

In My Opinion—Statement of Opinion Practices

by Lydia C. Stefanowicz

Several years ago, the Working Group on Legal Opinions (WGLO) and the Legal Opinions Committee of the American Bar Association's (ABA's) Business Law Section undertook a joint project to identify selected aspects of customary practice and other practices applicable to third-party legal opinions that are commonly understood and accepted throughout the United States. The joint project is an effort to foster a national opinion practice that will be widely recognized and endorsed across various practice areas and legal specialties. It has resulted in preparation of the *Statement of Opinion Practices*. The *Statement of Opinion Practice* is designed to build upon the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*,¹ which was approved by over 30 bar associations and other groups. The *Statement of Opinion Practices* has application to all types of third-party closing opinions in a wide variety of transactions.

To undertake the joint project, a committee was formed, which includes representatives of various state bar groups and others interested in opinion practice. The members of the project committee held numerous conference calls and meetings over the last several years, and reviewed and discussed many drafts of a proposed statement, all with an expectation that bar groups and others would endorse the final work product. The project committee examined the existing literature on legal opinions, including various bar reports, and focused on updating and amplifying the *Legal Opinion Principles*² and the *Guidelines for the Preparation of Closing Opinions*.³

The *Statement of Opinion Practices* is designed to update the *Legal Opinion Principles* in their entirety, and to update selected provisions of the *Guidelines for the Preparation of Closing Opinions*.

A version of the *Statement of Opinion Practices* was approved for distribution as an exposure draft dated March 31, 2016, by both the WGLO Board of Directors and the ABA Business Law Section's Legal Opinions Committee. Various bar groups and associations were asked to consider the exposure draft, offer their

comments and suggestions and advise the project committee if they would join with other groups in approving a final version of the *Statement of Opinion Practice* as descriptive of the commonly understood and accepted opinion practices set forth therein. The project committee subsequently recirculated a revised draft dated Jan. 18, 2017, which incorporated certain comments received to the March 31 exposure draft. Once the final version is approved by WGLO and the ABA committee, it will again be circulated to bar associations and other groups for their final approval. The New Jersey State Bar Association Business Law Section's Board of Directors is one of the many bar groups nationwide reviewing and considering the *Statement of Opinion Practices*.

The following excerpt is designed to provide a sample of some of the principles embodied in the current draft:

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 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.

The *Statement of Opinion Practices* is a worthwhile effort, and represents an important contribution to opinion literature. It is another attempt to articulate widely accepted principles in third-party closing opinion practice that are designed to bring reasonable standards into opinion practice with the goal of making the issuance of legal opinions more efficient and cost-effective. ■

Lydia C. Stefanowicz is a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, in Woodbridge.

Endnotes

1. 63 Bus. Law. 1277 (2008).
2. 53 Bus. Law. 831 (1998).
3. 57 Bus. Law. 875 (2002).