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**Spring Meeting Report**

We presented a program on Law Office Opinion Practices -- Policy and Process at the Spring meeting in Tampa. Our panel included Arthur Field, Tim Hoxie from Heller Ehrman, Amy Williams from Hunton & Williams, Larry Safran from Latham & Watkins, Trey Baldy from Holland & Knight, and Carolan Berkley, as moderator. I asked John Power, Vice Chair of the Committee to prepare a report on the program, which is included below:

**REPORT ON PROGRAM BY THE COMMITTEE ON LEGAL OPINIONS ON LAW OFFICE OPINION PRACTICES - POLICY AND PROCESS**

The program was stimulated by the Committee on Legal Opinions Report, *Law Office Opinion Practices*, 60 Bus. Law. 327 (2004). The report is based on responses to a 2002 questionnaire circulated to members of the Committee, on firm and department policies and procedures for giving third party legal opinions. Arthur Field, then Chair of the Committee, was the reporter of this project, and Don Glazer and Carolan Berkley were co-reporters.

**Introduction.** Arthur Field introduced the topic by indicating that the questionnaire on which the report is based addresses processes and procedures, not other issues. While all responding firms have processes and procedures for giving legal opinions, they vary broadly. This is in part due to different cultures and relationships in firms. For example, while many firms have opinion committees, some do not, and those with committees use them differently. Many have opinion manuals and many do not. Most firms surveyed have second partner consultation on legal opinions, but details vary from firm-to-firm.

Arthur noted that most information gathered about legal opinions focuses on the practices of lawyers in the securities or lending practice areas; less is known about practices of others. He discussed the inherent limitations of surveys; for example, they can elicit quick and unreliable answers. Only fifty responses to the questionnaire were received, and they could be unrepresentative.

The balance of the program was devoted to a discussion of the following questions included as part of the program materials. In general, the answers provided by the panelists were consistent with the conclusion of the report that the questionnaire responses “show a wide range of approaches.”

1. **Do you have policies covering review of opinions when you represent the opinion recipient?** Panelists try to observe the “golden rule” (don’t ask for an opinion you would not be willing to give) when reviewing opinions for recipients. They did not identify other firm procedures for review of opinions of others.

Panelists agreed that the golden rule doesn’t work very well where counsel for the opinion recipient does not customarily give opinions. The panelists also noted that counsel for the recipient is in a difficult situation if the client insists on a legal opinion that he or she would not
give; panelists try to dissuade their clients from this kind of request, but if the client insists, they usually proceed with the request.

2. To the extent your firm requires second partner or opinion committee review, do the reviewing partners also review the underlying transaction documents and due diligence material? Firms of all panelists seem to require some kind of pre-closing consultation on opinions. Firm practice regarding consulting partner review of underlying transaction documents ranges from always requiring review, to requiring it only where the opinion has specialized content in certain specialized areas, to a varying practice depending on the identity of the primary responsible partner or other factors.

Two represented firms have an informal practice of special pre-closing “hot spot” reviews, e.g., reviewing control agreements in personal property security transactions, the handling of factual issues for a no litigation confirmation, and reliance on factual certificates generally. They reported informal assistance by associates and legal assistants in identifying hot spots.

On related topics, represented firms are not uniform in requiring backup memos, or in maintaining a central index or filing system for opinions the firm has given. All sometimes use more than one consulting partner, particularly to provide specialized expertise. Practice varies on whether one consulting partner is required to be a member of the firm’s opinion committee.

3. How do you keep opinion reviewers informed? Has this changed with the increased use of law firm intranets? All panelist firms seem to use forms, an opinion manual and educational presentations to educate lawyers on the firm’s approach to opinion giving. It can be a challenge to make sure that everyone is aware of changes in the manual and forms, particularly where the firm has many offices.

Email and intranet capacity facilitates informing partners about firm procedures (including changes in procedures), review of opinion drafts by the responsible partner, and second partner or committee consultation. Panelists stressed the practical importance of completing all reviews before a draft of the opinion is sent out.

4. How do you integrate lateral hires into the opinion process? One panelist reported that his firm introduces laterals who are likely to be responsible for opinions to opinion committee members, and educates them on firm opinion policies. Second partner consultation helps assure policy compliance. He commented that discussion of processes used by the lateral’s former firm can result in good ideas for the combined firm’s practice.

5. If you have offices outside the United States, how does this impact your firm’s opinion practice? One panelist emphasized the importance of handling opinions on the same law in the same way regardless of the location of the office giving the opinion. On the other hand, domestic U.S. policies on the form of an opinion may not work where the opinion is given by a
non-U.S. office addressing non-U.S. law. Another panelist reported that his firm has a separate local opinion committee in each foreign office to focus on such issues as the form of opinions on non-U.S. law, and a master committee that establishes procedures for all opinions, for example second partner consultation.

6. Do you have any different policies or practices addressing giving opinions for new clients as opposed to established clients? One panelist suggested that it might be desirable to engage in more rigorous diligence for a new client.

7. Do you monitor opinions that have been delivered by the firm after the fact? Post-delivery monitoring may be useful in determining whether policies are being followed and whether education is effective. Most panelists reported that their firms do not audit opinions after delivery because of the time required, the inability in most cases to bill for that time, and the practical difficulty of collecting all of the opinions. The firm of one panelist requires all final opinions to be sent to a central location, and reviews some of the opinions on a random basis.

8. Do you maintain an accessible file of opinions received by clients of the firm from other firms? Panelists saw benefits in doing this, but none reported having an effective program.

9. Do you have procedures in place to address concerns raised by the cases? Have these procedures changed in response to the recent cases? One panelist reported updated forms of backup memoranda and opinions to respond to recent cases. Another reported that his firm is now more specific about defining “knowledge” in opinions. A third stated that his firm will not give factual confirmations, including “no litigation” confirmations, except for “10b-5” confirmations.

Conclusion. In concluding the program, Arthur said that he believes that claims against opinion givers have risen. He urged opinion givers to watch out for “red flags” when giving opinions, and to be cautious about factual confirmations. He also stressed paying special attention to how facts are gathered, and warned against using factual certificates that simply parrot the opinions they support.

John Power

Annual Meeting

We are co-sponsoring a program to be held at the Annual Meeting in Hawaii with the Partnerships and Unincorporated Business Organizations and Small Business Committees on “Practice and Perils of Opinions on Alternative Entities.” The program will be held on Sunday,
August 6 from 7 am to 9 am (yes the time is correct). Panelists include Carolan Berkley, Howard Lefkowitz from Proskauer Rose in New York, Nelson Crandall from The Enterprise Law Group in Menlo Park, California, Louis Hering from Morris, Nichols, Arsht & Tunnell in Wilmington, Delaware and Thomas Bell from Simpson Thacher & Bartlett in New York. We will cover legal opinions for limited liability companies and limited partnerships focusing on the TriBar Opinion Committee report on "Third-Party Closing Opinions: Limited Liability Companies” and role playing a complex hypothetical. In addition to the report and the hypothetical, materials include a form of third-party opinion for a private equity fund closing, a critique of the report, results of the survey that was circulated earlier this year and a cumulative survey of Delaware case law relating to limited liability companies. You will want to review the materials whether or not you plan to attend the program. All materials will be posted on the Business Law Section website and are available to members whether or not they attend the meeting. If you are planning to attend the program, I urge you to review the hypothetical in advance.

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**Joint meeting with Subcommittee on Securities Law Opinions and Ad Hoc Committee on Audit Responses**

Immediately following the program, we will meet on Sunday, August 6, from 9 am to 11 am, with the Securities Law Opinions subcommittee of the Federal Regulation of Securities Committee and the Ad Hoc Committee on Audit Responses.

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**Implications of ARBY Partners on Opinion Practice**

In *ABRY Partners V, L.P. v. F&W Acquisition LLC* (Del. Ch., February 14, 2006), Vice Chancellor Strine dealt with a buyer’s claim for rescission of an acquisition transaction based on the seller’s misrepresentation. The acquisition agreement contained an indemnification provision that capped liability and provided that it was the exclusive remedy. It also contained a non-reliance provision stating that the buyer did not rely on any representations other than those set forth in the agreement. The agreement provided that it was governed by Delaware law.

1. **Exclusive Remedy Provision.** The court held that, notwithstanding the exclusive remedy provision, as a matter of public policy the buyer could seek rescission if it could establish that the seller knowingly made a material misrepresentation (i.e., engaged in actual fraud). This holding raises the question whether an opinion exception to a remedies opinion on the acquisition agreement is needed for an exclusive remedy provision. The question would arise when an opinion giver has rendered an opinion to the other party to the transaction whose conduct is the reason the provision is not enforced. This typically would be when buyer’s
counsel is rendering an opinion to the seller, but it also could occur the other way in a merger of 
equals or when the buyer is issuing its securities.

An opinion exception should not be necessary for the possibility that a court 
might decline to give effect to an exclusive remedy provision when there is fraudulent conduct. 
This is because an opinion giver is entitled to assume, without so stating, that the opinion 
recipient did not engage in fraudulent conduct in connection with entering into the agreement. 

The court in ABRY Partners noted that some other jurisdictions, such as 
Massachusetts, as well as the Restatement, do not enforce an exclusive remedy provision 
governed by their law in the face of conduct that is less culpable than fraud, such as when there 
is recklessness or possibly gross negligence. An opinion exception should not be required in 
these jurisdictions either because the unstated assumption should cover the absence of any 
culpable conduct by the opinion recipient.

2. Non-Reliance Provision. The court also held that Delaware will require a party to keep 
its promise that it will not assert a claim based on a representation outside the agreement, and 
thus will enforce the non-reliance provision, even if there was fraudulent conduct. New York 
law appears to be similar but many other jurisdictions, including Massachusetts, will not permit a 
non-reliance provision (sometimes included in an integration or merger clause) to protect a party 
against its own fraudulent conduct.

No opinion issue arises in Delaware or New York because the non-reliance 
provision is given effect regardless of the opinion recipient’s conduct. An opinion exception for 
a non-reliance provision in states that do not follow the Delaware and New York rule should not 
be necessary because again the unstated assumption would cover culpable conduct of the opinion 
recipient. Although the court used general language indicating that many courts may not give 
effect to a non-reliance provision, the cases cited all involve culpable conduct of the party who 
was the intended beneficiary of the provision.

3. Governing Law. The Delaware court gave effect to the parties choice of Delaware law to 
govern the agreement even though the seller argued that Massachusetts law should apply to the 
tort claim. The court refused to bifurcate the contract and tort claims and noted the existence of 
the Delaware statute giving effect to the parties’ choice of governing law. In other states, the 
analysis could be different.

In Restatement states like Massachusetts, the courts will give effect to the parties’ 
choice of law unless doing so would violate a fundamental policy of another state whose law 
would govern in the absence of a choice of law in the agreement. Refusing to permit the waiver 
of fraud or other culpable conduct might be viewed as a fundamental policy.

However, for opinion purposes, if the opinion is limited to the law of a particular 
state, it is understood that it does not cover the fundamental policies of another state whose law 
is not covered by the opinion. Thus, the internal law of the state whose law is covered by the 
opinion should be examined to determine the enforceability of these provisions.

4. Law Covered by the Opinion. Non-Delaware lawyers typically limit the coverage of 
their opinions to the Delaware General Corporation Law. Since the ABRY Partners decision 
involved the application of Delaware contract law principles to the agreement provisions, an 
opinion that is so limited would not cover those principles. Often, a non-Delaware lawyer would 
render the remedies opinion as though its home state law applied, for example, as though the
internal law of Massachusetts governed the agreement. Under those circumstances, the opinion
giver would have to look beyond ABRY Partners to determine the law of the state covered by the
opinion in order to understand the enforceability of the exclusive remedy and non-reliance
provisions. However, as noted above, an opinion exception should not be necessary in any case.

5. **Opinion Practice.** Although an express exception should not be necessary for exclusive
remedy and non-reliance provisions because of the unstated assumption regarding absence of
culpable conduct of the opinion recipient, when a remedies opinion is rendered on an agreement,
such as an acquisition agreement, containing these provisions, an opinion giver may choose to
include an express exception regarding these provisions for clarity. Some opinion givers also
may choose to state expressly that they are assuming that no other state whose law would govern
absent a choice of law in the agreement has a fundamental policy that would be violated. As
noted above, this assumption is unnecessary but it is unobjectionable.

Stanley Keller
4/25/06

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**Opinion Risk Management Seminar-Fall 2006, New York City**

A national invitation-only seminar on Legal Opinion Risk is being held in New York on October
17. It is sponsored by the ABA Business Law Section, TriBar, and The Business Law Sections
of the Texas, California and Pennsylvania Bars and a number of law firms. Increasingly over the
past decade law firms have found themselves as defendants in law suits brought by recipients of
opinions given to non-clients. Claims have arisen against law firms for receiving such opinions
without proper advice to their clients. Most of these opinions are given to the party on the “other
side” of a transaction but underwriters, rating agencies, accountants and others are also recipients
of such opinions.

While those giving and receiving opinions have developed a relatively national uniform
approach, some differences persist and will be examined. The question of how courts will see
the duty of lawyers as opinion givers and recipients will also be examined at the Seminar. How
lawyers meet opinion standards in a multi office context and with downward pressure on fees is
of importance and will be considered.

There are only about 100 places available for the Seminar. If you have not already done so, you
can forward inquires to me at berkley@ballardspahr.com and I will forward them to the
planners.
Membership

If you know someone who would like to join the Committee and receive our Newsletter, please direct them to the ABA Business Law Section website: http://www.abanet.org/buslaw/home.html, click “Committees” and the Legal Opinions Committee. If you haven’t visited the website lately, I recommend you do so. Our mission statement and prior newsletters are posted there.

Next Newsletter

The next newsletter will be circulated sometime in September. Please forward cases, news and items of interest to berkley@ballardspahr.com.