

ABA
SECTION OF
BUSINESS LAW

COMMITTEE ON
LEGAL OPINIONS

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LEGAL OPINION NEWSLETTER

JAMES F. FOTENOS, EDITOR

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From the Chair

This has been another productive year for the Committee. One of the accomplishments we can take pride in is our ability to continue to contribute to the improvement of the quality of legal opinion practice in a range of areas and in a variety of ways. Here are some examples:

- We can take some credit, working with the Securities Opinion Subcommittee of the Federal Regulation of Securities Committee, for the very helpful guidance issued by the SEC staff on opinions filed in connection with registered securities offerings. That guidance clearly recognizes the importance of customary opinion practice and shows flexibility in seeking to accommodate practical necessities. This issue of the newsletter includes a Q&A that amplifies on some of the matters covered in the guidance.
- We continue our groundbreaking efforts analyzing in-depth issues in cross border opinion practice and promoting a greater understanding among opinion practitioners in different countries. Progress continues to be made on our report on outbound cross border opinions and we held informative programs on Canadian opinion practice at the Annual Meeting in August in Toronto and on cross border opinion issues, with a focus on the U.K. and the EU at the Section's Global Business Law Forum in September in London.
- We also are making progress on completing a report on the results of our survey on law firm opinion practices. These results will provide invaluable information to law firms in evaluating ways to enhance their own opinion practices.
- The initial product of the joint project on identifying and describing common opinion practices we are pursuing with the Working Group on Legal Opinions ("WGLO") should be ready for review in the coming months. The results of this project should make a great contribution to solidifying the consensus that exists on core opinion practices.
- We continue to meet our goal of educating the bar on legal opinion practice through (i) our periodic newsletter (this issue being the latest excellent example), (ii) use of our listserve, (iii) discussions, presentations and reports at our regular meetings, (iv) presentations at programs and webcasts, and (v) our initiative to train the less experienced lawyer. Along these lines, you should be aware of the two-hour webcast and teleconference program on Understanding Third Party Legal Opinions presented on December 8 by Julie Allen, Anna Mills, Steve Weise and me. It is accessible on the ABA CLE website (<http://apps.americanbar.org/abastore/index.cfm>). You may find the program a useful refresher but, more importantly, it can be used to train lawyers in your firms and organizations. Also, you will find as an addendum to this newsletter summaries of the 2011 Fall WGLO Seminar.

I look forward to another productive year in 2012 and to working with many of you. In closing, I extend my best wishes to each of you for happy holidays and for a peaceful and successful new year.

- Stan Keller
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Future Meetings

ABA Section of Business Law Spring Meeting
Caesar's Palace, Las Vegas, NV
March 22-24, 2012

Committee on Legal Opinions

Friday, March 23, 2012

- Committee Meeting: 3:00 p.m. — 5:00 p.m.
- Reception: 5:00 p.m. — 6:30 p.m.

Saturday, March 24, 2012

- Program: The New World of Legal Opinions in SEC Filings: 8:00 a.m. — 10:00 a.m.

Professional Responsibility Committee

Friday, March 23, 2012

- Committee Meeting: 9:00 a.m. — 10:30 a.m.

Saturday, March 24, 2012

- Program: What Business Lawyers Need to Know About Ethics 20/20: 8:00 a.m. — 10:00 a.m.

Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions

Friday, March 23, 2012

- Subcommittee Meeting: 2:00 p.m. — 3:00 p.m.

Committee on Audit Responses

Saturday, March 24, 2012

- Committee Meeting: 10:00 p.m. — 11:00 p.m.

Law & Accounting Committee

Saturday, March 24, 2012

- Committee Meeting: 11:00 a.m. — 12:30 p.m.

*Working Group on Legal Opinions
New York, New York
May 22, 2012*

*May 21, 2012: Related Meetings of the Steering Committee, Association Advisory Board
and Law Firm Advisory Board*

*ABA Section of Business Law Annual Meeting
Chicago, Illinois
August 2-7, 2012*

2011 Fuld Award

The Working Group on Legal Opinions presented the Fuld Award to Jerry Hyman at the WGLO's fall seminar held October 25, 2011. The award is named after James Fuld, the parent of modern opinion practice. The Fuld Award is presented annually to a person who has made a significant contribution to the field of legal opinions. The award is sponsored by Proskauer Rose LLP, where Jim Fuld was a partner. The previous recipients were Arthur Field, Donald Glazer, and Judge Thomas Ambro.

Jerome E. Hyman



Jerry received the 2011 Fuld Award to a standing ovation, in recognition of his extraordinary contributions over four decades to legal opinion practice. In presenting the award, Truman Bidwell, chair of the award selection group, drawing an analogy to the Athenian system with the Council, the Assembly and the scribes, commented:

Then there is the rare bird, think of Pericles, who is always thinking and challenging the members of the Council. He or she seeks perfection and seeks to avoid even a minor error in the materials distributed by the scribes. Like the

canary sent into the mine, he or she is always alert to the dangers of errors in Council pronouncements.

It is but a short step from the canary to this year's winner of the Fuld Award. A lawyer who is always challenging us not to be complacent, to be thorough and dammit, to be right!

Who else fits this description than Jerry, the canary, Hyman, this year's honoree?

These remarks resonated with those of us scribes in attendance who have felt, and continue to feel, the lash of Jerry's penetrating analysis. Jerry is one of those rare people who can challenge what everyone else in a room takes as a given and, through the sheer power of his intellect (and a fair measure of persistence), bring them around to his point of view. Jerry speaks softly and his Mississippi upbringing shows through in his courtly manner. But when he takes a position, he is one formidable opponent. Jerry not only was first in his class at Harvard Law School and a top corporate lawyer at Cleary Gottlieb during his many years practicing law, but he continues to be first in his class and a top lawyer on the bar association opinion committees on which he still actively participates.

Many of you know Jerry as the ABA Business Law Advisor to our Committee from 2008 to 2010. His contribution to the Committee during his tenure as an Advisor, as a participant on the drafting groups for the Committee's still-in-progress reports on cross-border opinions and law firm opinion practices and as a panelist on numerous programs, was immense. But consistent with Jerry's commitment to our efforts, his participation did not end with completion of his term, and Jerry continues to be an active participant in both of those drafting groups.

Jerry, who joined the TriBar Opinion Committee shortly after its inception in the late 1970's, also continues to be an active participant in that Committee – so active in fact that he recently took on the responsibility as co-reporter for a new TriBar Report, no doubt the oldest TriBar member ever to serve as a reporter. Indeed, in that role he recently forsook a morning at the pool while on a trip to Hawaii to review and comment on a draft and then, upon receiving a revised version, commented on it again while still on his trip. Jerry just doesn't let up and when he takes on something, he is a veritable bulldog.

As past and present chairs of the Committee, we want to congratulate Jerry, on behalf of the Committee, for an honor that could not be more deserved. We have been fortunate to have him as a mentor and friend.

- Tom Ambro
Carolyn Berkley
Arthur Field
Don Glazer
Stan Keller
John Power
Steve Weise

Fall Meeting of the ABA Section of Business Law

The Section of Business Law held its Fall Meeting in Washington, D.C. November 18-19, 2011. Following are reports on meetings of interest to members of the Committee.

Meeting of the Committee on Legal Opinions

The Committee met on November 18, 2011. Following is a summary of the substantive topics taken up by the Committee.

Presentation by John K. Villa. John Villa, of Williams & Connolly LLP, Washington D.C., is an experienced legal malpractice defense lawyer, and gave a presentation to the Committee on legal malpractice claims involving opinion letters. Following are some of John's observations:

- Reported cases involving claims by clients or opinion recipients against opinion givers for professional negligence or misrepresentation in rendering an opinion letter are extremely rare, particularly when the client is still operating and not in bankruptcy. In addition, when legal malpractice claims are brought, lawyers have many defenses available to them in defending the claims. Clients are also loath to sue their own lawyers because it opens up the attorney-client privilege. To John's knowledge, settled legal cases involving claims of legal malpractice, of all types, have not involved the payment of sums exceeding \$25 Million.
- When clients are in bankruptcy, however, trustees are less hesitant about bringing claims against the debtor's past counsel and are afforded presumptions in bringing claims (e.g., Bankruptcy Rule 12) that make dismissal of claims at the pleading stage difficult.
- Negative assurance letters entail greater risk of third-party claims than legal opinions generally. Such claims often raise questions of the imputation of knowledge to opinion preparers of other lawyers in the firm.
- Reliance on technical language in opinions may not be effective to shield an opinion giver in court before a judge or jury, particularly in the context of a rogue client, because they may ignore the actual language.
- On the other hand, judges do pay attention to the reference in opinions to an external document, such as the ABA Legal Opinion Principles, as to how to interpret the opinion.
- Although Rule 10b-5 liability of lawyers has been circumscribed the U.S. Supreme Court, liability under state law has not been similarly narrowed. Often a case against a law firm based on state law will survive a motion to dismiss.
- Courts have an inclination to read opinions in light of the opinion required by the agreement rather than the opinion actually delivered. Thus, lawyers should pay attention to what is being described in the agreement and make clear any departures in the opinion actually given from that referred to in the agreement. [Subsequently, the court in *Fortress Credit Corp. v. Dechert LLP*, _____ N.Y.S. 2d _____, 2011 WL 5922969 (App. Div., November 29, 2011) made clear that the opinion accepted at closing with the advice of counsel is what counts. See the description of that decision under "Recent Developments" below.]
- Counsel for opinion recipients also have responsibilities and there have been cases where recipient's counsel has been sued for not protecting the recipient from accepting an opinion

that turned out to be bad. The best way to deal with this risk is to define the scope of representation and to make clear in a written communication to the client what advice the lawyer gave and did not give about the other firm's opinion.

Included in the text box below is a list of many of modern reported cases involving opinion letters or advice of counsel, including cases referred to by John in his presentation. The list has been prepared with the assistance of Don Glazer.

List of Reported Cases Involving
Opinion Letters or Advice of Counsel

- *Coastal Orthopedic Institute, C.P. v. Bongiorno*, 807 N.E.2d 187 (Mass. App. Ct. 2004) (plaintiff failed to show that its former counsel failed to exercise reasonable care and skill in rendering an opinion that claims asserted by a terminated employee were “defendable”).
- *Dean Foods Co. v. Pappathanasi*, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004) (opinion giver did not follow customary diligence in delivering no-litigation assurance to opinion recipient).
- *Highland Crusader Offshore Partners, L.P. v. Andrews & Kurth, L.L.P.*, 248 S.W. 3d 887 (Tex. Ct. App. 2008) (summary judgment granted for opinion giver; no-breach opinion on preferred stock with limited voting rights where certificate prohibited the issuance of non-voting stock was not wrong).
- *In Re National Century Financial Enterprises, Inc., Investment Litigation*, 2008 WL 1995216 (U.S. Dist. Ct., S.D. Ohio 2008) (no violation of law opinion did not extend to alleged misrepresentations in violation of federal and state securities laws in offering circular; court relies, in part, upon opinion giver's incorporation by reference into its opinion of the Legal Opinion Accord (1991) and the Accord's qualification of the no violation of law opinion as not extending to securities laws).
- *National Bank of Canada v. Hale & Dorr, LLP*, 2004 WL 1049072 (Mass. Super. Ct. Apr. 28, 2004) (Superior Court's rulings on cross-motions for summary judgment addressing counsel's responsibility in giving negative assurance on pending litigation).
- *Reich Family Limited Partnership v. McDermott Will & Emery*, No. 101 921/03, N.Y. Sup. Ct., 230 N.Y.L.J. 20 (2003) (opinion recipient survived motion to dismiss its complaint alleging legal malpractice, breach of fiduciary duty, negligent misrepresentation, and negligence against opinion giver; trial court concludes, *inter alia*, that plaintiff stated a cognizable claim for malpractice as well as for negligent misrepresentation arising from opinion letter).
- *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp*, 2004 WL 1977572 (N.D. Ill. Aug. 31, 2004) (summary judgment granted to opinion giver on plaintiff's assertion of Rule 10b-5 liability for allegedly false statement in opinion letter; no information had come to counsel's attention that would have given counsel actual knowledge or actual notice that any documents, including a private placement memorandum, were not accurate and complete).
- *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006) (Court of Appeals upholds SEC's findings of material misrepresentations by bond counsel for counsel's failure to conduct a reasonable investigation into the facts underlying his opinion).

Joint Project on Common Opinion Practices. Steve Weise (Proskauer Rose LLP) reported on the status of the joint project undertaken by the Committee with the Working Group on Legal Opinions (“WGLO”), which includes the involvement of state and other bar groups, in preparing a description of common opinion practices. A working group, which includes Steve as reporter and Pete Ezell (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC) and Steve Tarry (Vinson & Elkins LLP) as co-reporters, and including Ken Jacobson (Katten Muchin Rosenman LLP), Committee chair Stan Keller, and Vladimir Rossman (McDermott Will & Emory) as co-chairs, is approaching the project in phases, the first phase consisting of a discussion of general issues, including the purpose of closing opinions. The working group’s draft will reflect provisions of the Legal Opinion Principles and the Guidelines for the Preparation of Closing Opinions, both of which are products of this Committee. The working group expects to have a draft of one or more sections of their report available for review by WGLO for its spring 2012 meeting and by this Committee for its annual meeting in August 2012.

Staff Legal Bulletin No. 19. Andy Pitts reported on the meeting held earlier that morning by his Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities. The Subcommittee devoted the bulk of its meeting to a review of the SEC Staff’s Legal Bulletin No. 19 (October 14, 2011) on legal and tax opinions in registered offerings. For a summary of the Subcommittee’s review of the Legal Bulletin, see Andy’s report on the Subcommittee’s meeting in this newsletter. See also the Q&A on the SEC guidance prepared by Don Glazer and Stan Keller, also in this newsletter.

WGLO Fall Meeting. Arthur Field reported on the WGLO Fall Legal Opinions Seminar held in New York on October 24-25, 2011. For a summary of presentations and breakouts made at the seminar, see the WGLO Addendum included with this newsletter.

Gail Merel then reported on the session she co-chaired at the WGLO meeting on assignability issues in third-party opinion practice. For a summary of that session, see the WGLO Addendum included with this newsletter.

Survey of Law Firm Opinion Practices. John Power reported on the Committee’s survey of law firm opinion practice. A draft of a summary of the survey responses should be available for review by the full Committee at its March 2012 meeting.

Cross-Border Project. Ettore Santucci, the reporter for the Committee’s outbound cross-border legal opinions report, reported on the status of the project. He expects the next full draft of the report to be available for review by March 2012. The working group has spent considerable time and effort wrestling with litigation-related topics, including opinions on choice of law and choice of forum provisions, service of process related issues, and enforcement of judgments. The issues involving these topics have been in large part resolved by the working group, and therefore he expects the pace of the finalization of the report to quicken.

Professional Responsibility Committee. Charles McCallum reviewed the agenda for his Committee, which was to meet the following day. The Committee will focus on the Ethics 20/20 Commission’s proposals.

Committee on Audit Responses and Report on Document Review Reports. The Chair, on behalf of Jim Rosenhauer, previewed the agenda for Jim’s Committee, to meet later that day. He also noted that the report of the Section of Business Law’s Task Force on Delivery of Document Review Reports to Third Parties, which Jim headed, has been finalized and submitted to *The Business Lawyer* for publication.

Opinion Requirements of Governmental Agencies. Charles Menges, head of a project of the ABA's Real Property, Trusts, and Estate Section reviewing the opinion requirements of governmental agencies, principally in real estate financing transactions, reported that HUD has revised its form of closing opinion. While HUD takes the position that its form of opinion is non-negotiable, Charles reported that the new form is an improvement over the old form. Charles reported that his group is also working with Fannie Mae and Freddie Mac on their required forms of closing opinions.

State Law Reports. Finally, the Committee received reports from Charles Menges and David Miller on Virginia's proposed report on real estate and business law closing opinions, Phil Schwartz on Florida's report, a draft of which has been completed and is now in final stages of review, and Pete Ezell on the completion of Tennessee's report. See "Legal Opinion Reports" in this newsletter.

The Chair thanked Jim Fotenos for his splendid work on the latest issue of the newsletter, Christina Houston for her assistance with the Committee's website, and Anna Mills for her work on membership and the Committee's initiative directed at less experienced opinion practitioners.

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Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities

The Subcommittee on Securities Law Opinions met on November 18, 2011. The principal topic of discussion was the Securities and Exchange Commission (the "SEC") Staff Legal Bulletin No. 19, "Legality and Tax Opinions in Registered Offerings" ("SLB 19"). Tom Kim, the Chief Counsel in the SEC's Division of Corporation Finance, participated in the discussion. At the commencement of the meeting, Mr. Kim stated that the views he would express were his personal views and not those of the Staff or the SEC.

The Subcommittee initially discussed resuming its project to update the 2004 "Legal Opinions in SEC Filings" special report of the ABA Business Law Section Task Force on Securities Law Opinions. This project had been suspended when the Subcommittee learned that the Staff was preparing SLB 19. The Subcommittee determined to resume the update project, principally to reflect the guidance in SLB 19 and the fact that the original report was published prior to the SEC's securities offering reforms in 2005.

The principal topics discussed with respect to SLB 19 were:

- *Assumption as to Pricing of Securities:* SLB 19 states that an Exhibit 5 opinion as to the validity of securities may contain an assumption that the proper corporate (or other type of entity) action necessary for the "pricing" of the securities has occurred. Although SLB 19 refers to such action being taken by a pricing committee of the issuer's board of directors (as would typically be the case for equity securities issued by a corporation), Mr. Kim stated that the reference to a pricing committee was intended to be illustrative and that an opinion may assume that other actions necessary for the pricing of securities authorized by the board will have occurred. Any action covered by such assumption,

however, must be predicated on a conclusion that the action, if taken, is sufficient under applicable law for the valid issuance of the securities.

- *Dating of Opinions:* Dating of opinions generally is not addressed in SLB 19 and the Subcommittee discussed the Staff's historical practice of requesting that Exhibit 5 opinions (other than in the context of Rule 415 shelf "takedowns") be dated the effective date of the relevant registration statement. Mr. Kim stated that he did not expect the Staff to comment on opinion dating generally following SLB 19 or to comment on opinion language indicating that the opinion speaks only as of its date.
- *Tax Opinions:* Mr. Kim stated that the guidance in SLB 19 was not intended to revise substantially the existing practice with respect to tax opinions.

The next meeting of the Subcommittee will be at the Section's Spring Meeting in Las Vegas, Nevada on March 23, 2012. The Subcommittee will co-sponsor the Legal Opinion Committee's program on SLB 19 at the Spring Meeting.

- Andrew J. Pitts, Chair
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Committee on Audit Responses

The Committee met on November 18, 2011. It first focused on the comments made earlier in the day, in a Law & Accounting Committee presentation, of Nili Shah, Deputy Chief Accountant of the SEC's Division of Corporation Finance, concerning SEC comments to issuers on loss contingency disclosures. Ms. Shah noted that the SEC understands the difficulties involved, tries to be concerned about confidentiality and not providing support for plaintiffs' claims, and tries to be practical. However, there is a clear focus on obtaining greater disclosure, and, where appropriate, accruals for contingent claims.

The Committee then focused on the impact of this focus on lawyers, both in providing audit responses and in advising clients concerning disclosure. One Committee member noted that auditors object when lawyers take no position on "reasonably possible" assessments, and often request quantification of contingencies. However, the response of lawyers continues to be to adhere to the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (the "Statement"). It was noted that in-house counsel are often placed under intense pressure.

It was reported that in recent roundtables some investors have acknowledged that often companies cannot come up with estimates, and that these investors are most focused on disclosure, whether or not in the financials.

It was noted that companies that describe to the SEC how they have attempted to develop an estimate often are successful in persuading the SEC that their disclosures are adequate, even if they are not able to produce an estimate of loss or range of loss. With respect to estimates disclosing information which would benefit plaintiffs, it was noted that at the stage where damages experts have exchanged information, disclosure of estimates based on that information often will not prejudice the issuer in the litigation.

Notwithstanding the greater focus on expanded disclosure by issuers, the Committee members confirmed that lawyers should continue to limit the content of their audit responses to the standards set forth in the Statement. Terms should be used as defined in the Statement and in the accounting literature.

Committee members noted that communications with auditors after delivery of the audit response need to be carefully managed to avoid inadvertent disclosure of privileged information. Many firms (i) have audit response experts who participate with litigators in any such communications, (ii) prepare, before any discussion with auditors, summaries of the information to be discussed (to avoid the disclosure of privileged information), and (iii) keep careful notes of the discussions. Not providing protected information that undercuts the privilege, or that might constitute a subject matter waiver, also needs to be considered when communicating with the SEC.

It was noted that some engagement letters of accountants ask the company to provide full access to all internal investigations, and that this request similarly raises privilege issues.

- James J. Rosenhauer, Chair
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Professional Responsibility Committee

The Committee met on November 19, 2011. Most of the meeting was devoted to the presentation and discussion of proposals of the ABA Ethics 20/20 Commission. Professor Stephen Gillers (NYU Law School), a Commission member, and Elyn Rosen (ABA Center for Professional Responsibility), counsel to the Commission, reviewed the Commission's current proposals, indicating that the proposals relating to "Technology and Confidentiality," "Technology and Client Development," and "Confidentiality in Connection with Conflicts Checking When Lawyers Change Firms," as well as two proposals relating to "Admission on Motion," will be brought to the House of Delegates in August 2012. Other proposals ("Choice of Law in Determining Conflicts of Interest," "Temporary Practice by Foreign Lawyers," "Pro Hac Vice Admission and Foreign Lawyers," and "In-House Counsel Registration and Foreign Lawyers") will be taken to the House in 2013. The Commission will also be issuing proposals with regard to alternative law firm structures. These proposals will likely be similar to the District of Columbia's rules, and will not propose the authorization of multidisciplinary practices, publicly owned law firms, or outside investment in law firms.

The Committee will have a program at the Section Spring Meeting in March 2012 entitled "What Business Lawyers Should Know About Ethics 20/20," with an outstanding panel moderated by Bob Mundheim. There will be four additional ethics programs at the Spring Meeting: (1) the Business Law Education Committee will present a program on "Ethical Issues in Contract Drafting"; (2) the UCC Committee will present a program on "Ethical Issues in Commercial Transactions"; (3) the Career & Practice Development Committee will present a program on "Ethical Issues and Dilemmas in Client and Practice Development"; and (4) the Business Law Advisors Committee will present a program on "Ethics of Negotiation."

The Committee will soon be launching a newsletter. The Committee is activating a number of subcommittees. Chairman Charlie McCallum would like to add new members, and would especially welcome those willing to consider becoming actively involved in the work of the Committee.

- Charles E. McCallum
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Fall Meeting of the Working Group on Legal Opinions

On October 25, 2011 the Working Group on Legal Opinions (“WGLO”) held its semi-annual seminar in New York, featuring panel discussions and breakout sessions on current opinion practice issues. Summaries of the panel sessions and breakout groups are included as an addendum to this issue.

The next WGLO seminar is scheduled for May 22, 2012.

Recent Developments

New York Appellate Court Dismisses Claims Against Dechert LLP Arising Out of Legal Opinion in Marc Dreier Fraud

In a rare decision directly addressing a law firm’s liability for a closing opinion, on November 29, 2011, a New York intermediate appellate court dismissed all claims brought by affiliates of Fortress Investment Group against Dechert LLP arising out of an opinion given by Dechert in a loan transaction that turned out to be part of Marc Dreier’s fraud. *Fortress Credit Corp. v. Dechert LLP*, 2011 WL 5922969.

In June 2008, Dechert provided Fortress a legal opinion in connection with a \$50 million loan from Fortress to Solow Realty & Development Company and affiliated borrowers. Dreier, who had been litigation counsel to Solow Realty, claimed to represent the Solow Realty borrowers, and also provided a personal guaranty to Fortress on its loan to Solow Realty. Dechert’s opinion stated that it had been retained by Solow Realty and Dreier solely for the purpose of issuing the opinion.

Dreier provided Dechert with an engagement letter and transaction documents, apparently signed by Solow Realty. The opinion stated that Dechert reviewed specified documents, assumed the genuineness of all signatures thereon (including those of its own clients, Dreier and Solow Realty), and did not conduct an independent investigation. Subject to such express terms, which were reviewed and accepted by Fortress and its counsel, Dechert opined, among other things, that the transaction documents were “duly executed” and enforceable.

In December 2008, Dreier was arrested for orchestrating a massive scheme to defraud Fortress and other funds, and is now serving a 20-year prison sentence. Dreier had forged Solow Realty's signature to the June 2008 transaction documents, including Dechert's engagement letter.

Fortress asserted claims against Dechert for fraud, breach of fiduciary duty, legal malpractice, negligence and negligent misrepresentation based on allegations that it relied on Dechert to "validate" Solow Realty's "participation" in the transaction. Fortress also alleged that Dechert's "due execution" opinion was "false" because the signatures, which Dechert had expressly assumed were genuine were, in fact, forged.

The appellate court found the complaint sufficiently alleged the "near privity" required for a non-client such as Fortress to assert a claim for negligent misrepresentation against a law firm. Citing the New York Court of Appeals decision in *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 605 N.E.2d 318 (1992), the appellate court held that Dechert owed a duty of care to Fortress only to the extent that Dechert was aware of the particular purpose for which Fortress intended to rely on the opinion. The appellate court found that Fortress failed to allege that it *informed* Dechert that Dechert was to do anything other than review relevant and specified documents or that Dechert was to "investigate, verify and report on the legitimacy of the transaction." Absent such allegations, Dechert could not have breached its duty of care to Fortress.

Rejecting the complaint's allegation that the express limitations in the opinion were mere "boilerplate," the appellate court found that the opinion, "by its very terms, provided only legal conclusions upon which [Fortress] could rely," and "was clearly and unequivocally circumscribed by the qualifications that [Dechert] assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts." 2011 WL 5922969 at *2. Accordingly, the opinion contained no misrepresentations.

The appellate court also held that Fortress failed to allege a knowingly false statement or participation in the scheme to support of a fraud claim, and that its legal malpractice and breach of fiduciary duty claims failed because Dechert did not represent Fortress in the transaction.

- Joel M. Miller
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[Editor's Note: Messrs. Miller & Wrubel P.C. represented Dechert LLP in this litigation.]

Questions and Answers on the SEC's Opinion Guidance

On October 14, 2011, the SEC's Division of Corporation Finance issued Staff Legal Bulletin No. 19 (the "SLAB") providing guidance on Exhibit 5 legality opinions and Exhibit 8 tax opinions required in registered offerings. Lawyers who prepare these opinions should read the SLAB and familiarize themselves with its guidance. This article answers some questions under the SLAB based on the authors' understanding of explanations provided by members of the SEC's staff. The answers are solely those of the authors and do not represent official positions of the SEC or its staff.

1. *Question:* The SLAB states that an opinion that the stock of a corporation is legally or validly issued includes an opinion that the corporation is validly existing under the laws of its jurisdiction of incorporation. In the case of non-corporate equity securities, such as LLC interests, note 6 of

the SLAB states that a LLC is “validly existing” if it has been duly formed. In practice, opinions that state only that the entity is “validly existing” frequently are given and accepted for both corporations and LLCs based on a certificate of legal existence from the secretary of state, without a review of statutes and actions at the time of incorporation or formation, which would be necessary for a “duly formed” opinion. Is this acceptable in the case of a LLC?

Answer: The SEC staff does not inquire as to the diligence required to support an opinion. That is a matter to be decided by counsel based upon applicable law and practice.

2. *Question:* The SLAB states that corporate stock is “fully paid” if, among other things, the consideration received satisfies the requirements of “any other applicable agreement.” As a matter of customary opinion practice, lawyers giving fully paid opinions do not necessarily review subscription agreements. Is the SLAB fairly read to mean that an agreement is applicable only if it is relevant as a matter of state corporation law to the fully paid status of the shares, such as when the authorizing resolution states that the shares shall be sold for the consideration set forth in a subscription agreement it incorporates by reference?

Answer: Yes, what is required to satisfy state corporation law requirements for “fully paid” stock is the determining factor.

3. *Question:* The SLAB does not address it directly, but is the formulation suggested in note 43 of the 2011 TriBar Report on Opinions on LLC Interests acceptable?¹

Answer: Yes, that formulation is acceptable.

4. *Question:* May a “validly issued” opinion be based on an assumption that action will have been taken to price the securities covered by the opinion if, instead of referring to a pricing committee of the board as mentioned in the SLAB, the assumption refers to another procedure permitted under applicable state corporation law for pricing adopted by the board resolution approving the issuance, such as compliance with a formula in the case of a dividend reinvestment plan or the setting of option prices by an authorized officer as permitted by the Model Business Corporation Act?

Answer: Yes, the reference to a pricing committee is only illustrative and an assumption that the shares will be issued at a price set in accordance with a procedure established by the board will be acceptable so long as the necessary board authorization has been obtained and the procedure for pricing is permissible as a matter of state corporation law. If the resolution remains in effect and the procedure referred to in the assumption is followed, no further opinion will be required to be filed when the shares are issued.

5. *Question:* The SLAB indicates that if corporate actions, such as a charter amendment to increase the number of authorized shares or to create the class or series of shares to be issued, need to be taken before the transaction is completed or if a reincorporation is contemplated prior to completion of the transaction, a qualified opinion can be filed without preventing the registration statement becoming effective. Is this a change in the staff’s position?

¹ 66 Bus. Law. 1064, 1072 (2011) (“Upon issuance by the LLC against payment as contemplated by the Registration Statement and Prospectus, the LLC Interests will be validly issued, and holders of LLC Interests will have no obligation to make any further payments for the purchase of the LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests.”).

Answer: Yes, but it is premised upon an unqualified opinion being filed before the closing of the transaction and disclosure being made in the prospectus of the actions required as a condition of the transaction.

6. *Question:* The SLAB recognizes that the inclusion in Exhibit 5 opinions of assumptions that are understood as a matter of customary practice whether or not stated is acceptable. In the case of exceptions, it recognizes that the standard bankruptcy exception and equitable principles limitation, although not required to be stated, may be stated expressly. This includes stating expressly any of the recognized aspects of the equitable principles limitation. The ABA Report on Legal Opinions in SEC Filings states that exceptions that are not material should not be objectionable or require prospectus disclosure.² Is this still correct?

Answer: Yes, whether prospectus disclosure is required is a question of materiality. Lawyers should be aware, however, that including nonstandard exceptions or assumptions in “validly issued” opinions or expressing those exceptions and assumptions in unconventional ways could result in staff questions and thus affect the processing of the registration statement.

7. *Question:* Is an approach similar to the approach that is acceptable for LLCs, stating in plain English what the opinion means, acceptable for foreign corporate securities when the “duly authorized, validly issued, fully paid and nonassessable” formulation does not fit?

Answer: Yes, this approach is acceptable.

8. *Question:* When a legality opinion is given on shares being sold by selling stockholders, what shares are covered by the opinion?

Answer: If the shares can be traced to their original issuance, as they often can be in an initial public offering, the opinion covers those shares. However, that is not always possible, especially when the shares are held in the DTC clearing system, in which case the opinion may practically have to be treated as an opinion on all the outstanding shares.

9. *Question:* In stating that counsel may not deny that it is an “expert,” the SLAB indicates that counsel need not expressly admit in the consent that it is an expert. Does this mean that the traditional express disclaimer that “counsel by filing this consent does not admit that it is an expert” continues to be acceptable?

Answer: Yes, the disclaimer continues to be acceptable.

10. *Question:* Will the SEC staff accept opinions that speak as of the date of the opinion letter without requiring an update absent developments that arise that affect the opinion?

Answer: Yes, although counsel needs to be mindful of the liability provisions that require a registration statement to be true and correct as of its effective date, and so would likely want to be comfortable that the opinion is accurate as of that date even though the opinion letter is dated earlier.

11. *Question:* When more than one counsel’s opinion is involved (e.g., when local counsel is required to opine on the law of a jurisdiction primary counsel is not in a position to cover), what is the difference between the assumption model and the reliance model?

² 59 Bus. Law 1505, 1509 (2004).

Answer: When counsel assumes a matter covered by another counsel's opinion, that other opinion must be filed and the other counsel must consent to its filing. When counsel gives an opinion on a matter in express reliance on another counsel's opinion, the other opinion must be filed but the other counsel need not consent to the filing. Under the assumption model, both primary counsel and local counsel are potentially subject to liability under Section 11 of the Securities Act because both have consented to be named in the registration statement. Under the reliance model, only the primary counsel is potentially subject to liability under Section 11 because Securities Act Rule 436(f) does not require the local counsel to provide its consent.

12. *Question:* The guidance on Exhibit 8 tax opinions sets out detailed requirements, including what is required for a so-called “short-form” opinion and, when counsel gives a “should” opinion, requiring counsel to explain why a “will” opinion cannot be given. Does this represent a change in practice?

Answer: No, the SLAB’s guidance on tax opinions is not intended to change current practice.

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Interpreting Contracts Covered By Legal Opinions

When an opinion giver provides a remedies (or enforceability) opinion or a no breach or default opinion with respect to an agreement governed by the law covered by the opinion letter, the opinion giver is responsible for reviewing the agreement under the contract law interpretive rules of the covered law. When a no breach or default opinion is given with respect to an agreement governed by a law that is not the covered law, the opinion giver may assume, without saying so, that the agreement would be interpreted in accordance with its plain meaning (TriBar Report, § 6.5.6, 53 Bus. Law. 591, 660-661 (1998)).

Two recent decisions apply interpretive rules that might affect the interpretive process in some of these cases, even where the covered agreement is governed by a law not addressed by the opinion letter. In *In re Bank of New England Corporation*, 646 F.3d 90 (1st Cir. 2011), the First Circuit reviewed a series of intercreditor agreements entered into in the 1980’s to determine whether junior creditors had subordinated their claims to interest accruing on the senior debt after the debtor had gone into bankruptcy. At the time the parties entered into the intercreditor agreement, the prevailing view among appellate courts applied the “rule of explicitness” for interpreting this question (based on decisions beginning in 1975). Under that rule, a junior creditor does not subordinate its claim to post-petition interest on the senior debt unless the intercreditor agreement “explicitly” says so. The intercreditor agreement at issue did not “explicitly” say so. However, the First Circuit had held in an earlier decision in the debtor’s bankruptcy (*HSBC Bank USA v. Branch (In re Bank of New England Corp.)*, 364 F.3d 355, 359 (1st Cir. 2004), that the “rule of explicitness” had not survived the adoption of the Bankruptcy Code of 1978 (which preceded the agreement under review) and thus the intercreditor agreement should be interpreted under ordinary principles of contract interpretation.

In applying the “ordinary” principles of contract interpretation, the First Circuit held that the trial court should take into account the parties’ understanding of the applicable law at the time the intercreditor agreement was entered into:

“ . . . courts may determine the meaning of ambiguous terms based on the law in force at the time the agreements are made, as ‘the law in force . . . becomes . . . part of the agreement . . . and the contract will be construed in the light of such law.’”

646 F.3d at 95 (quoting from *Dolman v. U.S. Trust Co.*, 2 N.Y.2d 110, 138 N.E.2d 784, 787 (N.Y. Ct. App. 1956)).

Here the trial court looked to the parties’ (and their lawyers’) understanding of the prevailing law. The trial court found (and the First Circuit concurred) that because it was widely (though it turns out incorrectly) understood that the “rule of explicitness” required an “explicit” provision for post-petition interest on senior debt to have seniority over the junior debt, the absence of such a provision was proper evidence of the intent of the parties that they did not intend at the time of entering into the intercreditor agreement that the post-petition interest on the senior debt would be senior to the junior debt.

In the second decision, *International Union v. ZF Boge Elastmetall LLC*, 649 F.3d 641 (7th Cir. 2011), the Seventh Circuit had to determine the expiration date of a collective bargaining agreement. An employer and a union had entered into a collective bargaining agreement in 2005. In 2007 they entered into an agreement with the title “Agreements: ZF Boge Elastmetall/UAW 2343 regarding items discussed to influence the plant selection decision and long term viability of the Paris [Illinois] facility.” The 2007 agreement was set forth in the form of a chart, “placing the previously negotiated provision of the still-in-effect 2005 agreement next to the newly negotiated terms, topic-by-topic.” 649 F.3d at 644. An issue arose as to whether the provisions of the 2007 agreement survived the expiration date of the 2005 agreement, or had an independent termination date.

The Seventh Circuit held that in interpreting an agreement a court should examine:

“ . . . the language, *structure*, history, and functions of the contract.”

649 F.3d at 646 (quoting from *Westinghouse Electric Corp. v. NLRB*, 809 F.2d 419, 422 (7th Cir. 1987)) (emphasis added).

The Seventh Circuit concluded that the *structure* of the 2007 “chart” amendment was determinative:

“Its *structure* is of significant help and leaves little doubt that it is intended as a modification to the existing CBA. . . . The new provisions are straightforward amendments to existing contractual terms; the clear intent of the *structure* was to alter specific provisions of the existing contract without doing violence to any of the unchanged terms of the then-existing CBA, including its expiration date.”

649 F.3d at 646-647 (emphasis added).

While an opinion giver generally is not responsible for facts outside the terms of the contract under review (e.g., parol evidence), the legal environment and the structure of the agreement are circumstances readily available to the opinion giver (unlike, say, side oral agreements) and may be relevant to the opinion giver’s interpretation of the agreement for purposes of giving the opinion.

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Legal Opinion Reports

[Editor's Note: For a summary of the discussion of pending and published bar reports at the Fall WGLO seminar, see "Recent Bar Opinion Reports and Statutory and Case Law Developments" in the WGLO Addendum to this issue of the newsletter (at page A-13). The Chart of Published and Pending Legal Opinion Reports below, prepared by John Power, was included in the panel materials, and is updated here to December 15, 2011.]

Recently Published Reports:³

ABA	2007	No Registration Opinions - Subcommittee on Securities Law Opinions
	2009	Effect of Fin. 48 - Committee on Audit Responses
	2009	Negative Assurance - Subcommittee on Securities Law Opinions
	2010	Sample Opinion - Committee on Mergers and Acquisitions
	2011	Diligence Memoranda – Task Force on Diligence Memoranda
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report Update
	2007	Comprehensive Report Update
	2009	Venture Capital Opinions
	2010	Sample Opinion
Florida	2011	Comprehensive Report Update
Maryland	2007	Comprehensive Report Update
	2009	Supplement to Comprehensive Report
Michigan	2009	Statement
	2010	Report
New York	2009	Substantive Consolidation – Bar of the City of New York
North Carolina	2009	Supplement to Comprehensive Report

³ These reports are available (or soon will be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, <http://apps.americanbar.org/buslaw/tribar/>.

Pennsylvania	2007	Update
Tennessee	2011	Report
Texas	2009	Supplement to Comprehensive Report
TriBar	2008	Preferred Stock
	2009	Secondary Sales of Securities
	2011	LLC Membership Interests
Multiple Bar Associations	2008	Customary Practice Statement

Pending Reports:

ABA Business Law Section	Outbound Cross-Border Opinions - Committee on Legal Opinions
	Survey of Office Practices Update - Committee on Legal Opinions
	Legal Opinions in SEC Filings (Update) – Subcommittee on Federal Securities Law Opinions
ABA Real Property Section (among others)	Annotated Real Estate Finance Opinion
California	Sample Venture Capital opinion
South Carolina	Comprehensive Report
Texas	Comprehensive Report Update
TriBar	Limited Partnerships
Virginia	Comprehensive Report

The City of London Law Society’s Guide to Opinion Letters

On November 17, 2011 the Financial Law Committee of The City of London Law Society issued its “Guide to Questions Addressed When Providing Opinion Letters on English Law in Financial Transactions” by English lawyers to a client or to a third party. The Guide is consistent in some respects with bar reports in the United States, for example, articulating the “golden rule,” recommending that opinion issues be addressed early, and confirming that an opinion letter speaks only as of its date. However, there are some significant differences. For example, indicating that “[T]here is a significant difference of practice between the USA and England,” the Guide states that the U.S. practice of requiring

a third-party enforceability opinion by borrower's legal advisers to the lender "is contrary to the English practice where the opinion is normally given by the lender's own legal advisers," with some exceptions. It addresses such matters as ethical rules relevant to third-party opinions, issues in giving cross-border opinions, and the treatment of factual matters in opinion letters. The Guide deserves careful study by U.S. lawyers giving or receiving cross-border opinions involving English law or English parties.

Membership

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her to the ABA Section of Business Law website: http://www.americanbar.org/groups/business_law.html, click "Committees," and scroll to Legal Opinions. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

Next Newsletter

We expect the next newsletter to be circulated in April 2012. Please forward cases, news and items of interest to Stan Keller (stanley.keller@edwardswildman.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

Addendum

Working Group on Legal Opinions

Fall 2011 Seminar Summaries

Addendum
Working Group on Legal Opinions
Fall 2011 Seminar Summaries

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WORKING GROUP ON LEGAL OPINIONS

FALL 2011 SEMINAR SUMMARIES

The following summaries have been prepared to provide an overview of the subjects covered at (i) the joint meeting of the Association Advisory Board and Law Firm Advisory Board held in New York on the evening of October 24, 2011, and (ii) the panel sessions and breakout groups held the following day, October 25, 2011. The summaries were prepared by panelists, leaders of the breakout groups, or by members of the audience. The next WGLO meeting is scheduled to be held on May 22, 2012 in New York.

JOINT MEETING PANEL SESSION:

Opinion Risk in a Changing Environment (Life and Death Risks for a Fragile Profession)

(Summarized by Arthur Field)

Arthur Field, Field Consulting LLC, New York, Moderator
Richard H. Murray, Liability Dynamics Consulting, LLC, Harrison, New York
Jeffrey M. Smith, Greenburg Traurig LLP, Atlanta
Randy J. Curato, ALAS Inc., Chicago

At the joint dinner meeting held by the Association Advisory Board and the Law Firm Advisory Board on October 24, 2011, the panel discussed the above subject matter, but the clear emphasis was on the subtitle—"Life and Death Risks for a Fragile Professional Enterprise." The discussion was broader than the title in the sense that the risks considered were those relating to handling "big ticket" transactions, not just the risk of giving opinions in these transactions.

The panelists were highly qualified on the topic of this presentation: Rick Murray is the retired Chief Risk Officer of Swiss Re, Jeff Smith is a co-author of a leading text — Mallen & Smith, *Legal Malpractice* (West 2009) — and Randy Curato is Loss Prevention Counsel at ALAS Inc.

The panel addressed the reasons why law firms may be considered to be "fragile" enterprises:

- Their limited capital;
- Their reliance on bank debt and long-term leases;
- Their limited ability to restrict competition by former partners and associates;
- Their reliance on partners with "portable business," whose loyalty may be greater to the client than to the firm;
- Their inadequate evaluation of prospective clients and transactions at the intake stage;
- Their lack of continuing oversight of firm work, including tolerance of partners who work alone and clients who limit information available to their lawyers;
- Their lack of effective quality control, as opposed to somewhat mechanical risk management procedures, such as docket control;
- Their limited management capacity, with many law firm leaders having little or no academic or practical training for the position;

- The limited communication with partners about risk events;
- Mergers and expansions that result in cross-border issues and partners who do not know each other well; and
- Their handling of transactions of a size such that damage claims arising therefrom could significantly exceed insurance limits.

There was a discussion of the current risk environment for business lawyers. Among the factors mentioned were:

- More aggressive clients;
- Reduced relationships with senior management of clients;
- Competition for what is regarded by clients as “routine” but big ticket work;
- The current financial services industry downturn;
- Greater willingness by clients, government agencies and third-party opinion recipients to sue lawyers;
- Diminished interest of judges in protecting legal functions;
- Fast moving transactions and the need to contain costs; and
- New specializations required by clients, as to which legal standards of care are developing.

Legal opinions are designed to help close deals, and therefore inherently serve clients' goals. But there should be consistent attention given to assure that opinions reflect an objective viewpoint rather than an economic need to provide what a client sees as the opinion necessary to do the deal. To obtain deal work there is sometimes client pressure on a lawyer to commit to a certain opinion deemed “market” by the client.

It was noted that actions by governmental agencies (including the IRS) and the bankruptcy courts may be seen as sources of significant risk. Unsuitable clients can pose significant risk. Transactions involving multiple clients may increase risk. The handling of factual materials used in opinions and transaction documents also involves significant risk. In litigation, will the defendant-law firm be able to testify about safeguards employed in the handling of such matters?

Even if there is a sound basis for positive testimony connected with meeting the standard of care, the panel noted two future risks that cannot be accounted for directly by a law firm's quality of legal work. First, public perception of lawyers in general and how legal opinions affect transactions specifically may not be as favorable in the future. Second, the availability of insurance and the relatively flexible attitude of the coverage analysis by insurers may not exist in the future.

The panel reviewed a list of business law oriented law firms that had failed in recent years. They failed for different reasons. In considering life threatening risk, history is not a reliable guide. Rendering high quality services reduces but does not avoid such risk. Bad luck plays a part. Some risk is business rather than practice oriented (*e.g.*, a new lease, a failed merger, the loss of a major client); this was noted but not discussed. Practice risk is influenced by many issues, including by national political and economic developments. Planning by most businesses takes all of these matters into account; law firms should consider this broader approach to planning that realistically looks at risk.

A question was raised as to whether there had been large legal opinion liabilities that justified the concerns being expressed. There have been no publicized awards on legal opinions that would threaten a firm's existence. (There have been instances of regulatory action in and out of the courts that have had that effect.) The panel discussed the fact that what passed for “history” may not be complete, since there have been unpublicized settlements regarding legal opinions that were known to panel members but not disclosed.

Why begin an inquiry into risk prevention measures from the vantage point of lawyers who specialize in preparing legal opinions? The panel thought that the “big ticket” liability problems are in transactional practice rather than with litigation practice. Opinion committees are the only current oversight of the transactional practice in many firms. If there is to be an identification and evaluation of risk in the transactional area, it must be made by those who know the area.

It may be difficult for law firms to approach these questions. Many of the partners think of the firm as it was, rather than as it is. Many law firms are no longer small businesses. Indeed, quite a number of law firms are complex in the sense that their products are diverse, their lawyers are spread geographically, and the applicable law may vary across offices. What is going on in the firm is no longer easy for those charged with the responsibility to supervise. Nevertheless, the partners in a firm expect that an effective effort will be made by management to avoid major risks. If a firm is seen by its partners as vulnerable, loyalty may be lost as a stabilizing factor.

The panel concluded that there is a useful opportunity available to firms now to look at their own “life and death” risk profiles, to show a heightened concern about risks and to make efforts to reduce them and prepare for them.

PANEL SESSIONS I:

1. Mandatory Choice of Forum Clauses (Summarized by Sylvia Fung Chin)

Sylvia Fung Chin, White & Case LLP, New York, Chair
Ettore A. Santucci, Goodwin & Procter LLP, Boston
Peter J. Wasserman, JP Morgan Chase, New York

This panel addressed whether an opinion can be given on the enforceability of a mandatory choice of forum clause.

A mandatory choice of forum clause differs from a permissive clause in that the parties agree that suit shall be brought to enforce the agreement only in courts in certain jurisdictions to the exclusion of others. Here is an example selecting the courts of New York:

“Any legal suit, action or proceeding against any lender or the borrower arising out of or relating to this loan agreement, or any transaction contemplated hereby, shall be instituted exclusively in the federal or state courts of the City and County of New York, State of New York, and each of lender and borrower hereby irrevocably submits to the jurisdiction of any such court in any such suit, action or proceeding.”

The forum chosen could be a federal or state court or a non-U.S. court. The panel focused on inbound choice of forum clauses, *i.e.*, the choice of a court in the jurisdiction whose law is being covered by the opinion giver.

The choice of forum is frequently tied to a choice of law provision, but not necessarily. From a contractual point of view, if they are not the same, the costs of litigation could be increased because a court in the chosen forum would be trying to determine the law of another jurisdiction.

The seminal case in this area is *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972), in which the U.S. Supreme Court held that forum selection clauses negotiated by experienced and sophisticated parties are *prima facie* valid in the absence of some compelling and countervailing reason making their enforcement unreasonable. The courts of many states have adopted this so-called “modern view” in enforcing forum selection clauses, subject to certain limited exceptions. New York and several other states have enacted statutes providing specifically for the enforcement of forum selection clauses. The New York statute is NY General Obligations Law § 5-1402(1). It is important to note that the statute is limited to inbound selections (i.e., a selection of the courts of New York), and applies only to contracts selecting New York law as the governing law and involving not less than \$1 million.

Although there was some disagreement among participants on how frequently requests are made in domestic transactions for an opinion specifically addressing the enforceability of forum selection clauses, many in the audience noted having received such requests. In any event, a remedies opinion on an agreement would typically cover the forum selection clause unless it is specifically excluded.

There was a general consensus as to the narrow exceptions sometimes included in opinions on the enforceability of forum selection clauses, such as the *Bremen* exceptions relating to unreasonableness. Some opinion givers may take a public policy exception for the provision or note the unenforceability of the provision if it were obtained by fraud or undue influence. The 2004 TriBar remedies report describes customary practice as not requiring an explicit statement of the *Bremen* exceptions, unless warranted by exceptional circumstances. See Special Report, TriBar Opinion Committee, “The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 58 Bus. Law 1483, 1499–1502 (2004). Nevertheless, many opinion givers, in the exercise of caution, state the exceptions when giving an enforceability opinion on a choice of forum clause unless they are relying on the New York statute or a similar one.

The federal courts might not apply the New York statute in situations involving federal subject matter jurisdiction. Federal courts also have the discretion under 28 U.S.C. § 1404 to transfer cases to another federal court. A lively debate ensued as to the appropriateness of taking a qualification sometimes seen to the effect that the New York statute might not bind a federal court.

The panel also described the recent change in the forum selection clause contained in the Loan Syndications and Trading Association (“LSTA”) form of model credit agreement, which states that the borrower “will not commence any action of any kind, whether in law or equity, whether in contract or tort or otherwise, in any forum other than the courts of the State of [---] sitting in [---]”. The rationale for drafting this very broad form of forum selection clause is based on several cases where banks were forced to litigate in jurisdictions with unfavorable statutory provisions or other law. Some opinion givers are including broad qualifications to the enforceability of clauses that attempt to dictate specific forums for non-contractual cases, but there does not yet appear to be a consensus on such qualifications. A few New York cases have enforced such provisions so long as they were drafted broadly and the action had some connection to the contract.

2. So-Called 4(1-1/2) “No Registration” Opinions

(Summarized by Julie Allen)

Julie M. Allen, Proskauer Rose LLP, New York, Chair

Mark H. Burnett, Goodwin Procter LLP, Boston

Matt J. Epstein, Mandel, Katz & Brosnan LLP, Valley Cottage, New York

Andrew J. Pitts, Cravath, Swaine & Moore LLP, New York

This panel focused on “no registration” opinions given in situations where there is no applicable safe harbor rule (such as the SEC’s Rule 144 or Rule 144A). These opinions are typically referred to as 4(1-1/2) opinions. First, the panel discussed the analytical framework for the so-called exemption. Resales of restricted securities must be registered unless exempt. Section 4(1) of the Securities Act of 1933 (the “Securities Act”) exempts transactions by any person other than the issuer or an underwriter or dealer. In the 4(1-1/2) context, the opinion giver must be able to conclude that the transferor is not an underwriter engaged in a distribution. Rule 144 and Rule 144A provide safe harbor exemptions from underwriter status. Where there is no safe harbor available, the SEC has recognized that private resales similar to private placements by issuers under Section 4(2) of the Securities Act (which exemption is technically only available to the issuer) are exempt under the so-called 4(1-1/2) exemption.

The panel noted that the facts under which a 4(1-1/2) opinion are requested will determine how easily the opinion can be given. For example, the panel noted that often these opinions are requested in a situation where the restricted security was issued to a corporate counterparty as part of a business transaction that had a primary purpose other than capital raising. In these situations, it is typically easy for the opinion giver to conclude that the opinion can be given. The opinion giver would customarily get a certificate from the transferee that it is an accredited investor, acquiring the shares for investment and without a view to distribution and other representations customarily given by buyers in a private placement transaction. Sometimes, but not always, the opinion giver might also require a certificate from the transferor that it acquired the securities in an exempt transaction (although the opinion giver may have independent knowledge of this if it assisted in the original transaction) and that the transferor has not engaged in any general solicitation in connection with the transfer.

In contrast, the panel did note some other situations where the opinion giver might have more difficulty in concluding that no registration is required in connection with a transfer. In particular, the panel discussed those situations involving securities issued in connection with distressed debt—the transferor received equity securities in exchange for the debt instrument and then seeks to transfer those securities, often to a party that will transfer the securities in short order. The parties in these transfers are often hedge funds or other entities whose primary business is investing and trading in securities. In these circumstances, it might not be as apparent that the transferor is not “taking with a view to distribution.” While the panel noted that some additional diligence and additional language in the back-up certificates might be required to address that issue, if the subsequent resale has the indicia of a private placement, the panel indicated that the opinion giver often can conclude that no registration is required.

Finally, the panel discussed the emergence of secondary trading platforms (such as SecondMarket and SharesPost) for restricted securities. It was mentioned that some firms as a policy matter will not give 4(1-1/2) opinions in connection with transfers made through such platforms. The concerns raised involve the difficulty in determining accredited investor status of the buyers and the possibility that the use of the platform itself might be deemed to constitute “general solicitation and advertising.”

CONCURRENT BREAKOUT SESSIONS I:

1. Assignability Issues (Summarized by Gail Merel)

Gail Merel, Andrews Kurth LLP, Houston, Co-Chair

Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair

David R. Keyes, Kelly Hart & Hallman LLP, Austin, Reporter

The purpose of this breakout session was to consider possible opinion language that would address some of the concerns expressed at prior WGLO seminars relating to requests that opinion givers permit reliance on their opinions by subsequent assignees of lenders in loan transactions.

General agreement was expressed among participants as to the acceptability of what has become known as the “Wachovia formulation” – that is, a qualification in the opinion (1) limiting reliance only to those future assignees who become lenders in accordance with the terms and conditions of the credit agreement and whose reliance is actual and reasonable under the circumstances at the time of assignment, and (2) clarifying that an opinion speaks only as of its date. There was also a general consensus that participants found such language acceptable when representing opinion recipients. While the consensus did not dispute the appropriateness of the substance of the Wachovia formulation, views were divided between those who, as opinion givers, would include it in their opinions and those who considered it as an unnecessary restatement of the rules of justifiable reliance.

One widely favored approach was the inclusion of a statement that no assignee may have any greater rights with respect to the opinion than its assignor (or perhaps the original opinion recipients). It was suggested that such a statement should be acceptable to opinion recipients, since the common understanding of the law of assignment is that an assignee steps into the shoes of its assignor – with no fewer and no greater rights. The group considered whether, in addition, opinion givers might want to address more particularly the rights of future lenders under statutes of limitation by stating expressly in the opinion that the agreement to permit reliance by future lenders does not constitute a reissuance of the opinion at any future date or otherwise extend any applicable limitations periods.

A number of participants also expressed interest in developing opinion language to limit the assertion of rights under the opinion to either the bank agent or the required majority lender group. They thought that such a qualification might find acceptance because it mirrors the approach often taken in loan syndications to limit the exercise of rights and remedies to the agent or a required lender group. Some expressed reservation about including any language in an opinion that might seem to invite claims against the opinion giver.

Other issues were discussed where there was no consensus or time did not permit sufficient discussion. Attendees of this session were generally of the view that the subjects addressed in this breakout session should be further considered at a future WGLO seminar, especially with a view to developing a consensus on appropriate opinion language to deal with assignability issues in loan transaction opinions.

2. Ethics and Client Fraud
(Summarized by William Freivogel and James Smith)

William Freivogel, Chicago, Co-Chair

James A. Smith, Foley Hoag LLP, Boston, Co-Chair

Philip B. Schwartz, Akerman Senterfitt LLP, Miami, Reporter

The focus of this breakout session was the hazards to lawyers and law firms in situations where their clients engage in fraud in transactions involving the competent work of their lawyers.

The session started with the Co-Chairs Bill Freivogel and Jim Smith summarizing several criminal proceedings against lawyers and multi-million dollar settlements by law firms and their insurers. They noted that the vast majority of the largest of these settlements concern business transactions (as opposed to litigation). They then opened the discussion to questions and comments so that attendees could ask questions and suggest ways these hazards could be avoided, or at least minimized.

The attendees discussed the role of ABA Model Rule 1.2(d), which provides that lawyers may not assist clients in the commission of crimes or frauds. One commenter noted that the rule does not have a materiality standard.

Several commenters observed that the profession has come to an unacceptable point when good lawyers doing good work can be ensnared in the misdeeds of their clients. In response to these circumstances, it is important for law firms to adopt a culture that identifies risk and then has the willingness to deal with it.

Possibly the most significant point to surface was whether opinion committees (or others responsible for a firm's opinion practices) were or should be part of the firm's risk identification and prevention function. In many respects, opinion committees in law firms are uniquely positioned to assist in the effort to ferret out client wrongdoing because they often provide a second partner review of aspects of many business transactions handled by the firm through their review of the opinion. Such committees may be the only institutional mechanism in many firms in a position to play this role. However, there are substantial limitations to the ability of an opinion committee to take on the risk prevention role, including the fact that many business transactions do not involve third party opinions at all; many transactions involve standard opinions that do not normally generate concern; and opinion committees often do not seek a deeper understanding of the business transaction beyond that needed to evaluate the particular (sometimes limited) opinion that is required at the closing.

Finally, the group speculated as to whether the risk analysis function should be thrust upon opinion committees and whether, if so, these committees (or those responsible for a firm's opinion practices) should begin to adopt a culture of asking broader questions regarding the underlying business transaction as a way of identifying not only opinion issues but also the potential risks to the firm from taking on the representation.

3. **Opinions on Contracts Governed by Federal Common Law**
(Summarized by Linda Hayman, Skadden, Arps, Slate, Meagher & Flom LLP, New York)

Thomas H. Kennedy, Skadden, Arps, Slate, Meagher & Flom LLP, New York, Co-Chair
Jerome A. Grossman, Luce, Forward, Hamilton & Scripps LLP, San Diego, Reporter

This session considered the issue of opinions addressing contracts governed by federal law. Although contracts to which the federal government is a party may be governed by federal common law, opinions with respect to the enforceability of these contracts are rarely requested or given. Accordingly, there does not appear to be any commonly-accepted form of such an opinion (or qualifications for such an opinion).

The group noted that there is a paucity of case law, and what exists is often conflicting. Citing cases such as *Erie Railroad Co. v. Tompkins* 304 U.S. 64, 78 (1938) (“there is no federal general common law”), some opinion givers expressed reluctance to opine on contracts governed by federal common law. However, based on later cases such as *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), others felt that opinions can appropriately be given where there is a clear federal interest. Others expressed concern that in the case of some contracts, federal common law may govern only those portions of the contract as to which there is a clear federal interest.

The discussion considered the appropriateness of different qualifications (including qualifications addressing the existence of a federal interest and the choice of state law in the event the court looks to state law). In addition the group discussed opinion procedures for reviewing opinions addressing contracts governed by federal law, as well as best practices for negotiating such opinions.

It was noted that the governing law clause in the contract itself could alter the analysis and ultimately the drafting of the opinion. Some clauses simply state that the contract is governed by federal law. Others refer to both state and federal law in varying ways.

No consensus was reached by the discussion group on these issues.

PANEL SESSIONS II:

Due Diligence Reports — Non-Client Disclosure/Review/Reliance Issues
(Summarized by John Evangelakos)

John Evangelakos, Sullivan & Cromwell LLP, New York, Co-Chair
Lou R. Kling, Skadden, Arps, Slate, Meagher & Flom LLP, New York, Co-Chair
Kenneth M. Wolff, Skadden, Arps, Slate, Meagher & Flom LLP, New York

The panel reviewed the current practices of U.S. law firms in dealing with requests by third party non-clients, typically financing sources, for diligence reports prepared for clients in connection with proposed acquisitions and investments. Their remarks were based on the work of the ABA Business Law Section’s Task Force on Delivery of Document Review Reports to Third Parties, on which all three of them had served. They described the predominant practice of those U.S. law firms that make the reports available to non-clients (many firms choose not to do so), which is to make such reports available to non-clients on a non-reliance basis, accomplished both by including appropriate cautionary and exculpatory language in the report itself that is made available to the third parties and by receiving from these third parties executed non-reliance letters. The U.S. practice was contrasted to the prevailing European practice of providing reports on a reliance basis but with an agreed cap on potential liability of the firm providing the report.

During the presentation, they discussed the concern that non-reliance undertakings may be unenforceable in situations where it is expected that the proposed financing of the transaction may be replaced before or after closing by the proceeds of a securities offering. The discussion touched on the appropriateness of a third party recipient that expects to act as a prospective underwriter or placement agreement agreeing that it would not use such a report as part of its due diligence; the enforceability of non-use and non-reliance undertakings under these circumstances; and whether a law firm should even be willing to provide a report to third parties under these circumstances.

During the question and answer period, there was a discussion of how global law firms balance practice demands in different offices and whether they try to maintain one global standard or vary their practices in accordance with local practice.

CONCURRENT BREAKOUT SESSIONS II:

1. Internal Opinion Policies and Procedures: Problematic Opinion Requests

(Summarized by Leonard H. Gilbert)

Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair
Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair
Leonard H. Gilbert, Holland & Knight, Tampa, Reporter

Continuing the theme of opinion practices previously commenced by the co-chairs, this breakout session discussed issues relating to problematic opinion requests. As in the past, the focus of these sessions was not to develop prescribed or recommended practices, policies or procedures, but to discuss certain issues represented by the request for problematic opinions and to examine the process that firms would use to resolve these questions. Andy Kaufman and Reade Ryan posed four problematic opinion requests and invited participants to discuss how their firms would address them.

Problematic opinion requests are a real challenge for the opinion giver. In light of “know your customer” and similar “gatekeeper” initiatives and requirements, many law firms have encountered a “citizenship” opinion request similar to the one recently posed on the Committee’s Listserve (see the Fall 2011 issue (vol. 11, no. 1) of the newsletter, under “Notes From the Listserve – *Opining that a Guarantor is not a Foreign National*” (page 15)), and these certainly will arise again. But problematic requests are not limited to this particular topic. One of the session co-chairs noted that in the last few months he had received the following opinion requests (or more precisely, non-negotiable demands, and in each case presented straight-faced by opinion recipients and counsel who, one would have thought, were well familiar with accepted opinion practice):

1. The Intercreditor Agreement [a subordination agreement among each of the two lending groups and the borrower] is the legal, valid and binding obligation of each party thereto, enforceable against such party in accordance with its terms.
2. The acquisition of a significant minority interest in a major league baseball team does not result in a violation of any rule or regulation of Major League Baseball. (Major League Baseball offered to permit the opinion giver to review its rules and regulations at its offices (but nowhere else) and would not certify that its copy of the rules and regulations was complete or unamended.)
3. The Bank's activities comply with all applicable law.

4. Neither the Borrower nor any of its Subsidiaries is in default under or with respect to, or a party to, any contractual obligation that would, either individually or in the aggregate, be expected to have a Material Adverse Effect.

So the question presented was what would the opinion giver do under those circumstances? Would the opinion giver resign? Proceed as best one could? Yell and scream? How is that decision made?

The questions considered by the group included the following:

- What role does the opinion committee play?
- Does the opinion committee participate as a group or through individual committee members or the committee chair — who is authorized to act?
- What role do other firm policies or management committees play? For example, risk management?
- How are internal political issues and client considerations handled?
- How much authority is given to the individual partner(s) handling the transaction to resolve the issues?

The responses of the participants ranged from “we would never give that opinion” to sometimes you have to be practical and see best how you can negotiate and narrow the request. None of the participants wanted to be responsible for “blowing the deal.” However, a couple acknowledged that in the course of their practice their firm had to resign and withdraw rather than to give a requested opinion and this only after considerable research, discussion with the client and with the appropriate committee or officers of the firm.

An extensive discussion regarding risk management intertwined with opinion giving produced interesting comments. For the most part, firms separate risk management from the opinion committee although there may be overlap of membership. The consensus was that proper training afforded to those involved in opinion giving helps avoid risks and problems. Narrowing the request for a problematic opinion seemed to be the consensus view.

In some firms, when an opinion question arises, the opinion preparer contacts by email or otherwise the entire opinion committee to make sure that he or she is acting consistently with other opinions given by the firm. Other firms have a two-attorney rule, while some firms require an opinion committee member to approve the opinion. There was general consensus that the job of the opinion committee was not that of a “policeman” reporting up the chain to the firm management. Rather, there had to be confidence in the opinion committee, which is only achieved by working with the lawyers who have to issue the opinions. There has to be a “buy-in” process on how you procedurally navigate the problems when they arise. The goal is to see that the right thing is done and to be sensitive to the issues, showing good judgment. Members of the opinion committee have to be seen as working with the partners to obtain the right result for the client and the firm. If the problem cannot be solved at that level, then it needs to be considered by the risk management committee or by firm management. The participants commented that the process of risk management is a different process than the opinion committee process. Risk management's obligation is to manage risk.

The question of conflicts was raised. The consensus of the group was that they are not the province of the opinion committee, but rather of the conflicts committee, preferably at the intake of the matter by the firm.

Analysis of the four examples took place during the discussion, and the general consensus was that one should be able, through negotiation to narrow the opinion request and through analysis to give opinions in examples 1, 2 and 3, but the example 4 opinion could not be given. It was noted that example 1 is a typical request from European counsel because it is not unusual in Europe.

A discussion followed as to the occasion when an outrageous request is received and how best to deal with it, with various solutions being offered depending upon from whom the request was made, the timing of the request and at what point the client should be brought in to the mix, though the favorite solution, if it can be done, is to narrow the requested opinion to the point where an opinion can be given.

2. Post-Transaction and Follow-On Opinions

(Summarized by Mark Spradling)

Mark R. Spradling, Vinson & Elkins LLP, Houston, Chair
Lawrence S. Goldberg, Schulte Roth & Zabel LLP, New York

The panel first considered the tensions that arise when an opinion giver wishes to update a form of opinion that the opinion giver has repeatedly provided in a particular type of transaction for a client. The opinion “precedent” for such transactions may have remained unchanged for years, even as the firm’s general opinion form has evolved. There was consensus among the participants that if the precedent is wrong, of course it must be changed. If the firm’s form has been updated to be more protective of the firm or to conform to current opinion practice, a majority indicated that, depending on the significance of the change and its effect on the transaction, the precedent should probably be updated when the opinion is next requested, subject perhaps to some “last uses” of the old form of opinion to ease the transition.

Next, the participants discussed how an opinion giver deals with newer structures (e.g., synthetic leases) and entities (e.g., limited liability companies and series LLCs) that might be restricted by covenants in older documents. Specifically, can an opinion giver provide a “no breach or default” opinion with respect to the subject transaction documents not contravening earlier documents if the older documents do not clearly contemplate the later transaction, and what steps can the opinion giver take to mitigate the risk of providing such an opinion in light of the uncertainty? A wide array of views were expressed, but as the discussion continued, there appeared to be a general consensus that the approach to contract interpretation under the law covered by the opinion should be considered and that, depending on that law, a strict construction, literal wording, or *Prudential v. RJR Nabisco*-type analysis, might not be necessary.[§] It was noted that in many states the approach to contract interpretation is to attempt to discern what the intent of the parties would likely have been had the parties been confronted with the new structure at the time of preparing their documents. A Delaware practitioner pointed out, however, that Delaware courts interpret contract provisions narrowly. When the opinion can be given, absent some strong indication from the documents about what the parties’ intent might be, many participants suggested that reasoned opinions, as opposed to “clean” no breach or default opinions, might be necessary.

The participants turned to a third area of post-transaction opinions: when a law firm that has only recently begun to represent a client is called upon to give an opinion covering all of the client’s

[§] See *Metropolitan Life Insurance Company v. RJR Nabisco, Inc.* 716 F. Supp. 1504 (S.D.N.Y. 1989) (strictly construing the terms of bond indentures).

outstanding shares (some of which were issued decades earlier) in connection with a public offering or other significant new event. The participants' general view was that, if the opinion giver could not persuade the recipient to forego the opinion (perhaps on the basis that opinions had been given by others in the past), it essentially has two options: to decline the engagement, or to do some type of comprehensive due diligence and, if a problem is identified, to disclose it or have remedial action taken.**

Enforceability opinions covering documents not usually the subject of opinions, such as opinions covering construction contracts, supply agreements or off-take agreements to which the opinion giver's client is a party, may present special problems, especially if they are already in effect and the parties are performing under them. Some firms might not be as familiar with the substantive matters covered by such contracts and may not have the same level of expertise in the provision-by-provision analysis of enforceability that firms customarily have with respect to credit documents. Additionally, firms may not keep abreast of special statutes, decisions, or other legal developments that affect the enforceability of such contracts in the same way they do in other areas with which they have more familiarity. Finally, if the client and its counterparties have begun performing under such contracts, additional inquiry may be necessary to determine whether the parties are disputing any aspect of performance.

3. Working with Non-U.S. Lawyers on Cross-Border Legal Opinions (Summarized by Truman Bidwell)

J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York, Co-Chair
James R. Silkenat, Sullivan & Worcester LLP, New York, Co-Chair
Timothy G. Hoxie, Jones Day, San Francisco, Reporter

With Special Presenters:

Samuel S. Garcia-Cuellar, Creel, Garcia-Cuellar, Aiza & Enriquez, Mexico City
Peter E. Hamilton, Strikeman Elliot LLP, Toronto
Carolina T. Joop, Demarest & Almeida, Sao Paulo and New York
Xiaolin Zhou, Jun He Law Firm, Beijing and New York

This group began its deliberations by considering the use of "as if" opinions in cross-border legal opinions. It was agreed that the use of such opinions was not a good practice because U.S. and foreign laws frequently diverge on important points.

A discussion ensued concerning the need for opinions in cross-border transactions where the assets are located within and without the U.S. There was general agreement that opinions in such instances would usually be required, but it was also recognized that one should carefully consider whether the cost of an opinion is warranted in a particular transaction.

The group then discussed a number of opinion topics, including enforceability and choice of law (both U.S. and foreign). There was a consensus that foreign lawyers and U.S. lawyers are usually able to give these two opinions, although the underlying laws are often quite different.

** The Session recognized that a third option, obtaining permission to rely on old opinions previously rendered with respect to outstanding securities of the issuer, exists, but this option often is not available and, even if it is, some participants expressed concern over following this approach unless the recipient agreed to rely solely on those previous opinions.

Matters relating to arbitration and litigation were also discussed. In respect of arbitration clauses, the group discussed the enforceability of agreements to arbitrate and the recognition of arbitral awards in non-U.S. countries.

Opinions relating to choice of forum, recognition of judgments, service of process and submission to jurisdiction were all considered. It was noted that these opinions are often ones which are very important to clients in cross-border transactions.

The meeting closed with a discussion of areas where U.S. and foreign lawyers often have difficulty in reaching common ground (such as security interests over property and “to our knowledge” opinions) and a discussion of the use of opinion committees within law firms in connection with cross-border opinions.

All participants agreed that the discussions had been useful and looked forward to continuing them in the future.

PANEL SESSIONS III:

1. Joint Committee on Statement of Certain Commonly Accepted Opinion Practices

Kenneth M. Jacobson, Katten Muchin Rosenman LLP, Chicago
Steven O. Weise, Proskauer Rose LLP, Los Angeles

[Editor’s Note: For a summary of this presentation, see the main body of the newsletter under “Fall Meeting of the ABA Section of Business Law — Meeting of the Committee on Legal Opinions, Joint Project on Common Opinion Practices.”]

2. Discussion of Bar Opinion Report Developments and Other Recent Opinion Developments (Summarized by John Power)

John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator
Kenneth P. Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Nashville
Donald W. Glazer, Boston
Stanley Keller, Edwards Wildman Palmer LLP, Boston
Steven O. Weise, Proskauer Rose LLP, Los Angeles

In this session, John Power first described the current status of recent and pending bar reports, and noted the publication as of July 1, 2011 of the Tennessee Bar Association’s Report on Third Party Closing Opinions.^{††} Pete Ezell, chair of the Tennessee committee, commented on the report. Steve Weise then summarized the holdings of two cases on contract interpretation relevant to enforceability opinions. Later in the session Stan Keller summarized SEC Staff Legal Bulletin No. 19 providing guidance on Exhibit 5 legality opinions and Exhibit 8 tax opinions, issued October 14, 2011. See “Recent Developments” in this issue of the newsletter for reports on both of these developments.

^{††} The Tennessee report is posted in the Opinion Resource Center on the Legal Opinion Committee’s web site. See “Legal Opinion Reports” in this issue of the newsletter for a chart showing recent and pending bar reports as of November 30, 2011.

Don Glazer discussed three issues that are covered in the 2011 Supplement of the third edition of Glazer & Fitzgibbon on Legal Opinions:

1. When an agreement contains a provision that extends the period for bringing claims beyond the time permitted by the applicable statute of limitations, preparers of an enforceability opinion should consider cases holding that provisions purporting to waive or extend the statute of limitations violate public policy and are not enforceable. This is in contrast to provisions that shorten the statute of limitations, which are generally enforceable.

2. Several courts have narrowed, distinguished or ignored holdings of the U.S. Supreme Court that state laws prohibiting certain provisions in arbitration clauses are preempted by the Federal Arbitration Act (see *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)). This creates uncertainty for opinion givers giving enforceability opinions on arbitration clauses, and they may be well-advised to exclude those clauses from the scope of the enforceability opinion.

3. In light of Delaware's *Meso Scale Diagnostics, LLC* decision (*Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2001 WL 1348438 (Del. Ch. 2011)), some opinion givers are concerned about giving no breach or default opinions in the case of a reverse triangular merger on agreements prohibiting assignments by operation of law. In a situation where the corporation is incorporated in Delaware but the opinion covers the law of another state, the no breach or default opinion might be given by assuming that a technical term, e.g. "assignment," has the same meaning as under the covered law and not Delaware law. However, if the agreement chooses Delaware law, the opinion giver should consider whether an unqualified opinion in reliance on that assumption would be misleading to the recipient if the courts of the covered law state would use Delaware law to determine whether the reverse triangular merger violated the prohibition on assignments by operation of law.

3. Current Status of Loss Contingency Disclosure and Audit Responses

(Summarized by Stanley Keller and James J. Rosenhauer)

Stanley Keller, Edwards Wildman Palmer LLP, Boston, Co-Chair

James J. Rosenhauer, Hogan Lovells US LLP, Washington, D.C., Co-Chair

Michael R. Young, Willkie Farr & Gallagher LLP, New York

This panel discussed the increased focus by the SEC on the adequacy of disclosure of loss contingencies under existing accounting standards, and the challenges this presents to companies and their counsel, including in responding to auditors' requests for information.

After reviewing the requirements under ASC 450-20 (formerly FAS 5) for disclosure of loss contingencies, the background of changes proposed by the FASB that have not been adopted pending assessment of the experience with compliance with ASC 450-20, and the operation of the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information as part of the auditing process under SAS No. 12, the panel examined a hypothetical entitled "The Unhappy Saga of ChronoRx." The hypothetical followed the evolution of development of a successful drug that began to show signs of contra-indications, which, over time, developed into a governmental investigation and then full-scale claims of product liability and securities fraud through class action lawsuits.

The panel discussed the company's disclosure obligations as the problems with the drug emerged and evolved, and the challenges faced by counsel in responding to the auditors and advising the client on the client's disclosure obligations as the red-flags became more apparent, including the professional

duties of counsel under Model Rule of Professional Conduct 1.13 and the SEC's Part 205 Rules of Professional Conduct.

The panel noted the difficulties in complying with the existing quantitative and qualitative accounting disclosure requirements regarding loss contingencies, as they are currently being enforced by the SEC, particularly given the inherent unpredictability of litigation. The SEC is requiring greater specificity and the justification of why an estimate of potential loss or range of loss cannot be made. On the other hand, the SEC is just seeking to apply existing requirements, is sensitive to concerns regarding prejudicial information, and has been permitting aggregation of claims to ameliorate the prejudicial impact.

The panel concluded by emphasizing that lawyers have an important role to play in assisting their clients to comply with the existing requirements as the best way to avoid the imposition of new requirements that could be even more problematic.

PANEL SESSIONS IV:

Gatekeeper Initiative—Update, Policies and Procedures

(Summarized by Kevin L. Shepherd)

Kevin L. Shepherd, Venable LLP, Baltimore

Douglas E. Nordlinger, Skadden, Arps, Slate, Meagher & Flom (UK), London

Randy J. Curato, Attorneys' Liability Assurance Society, Chicago

This panel discussed recent developments with the Gatekeeper Initiative and highlighted the significant differences between anti-money laundering (“AML”) regimes applicable to lawyers and law firms in the United Kingdom and the United States. The Gatekeeper Initiative is an effort by the international community to impose AML obligations on those perceived as “gatekeepers” to the domestic and international monetary systems, including lawyers. The panel concluded by updating the status of recently-filed legislation in Congress seeking to impose Gatekeeper-type AML obligations on the legal profession.

Douglas Nordlinger, the money laundering reporting officer for Skadden, explained the client due diligence (“CDD”) elements that are examined to determine the level of risk that a potential client is engaging in money laundering or terrorist financing. Doug indicated that his firm applies these CDD requirements on a firm-wide basis, even though CDD procedures are not legally required in the United States and in some of the other jurisdictions where his firm maintains offices. Before any lawyer in the London office may perform work on behalf of a client, the firm must complete the CDD and “know your client” analyses except in limited circumstances where the risk of money laundering is low or it is unnecessary to interrupt the normal conduct of business.

Randy Curato explained the origin and development of the ABA-adopted Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing. The Voluntary Good Practices Guidance serves to implement the internationally adopted risk-based approach for the legal profession. Randy identified the three major risk categories that must be analyzed as part of the CDD process (*i.e.*, country/geographic risk, service risk, and client risk) as well as the other factors that adjust the client's risk profile either upward or downward. Randy discussed suggested CDD protocols that lawyers and law firms may want to adopt.

To conclude the panel discussion, Kevin Shepherd discussed S. 1483 (Incorporation Transparency and Law Enforcement Assistance Act), which was recently introduced into Congress. S. 1483 is of particular interest to lawyers because it seeks to impose federally-mandated AML obligations on company formation agents. Although the bill contains an exception for lawyers and law firms, this exception may fall short of addressing the concerns of the legal profession. Kevin noted that the ABA Task Force on Gatekeeper Regulation and the Profession has sought an advisory opinion on a lawyer's ethical obligations to perform CDD from the ABA Committee on Ethics and Professional Responsibility. Kevin concluded the presentation by highlighting the importance to law firms and lawyers of implementing an effective CDD process in an effort to prevent federal legislation in this area.

PANEL SESSIONS V:

What to do? Has the Potential Client (Who Will Not Disclose) Intentionally Misrepresented?

(Summarized by Susan Cooper Philpot, Cooley LLP, San Francisco)

Arthur Norman Field, Field Consulting LLC, New York, Moderator

Bruce Green, Director of Stein Center on Law and Ethics, Fordham Law School, New York

Joel M. Miller, Miller & Wrubel, P.C., New York

Honorable Robert S. Smith, N.Y. Court of Appeals, New York

The panel discussed the ethical issues involved in a hypothetical, the key features of which were:

“The Magna family is selling the ABC Loan Corp. to XYZ Financial pursuant to a Purchase Agreement that was negotiated by John Magna, CEO and COO, and his son Morris Magna, Secretary and in-house counsel. The Purchase Agreement has been signed and ABC is now asking David Dunkin, an old friend and a lawyer, to help close the deal and give the opinion to the buyer at closing. A couple of issues have come up, however. First, ABC represents and warrants in the Purchase Agreement that no loan has any required payment that is more than 30 days overdue. This is not factually true and the CEO knew the representation was not accurate when he signed the Purchase Agreement. However, the payment status of all loans was readily available to the buyer in due diligence, the legal opinion at closing does not deal with the payment status of the loans, and the Purchase Agreement provides that loans that are not current at closing are to be replaced by the seller with fully performing loans. Second, John Magna is aware of an oral threat by a U.S. Equal Employment Opportunity Commission Regional Director to commence a proceeding against ABC relating to ABC's treatment of women in the workplace. This threat was not disclosed to the buyer in due diligence. However, the ABC litigation representation and the legal opinion to be given at closing only cover “proceedings” and “written” threats of litigation, not “investigations” or “oral” threats. John Magna is unwilling to disclose either of these matters to the buyer for fear that it would jeopardize the buyer's willingness to close. Can David Dunkin take on the representation?”

The members of the panel expressed various views.

Looking at the law, deceit is an intentional (sometimes merely reckless) misrepresentation intended to be relied on, and which is relied on, causing injury. The ABA's Model Rules of Professional Conduct prohibit a lawyer from assisting a client in conduct the lawyer knows is fraudulent, but a lawyer

may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, and meaning or application of the law. Model Rules 1.2(d) and 1.16(a). It is noteworthy that there appears not to be any concept of materiality in the Model Rules.

In addition, the courts have long recognized that a lawyer who gives a literally true opinion that facilitates the closing of a fraudulent transaction by the lawyer's client may be held responsible for that fraud. *See Securities and Exchange Commission v. National Student Marketing Corp.*, 457 F. Supp. 682, 712-715 (D.D.C. 1978).

The Guidelines for the Preparation of Closing Opinions promulgated by the ABA's Committee on Legal Opinions use a subjective test:

“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.”

Guidelines ¶ 1.5 (citing, for a fuller discussion, the 1998 TriBar report § 1.4(d), 53 Bus. Law. 591, 602-603 (1998)).

It is difficult to apply the law in this area in the context of the extensive and sweeping representations and warranties often contained in merger and acquisition agreements, which often go beyond what the parties can really know for certain. One could argue that in the case of past-due loans that the representation should be treated as a warranty, and not as a representation of a fact, acting as a risk allocation device. *See Lone-Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383 (5th Cir. 2010). This might be persuasive for this hypothetical, particularly if the remedy of replacing the non-current loans were the exclusive remedy for this type of breach. One might also question whether someone knowledgeable in the industry could reasonably rely on a statement of 100% current status for any loan portfolio. A court might be inclined to read this representation in light of the larger context and the fact that the exact status of each loan was available to the buyer in due diligence. *But see DDJ Management, LLC v. Rhone Group L.L.C.*, 15 N.Y.3d 147, 931 N.E.2d 87 (2010) (where a party obtains representations and warranties to the effect that nothing in the financials is materially misleading, the New York Court of Appeals declined “to hold as a matter of law that plaintiffs were required to do more - either to conduct their own audit or to subject the preparers of the financial statements to detailed questioning,” 15 N.Y.3d at 156, 931 N.E.2d at 93).

Similarly on the EEOC matter, perhaps the absence of representations on investigations and orally threatened litigation was intentional by both parties, in recognition of the inherent uncertainty involved in such matters, such that the buyer is not being misled.

The panel asked, however, whether you would want to be the counsel having to make these arguments to a court trying to sort this out after the fact? They expressed their view that, whether or not he was required to do so, the safest course for David Dunkin would be to decline the representation, unless ABC discloses these matters prior to closing.