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Customary Practice and Diligence in Legal Opinion Letters, and Cross-Border Comparisons

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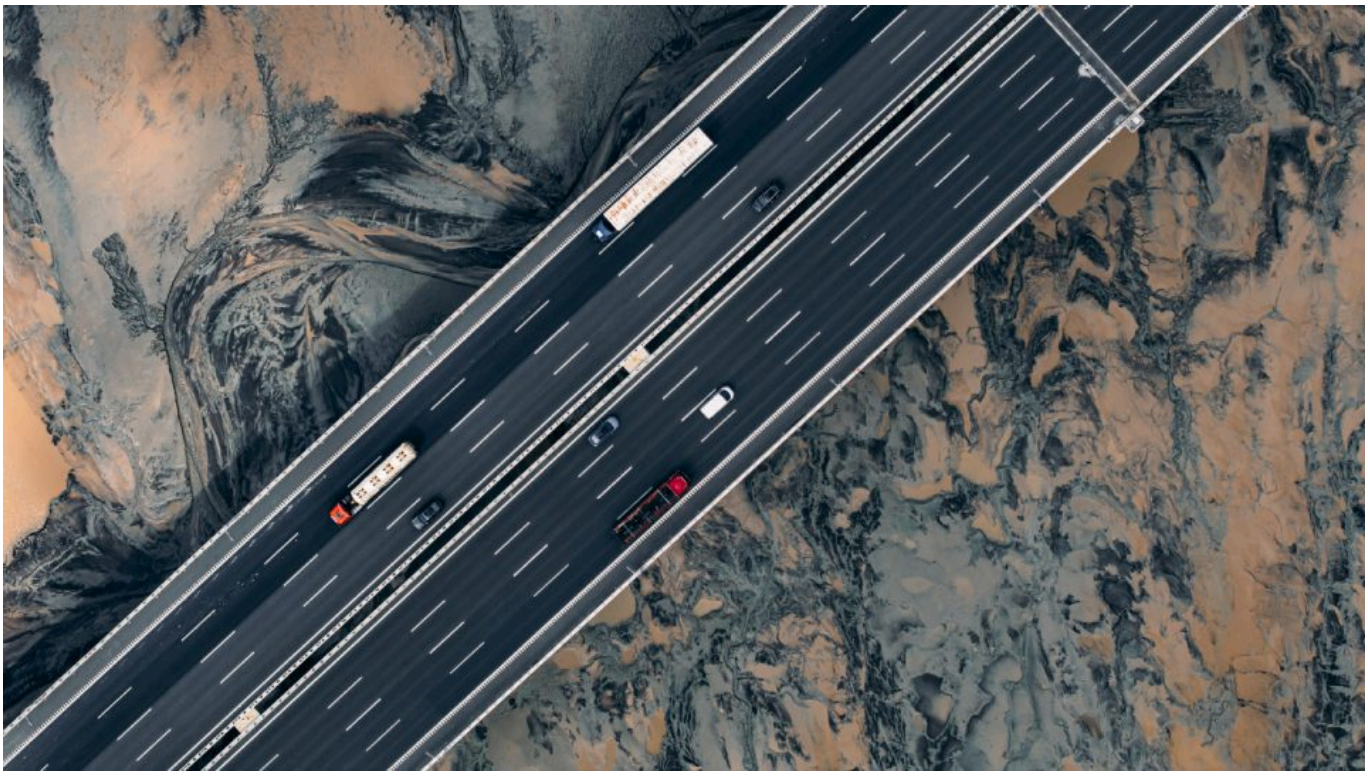
Summary

- Customary practice is key to competent legal opinion giving, which requires maintenance of practice-area knowledge.
- The laws covered by an opinion determine the facts required, which then determine the required diligence.
- Customs in opinion giving vary greatly across borders; refer to resources and chart out cross-border transactions when drafting.
- Canada and U.S. opinion giving have significant similarities and differences; most significantly, Canadian counsel will not give good standing opinions.



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A German attorney, a New York attorney, and a Canadian attorney walk into a bar and stay until last call. Despite the mental lubrication of the bar's finest offerings, they only agree that they all disagree on what the word "knowledge" means and what a "legal opinion" is. Such is the murky world of cross-border legal opinion practice.

In an effort to bring clarity, an esteemed "who's who" of experts in the world of legal opinions convened in Toronto in September 2025 for a sober yet animated panel discussion on the underlying work required to support a firm's legal opinion, and—with the help of Canadian counsel—a comparative United States / Canada cross-border analysis on the same subject. The discussion examined the best practices, including what qualifies as "customary diligence," the universe of authoritative literature, and how firms teach their teams the skills and knowledge to properly form and issue opinions.

The panel was moderated by Christina M. Houston, partner at DLA Piper (Wilmington, Delaware), and featured Arthur A. Cohen, partner at Haynes and Boone, LLP (Houston, D.C., and NYC); Aaron S. Emes, partner at Torys LLP (Toronto); Timothy G. Hoxie, of counsel at Jones Day (San Francisco); Ettore A. Santucci, partner at Goodwin Procter LLP (Boston); and Steven O. Weise, partner at Proskauer Rose LLP (Los Angeles). Karina S. Oshunkentan, counsel at Haynes and Boone, LLP (Washington, D.C.), was the materials coordinator. The program was sponsored by the firm of Young Conaway Stargatt & Taylor, LLP (Wilmington, Delaware) (where this author is an attorney).

Customary Practice in Opinion Giving

The concept of "customary practice" provides both a safeguard and a responsibility for attorneys. Weise informed the audience that "the various restatements of torts and of the law governing lawyers have said that in testing whether you were negligent or not, an important component is customary practice and customary diligence." Therefore, the stakes are high. Weise continued, "Understanding what customary practice requires and what it means, and what you should do, is going to be critical if you ever have to defend a lawsuit on an opinion letter."

In discussion, Weise and Cohen explained that a lawsuit could be based on the tort of misrepresentation, but that a legal opinion recipient can only sue on the grounds of something it would have been reasonable to rely upon. Weise stated that "the recipient expects, reasonably, that you are going to follow customary practice," and the recipient cannot "reasonably expect more than what customary practice might call for." Cohen humorously summarized, "They can't. [Because i]t's not reasonable." According to Hoxie, an "opinion recipient is entitled to expect the giver has acted within customary diligence, [and . . . an] opinion giver is entitled to expect the recipient is to be aware of customary practice."

Because each transaction is unique, Cohen explained that what an opinion author needs to do "is a function of your professional practice *as modified* by customary practice." If you diverge from customary practice, it should be disclosed through a carve-out or assumption. So how does an attorney know if they have met the bar of customary practice?

Opinions Determine the Diligence

Hoxie advised opinion givers to ask themselves, "What opinion am I giving, and what is required to support that opinion?" The set of opinions being given informs the customary diligence required to back those opinions; and customary diligence is comprised of factual diligence and legal diligence. Diligence requires understanding what facts are needed to reach a conclusion, and how to determine those facts. Through those specific and established facts, opinion givers apply the law.

Factual diligence is an important focus because while the facts vary, the law usually does not. Hoxie observed therefore that "usually, if there is a problem, it is a factual issue and not a problem of understanding the law." But opinion givers should be aware that endless diligence is not a workable solution to uncertainty. According to Weiss, "Customary diligence is a floor, but it is also a ceiling." He further explained, "Customary diligence also has a cost-benefit analysis: What does it make sense to do in a deal? Is it cost effective for the transaction?" When push comes to shove on feasible diligence, Hoxie and Cohen

agreed that divergence from customary diligence is okay if it is clearly disclosed and the parties relying upon the opinions understand what has been done.

Reports prepared by the TriBar Opinion Committee ("TriBar") provide significant guidance for opinion givers, including what various opinions *mean* and what is *needed* to produce them. But each circumstance, transaction, and governance scheme creates a case-by-case determination for what is necessary and customary. The TriBar Reports and a trove of other opinion resources are available online at the Legal Opinions Resource Center, which Hoxie called "the best one-stop compendium of all of this literature." These publications and reports study and document what becomes considered customary practice and customary diligence. State and local bar associations also often have publications, which might be most relevant to opinions in particular fields.

Cross-Border Comparisons

"Local customs and practice matter a great deal," according to Santucci. Santucci stated that it is a "bedrock principle" that "U.S. lawyers giving third-party legal opinions in cross-border transactions rely on the same customary practice on which they rely when they give domestic opinions." However, those practices cannot be applied to contracts governed by non-U.S. laws.

The discussion revealed that customary practice is far less consistent across national borders than state borders. Santucci provided a few examples of varying global practice. In London, "legal opinions are part of client advice, and not a legal opinion at all." In Germany, "an opinion is a lawyer's reasoned analysis of applicable law, often coming to no conclusion at all."

Perhaps given their proximity, U.S. and Canadian legal opinions are more alike. It is understood that the laws covered in a U.S. or Canadian legal opinion—and therefore the analysis provided—are only the laws of the jurisdiction covered (if stated), and only the laws an experienced lawyer in the relevant jurisdiction would think are applicable and appropriate. In the United States and in Canada, tax, securities, and antitrust laws are customarily understood to be excluded unless expressly covered.

Emes detailed further similarities between Canada and U.S. legal opinions:

- Choice of law opinions are given in Canada, subject to public policy exception, the same as in the United States.
- Enforcement of foreign judgements opinions are based on common law, but Canada does not require reciprocity for enforceability.

- Enforcement of foreign arbitral award opinions are almost identical to those given in the United States.

Emes also noted some differences between Canadian and U.S. practice, including the following:

- Unlike in U.S. practice, Canadian practice will provide underwriting agreement enforceability opinions, but they include indemnity carve-outs because of the possibility of a court taking a public policy position on indemnity.
- Intellectual property opinions are not common in Canadian practice, so U.S. practice is influential in those opinions.
- Negative assurance letters are not given in domestic opinions, but they can be given in cross-border opinions with a disclaimer regarding the meaning of "material facts" (which relates to "knowledge").
- Good standing opinions are not given; the relevant Canadian authorities provide certificates of corporate status, which only state that an entity is not dissolved.

Given the complexity of cross-border opinions, Santucci recommended a foolproof methodology for cross-border practitioners: "Start every cross-border opinion not with a form of opinion, but with a chart: Who is doing what to whom, where, and—ideally—why and how. And then annotate that chart with choice of law and forum selection." The 2023 publication "Good Practice in Cross-Border Legal Opinion Practice" is also recommended as an excellent resource.

Conclusion

When preparing a legal opinion letter, an author should identify the facts required to come to a sound legal conclusion. The legal standards relevant to that law define the relevant facts, and customary practice and the contours of the transaction itself define the customary diligence.

Learning the facts and the law are often easier than learning customary practice. But learning customary practice is essential for competency in the practice of opinion giving. Therefore, maintaining knowledge of customary practice is a communal project of conferring with colleagues directly and through legal publications.

Just as languages—and accents within the same language—vary as the globe rotates, customs vary as well, including the customs underpinning legal opinions. To avoid any

misunderstandings, cross-border opinion givers should use extra care when entering murky international waters.

Thankfully, we are not in the “age of discovery” with opinion practice, and there are many experts and resources to rely upon both for domestic and cross-border opinion giving.

This article reports on a CLE program titled “What Work Do You Need to Do to Support a Legal Opinion? A Cross-Border Perspective,” which was presented during the ABA Business Law Section’s 2025 Fall Meeting. To learn more about this topic, view the program as on-demand CLE, free for Business Law Section members.

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