2007).

¹⁰ See TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591, 604 (1998). See also *McCamish v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999); RESTATEMENT (SECOND) OF TORTS § 552 (1977).

ANNEX I TO SUPPLEMENT NO. 4

STATEMENT ON THE ROLE OF CUSTOMARY PRACTICE IN THE PREPARATION AND UNDERSTANDING OF THIRD-PARTY LEGAL OPINIONS

At the closing of many business transactions, the lawyers for one party deliver to the other party a legal opinion letter covering matters the recipient has asked those lawyers to address. These opinion letters, also commonly known as closing or third-party legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give them and review them for clients.

Customary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.
2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.

By providing content to abbreviated opinion language, customary practice permits the omission from an opinion letter of descriptions of the procedures that the opinion giver has performed and of many definitions, assumptions, limitations, and exceptions. Thus, it reduces the number of words needed to communicate complex thoughts. As a matter of customary practice, the explicit inclusion in an opinion letter of some but not all of these matters does not exclude others customarily understood to apply. A departure from customary practice is not implied and should not be inferred unless the departure is clear in the opinion letter.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of the Law Governing Lawyers*¹ states:

In giving "closing" opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.

¹ The references to the *Restatement* in this statement are to Sections 51, 52, and 95 of the *Restatement*. The references also include the following Comments, Illustrations, and Notes to those sections: Section 51, Comment *e*; Section 52, Comment *b*, Comment *e*, Illustration 2; and Section 95, Reporter's *Note* to Comment *b*, Reporter's *Note* to Comment *c*. The *Restatement* sometimes refers to "custom and practice." The *Restatement* uses the phrases "custom and practice" and "customary practice" to mean the same thing.

The *Restatement* also refers to customary practice as an element in determining the “meaning of the opinion letter.”

The *Restatement* identifies customary practice as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. Under the *Restatement* the “professional community whose practices and standards are relevant” in making that determination is that of “lawyers undertaking similar matters.” That professional community may vary based on, among other things, the subject of the opinion and the relevant jurisdiction.

The *Restatement* treats bar association reports on opinion practice as valuable sources of guidance on customary practice. Customary practice evolves to reflect changes in law and practice.

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

* * * * *

This Statement is approved by the following bar and lawyer groups:

- Legal Opinions Committee of the Section of Business Law of the American Bar Association
- Legal Opinions in Real Estate Transactions Committee of the Real Property, Trust and Estate Law Section of the American Bar Association
- American College of Commercial Finance Lawyers
- American College of Mortgage Attorneys
- Attorneys Opinions Committee of the American College of Real Estate Lawyers
- Business and Finance Section of the Atlanta Bar Association
- Business Law Section of the Boston Bar Association
- Business Law Section of the California State Bar
- Commercial Law Section of the Delaware State Bar Association
- Real & Personal Property Section of the Delaware State Bar Association
- Corporate Law Committee of The Bar Association of the District of Columbia
- Business Law Section of The Florida Bar
- Real Property, Probate and Trust Law Section of The Florida Bar

- Real Property and Financial Services Section of the Hawaii State Bar Association
- Business Law Section of the Maryland State Bar Association
- Real Property Section of the Maryland State Bar Association
- State Bar of Michigan Business Law Section
- TriBar Opinion Committee (consisting of members of (i) the Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) the Corporation Law Committee, The Association of the Bar of the City of New York, (iii) the Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association, and (iv) other state and local bar associations)
 - Business Law Section of the North Carolina Bar Association
 - Corporation Law Committee of the Ohio State Bar Association
 - Business Law Section of the Oregon State Bar
 - Business Law Section of the Pennsylvania Bar Association
 - Business Law Section of the Philadelphia Bar Association
 - Corporate, Banking and Securities Law Section of the South Carolina Bar
 - Business Law Section of the State Bar of Texas
 - Real Estate, Probate and Trust Law Section of the State Bar of Texas
 - Business Law Section of the Washington State Bar Association
 - Business Law Section of the State Bar of Wisconsin

ANNEX II TO SUPPLEMENT NO. 4

GUIDELINES FOR THE PREPARATION OF CLOSING OPINIONS

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

The Section of Business Law of the American Bar Association has adopted the following *Guidelines* for preparing legal opinions delivered at the closing of a business transaction by counsel for one party to another party (or parties) ("closing opinions").¹ These *Guidelines* replace the *Guidelines* included in the Section's 1991 *Third-Party Legal Opinion Report*² and reflect developments in customary practice in the decade since 1991.³ These *Guidelines* complement and are intended to be read and applied with the Section's *Legal Opinion Principles*⁴ adopted in 1998 for closing opinions that do not adopt the *Legal Opinion Accord* included in the Section's 1991 *Report*.⁵ Like the *Legal Opinion Principles*, these *Guidelines* provide guidance⁶ regarding closing opinions whether or not referred to in an opinion letter.

1. PURPOSE, SCOPE, AND RELIANCE

1.1 Purpose

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

1.2 Coverage

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver.

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

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

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

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

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

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

The benefit of an opinion to the recipient should warrant the time and expense required to prepare it.⁷

1.3 Relevance

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

1.4 Professional Competence

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

1.5 Misleading Opinions

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

1.6 “Market” Opinions

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

1.7 Reliance

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

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

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

2. PROCESS

2.1 Opinion Request and Response

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

2.2 Other Counsel's Opinion

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

2.3 Financial Interest in or Other Relationship with Client

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

2.4 Client Consent and Confidential Information

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

3. CONTENT

3.1 Golden Rule

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

3.2 Materiality

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

3.3 Presumption of Regularity

An opinion giver may rely upon the presumption of regularity⁹ for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book, that are not verifiable from the client's records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.¹⁰

3.4 Use of the Phrase "To our Knowledge"

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

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

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

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

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

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

3.5 Explained Opinions; “Would/Should”

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

4. SPECIFIC OPINIONS

4.1 Foreign Qualification and Good Standing

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

4.2 Outstanding Equity Securities

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

4.3 Comprehensive Legal or Contractual Compliance

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

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

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

4.4 Lack of Knowledge of Particular Factual Matters

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

4.5 Negative Assurance

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

4.6 Fraudulent Transfer

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

4.7 Litigation Evaluation

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

4.8 Matters of Public Policy

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

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

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

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

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

²⁰ *See supra* note 6.

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

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

APPENDIX A TO GUIDELINES FOR THE PREPARATION OF CLOSING OPINIONS

LEGAL OPINION PRINCIPLES

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

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

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

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

I. GENERAL

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

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

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

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

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

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

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

II. LAW

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

B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter² exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.

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

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

III. FACTS

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

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

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

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual

² See § II.A.

assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction.

IV. DATE

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