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Report from the Chair

There’s a lot going on in the opinion world.

WGLO3

The Working Group on Legal Opinions, co-sponsored by the ABA, held its third invitation-only risk seminar in New York on October 30, 2007, under the outstanding leadership of Arthur Field. As with earlier WGLO events, it was very well attended and valuable. Immediately following this Chair’s report you will find an article by Don Glazer summarizing important points he took away from the event. Attached at the end of the newsletter is a collection of brief summaries of the panel discussions and breakout groups presented at WGLO3.

Section Fall Meeting

At the Section of Business Law’s November meeting in Washington, D.C., we had an informal get-together, attended by approximately 20 Committee members. Steve Weise gave us an update on his progress in finalizing the Statement on Customary Practice, which as you know was approved by our Committee at the annual meeting, and is to be co-sponsored with other bar groups to promote understanding of the importance of customary opinion practice. Steve believes that the Statement will be published in the February issue of the Business Lawyer. (See the summary of the breakout session on the Statement Steve led at WGLO3 at the end of this newsletter.) Stan Keller told us about the TriBar Opinion Committee’s continuing efforts to reach consensus on a report on opinions on due authorization of preferred stock; he expects that TriBar will publish its report early this year.

The group also discussed future projects for the Committee, focusing on cross-border legal opinions. There was considerable support for preparing guidelines to aid United States opinion givers providing legal opinions to non-U.S. opinion recipients or in non-U.S. deals. More about this below.

Three other committees responsible for subject matter important to us met in Washington: the Federal Regulation of Securities Subcommittee on Securities Law Opinions (chaired by Dick Howe; see Dick’s report in this newsletter), Committee on Audit Responses (chaired by Stan Keller; see Stan’s report, also in this newsletter), and Committee on Professional Responsibility (chaired by Bill Freivogel).

Committee Projects

The Section of Business Law has as one of its main emphases this year, under the leadership of Charlie McCallum, projects relating to cross-border transactions. In support of that initiative we are considering preparation of guidelines for opinions by U.S. opinion givers to non-U.S. recipients. For example, a group, led by Daniel Bushner, is considering preparation of guidelines for negative assurance statements by U.S. counsel in non-U.S. securities offerings. Because this subject is within the general ambit of work already under way by the Federal
Regulation of Securities Subcommittee on Securities Law Opinions, a project may go forward as a joint venture with that subcommittee or be shifted over to it. We will have a substantive discussion of the cross-border area at our Committee’s spring meeting in Dallas.

We are also looking for other projects in such areas as ethical issues, reliance issues, issues for recipients, and threshold issues. We may undertake an update of the Committee’s survey of opinion practices accomplished under Art Field’s leadership three or four years ago. Of course, it is important not to undertake too many projects and overstretch our resources. We now have capacity for two or three, however, and we are looking for volunteers to work on them. Let me know at johnpower@earthlink.net of your interest.

Committee Programs

The Committee will sponsor a program at the spring meeting chaired by Stan Keller on opinions on preferred stock, including due authorization of preferred stock, and Steve Weise will also present a program or report to the Committee on the Customary Practice Statement. The Committee will co-sponsor (with the Commercial Finance Committee) a program there for young lawyers, in which Carolan Berkley will discuss legal opinions from the viewpoint of the opinion giver. We are also working on a proposal to present a teleseminar in the spring on opinion practice basics. We’ll provide you more information when these plans are further along.

Spring Meeting

The Committee will meet at 9:30 a.m. on Friday, April 11, 2008 at the Section spring meeting in Dallas. Immediately following the meeting, at 10:30 a.m., the panel chaired by Stan Keller will present its program on Preferred Stock.

Importantly, for the first time in its history, the Committee will have a cocktail reception for its members at 5:00 p.m. on April 11. This reception will be generously hosted by Vinson & Elkins, and includes spouses and special guests. Deepest thanks to Gail Merel for providing the leadership and planning for this reception, and to V&E for hosting it.

The Section of Business Law is also planning a meeting in Frankfurt, Germany May 28 - 30, 2008, in furtherance of this year's emphasis on transborder transactions. While most attendees are expected to be U.S. lawyers working in Europe, many U.S.-based Committee members plan to attend. We are thinking about having a Committee meeting and a program there. We hope you will consider attending this meeting.

Opinion Reports of Other Bar Groups

Maryland (comprehensive update), California (updates of its remedies opinion report and its comprehensive report) and Pennsylvania have published updated opinion reports within the past year or so. Moreover, the Federal Regulation of Securities Subcommittee on Securities Law Opinions has just published its report on no registration opinions in the Business Lawyer. See Carolan Berkley’s summary of the subjects addressed by the Pennsylvania report below.
We are aware that the following state bar associations are currently preparing reports: California (venture capital opinions, model opinion); Florida (comprehensive update); and Texas (acceptance of ABA Principles and Guidelines by Texas customary practice). As noted elsewhere, both TriBar (due authorization of preferred stock) and the Federal Regulation of Securities Subcommittee on Securities Law Opinions (update of negative assurance report) are currently preparing reports.

Final Thank Yous

I want to recognize and thank again Martin Brinkley for serving as the editor of this issue of the newsletter. This is an otherwise thankless job, and is a lot of work.

I also thank again Christina Houston for her ongoing work on our web site, Gail Merel for leading the effort for a cocktail reception for the Committee at the spring meeting, and those who summarized WGLO3 panels and breakout groups in the attachment to this edition.

- John Power, Chair

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Don Glazer on Recent Opinion Programs

This will summarize some points of particular interest that were raised at the recent ABA-sponsored Fall 2007 WGLO3 seminar on legal opinions and the November 2007 meeting of the ABA Business Law Section’s Professional Responsibility Committee.

1. Law Suits. The number of suits being brought against opinion givers is not large but the magnitude of potential damages can be catastrophic from the standpoint of the defendant firm. Suits follow the business cycle, and the largest claims usually stem from the collapse of a major company.

   Opinion givers are subject to two types of claims. The first is by their own client. The second is by investors in the client’s securities. Although clients have a natural disinclination to sue their own lawyers, bankruptcy trustees have no such inhibition, and suits against company counsel by bankruptcy trustees are now commonplace. As evidenced by the Batson report in the Enron litigation, examiner’s reports for a bankruptcy trustee can be far reaching and, because the trustee will have waived the attorney-client privilege, often cite documents, memos and e-mail exchanges that lawyers in a firm never imagined would see the light of day. Examiners have few limits on the documents they can obtain and, when their reports disclose what they have discovered, they provide disappointed investors what, in effect, is the product of full discovery in a third-party action. The result is that investors are able to cite materials in their complaint that make a defendant’s winning a motion to dismiss extremely difficult.

   When sued by a bankruptcy trustee, a law firm has an “in pari delicto” defense and cases typically settle for an amount a law firm can live with. When, however, a motion to dismiss is lost in a third-party action, a law firm can be looking down the barrel of a $500 million or $1
billion gun and defense costs (preparing for a motion for summary judgment and possible trial) of $25 million to $100 million.

John Villa of Williams & Connolly LLP observed that being able to point a judge to bar association reports can be helpful in litigation and indicated that the forthcoming statement, subscribed to by bar associations in numerous states, affirming the application of customary practice to closing opinions will be particularly helpful in that regard. His comments underscore the value of expressly referring to the ABA Principles in opinion letters.

2. **Disclaimers/Limitations on Liability.** Some question exists under New York law whether a limitation on liability set forth in an opinion letter will be binding on the recipient if the recipient does not agree to it in writing. That, however, is likely to be a theoretical issue since limitations are not currently “market” and any one firm is likely to encounter stiff resistance to an effort to include it. John Villa and Geoff Hazard suggested that a possible avenue to overcoming that resistance would be for a bar association group such as the ABA Legal Opinions Committee to initiate discussions with the American Corporate Counsel Association and major investors such as the Ohio pension fund to see whether a protocol could be worked out that everybody could accept. Having a large law firm fail on the basis of a single negligently-prepared opinion is not in anyone’s long term interest.

3. **Due Diligence Reports.** Looming on the horizon as a major threat to law firms is the migration to the US of due diligence reports law firms, including US firms, are now providing in Europe. Those reports not only relate to AIM offerings but also are now used in large M&A transactions as a way of reducing the work potential bidders must perform before making a bid. Limits on liability and recipients’ ability to rely are common in Europe. Whether recipients of due diligence reports will accept similar limits in the US or, if they will, whether they will be legally enforceable is an open question.

4. **Bar Association Reports on Legal Opinions.** A few states are following the lead of California, North Carolina and Pennsylvania in updating their old reports. In almost all respects the updated reports agree on key opinion issues. Other states have decided that the ABA and TriBar reports are sufficient and that updating isn’t worth the effort. During the last seven years no state that had not previously issued a report has issued one, and currently only one or two states that have not written reports are working on reports.

5. **Responsibilities of Recipients’ Counsel.** Large institutions rely on outside counsel to know customary practice and to obtain the opinions from company counsel that the market expects. If outside counsel runs into a problem, institutions expect outside counsel to alert inside counsel, especially if the problem is unlikely to be understood or its significance appreciated by the business people working on the transaction.

Recipient’s counsel is not expected to duplicate the work done by an opinion giver but is expected to confirm that the recipient’s reliance on the opinion is reasonable. Thus, recipient’s counsel is expected to identify any assumptions that make an opinion meaningless and to bring to the recipient’s attention assumptions that require further diligence. Recipient’s counsel also is expected to identify any opinions that in its experience reach questionable conclusions.
6. **Foreign Counsel.** When dealing with matters of foreign law, an opinion recipient would be well advised to retain its own foreign counsel rather than rely on foreign counsel retained by the company. Besides assuring that foreign counsel has the requisite expertise, retaining one’s own counsel can be helpful in assuring that a transaction is properly structured under foreign law and that foreign counsel understands the opinions it is giving to mean what the recipient understands them to mean.

7. **Rating Agencies.** A key difference between opinions to rating agencies and to other parties to a transaction is that rating agencies have no direct stake in the transaction and are not represented by their own outside counsel. The implications of those differences need to be kept in mind when an opinion giver is aware that a rating agency may not understand the significance of an unusual limitation or assumption.

8. **Assignable Opinions.** As a quid pro quo to permitting assignees to rely on opinions given on syndicated loans, a proposal has been made that only the agent bank be permitted to bring suit on behalf of noteholders against an opinion giver. Although that proposal has not yet caught on in practice, inside counsel for J.P. Morgan thinks such a limitation would be acceptable to noteholders as long as they have a remedy and to the lead bank as long as it has the power to appoint a subagent if an action actually needs to be brought (banks don’t like to sue law firms that regularly represent them). Limiting noteholders’ (including assignees’) ability to sue protects opinion givers from having to defend themselves in multiple jurisdictions and facilitates settlements by allowing an opinion giver to reach a single agreement that binds all noteholders.

The best way to limit suits would be to include an appropriate provision in the loan agreement (as well as possibly saying something in the opinion letter). To avoid any implication that the agent bank is conducting due diligence for anyone other than itself, the provision should make clear that the responsibility it creates relates only to the decision to bring and pursue litigation, and, for the same reason, the opinion should be addressed as it is today to each of the purchasers of loan interests.

9. **Local Counsel Opinions.** Umbrella opinions in which lead counsel relies on local counsel for particular opinions have fallen out of favor. Two reasons are that lead counsel often does not select local counsel and lead counsel does not want to be responsible for possible gaps between its opinion and the opinions on which it is relying.

Unlike lead counsel, local counsel often states that it only is relying on specified documents and has conducted no investigation beyond its examination of those documents. In addition, opinions of local counsel often include lengthy exclusions of the laws covered to make clear not only that the opinion is limited to the law of a particular state but that it is passing only on a particular statute or legal area.

10. **Side Letters.** Enabling provisions now included in limited partnership and LLC agreements permit a fund to enter into side letters. They also put investors on notice that side letters may exist. They do not, however, permit a fund to enter into an agreement with one investor that adversely affects the rights of other investors. Opinions that side letters are enforceable obligations of a fund are unusual and, if given by local counsel, often are narrowly
drafted. In giving such an opinion, the opinion preparers need to consider whether a side letter goes beyond the authority granted by the enabling provision. Concluding it does not often will be easy -- but not always. For example, the opinion preparers may need to decide whether other investors are hurt by an early redemption right or a provision that provides an investor additional bases for avoiding a capital call (but not increasing the obligations for capital contributions of other investors). To give an opinion on a side letter, counsel normally obtain a certificate regarding all the side letters the fund has entered into and check them for provisions that could affect the opinion, such as most favored nation clauses. As a practical matter, however, because enforceability is a function of contract law, non-Delaware lawyers ordinarily will not give enforceability opinions on side letters of Delaware entities and thus they only will have to face the problem of giving an opinion on a side letter when the fund is organized under their state’s law rather than Delaware’s.

11. **M&A.** The practice of not giving opinions on mergers of public companies has taken hold in the private sector, and today opinions on mergers of private companies are now given only about half the time and then usually only on smaller transactions. One reason is that acquirers normally prefer to rely on their own counsel to conduct due diligence. Another is that regular counsel for the acquired company, who is most knowledgeable about its business and legal affairs, often is replaced by special M&A counsel, who is in no better position than counsel for the acquirer to address the issues covered by an opinion. One exception, however, to the trend away from giving opinions on mergers relates to the acquisition of regulated companies, such as utilities and financial institutions. In those acquisitions opinions are still standard because the acquirer wants confirmation from the acquired company’s counsel that the acquired company has obtained all the approvals of regulatory agencies required for it to consummate the transaction.

   - Donald W. Glazer

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**Subcommittee on Securities Law Opinions**

The Subcommittee on Securities Law Opinions met on November 16, 2007 in Washington, D.C. The principal topic for discussion was a revised draft of a new form of negative assurance to update the illustrative form of negative assurance contained in the Subcommittee’s report on Negative Assurance in Securities Offerings, 59 Bus. Law. 1513 (Aug. 2004), to reflect changes in practice in light of securities offering reform.

The revised form of negative assurance was accompanied by a report discussing the issues related to use of the form. At the meeting there was an extensive discussion of several of the issues presented. The discussion included whether the form should address the pricing disclosure package as of a particular time on a particular day; whether electronic road shows can or should be covered; the manner of addressing documents incorporated by reference that the attorney had no involvement in preparing; determining the effective date of the registration statement in shelf offerings; inclusion of language clarifying which attorneys in the firm were responsible for the letter; the manner of expressing the basis for the negative assurance;
addressing disclosure as of the closing date; and whether to address the issue of conveyance of the disclosure documents to the purchasers of the securities and IRS Circular 230.

The Subcommittee asked members to send in comments and suggestions on the report and form by the end of 2007, as well examples of negative assurance letters given by different law firms. It is hoped that the revised form will be useful to practicing lawyers who are involved in giving negative assurance in securities offerings.

A new draft is to be prepared and circulated to the members of the Subcommittee before the next meeting, scheduled to be held in connection with the Section’s spring meeting in Dallas, Texas on April 10-12, 2008.

- Richard R. Howe, Chair
  Subcommittee on Securities Law Opinions
  Committee on Federal Securities Law Regulation

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**Committee on Audit Responses**

The Audit Response Committee met on November 16, 2007 at the Section’s Fall Meeting in Washington, DC. The meeting began with an update on some current developments including a report on the activities of the ABA Task Force on Attorney-Client Privilege regarding audit-related matters and a discussion of the decision in U.S. v. Textron in the United States District Court for Rhode Island, which the IRS is appealing, holding that the privilege was not waived by sharing tax work papers with the company’s outside auditors. There was also a report on FASB’s project to revisit FAS 5 (which governs the accounting for loss contingencies), with the first phase focusing on disclosures required by FAS 5 and the second phase addressing use of fair value accounting.

The Committee then discussed a proposed statement on the effect of FIN 48 on audit response letters. FIN 48, which recently became effective, governs accounting for tax loss contingencies and amends FAS 5 by eliminating tax loss contingencies from its ambit. It was the consensus that such a statement would be helpful to make clear that the audit response letter was not the place for a FIN 48 assessment, that pending and threatened tax claims continue to be covered by the response in accordance with the ABA Statement and that FIN 48’s amendment of FAS 5 does not change the professional responsibility of a lawyer, as confirmed in the audit response letter, to advise its client regarding disclosure of tax matters when that is required in
connection with the lawyer’s engagement. A revised statement will be circulated to the Committee for action at the Spring Meeting.

- Stanley Keller, Chair
  Committee on Audit Responses

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**Pennsylvania Update**

Carolan Berkley has provided the following summary of recent, modest changes in the second edition of the Pennsylvania Legal Opinion Deskbook:

- Dedicated to William P. Hackney. Bill was the primary drafter of the annotated opinion included in the deskbook.

- Adds TriBar Remedies Opinion and Closing Opinions of Inside Counsel Reports.

- Refers to other state or local bar reports where appropriate, including California and Boston.

- Deletes references to the ABA Accord and updates cross references to the ABA Guidelines. The ABA Guidelines are included in the Deskbook.

- Narrows the Investment company opinion to cover only whether the company is required to register. The opinion that a company is not controlled by an investment company is often difficult to give because it requires an analysis of the company’s and parent’s shareholders. Generally the narrower opinion is accepted in bank transactions.

- Narrows the no litigation confirmation in light of *Dean Foods Co. v. Pappathanasi*, 204 WL 3019442 (Mass. Super. Dec. 3, 2004), which involved a no litigation confirmation given in a very broad form and addressed the issue of customary diligence necessary to give the confirmation where the firm had actual knowledge of a proceeding against a customer that may have implicated the client.

- Adds an alternative restriction on use of opinion letter clause regarding reliance by future assignees. Increasingly, opinion recipients require that opinions delivered in connection with the closing of a financial transaction include express permission for future holders of an interest in the financing documents to be able to rely upon the opinion. As the class of assignees has expanded to include mutual funds and hedge funds, and as loan, as well as real estate transaction, documents have increasingly been included in securitization and other structured transactions, opinion givers have become increasingly concerned over how widely their opinions may be circulated. The alternative provision adds further context to the basis on which any future assignee may rely. However it does not address
some of the other points that are beginning to be considered nationally, such as arbitration and governing law clauses.

- Deletes optional paragraphs regarding financial interest of opinion giver, no conflicts opinion, and generic limitation. Increasingly the consensus is that a financial interest of the firm or a lawyer in the client need not be disclosed in the opinion letter. The no-conflicts opinion is becoming less common in bank transactions, and the generic limitation is also less prevalent. For secured transaction opinions under the Uniform Commercial Code, the TriBar UCC Report does not include a generic qualification. In real estate finance, the generic qualification has been modified and is beyond the scope of the report.

- E. Carolan Berkley
Ballard Spahr Andrews & Ingersoll, LLP

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**Working Group on Legal Opinions**

The national Working Group on Legal Opinions, co-sponsored by the American Bar Association and others, has scheduled its fourth invitation-only Legal Opinion Risk Seminar for May 6, 2007 in New York.

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**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](http://www.abanet.org/buslaw/home.html), click “Committees” and the Legal Opinions Committee. If you haven’t visited the website lately, we recommend you do so. Our mission statement and prior newsletters are posted there.

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**Next Newsletter**

We expect that the next newsletter will be circulated in the spring. Please forward cases, news and items of interest to John Power (johnpower@earthlink.net) or Martin Brinkley (mbrinkley@smithlaw.com).
The following summaries have been prepared to provide a general idea of the subjects covered by the panel sessions and breakout groups at the October 30, 2007 WGLO seminar in New York. The summaries were prepared in most cases by members of the audience. Program and breakout group chairs are preparing separate summaries that will be available on or through the WGLO website.

PANEL SESSIONS:

1. Limiting Opinion Liability: Strategy and Ethics
   (Summarized by Martin Brinkley)

   Lucian T. Pera, Adams & Reese LLP, Memphis, Chair
   Frank R. Adams, Dewey LeBoeuf LLP, New York
   Lori S. Gordon, Attorneys’ Liability Assurance Society, Chicago
   Cheryl A. Gorman, Gibbon P.C., Newark

   This panel addressed the feasibility of and ethical ramifications associated with various techniques of limiting malpractice liability, both in opinion practice and in general. These techniques include agreements providing for binding arbitration of malpractice disputes and agreements prospectively limiting the law firm’s liability (and inclusion of such provisions in opinion letters). The panel also discussed the practice, occurring increasingly in the U.S., of permitting non-client third parties to rely on due diligence memoranda prepared by counsel at the request of its client.

   Downsides to mandatory arbitration. Some have suggested including mandatory arbitration clauses in opinion letters. Although there has been sporadic movement towards including arbitration clauses in client engagement letters, experience (confirmed by a show of hands among those attending the WGLO seminar) suggests that few law firms actually do. Perceived advantages of arbitration (foreclosing jury prejudice, avoiding discovery costs, confidentiality, etc.) may be outweighed by disadvantages. Arbitrators may be biased or uninformed and may not feel compelled to apply governing law (or may deliberately ignore it). Arbitration does not necessarily reduce litigation costs. The lack of discovery rules in arbitration may reduce the availability of evidence the law firm can offer to defend the case. There is no meaningful appellate review from arbitration decisions. Firms considering mandatory arbitration should draft standard arbitration clauses with care rather than leaving individual lawyers to craft inadequate provisions. Arbitration clauses should address (1) scope and mechanics of discovery; (2) governing law and whether the arbitrators are required to apply it; (3) whether the arbitrators must explain the reasoning for their decision and whether the decision will be binding; (4) reasons why the arbitration award could be vacated by a court; (5) the nature of the remedies available to the client or opinion recipient; and (6) any rules that will control the conduct of the
arbitration proceeding. It may not be feasible to include all these details in an ordinary engagement letter or opinion letter.

Are liability limitations limited by ethics rules? Some suggest including direct limitations on liability in legal opinions. Rule 1.8(h) of the ABA Model Rules of Professional Conduct provides that a lawyer may not “make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” Rule 1.8(h) has not been adopted uniformly by all jurisdictions. A majority of state bars have embraced the rule, while nine states (including New York, California and the District of Columbia) prohibit any agreement limiting future malpractice liability. Most state bars that have considered the issue have found that arbitration agreements are not governed by Rule 1.8(h), but there is considerable variation in approach among jurisdictions. This rule is applicable to agreements with clients, but doesn’t seem to apply to those with non-clients, including opinion recipients.

Providing due diligence reports to non-clients and related liability risks. U.S. law firms are increasingly being asked to furnish non-clients, often lenders, with due diligence reports or memoranda prepared at the request of their clients. Can firms limit their liability in doing so? In the U.K. some law firms asked to furnish the results of their due diligence investigations to non-clients are including caps on their liability.

Recognizing that claims and suits by non-clients can pose significant malpractice liability risks, some U.S. law firms are including explicit disclaimers in the diligence report purporting to prohibit reliance by the non-client. Some firms seek to have the non-client acknowledge in writing the effect of these disclaimers and prospectively release the law firm from any liability associated with providing the report. Alternatively, firms seek to cap their liability exposure to non-clients. Professional ethics rules condition or prohibit lawyers from prospectively limiting their liability to clients, but do not speak to lawyers’ ability to limit potential liability to non-clients. Therefore, U.S. firms’ efforts do not appear to violate ethics rules. While such disclaimers or limitations may offer a firm some inoculation against exposure associated with furnishing the results of due diligence investigations to non-clients, they are not a universal cure. The non-client may attempt to avoid the disclaimer’s effect by arguing that it was a third-party beneficiary of the law firm’s services to its client, that reliance was justifiable and reasonable, or that misstatements in the diligence report were made with fraudulent intent. Although the firm may be able to refute these arguments, firms considering including disclaimers in these diligence reports should review the law in their states carefully for exceptions before moving ahead. Tendering a diligence report to a non-client should be treated as a risk management issue (not unlike opinion letter practice). Lawyers charged with preparing a diligence report should make special efforts to learn about the report’s ultimate destination.

2. **Opinions on Due Authorization of Preferred Stock**  
(Summarized by Jerome Grossman)

*Arthur Norman Field, New York, Co-Chair*  
*Donald W. Glazer, Goodwin Procter LLP, Boston, Co-Chair*
This panel discussed the TriBar Opinion Committee’s current project, a report on the diligence required to give an opinion that preferred stock is “duly authorized.” Project participants have agreed that this opinion means:

(1) The shares are part of a class or series of shares that the company has the authority to issue.

(2) The company has a sufficient number of authorized shares of that class or series available for issuance.

(3) The proper procedural steps were taken to create the class or series of shares.

(4) The company’s charter contains all the substantive terms required by the applicable state corporation statute to create the class or series of preferred stock.

Project participants appear to have reached consensus that the “duly authorized” opinion does not mean that stockholders can enforce the provisions of the preferred stock. Rather, the opinion covers only the power of the company under the corporation statute and its charter to create the preferred stock. Still under discussion, however, is the exact extent to which the opinion covers whether the actual terms of the preferred stock violate the corporation statute or the terms of the company’s charter.

Delaware courts have held that stock not created in accordance with the procedural requirements of Section 151 of the Delaware General Corporation Law is invalid, and the Delaware Supreme Court has held that, if convertible preferred stock is invalid, the common stock issuable upon conversion is also invalid. If a term of the preferred stock violates the relevant corporation law, will the existence of that term result in invalidation of the entire class or series of stock? What is the responsibility of the opinion giver in relation to that issue?

The panelists also addressed the responsibility of the opinion giver regarding the effect of noncompliance with fiduciary duties or with nonstatutory procedural requirements (e.g., charter requirements) in the preferred stock authorization process.

In any given transaction, they concluded, it is relevant to ask what the opinion recipient thinks it is getting when it receives an unqualified “duly authorized” opinion, as well as what the opinion giver thinks it is giving. Ultimately, customary practice should control: the opinion should not be interpreted to cover more than opinion preparers customarily consider in performing the work to support it.

3. Responsibilities and Concerns of Opinion Recipients
(summarized by John B. Power)

Reade H, Ryan, Jr., Shearman & Sterling LLP, New York, Chair
Doris J. Bryant, Allstate Investments LLC, Chicago
Warren F. Cooke, Milbank, Tweed, Hadley & McCoy LLP, New York
William Viets, JPMorgan Chase & Co., New York
This panel began with the premise that an opinion giver is justified in assuming that customary practice is applicable to the opinion, and has no duty to determine whether the opinion recipient or its counsel understands customary practice. The discussion then focused on the responsibility of recipient counsel to its own client. The major points were as follows:

**Recipient counsel engagement.** Inside counsel to the opinion recipient provides advice to its client and helps evaluate risk. When outside counsel for the recipient is involved, its responsibility is measured by the terms of its engagement, which typically is broader than merely reviewing the opinion. Outside counsel generally “runs” the documentation, including negotiating the opinion, within the boundaries of the client’s policies and, in syndicated credits, the demands of the market. Outside counsel typically understands client policies and market acceptability. Outside counsel involves a business person or inside lawyer in the opinion process when major issues arise. In some cases, outside lawyers complain that they have difficulty getting the attention of a responsible business person or inside lawyer.

In negotiating the opinion, the role of recipient counsel typically is to “clean up” inappropriate laundry list items and then to judge whether the opinion (1) is clear, (2) provides the appropriate scope without material gaps, and (3) is substantially correct. Recipient counsel explains the opinion and any issues it raises to the client.

**Reliance on the opinion.** Recipient counsel typically advises the client whether it is reasonable to rely on the opinion, based on the documents it has seen “on the table” in the transaction.

**Providing requested form of opinion.** Where the client is in control of the transaction (i.e., not simply a member of a group or syndicate), the recipient or its counsel typically provides the opinion giver the form of the opinion it wants, not including assumptions, exceptions and the like, reserving the right to supplement the request if dictated by later developments in the deal.

**Acceptability of the opinion giver.** Occasionally, an opinion giver is found to be unacceptable to the market. As a practical matter, it is hard to disqualify counsel where its client is a “customer” of the recipient. This issue does not normally arise with well-recognized opinion givers.

**Acceptability of opinion content.** Recent write downs of loan portfolios have caused many recipients to look at opinions in new deals very carefully. Recipient counsel determines whether an important requested issue is missing, and whether the opinion giver appears to have studied the transaction and thought about it in preparing the opinion.

**Opinions by recipient counsel.** Historically, it was not unusual for lender’s counsel and borrower’s counsel both to give opinions to the lender, but that is now uncommon. If there is a legitimate difference of opinion as to enforceability of a particular provision, recipient counsel sometimes provides the enforceability opinion on that provision. When documents have been drafted by recipient counsel and the opinion giver is not from the jurisdiction whose law is chosen, recipient counsel may give the enforceability opinion.
4. **When a Problem Arises**  
(summarized by Steven K. Hazen)

*Jeffrey M. Smith, Greenberg Traurig LLP, Atlanta*  
*Philip Shaeffer, White & Case LLP, New York*

The panelists described critical issues that arise for a law firm when it becomes apparent that a closing opinion may generate a potential claim. These include: (1) what should be communicated to whom; (2) what the risk manager of the opinion giver should be told; (3) what attorney-client privilege and attorney work product immunity issues exist; (4) what the opinion preparer should do; (5) what specialized statutes (e.g., Sarbanes-Oxley) might apply; (6) the impact of pressures for cooperation when criminal actions are pending or possible; and (7) any office-wide rules and procedures that apply. The panelists did not address all of these topics in detail, focusing instead on the question of what should be disclosed and when -- to the malpractice insurance carrier, the client, the government, and to other non-clients or non-agents.

**What to disclose to the insurance carrier.** The panelists focused on the need for open and clear communications, recognizing that the carrier is the agent of the opinion giver for purposes of a claim and would have co-counsel with respect to any settlement. Different dynamics are at play when the focus is on cooperating in defense of the claim versus any dispute between the opinion giver and the carrier over scope of insurance coverage. The panelists recommended that concern for the latter not be allowed to affect the former.

**What to disclose to clients.** The panelists focused on the obligation of candor and potential incongruity of interests as between the opinion giver and the client. Where the potential conflict of interest is waived, efforts should be made to avoid any residual inhibition about responding to a potential claim because of the continuing duty of professional responsibility to the client. If an actual conflict of interest arises, communications between the opinion giver and its client could prove not to be protected by the attorney-client privilege.

5. **Assignable Opinions**  
(summarized by Susan Cooper Philpott)

*A. Mark Adcock, Moore & Van Allen PLLC, Charlotte, Chair*  
*Robert L. Nutt, Ropes & Gray LLP, Boston*  
*Williams Viets, JPMorgan Chase & Co., New York*

To enhance post-closing marketability of loans and put initial and future lenders on an equal footing, opinion recipients in syndicated loan transactions and securitizations typically require that assignees of the loan be expressly entitled to rely on borrower counsel’s closing opinion. Opinion givers have long been concerned about the ramifications of allowing reliance by unknown future assignees. They fear that (1) assignees will rely on “market standards” and will not have read the actual opinion or be informed of its express exceptions, qualifications and limitations; (2) even if a copy of the opinion is actually received, the buyer will purchase the loan participation in the market without being represented by counsel and may not understand the
opinion’s coverage due to lack of familiarity with customary practice; (3) the facts, law and/or
special qualifications of the initial lenders upon which the opinion was based may have changed
since its date; and (4) since the market typically breaks large loans into $1 million segments that
may be acquired by multiple buyers and any claim will likely be based on a negligent
misrepresentation theory, the opinion giver may be subjected to multiple claims, in multiple
jurisdictions, under multiple substantive laws.

Current approaches. Opinion givers have attempted to address these concerns in various
ways. Some have expressly prohibited reliance or limited reliance on the opinion to lenders
joining the syndicate within the first 60 days. Agent banks have strenuously objected to this
approach. A more commonly accepted practice is to include language (often referred to as the
Wachovia policy limitation) in the opinion letter’s reliance provision limiting reliance to
assignees in transfers made in accordance with the terms of the credit agreement, on the
following conditions and understandings: (a) the opinion speaks only as of its date; (b) the
opinion giver has no responsibility or obligation to update the opinion or to take into account
changes in law, facts or other developments; and (c) any reliance by a future assignee must be
actual and reasonable under the circumstances existing at the time of assignment, including
changes in law, facts or any other developments known to or reasonably knowable by the
assignee.

Proposal. The panelists suggested a new approach that they believe could prove better
than the Wachovia policy limitation for all parties concerned. The opinion letter would be
addressed only to the agent bank on behalf of all lenders, present and future, and distribution to,
or reliance by, third parties on the opinion letter would be expressly prohibited. A new provision
would be added to the credit agreement expressly providing for the bringing of suit on the
opinion by the agent bank for the benefit of all lenders and prohibiting individual lenders from
pursuing any such claims. The panelists expressed the belief that these limitations would be
enforceable under New York contract law. Since the tort of negligent misrepresentation in most
jurisdictions requires reasonable reliance by a plaintiff, reliance on an opinion by individual
holders of the loans in the face of clear non-reliance language would likely be found
unreasonable. From the lender’s perspective, the proposal would reduce the cost of pursuing a
claim against the opinion giver and would eliminate the need to prove individual reliance on the
opinion. From the agent bank’s perspective, any additional duties and associated liability that
might arise out of acting as the administrative agent for any suit on an opinion probably can be
handled through additions to the exculpatory language in the credit agreement. Finally, from the
opinion giver’s perspective, it is unclear whether the proposal’s procedural benefits in resolving
opinion-related litigation would be offset by an increased likelihood of suit on the opinion if the
loan goes bad. It appears that no loan has yet implemented this proposal.

6. Local Counsel Opinion Responsibility
(summarized by Martin Brinkley)

Louis G. Hering, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Chair
Joseph P. Hadley, Davis, Polk & Wardwell, New York
Scott A. Stengel, Orrick, Herrington & Sutcliffe, LLP, Washington, DC
William A. Yemc, Richards, Layton & Finger, P.A., Wilmington
This panel was a continuation of the LORS II April 17, 2007 breakout session on local counsel opinions. A central topic of discussion in the April session was whether customary practice is different for local counsel opinions than for lead counsel opinions. Many participants in the April session believed that it was, and sought to advance the discussion by deciding how the differences could be reflected in the local counsel opinion itself.

The panelists focused on the roles of the three primary participants in transactions in which local counsel opinions are delivered: (1) lawyers whose clients need a local counsel opinion from the other party to the transaction; (2) lawyers representing clients who are asked to obtain a local counsel opinion; and (3) lawyers who deliver local counsel opinions. The following major points emerged:

If you are counsel to the opinion recipient, think about the need for local counsel opinions early in the transaction. What is the purpose of the local counsel opinion? Is specific comfort on issues of local law needed, or is the opinion relatively formulaic? Early dialogue between lead counsel and local counsel in an effort to filter the content of the local counsel opinion can avoid misunderstanding and delay. Lawyers serving as lead borrower’s counsel should strive to make the local counsel opinion process efficient by tailoring opinion requests and limiting the local counsel opinion’s coverage to issues of local law reasonably related to the transaction.

Involving an experienced lawyer in the opinion request. Junior lawyers with little opinion experience are often given the task of communicating with local counsel. Difficulties on the eve of closing may be avoided by an early conversation between senior lawyers on all sides of the opinion request.

Opinion content may properly reflect the local counsel’s limited role. Local counsel may appropriately (1) list the documents reviewed, (2) assert that they have made no independent factual investigation to support the opinions given, and (3) make explicit the narrow “laws covered” limitation that is typical in local counsel opinions. If counsel for the opinion recipient (or, in the case of a “bundled” opinion request, lead counsel for the borrower) questions limitations in the local counsel’s opinion draft, local counsel should be prepared to explain why the additional limitations are necessary.

Panelists noted that the practice of “unbundling” of opinions seems to have become widespread, with fewer requests seen for “bundled” opinions.

7. **Side Letters and Opinions**
   (summarized by Gail Suniga)

*Philip B. Schwartz, Akerman Senterfit, Miami, Chair*
*Paul M. Altman, Richards, Layton & Finger, P.A., Wilmington*
*Thomas H. Bell, Simpson, Thacher & Bartlett LLP, New York*

This panel reported on changes that have occurred regarding side letter disclosure practice. Side letters have been proliferating, especially in fund formation practice. For
example, a proposed limited partner to a fund in formation may be subject to some regulatory scheme in the country of its residence that requires special treatment for the limited partner, such as a special accounting from the fund. However, some of these side letters include agreements among parties to the principal agreement that change the terms of the principal agreement, such as a provision releasing one potential limited partner from making an additional capital contribution to the fund that all other limited partners are obligated to make.

The panel indicated that it has become more common to disclose all side letters to all participants in the transaction. Moreover, “enabling clauses” have begun to appear in the principal agreements that permit side letters and specify what can be in them. “Most favored nation” clauses are now being added to the principal agreements to the effect that every investor will receive the same right to receive benefits as is given to any other investor in a side letter.

Since counsel representing the issuer, and perhaps local Delaware counsel, must render an opinion that the formation documents are valid and binding, the general partner of the issuer is increasingly being required to represent that all side letters have been delivered to counsel for review. If all side letters are not available, counsel should be permitted to state this in its opinion and that the unavailable side letters may affect the opinion.

The panelists agreed that the existence of an “enabling clause” does not render the principal agreement illusory.

Generally, breach of fiduciary duty and breach of implied covenants of good faith and fair dealing would be understood as a matter of customary practice not to be covered by a remedies opinion. However, an opinion giver who is consciously aware of serious fiduciary duty or implied covenant issues may need to consider whether it would be misleading not to make reference to these issues in the opinion.

CONCURRENT BREAKOUT SESSIONS:

1. **Foreign Counsel Opinions**
   (summarized by Martin Brinkley)

   Elizabeth Van Schilfgaarde, NautaDutilh, New York, Chair

   This breakout discussed questions and challenges relating to the role and responsibilities of U.S. counsel with regard to foreign counsel opinions delivered at closing.

   Foreign counsel opinions present significant challenges. There was consensus that obtaining foreign counsel opinions can be a daunting task for U.S. lawyers. There is little or no “customary practice” in the rendering of third party legal opinions among lawyers in other countries. Significant issues that may confront U.S. counsel seeking a foreign counsel opinion may include: (1) whether reliance on a foreign counsel opinion is reasonable; (2) whether the foreign counsel opinion’s coverage is adequate and what responsibility U.S. counsel has for recognizing and dealing with coverage problems; (3) what issues are appropriate for foreign
counsel to address and whether the “golden rule” applies to the relationship between U.S. counsel and foreign counsel; (4) problems with the use of forms of opinion when local counsel does not interpret opinion language in accordance with U.S. customary practice standards; and (5) practical problems of communication with foreign counsel and coordinating delivery of opinions with closing. Some of these issues echo themes encountered in traditional U.S. local counsel opinion practice. The absence of consistent customary practice standards in the foreign counsel opinion arena exacerbates the difficulties.

Communication is key. If these challenges are to be overcome, full and frank communication with foreign counsel early in the transaction is essential. Foreign counsel should be given enough background information to understand the transaction and the purpose of the opinions they are being asked to render. To avoid misunderstanding and inefficiency, a senior lawyer may need to facilitate these initial conversations rather than leaving them in less experienced hands. U.S. counsel may find it helpful to adopt a flexible approach to dealing with foreign counsel. A discussion of opinion “topics” may be better than seeking to impose traditional U.S. language formulations and customary practice standards on foreign counsel. A list of “due diligence” questions related to the aspects of the transaction relevant to the foreign jurisdiction may be a better first step than sending foreign counsel a form of opinion derived from U.S. opinion practice.

Retaining two foreign counsel firms may be the best solution. It is often advisable for the client to retain its own counsel in the foreign jurisdiction to engage in direct communication with the opposing party’s foreign counsel. (In some countries, particularly the U.K. and Ireland, it is standard practice for the recipient’s own counsel to render any necessary legal opinions.) It may be possible to select a single neutral “counsel to the transaction” where the foreign legal issues are relatively straightforward, but this approach can raise significant conflict and confidentiality problems if a party needs to discuss private concerns. If business issues involving the opinion need to be resolved, retaining two foreign counsels can be the best solution, assuming the cost can be managed. Having the ability to turn to the client’s own foreign counsel for advice on opinion coverage issues can ease U.S. counsel’s burden of advising the opinion recipient.

Practical realities. Practical techniques such as dating documents “as of,” executing signature pages in advance and holding them in escrow, and holding previously signed foreign counsel opinions in escrow are sometimes used to address challenges of timing and closing mechanics, but these approaches may present other issues and meet with resistance from foreign counsel. There are no “one size fits all” solutions to the problems of working with foreign counsel, but commonsense steps, such as retaining a firm with which U.S. counsel is comfortable and making contact several weeks prior to closing, can mitigate them.

2. **Opinions to Accountants, Rating Agencies and Regulators**
   (summarized by Steven K. Hazen)

   *Rebecca J. Simmons, Sullivan & Cromwell LLP, New York*

This breakout session identified opinion recipients as falling into two different categories: addressees and other recipients. The three types of opinion recipients discussed in the session
share the characteristic of not being party to the transactions in which the opinion is delivered. For those that are not addressees, two issues are present: (1) whether the rights of non-addressees who receive reliance letters should be analyzed in the same way as those of addressees; and (2) whether the rights of recipients who receive a copy of the opinion letter with notice that they are not permitted to rely should be analyzed differently than those of non-addressees who receive a reliance letter or are not informed that reliance is prohibited. The session also discussed special problems of permitting reliance by a party who may not be familiar with customary practice on which the opinion is based and is not represented by legal counsel.

Opinions to rating agencies. This part of the discussion occupied a significant part of the session, due in part to the particular interest of the participants. It included such issues as whether the opinion giver should attend the presentation to the rating agency, whether the rating agencies paid greater attention today than in the past to the substance of legal opinions and whether that reflected the role that evaluation of opinions plays in the diligence performed by the rating agency.

Opinions to regulators. This part of the discussion addressed the fact that statutory provisions, such as those providing for criminal sanctions, may impact the role of the opinion giver. Lawyers giving opinions to regulators may feel a greater need to address contrary authority head-on rather than merely state legal conclusions. Some participants observed that state regulators with whom they deal are increasingly requesting opinions incorporating the ABA Accord in the face of uncertainty by them as to why different opinion givers use different exceptions in their legal opinions.

Opinions to accountants. The discussion addressed the question of whether the relationship with auditors was more “across the table” (i.e., similar to an adversarial relationship) than for the other two types of recipients as to which a more collaborative approach was often the norm.

The group concluded that additional work could productively be done on this topic, but that opinions to each type of recipient probably need to be examined separately. The goal would be to recognize different dynamics in the opinion process for each type of recipient, and not to suggest different kinds of opinions or practices for each.

3. Current and Upcoming Bar Reports on Opinions
   (summarized by John B. Power)

   John B. Power, O’Melveny & Myers LLP, Los Angeles, Chair

   This breakout session heard brief summaries of recently issued bar opinion reports and reports in preparation, emphasizing the general subject of the respective reports and the reasons for their preparation:
Recently Issued Reports:

Maryland Comprehensive Update Sharon A. Kroupa
Pennsylvania Update E. Carolan Berkley

Reports in Process:

ABA Negative Assurance Update Richard R. Howe
Section of Business Law, Securities Regulation Committee, Subcommittee on Securities Law Opinions
California Model Opinion Venture Capital Opinions Jerome A. Grossman
Florida Comprehensive Update Philip B. Schwartz
Texas ABA Principles and Guidelines Gail Merel
TriBar Preferred Stock Stanley Keller

Joint Sponsors Customary Practice

Most of these reports update earlier reports.

In the discussion, a strong consensus favored a central website providing information about all published state, local, ABA and other bar reports. Currently, access to all reports is provided by Glazer and Fitzgibbon on Legal Opinions. The ABA Section of Business Law Legal Opinions Committee is in the process of expanding the resource center on its website to include state and local bar reports.

The consensus also favored a clearinghouse through which information about bar reports in preparation would be available. Authors would be able to share information with those involved in other reports and obtain ideas from others, and cross-citation would be facilitated. The group also expressed the hope that there would be an opportunity for further discussion of this topic at the next WGLO seminar.

4. M&A Opinions

(summarized by Martin Brinkley)

Joel I. Greenberg, Kaye Scholer LLP, New York, Chair
This breakout session discussed trends in third-party legal opinions in M&A transactions. According to studies by the ABA Section of Business Law’s Committee on Negotiated Acquisitions, opinions have essentially been abandoned in acquisitions of public companies, presumably reflecting a consensus that they provide little value in that context. Opinions are still relatively common in private company acquisitions, with some variation based on the nature of the buyer (public company, private equity, etc.), although decline in the frequency of opinion giving appears to be accelerating even in this context. The study results may suggest that opinions are required more frequently in smaller transactions, leading to further reflections on the sophistication and experience of the counsel involved. The data provide no information on the coverage of opinions that are still being given frequently in the M&A context.

The breakout discussion went on to discuss several questions and issues:

Should legal opinions still be regarded as providing value in M&A transactions in which a private company is the target? The greater availability of post-closing contractual remedies against the seller for breaches of representations and warranties covering some of the same issues that may be addressed in a legal opinion seems to make the opinion less necessary. The group’s collective experience suggested that the scope of opinion coverage in private M&A transactions is narrowing, which may reflect recognition of this reality. The “golden rule” appears to apply vigorously in the M&A context because counsel tend to switch roles (from representing the buyer to representing the seller) more frequently than in commercial loan transactions. There was concern, however, that smaller firms acting as counsel to targets may be under pressure to deliver opinions that larger firms would find unacceptable.

If seller’s counsel has limited or no prior experience with the target, is its opinion a useful source of information concerning the target? Why is buyer diligence not equally efficient? The group discussed situations in which it may be better for the buyer to rely on its own counsel or local counsel of its own selection for advice in specialized areas or cross-jurisdictional issues (such as the enforceability of noncompetition covenants).

Some customary opinions may be more important in M&A transactions. For example, there may be a difference between the value of an enforceability opinion between counsel who jointly negotiated the acquisition agreement (low) as opposed to status, power and authority opinions on the parties and due execution and delivery of the transaction documents (higher).

5. Proposed Customary Practice Report
   (summarized by John B. Power)

Steven O. Weise, Heller Ehrman LLP, Los Angeles, Chair

This breakout session discussed the proposed statement on customary practice, drafted by Steve Weise and Bill Nimkin and designed to educate judges and litigation lawyers on the importance of customary practice in preparing and understanding third-party legal opinions. The statement was circulated broadly for comment and is achieving broad sponsorship by bar associations.
Steve reported that he has received comments in the following areas:

- Drafting edits
- Relationship between customary practice and the duty of care
- Relationship between customary practice and plain meaning
- Sources of customary practice
- National vs. state customary practice
- Variations from customary practice
- Citations to the Restatement of the Law Governing Lawyers

Steve listed approximately 15 bar associations that have already agreed to co-sponsor the statement, subject to review of the final form, or were studying it with the expectation that they would co-sponsor it. He explained and the group discussed comments received. He will prepare and circulate another draft responding to comments, and plans to publish the statement in the February 2008 issue of the Business Lawyer.

By consensus, the breakout group approved the statement and Steve’s approach to comments, subject to reviewing the final draft.

6. **Structured Finance Opinions**

(summarized by Steven K. Hazen)

*Scott A. Stengel, Orrick, Herrington & Sutcliffe LLP, Washington, DC, Co-Chair*
*J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York, Co-Chair*

Some of the questions posed in this breakout session were similar to those for the session on “Opinions to Accountants, Rating Agencies and Regulators”: the extent of duties to non-addressees or permitted assignees, duties to a non-client if the lawyer knows that an opinion provided in the transaction by another opinion giver is wrong, and duties to a rating agency beyond the content of the opinion letter. One issue focused on transactions utilizing a single “deal counsel” where the opinion recipients are not separately represented and no other counsel is present to serve as a check on the content and meaning of a legal opinion rendered by the deal counsel. That prompted discussion of whether customary practice is relevant where there may be no common understanding of the meaning of and diligence for an opinion, because the recipient does not have separate legal counsel to apply customary practice to the situation or to explain its impact to the recipient.

Another issue addressed was whether the typically lengthy recitation of facts in “true sale” and “non-consolidation for bankruptcy purposes” securitization opinions could be shortened when recipient counsel is involved and can assess the legal analysis upon which the opinion is based and all recipients are sophisticated parties with experience in that type of transaction. The group also discussed the role that recitation of the legal analysis plays in putting a recipient on notice that it needs to consult with its own counsel to assess the opinion’s significance in the context of the transaction. To the extent any consensus emerged, it was that structured finance transactions at the very least present difficult issues for customary practice and its application.
7. **Risk Analysis for Opinions**  
*(summarized by Harry Bryans)*

*William Freivogel, Ethics Consultant, Chicago, Co-Chair*  
*Henry S. Bryans, Aon Risk Services, Radner, Pennsylvania, Co-Chair*

This breakout session focused on base line quality control procedures adopted by firms in their opinion practice. Substantially all the firms represented in the group had an active opinions committee. Several of the firms represented indicated that their opinions committees met regularly, while others stated that they met on an as-needed basis. Almost all present said that their firms had written policies on opinions. Several noted that the policies are on their firm’s intranet.

Almost all present indicated that they have second-partner reviews for closing opinions, tax opinions, and any opinions given in real estate transactions. Most present stated that the second partner has to be someone not involved in the particular transaction and approximately half of those present said that the second-partner review had to be by a member of the firm’s opinions committee. Several indicated that changes to the opinion draft frequently occurred as a result of these reviews. Several firms require a heightened review of reasoned corporate opinions.

There was a further discussion of requested non-client reliance on diligence reports. There was general agreement that this is potentially a high risk area and that opinions committees at some firms are actively considering the relevant issues, promulgating policies on the conditions for releasing reports to non-clients, and reviewing the relevant documentation to accompany the report prior to furnishing diligence reports to non-clients. For more discussion of this problem, see the relevant portion of the panel session summary on “Limiting Legal Opinion Liability: Strategy and Ethics” (p. 2 above).

It was generally accepted by members of the group that dishonest, insolvent, and otherwise “unworthy” clients present the greatest single risk to large law firms. Most of those present said that their firms require background checks (via internet sources or otherwise) on new clients that are proposed for representation in corporate matters.