

## **MEMORANDUM**

**TO:** Corporate, Banking and Securities Law Section of the South Carolina Bar – Section Council

**FROM:** Jennifer C. Blumenthal, Chair, Legal Opinion Ad Hoc Committee

**DATE:** May 25, 2017

**RE:** Brief Summary of the Statement of Opinion Practices and Core Opinion Principles

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The *Statement of Opinion Practices* (“Statement”) and the *Core Opinion Principles* (“Principles”) are the result of a joint project of the ABA Business Law Section Legal Opinion Committee and the Working Group on Legal Opinions. The purpose of the Statement is to update the understanding of “customary practice,” as agreed by attorneys who routinely give and request third-party legal opinions. The Principles summarize some of the principles from the Statement and will replace the ABA *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). The Statement and the Principles amplify the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008), previously approved by the Section Council. The Joint Committee on the Statement of Opinion Practices requests the approval of the Statement and Principles by other bar associations and lawyer groups. As discussed during the May 24 meeting, the following is a brief summary of the list of opinion practice principles addressed by the Statement and Principles.

### **THE STATEMENT OF OPINION PRACTICES**

1. INTRODUCTION
- \*[1.1] 2. CUSTOMARY PRACTICE – Opinions are prepared and understood in accordance with customary practice.
3. LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT
- \*[1] 4. GENERAL
- \*[1.3] 4.1 *Expression of Professional Judgment* – An opinion is not a guarantee of any outcome.
- 4.2 *Bankruptcy Exception and Equitable Principles Limitation* – Apply whether stated or not.
- 4.3 *Cost and Benefit* – The time and cost to render an opinion should not exceed the benefit to the recipient.
- 4.4 *Golden Rule* – Do not ask for an opinion you would not give or refuse to give one ordinarily given.
- \*[1.4] 4.5 *Reliance by Recipients* – A recipient may not rely on an opinion it knows is incorrect or unreasonable.
- \*[1.5] 4.6 *Good Faith* – The parties are expected to act in good faith.
- \*[2] 5. FACTS AND ASSUMPTIONS
- \*[2.1] 5.1 *Reliance on Factual Information and Use of Assumptions* – May rely on factual assumptions.
- \*[2.2] 5.2 *Reliance on Facts Provided by Third Parties* – May rely on facts by others unless known to be false.
- \*[2.3] 5.3 *Scope of Inquiry* – Opinion giver is not expected to conduct an in depth inquiry.
- \*[2.4] 5.4 *Reliance on Representations That Are Legal Conclusions* – Should not rely on such representations.
- \*[2.5] 5.5 *Factual Assumptions* – Some assumptions are implied; others should be expressly stated.
- 5.6 *Presumption of Regularity* – Opinion giver may rely on the presumption without stating it.
- 5.7 *Limited Factual Confirmations and Negative Assurance* – Should not be asked to confirm facts.
- \*[3] 6. LAW
- \*[3.1] 6.1 *Covered Law* – No law covered other than the law of the jurisdiction expressly stated.
- \*[3.2] 6.2 *Applicable Law* – Certain laws, such as securities, tax, insolvency and municipal law, are excluded.
7. SCOPE
- \*[1.7] 7.1 *Matters Addressed* – Limited to specific matters of law involving exercise of professional judgment.
- \*[1.8] 7.2 *Matters Beyond the Expertise of Lawyers* – Lawyers are not expected to give such opinions.
- 7.3 *Relevance* – Limited to matters that are reasonably related to the client and the transaction.
8. PROCESS
- \*[1.6] 8.1 *Opinion Recipient and Customary Practice* – You can assume recipient is familiar with customary practice.
- 8.2 *Other Counsel’s Opinion* – Not expected to concur with other counsel’s opinion.
- 8.3 *Financial Interest in or Other Relationship with Client* – Not required to be determined or disclosed.
- 8.4 *Client Consent and Disclosure of Information* – Inferred but do not disclose confidential information.
- \*[4.1] 9. DATE – A closing opinion speaks as of its date.
- \*[1.2] 10. VARYING CUSTOMARY PRACTICE – May be varied by an understanding with recipient or its counsel.
- \*[4.2] 11. RELIANCE – Only the addressee and those expressly authorized may rely on the opinion.
12. NO OPINIONS THAT WILL MISLEAD RECIPIENT

**\* Covered in the Core Opinion Principles [corresponding Principles section reference in brackets]**

NOTE: Please refer to the current drafts of the Statement and the Principles for the actual, full and complete text, available online at [www.americanbar.org](http://www.americanbar.org). The foregoing summary is provided for convenience only.