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**Annual Meeting**

We will be meeting at 10 a.m. in the Crown Room at the Fairmont Hotel on Sunday, August 12, 2007, immediately following our program entitled “Crossing the Threshold: Why Ask for an Opinion at All?” to be held in the same room starting at 8:30 a.m. We will discuss and hopefully approve the Draft Statement on Customary Practice, which was previously circulated and is included below. Several bar associations have signed on to the statement and others have commented. Steve Weise is working on obtaining additional support and the existing comments and hopes to prepare the final statement for publication in the early Fall.

Some of the comments have considered whether the statement goes far enough or should establish itself as the standard of liability. We are unable to change state tort law through the statement and not all state standards are consistent. We hope to keep the statement brief and easily understandable by judges, litigation attorneys and jury members.

Please review the statement and send any comments in advance of the meeting to berkley@ballardspahr.com. Comments that have been provided to Steve do not need to be sent again. My hope is to have the committee approve the statement at our meeting so we can go through any necessary ABA channels in time to be listed as a sponsor when the statement is published in *The Business Lawyer*.

I will then turn the reins of the committee over to John Power to discuss with you his vision for the committee, which is outlined in his report below. You are in good hands, and I look forward to continuing to be active in the committee under John’s leadership.

Thank you for the opportunity to serve you over the last three years. I hope you have learned as much from our programs, newsletters and list serve activity as I have. Like all prior chairs of our committee, we do not go quietly into that good night, and I expect to continue to see many of you at future meetings.

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**Draft Statement on Customary Practice**

**Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions**

Legal opinions that lawyers give to non-clients in business transactions are known as third-party legal opinions. These opinions are prepared and understood in accordance with the customary practice of lawyers who regularly give or review them.
Customary practice permits an opinion giver and an opinion recipient to have common understandings about an opinion without stating them in the opinion.

The use of customary practice does this in two principal ways:

It establishes the diligence (factual and legal) required to be undertaken to give an opinion. In so doing, it reflects a realistic assessment of the nature and scope of the opinion and the difficulty and extent of the diligence required.

It explains how certain of the words and phrases commonly used are understood in the specialized context of an opinion. These explanations may expand or limit the plain meaning of the words and phrases used.

By providing content to abbreviated opinion language, customary practice significantly reduces the number of words needed to communicate complicated matters. As a result, an opinion may omit lengthy lists of diligence procedures, definitions, exceptions, limitations, and assumptions where customary practice supplies this content. Under customary practice, the inclusion in an opinion of some but not all of this information does not mean that other information customarily understood to apply does not apply. Departures from customary practice, to be effective, must be indicated in the opinion.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute’s Restatement (Third) of the Law Governing Lawyers, Section 95 (Reporter’s Note to Comment c) states:

“In giving ‘closing’ opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.”

The Reporter’s Note adds that customary practice covers the “meaning of the opinion letter including all such assumptions, limitations, and diligence standards.”

Customary practice evolves over time to reflect changes in the law and practice. Treatises, law review articles, and bar association reports describe customary practice. They also describe principles derived from customary practice that an opinion giver and the opinion recipient may use to resolve opinion issues.

Some opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.
**Incoming Chair’s Report**

A LOOK AT THE PROMISING FUTURE OF THE LEGAL OPINIONS COMMITTEE

Dear members of the Legal Opinions Committee,

I write this letter to thank Carolan Berkley for her service as Chair of our Committee, and to take a look at the future of the Committee and how you and the Committee can continue to work together successfully.

Thank you, Carolan.

Over the last three years, Carolan has brought to the Committee her leadership skills, energy, and broad experience and friendships in the legal opinion world. Thanks to Carolan, the Committee’s traditional role as the preeminent source of information about developments in the legal opinion practice has been enhanced, for example by excellent cutting edge programs, and an active newsletter for members. The Committee continues its role as a premier venue for discussion of legal opinion issues by national leaders in the field. Her legacy is satisfied and active members (Membership has grown to nearly 800.).

**August Committee Meeting and Program in San Francisco.** We will have an opportunity to thank Carolan in person at the August meeting of the Committee at the ABA Annual Meeting in San Francisco. The meeting will be held at 10:00 a.m. on Sunday August 12 in the Crown room of the Fairmont Hotel. The agenda will also include discussions of Committee co-sponsorship of a statement on customary practice, and future Committee activities.

The Committee will sponsor a program immediately preceding its meeting, starting at 8:30 a.m., also in the Crown Room of the same hotel. The topic is “Crossing the Threshold: Why Ask for an Opinion at All”. Panelists Don Glazer, Jonathan Lipson, Bill Viets, Ann Walker and I will discuss the analysis used in determining whether to ask for a legal opinion. We will use as program material a portion of the 2004 California Report on Remedies Opinions (accompanied by a power point presentation by Ann Walker), original articles by Jonathan Lipson, and an analysis of a fascinating April exchange among members on the Committee list serve on this topic.

**Future Activities of the Committee.** I will have the honor of succeeding Carolan as Chair of the Committee. It will be a tough act to follow. In planning our future direction, I see three areas of emphasis: (1) continuing the Committee’s leadership in disseminating information on cutting edge developments in the legal opinion field through its newsletter, programs, web site and list serve; (2) emphasizing efforts to study important specific areas of interest in this field, and, where appropriate, publish authoritative reports in those areas, and (3) attracting the active involvement of even more of you members in the activities and deliberations of the Committee.
Studying Areas of Interest. Sylvia Chin and Paul Storm chair the Committee’s Subcommittee on Cross-Border Legal Opinions, and are currently working on plans for the Subcommittee’s future. Richard Howe is the Chair of the Committee’s Task Force on Reliance Issues, and is similarly working on its plans. We hope to hear reports on these efforts at the Committee meeting in August; you may join the Subcommittee or the Task Force on the Committee’s web site.

We need your input to determine other areas for Committee study. For example, should we undertake a study of customary practice of opinion recipient counsel? What about further discussion of the Threshold issue, the subject of the Committee’s program in August? If you have ideas about these topics or suggestions for other areas of study, please let me know by email at the address set forth below.

Increased Member Involvement in the Work of the Committee. I hope you will increase your participation in the work of the Committee. Such involvement better acquaints you with other leaders in the legal opinion field, gives you greater exposure to developments in the opinion practice, gives you a higher profile in this area, and not incidentally permits you to use your skill and experience to improve opinion practice. Please let me know of your interest in further involvement.

Programs of the Committee. The Committee typically sponsors a program each year at the Annual Meeting of the ABA and at the spring meeting of the Section of Business Law. It also sponsors other programs from time-to-time, either in person or by teleseminar or webinar. I solicit your involvement in a new subcommittee of members responsible for finding good topics and speakers, participating where appropriate in presentations of programs, and generally providing program assistance to the Committee. Even if you do not join the subcommittee, we welcome your ideas for programs, both those that you would like to help present and those you would like to see or hear.

Committee Newsletter. The Committee publishes a quarterly electronic newsletter covering developments in opinion practice and relevant law and Committee activities. I propose a newsletter subcommittee to gather material for the newsletter and participate in its publication. I solicit your expressions of interest in participating in this subcommittee.

Web Site, List Serve, Resource Center. The Committee now has a host of other electronic tools to help members stay current in the opinion practice field, providing assistance in answering practice questions as they arise, and alerting you to Committee activities. (1) The Committee web site provides information about the Committee and its activities. Included on the web site is (2) the Legal Opinion Resource Center, which gives access to reports, archives and other materials useful in the practice. (3) The list serve provides opportunities to discuss legal opinion issues with other members of the Committee. An archive of list serve exchanges is maintained in the resource center.

I solicit your interest in joining a subcommittee of members responsible for keeping the web site current, monitoring the list serve, and further developing the resource center. For example, a current issue for the Committee is determining what opinion resources
should be added to the resource center. Members involved in this subcommittee will be at the cutting edge of the Committee’s work

Sign up. We will gather around each of these tasks as many of you as are interested. This is your chance to become more actively involved. Please let me know what you want to do. My email address is johnpower@earthlink.net, and my telephone number is (310) 271-1460.

Other Opinion Groups. There are significant efforts in the opinion world being made by other groups. We will avoid duplicative work and will develop creative ways to cooperate with others, to enhance the development of a national consensus on legal opinions. For example, two other committees within the ABA Section of Business Law are actively involved in fine work, the Committee on Audit Responses chaired by Stan Keller, and the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee chaired by Richard Howe. We will continue our close relationship with those committees, sharing ideas and members, and participating in the distribution of their wonderful work product.

Outside of the ABA, others study legal opinion issues and many of them present programs and prepare and publish authoritative reports. We all know the TriBar Opinion Committee, initially a New York-based committee which in recent years has added representatives from numerous other Bar Associations. It was the first Bar Association organization to publish reports on opinion practice and it has produced many of the most authoritative legal opinion reports. Other state and local Bar Associations also have published authoritative legal opinion reports, some for decades. Many of our members are also members of these other groups, and we welcome opportunities to work closely with them in the future.

As most of you know, the Committee recently participated in the formation of a new invitational working group on legal opinions, which sponsors highly successful risk seminars. Other participants include representatives of law firms in the opinion practice, state and local Bar Association opinion committees, opinion recipients, rating agencies, commentators, and other interested constituencies. The working group focuses on promoting a national consensus about customary legal opinion practice and on understanding the nature and scope of legal risk in that practice. Our committee fully supports that working group and is working closely with it.

In conclusion let me say that the stature of our Committee is based on a long history of excellence, authoritative work product, and broad membership. We stand on the shoulders of our former chairs, including Tom Ambro, Steve Weise, Don Glazer, Art Field and now Carolan Berkley, all of whom remain active in our work today. (At least three Chairs of the Section have served actively on our Committee: Tom Ambro, Steve Weise, and the current Section Chair Linda Hayman). Our challenge is to continue this tradition of quality and excellence; I believe we will. I look forward to working with you in the coming months and years, welcome your comments and suggestions, and encourage your active participation.

See you in San Francisco.

John Power
**Annual Meeting Program**

Just a reminder about our program at the annual meeting. As noted in the Spring newsletter, we will present a program at the ABA Annual meeting in San Francisco in August entitled “Crossing the Threshold: Why Ask for an Opinion at All?” The program panel will discuss and debate when it is appropriate to ask for a third-party closing opinion. Panelists will use as background the California Business Law Section’s 2004 Report on Third-Party Remedies Opinions appendix “Threshold Question: When Should a Remedies Opinion be Requested?”, and Jonathon C. Lipson’s 2005 Berkeley Business Law Journal article “Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation).” Panelists are Donald Glazer, Jonathon Lipson, John Power, William Viets, and Ann Walker.

Hope to see many of you at the meeting.

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**ORS**

Be sure to review the report on the Legal Opinion Risk Seminar in the February 2007 *The Business Lawyer*. The report includes papers from the seminar as well as an article on Recipient Counsel Responsibilities and Concerns by Reade Ryan, who has prepared the next report on Sonicblue, and an article on Ethics Issues in Opinion Practice by Charlie McCallum and Bruce Young.

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**SONICBLUES**

In a bankruptcy court case involving the debtor, SONICblue Incorporated, and its subsidiaries (U.S. Bankruptcy Court, Northern District of California March 26, 2007), the bankruptcy judge ordered that a law firm that had been representing the debtor in the case must be disqualified due to a claim against the law firm arising from a closing opinion given by the law firm as the debtor’s counsel prior to the debtor entering into bankruptcy.

The facts of the case are fairly straightforward. In April 2002 the law firm rendered a third-party closing opinion in connection with the issuance and sale by the debtor of an issue of secured senior subordinated convertible debentures together with stock warrants to three hedge funds. The long and relatively complex opinion split the enforceability opinion into two paragraphs, one covering all transaction documents other than the debentures and the second paragraph covering the debentures. The opinion took a bankruptcy exception for the first enforceability paragraph, but omitted to take a bankruptcy exception for the second enforceability paragraph covering the debentures. Nearly a year later, in March 2003, the debtor filed for bankruptcy, and engaged the law firm with the court’s approval to continue representing the debtor in possession. The bankruptcy proceeding dragged on for three years and in August
2006 the debtor’s law firm advised the hedge funds (still holding the debentures) and their counsel that the hedge funds might be subject to a significant disallowance in their debenture claims on account of an unamortized original issue discount (attributable to the stock warrants) as of the bankruptcy filing date. Counsel for the hedge funds responded to the law firm that, since the law firm had rendered an enforceability opinion covering the debentures without a bankruptcy exception, the hedge funds interpreted the opinion as assuring the hedge funds that their debenture claim in bankruptcy would be allowed in full and thus demanded that the law firm defend and indemnify the hedge funds for any losses due to unamortized original issue discount. The law firm denied that its opinion could be so interpreted. However, the law firm did not file a supplemental disclosure describing this conflict until March 2007, whereupon the bankruptcy court held a hearing concerning a motion to disqualify the law firm as debtor’s counsel and for disgorgement of attorney’s fees. At the hearing the court ruled that the law firm must be disqualified, but reserved the issue of disgorgement of fees for a later hearing.

The SONICblue case was discussed at a breakout session at the Legal Opinion Risk Seminar II on April 17, 2007. The consensus of the discussion was that, although the debtor’s law firm should have disclosed the conflict before March 2007, the claim by counsel to the hedge funds that the original enforceability opinion, by not taking a bankruptcy exception for the debentures, was assuring the debenture holders of no adverse consequences in the debtor’s bankruptcy was questionable at best. The hedge funds seemed far too sophisticated to believe their debentures would be free from adverse consequences in bankruptcy. In addition, the bankruptcy exception, together with the equitable principles limitation, are standard exceptions to any enforceability opinion, and are understood as a matter of customary practice to apply to all opinions that raise the concerns to which they are addressed. See TriBar Opinion Committee, Third-Party “Closing” Opinions, 53 Bus. Law. 591, § 1.2(c) at 597-8 (1998). The notion that a law firm that represents a debtor would have to review all the deals and opinions rendered on behalf of a debtor before becoming debtor’s counsel in the debtor’s bankruptcy seemed an unnecessary and impractical burden. However, there may be some lessons from the SONICblue case:

1. In rendering third-party closing opinions, a law firm might well require that any such opinion be reviewed by more than one partner, so that an omission like that which occurred in the SONICblue opinion might be caught.

2. Long, complex opinions, like that rendered in the SONICblue case, are more susceptible to errors and omissions than short, simple, opinions.

3. Once a bankruptcy debtor’s counsel has notice of a conflict, counsel should make immediate disclosure of that conflict to the court.

4. A law firm that has acted for the debtor prior to its bankruptcy seems vulnerable to claims of conflict in the bankruptcy and so should be especially diligent in uncovering and disclosing potential conflicts.

5. The bankruptcy judge in her disqualification opinion made reference to “allegations that the case is being run by and for the benefit of counsel.” A
bankruptcy process resulting in such allegations would not be helpful either to the debtor or to the counsel.

Reade H. Ryan, Jr.

MARYLAND REPORT ON LAWYERS’ OPINIONS IN BUSINESS TRANSACTIONS (2007)

On June 14, 2007, the Special Joint Committee on Lawyers’ Opinions in Business Transactions of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. (the “Committee”) issued its REPORT ON LAWYERS’ OPINIONS IN BUSINESS TRANSACTIONS (the “Report”) in response to a perceived need to update a 1989 Report prepared by the Special Joint Committee on Lawyers’ Opinions in Commercial Transactions.

The full text of the Report may be found at https://www.msba.org/sec_comm/sections/realprop/docs/businesstrans_update.pdf.

The Report contains several sample opinions and an exhaustive list of sample opinion language with commentary.

Some of the highlights of the Report include the following:

1. No Opinion

The Report states that it is inappropriate to give or to request opinions in the following situations and as to the following matters, among others:

(i) overly broad matters such as “compliance with all federal, state and local laws, rules and regulations”;
(ii) financial status of the client;
(iii) factual matters (with certain exceptions);
(iv) priority of liens on real or personal property;
(v) title to real or personal property;
(vi) environmental status of the property;
(vii) compliance with zoning laws and regulations (with some exceptions);
(viii) opinions under the law of a state where the opinion giver is not admitted (with some exceptions, such as Delaware corporate law).
2. Creation, Perfection and Priority of Liens on Personal Property

a. Perfection

The Report contains a lengthy and well-considered discussion on perfection and priority opinions. The Committee basically adopts the 2003 TriBar U.C.C. Report and commends the 2003 TriBar U.C.C. Report as an important resource and guide when rendering opinions relating to Article 9 matters.

b. Priority Opinions Generally Disfavored

An opinion recipient generally should not request, and a Maryland lawyer generally should not be required to render, an opinion as to the priority of a security interest under Article 9. The priority of a perfected security interest under Article 9 can usually be determined by reference to records, reports or other information (other than a legal opinion) that are available to the secured party. The Report’s position is consistent with customary practice in Maryland and national practice as described in the 2003 TriBar U.C.C. Report. In addition, UCC insurance is available to secured parties.

Jeremy S. Friedberg
Leitess Leitess Friedberg + Fedder PC

Audit Response Committee

The Audit Response Committee will be meeting Sunday, August 12 at 4:30 p.m. At the meeting we will be discussing issues raised by auditor requests relating to pension plan financial statements and the possibility of issuing guidance. We also will be discussing the impact that FIN 48 relating to the accounting for income tax positions has on audit responses. Other accounting and auditing changes that affect FAS 5 and audit responses will be reviewed.

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**

We plan to publish our next newsletter in September. Please submit to John Power at johnpower@earthlink.net developments of law and practice you would like to see published.