SECTION MEETINGS - LOS ANGELES - APRIL 3-6

LEGAL OPINION COMMITTEE

▪ MEETING – FRIDAY, APRIL 4
  10:30-12:30 (St. Regis Hotel)
  Maintaining Opinion Standards: Opinion Committee Survey – Moving From Raw Data to Tentative Conclusions

▪ PROGRAM – FRIDAY, APRIL 4
  3:15-5:15 PM (Century Plaza Hotel)
  How Does Sarbanes-Oxley and Enron Affect Opinion Practice?; also Brief Reports on (1) Committee’s Report on Inside Counsel Opinions, (2) Survey Results – Opinion Standards and Opinion Committee Survey
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▪ OTHER PROGRAMS OF SPECIAL INTEREST
  9:00-11:00 AM – THURSDAY, APRIL 3
  Third Party Liability in the Post Enron Environment – Business and Corporate Litigation Committee
  10:30-12:30 – FRIDAY, APRIL 4
  New Disclosure Regime Post-SOX Rulemaking – Federal Regulation of Securities Committee

Spring Meeting Hotel Reservation Deadline March 7

Call: Century Plaza – 310-551-3300 or
St. Regis – 877-787-3452
In re Enron – On Opinions

In re Enron Corporation Securities, Derivative and ERISA Litigation, No. H—1-3624, MDL 1446 U.S. Dist. Ct. So. Dist. Texas 2002 WL 31854963 on motions to dismiss, the Court dismissed the case against Kirkland & Ellis (but not the other defendants including Vinson & Elkins). The case involves a class action complaint against banks and professionals for making false statements or failing to disclose adverse facts while selling Enron securities and/or participating in a scheme to defraud purchasers of Enron’s public securities. Kirkland’s motion seeking dismissal was granted because it is not alleged that it “made any material misrepresentations or omissions to investors or the public generally that might make it liable under § 10(b).” For example, the court stated that “any opinion letters that the firm wrote are not alleged to have reached the plaintiffs nor been drafted for the benefit of plaintiffs.” See particularly pages 20-27, 53-62 and 82-83 of this very long decision.

Aiding & Abetting Redux

In Central Bank of Denver, NA v. First Interstate Bank of Denver NA, 511 U.S. 164 (1993), the U.S. Supreme Court held that the Securities Act did not grant to a private plaintiff a § 10(b) claim for aiding and abetting. That approach may be largely undone if other courts follow the approach of Judge Harman in the Enron decision cited above. The Court reads the Central Bank case to allow the lower courts to determine who is a primary violator of the statute albeit as a “secondary actor.” This approach can result in lawyer liability for opinions. Among other things, it is a rationale for not dismissing the case against Vinson & Elkins.

SEC SOX Rules and 3d Party Opinions

The final SEC Rules under Section 307 seem to require an attorney-client relationship for the Rules to apply. Thus, 3d party opinions should not be affected. This point was not clear under the proposed Rules. The final rules contain an expansive definition of “practicing before the Commission.” The result is that one giving an opinion to a client in a non-SEC transaction may be deemed to be practicing before the Commission in some circumstances. For example, the opinion may become a filed document if the transaction is material. This could result in “practice before the Commission.”

Ethics and Lawyering Today

A free e-mail newsletter published by Committee member Bill Freivogel and Lucian Pera sometimes includes cases on opinion letters but is always interesting. You can subscribe at http://www.ethicsandlawyering.com. For example, the May, 2002 Newsletter refers to a tax opinion. Reliance on an opinion of a professional is a defense to a tax negligence penalty. However, the opinion given in this case was not accepted as a defense because the lawyer giving it had a conflict of interest, here an investment in the transaction that was the subject of the opinion.
A Preview of the Opinion Committee Survey

A. The Firms and Law Departments in the Survey

The survey will be discussed at the April meeting and described at the April program. At the meeting, the Committee will review the raw data and see if there is a consensus as to conclusions to be drawn. The Committee will also review the next steps to be taken. Is there enough data and interest for a published report? If so, what type of format would be best? Here is a preview of the survey results. At the program, there will be a very brief review of the data to test the level of interest in developing a report.

We received 50 responses to the survey. Most (38 of 50) were from firms of over 100 lawyers. However, about half of the responses (26 of 50) were from firms with fewer than 100 business (transactional) lawyers. Most of the firms did not have non-U.S. offices (30 of 48). Thus, the largest firms did not predominate in the survey. Nearly half of the firms responding (22 of 50) had over 5 offices in different cities. It seems fair to characterize the responses as being primarily from mid-size firms with a number of offices in different states. Ten percent of the responses were from smaller firms (fewer than 25 lawyers) and 20% of the responses were from one office firms.

B. About The Use of Opinion Committees

Ten of the 44 firms and departments (22%) responding had no opinion committee. Thus, it is clear that a number of responding firms with more than 25 lawyers in a business transactional practice have no opinion committee. Larger firms may have a more well defined opinion committee structure. This survey suggests the continued informality of the opinion process, only 3 of the 40 responses indicated regular monthly or quarterly committee meetings and only 4 of 38 responses indicated that the committee kept minutes of meetings. Thirty two of 40 responses indicate that the opinion committee had 10 or fewer members. A committee of 5 or less was indicated in 15 responses.

C. What Do Opinion Committees Do?

In addition to overseeing consultation as to opinions to be given, the survey indicates that opinion committees are involved in the following activities:

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<tr>
<th>Activity</th>
<th>Answer</th>
<th>Count</th>
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<tr>
<td>Circulate information about current cases and problems</td>
<td>Yes</td>
<td>26 of 39</td>
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<tr>
<td>Conduct educational programs on opinions</td>
<td>Yes</td>
<td>31 of 41</td>
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<tr>
<td>Provide written guidance about Firm/Department policies on opinion giving</td>
<td>Yes</td>
<td>36 of 40</td>
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<tr>
<td>Provide an Opinion Manual or other guide for opinion giving</td>
<td>Yes</td>
<td>25 or 41</td>
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<td>Make materials (about opinion giving) available in the office/law department to lawyers who prepare opinions</td>
<td>Yes</td>
<td>36 of 41</td>
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<td>Review opinions (after the fact) as a quality control effort</td>
<td>Yes</td>
<td>6 of 41</td>
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As can be seen from the responses above, the committees generally support opinion givers in keeping up with current opinion materials and in educating generally as to opinions. The picture is quite different as to opinions already given. The review of opinions given (after the fact) is not often seen (6 of 41 Yes). Less than 40% of firms collect opinions given in a manner that facilitates later use of them and less than 15% collect opinions received by them from others in a manner that facilitates later use. At the meeting, we will discuss the manner in which consultation as to opinions to be given is administered by law firms/departments.

Possible Fall Meeting
The Committee is tentatively planning a Fall meeting in Washington, DC on December 4. The meeting will probably be held only if the Committee determines to prepare a report on the Opinion Committee Survey for publication.

New Projects
At the April meeting, the Committee will consider whether to undertake new projects for the coming year. If any of you have suggestions, please e-mail the editor at anfield@igxg.com. It may be appropriate to explore several areas selected at the meeting deferring any final decision to the August or December meeting.

Items of Interest for Newsletter
We depend on members of the Committee to bring items of interest to opinion givers to the attention of the editor. Let us know about cases, articles and other materials you think are relevant. Thanks.

Membership Committee
The Committee operates between meetings through its Chair, Vice Chair and Immediate Past Chair. We need some help in bringing in new members. If we can interest you in helping with our membership effort, please e-mail the editor at anfield@igxg.com. Or if you know of section members who are interested in joining the Committee, please send me their names and e-mail addresses.

Please fill in the form below suggesting new members for the Committee. We will follow up.

[Fax to A. N. Field (212) 504-8078]

I suggest the following lawyer(s) who are interested in legal opinions and might join the Committee. They are members of the Section. Please contact them.

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From: __________________________________________

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