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Report from the Chair

To the members of the Legal Opinions Committee:

We are headed into a busy time of meetings and programs sponsored by the Committee.

Section of Business Law’s Spring Meeting in Dallas

The Committee will have three important events at the spring meeting of the ABA Section of Business Law in Dallas. I hope you will attend all of them.

Committee Meeting. The Committee meeting is from 9:30 to 10:30 am on Friday, April 11, 2008 at the Hilton Anatole Hotel in Obelisk A, Atrium I and II, Mezzanine Level. Our primary focus will be discussion of a report in gestation on outgoing cross-border legal opinions. As the number of cross-border transactions increases, U.S. lawyers increasingly are called upon to give third-party opinions to non-U.S. recipients. At the meeting you will have a chance to weigh in on whether we should do a report in this area, and if we do it, what you think such a report should cover. Attached to this newsletter are an agenda for the meeting and a draft outline of the cross-border opinion topic, which we will discuss at the meeting. Of course, if you are interested, you will have a chance to sign on to do some work on the report. If you are not able to join us in Dallas in person, you may listen in to the meeting by dialing in:

Domestic dial-in: (800) 504-8071
International dial-in: (647) 723-3983
Access code: 0698334

Program on Due Authorization of Preferred Stock. From 10:30 to 12:30 on Friday, April 11, immediately following the Committee meeting in the same room, we will present a program titled “Is the Preferred Stock Duly Authorized? Opinions on Preferred Stock.” The program will summarize the soon-to-be-published report of the TriBar Opinion Committee on preferred stock due authorization opinions. Steve Weise will also give a status report on the customary practice statement approved at our last meeting, a copy of which is attached to this newsletter. The panel is chaired by Stan Keller, the primary author of the TriBar preferred stock report. In addition to Steve, Stan will be joined by Julie Allen, Steve Bigler and Dick Howe. This program will enlighten us all, and you should not miss it.

First Annual Committee Reception Hosted by Vinson & Elkins. By now you should have received an e-mail invitation to a reception for all Committee members and all participants in the Working Group on Legal Opinions, graciously hosted by Vinson & Elkins LLP at the Hilton Anatole Hotel from 5:00 to 7:00 pm on Friday, April 11. We expect all prior chairs of the Committee for at least the past ten years to attend. You will have an opportunity to bump noses with legal opinion mavens from all over the country, including the national giants in this field. Thanks to Gail Merel for providing the leadership initiating this reception, and to V&E for generously hosting it. I hope you will join us. Please RSVP to Ashley Nichols by April 7th (anichols@velaw.com or 713.758.2226).
Institute for Young Lawyers. On Thursday, April 10 from 10:30 to 11:30 am, Carolan Berkley will appear on behalf of our Committee in a program for younger lawyers titled “A Different View on Credit Agreements: Representing the Borrower.”

Webinar on “Fundamentals of Third Party Closing Opinions”

On March 26 the Committee sponsored a teleconference and live audio webcast on “Fundamentals of Third Party Legal Opinions,” presented by Steve Weise (chair), Art Field, Don Glazer, Stan Keller and Sandy Rocks. The program provided a wonderful review of basics in the practice, of great value for beginning lawyers and seasoned warriors as well. To order the program in CD or DVD format, visit the ABA Web Store: http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=CEV08FTPD.

Global Business Law Conference in Frankfurt

The ABA Section of Business Law will hold its first Global Business Law Conference in Frankfurt, Germany May 29-30 at the Westin Grand Hotel. See the home page of the Section of Business Law for registration and hotel information. I hope you will join us at this meeting.

The Committee will sponsor two programs there. First, I will chair a panel including Don Glazer, Steve Weise and Elizabeth Van Schilfgaarde on customary practice in cross-border opinions. The second program, chaired by Dick Howe, is co-sponsored by our Committee and the Subcommittee on Securities Law Opinions of the Committee on Securities Regulation. The panel will focus on a proposed report on negative assurance by lawyers in securities offerings by the Subcommittee on Securities Law Opinions. Daniel Bushner of our Committee will discuss negative assurance issues in offshore transactions. See Subcommittee on Securities Law Opinions Update, below.

We hope to arrange an informal gathering of Committee members in the course of the conference; we will keep you advised of our progress using the committee listserv.

Recent and Upcoming Publications

The third edition of the authoritative Glazer and Fitzgibbon on Legal Opinions is about to be published, co-authored by Don Glazer, Steve Weise and Scott Fitzgibbon.

Don Glazer and Jonathan Lipson’s article “Courting the Suicide King – Closing Opinions and Lawyer Liability” was published in the March/April edition of Business Law Today. The article addressed the risk of liability in opinion practice using a dramatic metaphor. It flows directly from our Committee’s program at the 2007 ABA annual meeting, “Crossing the Threshold: Why Ask for an Opinion at All?,” in which Don and Jonathan were panelists.
Committee Website

The Committee’s web site is being modified to add access to recent reports on legal opinions published by state and local bar associations. We expect this new feature to go live in the next few days. Click on Legal Opinion Resource Center on our home page, http://www.abanet.org/dch/committee.cfm?com=CL510000. Thanks to Christina Houston for diligently planning this, and also to the ABA’s terrific technology expert, Frank Hillis.

See you in Dallas.

- John Power, Chair

Jim Fuld, 1912-2008

Jim Fuld died in late January in New York. He changed the way we think about legal opinions. His seminal article Legal Opinions in Business Transactions – An Attempt to Bring Some Order Out of Chaos, 28 Bus. Law 914 (1973), is still worth reading. Legal opinions were folklore before his article. After it, they were a subject for intense study. He understood the need for a national approach to opinions and took a leading role in inducing the ABA Section of Business Law to organize the Silverado Conference in 1989. Earlier, he had been a guiding spirit in the formation of the TriBar Opinion Committee.

Jim never attended a TriBar meeting nor did he come to the Silverado meeting or participate in the subsequent report. We were all Jim’s intellectual children. He preferred to make his strong views known privately. He was charming and soft-spoken but assertive and persistent. He followed each report as it came out. He was a corporate lawyer of great stature in New York. He spent his entire career at the Proskauer firm.

He was also a world class collector of sheet music and a very capable musician.

He was a friend and mentor to me. I had lunch with Jim at his apartment several years ago. He retained his interest in family, music, his community, the law and, particularly, legal opinions.

- Arthur Norman Field

Committee on Professional Responsibility: Expanding Liability Exposures

The Committee on Professional Responsibility of the ABA Section of Business Law met in Washington, D.C. on November 17, 2007. The primary purpose of the meeting was to explore
the dynamics of law firm liability arising in corporate practice and possible ways for law firms to protect themselves from these exposures. John Villa, a partner at Williams & Connolly, was invited to the meeting as a special guest. Mr. Villa has defended several of the largest claims against law firms, including those against Vinson & Elkins in the Enron matter. Also attending was Geoffrey Hazard, currently the Thomas E. Miller Distinguished Professor of Law at Hastings College of Law. Professor Hazard is an Advisor to the committee. Participants included a number of distinguished members of the Section of Business Law, a bankruptcy judge, a recognized authority on transactional legal opinions and liabilities arising from them, a plaintiff’s lawyer, and loss prevention lawyers from ALAS and Aon. An additional number of lawyers participated by conference telephone. Much of the discussion came as a result of remarks by Mr. Villa.

The Chair emphasized that purpose of the meeting was to facilitate free and open exchange of views on the topics to be considered by those with experience or interest in the subject matter. It was not intended that the meeting, or any subsequent meetings on the topics, result in any recommended course of action for participants or their firms.

*The Concern.* U.S. law firms with significant corporate practices maintain malpractice insurance with limits ranging from $20 million per claim up to $250 million, and, perhaps, in some cases more. Yet a number of these firms are regularly handling transactions that involve $1 billion or more. Thus, there is a concern among some that a claim arising from one of these large transactions could exceed available coverage. Claims can come from clients alleging the firm made a mistake, from trustees in bankruptcy purporting to “stand in the shoes” of a former client, or from non-clients alleging aiding and abetting fraud, aiding and abetting breach of fiduciary duty, conspiracy, and other third-party liability theories.

*Examiners’ Reports.* It has long been recognized that corporate insolvencies can produce substantial exposure for firms that represented the entity pre-bankruptcy. Claims against the former counsel to Enron, Adelphia, DVI and Refco were all brought by the trustees in bankruptcy of those corporations. Mr. Villa stated that some of his most difficult cases arose from “findings” and/or “recommendations” set out in reports issued by examiners who had been appointed by bankruptcy judges. He stated that these reports are based on investigations by examiners possessing broad discovery powers who routinely obtain a waiver by the trustee of the bankrupt’s attorney-client privilege. The result is that the examiner has largely completed extensive discovery on behalf of the trustee before the case is filed and that, in such circumstances, a law firm defendant can find itself at a tremendous disadvantage in mounting an effective defense. He said that the “findings” in these reports are often sufficiently detailed to permit the trustee, and third parties using the reports, to successfully oppose motions to dismiss and for summary judgment. There is no obvious mechanic to “level the playing field” in the context of a bankruptcy, but the issues arising when a corporate client files for bankruptcy should be well understood by all law firms with significant corporate practices.

*Due Diligence Reports and other Foreign Developments.* It is common in Europe, and increasingly in the U.S., for non-clients in transactions to seek to rely on due diligence reports prepared by law firms for their clients. European firms frequently deal with such attempts by obtaining liability limitations from various parties to the transaction. The committee discussed
the current U.S. practice and ways that firms have implemented to attempt to limit liability to non-clients in those circumstances.

**Limiting Liability to Clients.** The Chair distributed copies of ABA Model Rule 1.8(h) (1) and a variation in effect in numerous jurisdictions. ABA Model Rule 1.8(h) (1) permits a lawyer to obtain an agreement from a client limiting the lawyer’s liability to the client for malpractice if the client is independently represented in making the agreement. The variation, which is a carryover from the Code of Professional Responsibility, prohibits a lawyer from limiting his liability to a client for malpractice. Although a number of states have adopted Model Rule 1.8(h) (1), some commercially important jurisdictions, including California, New York, and D.C., continue to provide for an absolute prohibition on limitations of liability to clients for malpractice. The chair advised that his information from New York was that a change in the New York rule would be politically impossible. The situation in California, which is in the process of adopting a new set of rules, was less clear. D.C. recently overhauled its rules, retaining the outright prohibition. Professor Hazard and others present expressed concern that a law firm with lawyers in states having both kinds of provisions could not necessarily rely on the application of one version or the other.

**Limiting Liability to Non-Clients.** There was a consensus at the meeting that no ethics rule prohibits limitations of liability to non-clients. This would include non-clients who sought to rely on due diligence reports. The big issue for such limitations is how they can be made effective as a matter of contract. All agreed that obtaining a signed agreement from the non-client should be effective. It is less clear whether a “self-executing” provision contained in a report or opinion would be effective. One member present said his firm’s research suggested that such a provision might be effective in the U.K. but probably not in at least some U.S. jurisdictions.

**Insurance.** An insurance broker specializing in transactional insurance (i.e., coverage for liability arising from representations and warranties made in acquisition agreements) had planned to attend the meeting, but had to cancel for health reasons. He has offered to attend a future meeting and discuss what types of insurance may (or may not) be available to address the concerns of lawyers handling large transactions.

**Plaintiff’s Lawyer’s Perspective.** One lawyer present had represented plaintiffs in claims against law firms arising from a failed transaction or failed business. He said that, in his experience, these cases are very hard to bring and are very hard for plaintiffs to win.

**Next Meeting.** The Committee on Professional Responsibility will meet at the spring meeting in Dallas on Saturday, April 12, 2009 at 2:00 pm at the Hilton Anatole Hotel in Obelisk A, Atrium I and II, Mezzanine Level. This meeting will be a sequel to the last one, and we will discuss the insurance implications of this exposure, as well as related claims data regarding these large losses.

- William Freivogel, Chair
Committee on Professional Responsibility
**Subcommittee on Securities Law Opinions Update**

The Subcommittee on Securities Law Opinions of the ABA Business Law Section’s Committee on Federal Regulation of Securities published its report, *No Registration Opinions*, at 63 Bus. Law. 187 (Nov. 2007). Two illustrative forms of no registration opinion are included in the report.

As reported in the January newsletter, the Subcommittee on Securities Law Opinions is preparing a new form of negative assurance intended to reflect changes in practice in light of securities offering reform. The new form will update the illustrative form contained in the Subcommittee’s report on *Negative Assurance in Securities Offerings*, 59 Bus. Law. 1513 (Aug. 2004). A second revised draft has been prepared and circulated to the members of the Subcommittee for discussion at its next meeting. That meeting will occur from 2:00 to 3:00 pm in the Coral Tower, Lobby Level, Anatole Hilton Hotel at the Section of Business Law’s spring meeting in Dallas on Friday, April 11.

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**Committee on Audit Responses Meeting**

The activities of this committee have been reported in earlier issues of the newsletter. The committee will meet at the Section of Business Law’s spring meeting in Dallas on Saturday, April 12, 2009 at 8:00 am at the Hilton Anatole Hotel in Obelisk B, Atrium I and II, Mezzanine Level. It plans to discuss a statement on the effect of FIN 48 on audit response letters and review the FASB proposal to revise the disclosure requirements for loss contingencies under FAS 5 (there also will be a program on that subject later that morning).

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**TriBar Opinion Committee Update**

The TriBar Opinion Committee’s report on *Opinions on Due Authorization of Preferred Stock* is complete and will be published shortly in the *Business Lawyer*. As noted in the Chair’s Report (above), at the Section of Business Law’s spring meeting in Dallas, Stan Keller will lead a program to present the report.

In other developments, the TriBar Opinion Committee has undertaken two new projects. One will be a report on opinions on the sale of outstanding securities, for example in secondary offerings. The other will report on opinions on the duly authorized and validly issued status of limited liability company interests and limited partnership interests. The latter report in part will supplement the TriBar Opinion Committee’s *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 279 (2006).
Working Group on Legal Opinions

The national Working Group on Legal Opinions, co-sponsored by the American Bar Association, state and local bar associations, various law firms and others, has scheduled its fourth invitation-only Legal Opinion Risk Seminar for June 2007 in New York.

Customary Practice Statement

At our August meeting in San Francisco, our committee unanimously approved a customary practice statement prepared by Steve Weise and Bill Nimkin. Thanks to huge efforts by Steve, the statement is co-sponsored by numerous bar groups across the country, and is designed to provide guidance on the importance of customary practice in the preparation and understanding of legal opinions. The Committee delegated to the Chair and prior Chairs the responsibility of reviewing and approving changes in the statement. The latest form of the statement will be submitted to the Section of Business Law Council at its meeting in Dallas for final approval of co-sponsorship of the statement by the Section.

Case Law Update

Crime-Fraud Exception to the Attorney-Client Privilege Applied to Communications with the Client to Support an Opinion

Plaintiffs in a federal securities fraud case moved to compel the defendant issuer's counsel to testify to certain communications he had with the issuer in connection with opinions the counsel rendered to the issuer’s transfer agent that addressed removal of restrictive legends on share certificates. Judge Scheindlin of the U.S. District Court for the Southern District of New York granted plaintiffs’ motion to compel counsel’s testimony, ruling that the crime-fraud exception to the attorney-client privilege applied to the communications. Memorandum Opinion and Order, Catton v. Defense Technology Systems, Inc., 2007 WL 3406928 (S.D.N.Y., Nov. 14, 2007).

- James F. Fontenos

Enforceability Opinions: California Supreme Court Limits Enforceability of Advance Releases of Liability Based on Gross Negligence

The parents of a child in a summer camp signed a release releasing the camp from liability arising out of “any negligent act” of the camp. The child drowned at camp, and the parents brought a claim. The court held that as a matter of “public policy to discourage . . .
“aggravated wrongs,” the release could not release liability based on gross negligence or worse. *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1115 (Cal. 2007). This case is of interest to preparers of enforceability opinions.

- Steven O. Weise

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**Membership**

If you know someone who would like to join the Committee and receive our newsletter, please direct them to our website, [http://www.abanet.org/dch/committee.cfm?com=CL510000](http://www.abanet.org/dch/committee.cfm?com=CL510000). 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 summer. Please forward cases, news and items of interest to John Power ([johnpower@earthlink.net](mailto:johnpower@earthlink.net)) or Martin Brinkley ([mbrinkley@smithlaw.com](mailto:mbrinkley@smithlaw.com)).

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American Bar Association
Section of Business Law
Legal Opinions Committee

AGENDA

Meeting of April 11, 2008

Hilton Anatole Hotel
2201 Stemmons Freeway
Dallas, TX 75207

Obelisk A, Atrium I and II, Mezzanine Level

Domestic dial-in: (800) 504-8071
International dial-in: (647) 723-3983
Access code: 0698334

9:30 am

1. Introductory Remarks John Power

2. Reports and Announcements

   - First Annual Committee Reception Hosted by Vinson & Elkins, 5-7 p.m,
     Hilton Anatole Hotel


   - Recent and Upcoming Publications

   - Recent and Upcoming Programs

   - Committee Newsletter Martin Brinkley

   - Committee Website Christina Houston

   - Meetings of Other Committees
-  
  -  Audit Responses
  -  Professional Responsibility
  -  Securities Law Opinions

-  Working Group on Legal Opinion
-  TriBar Opinion Committee
-  Customary Practice Statement


   See outline

4. Possible Other Projects

   -  Law Firm Practice Survey (update)
   -  Recipient Issues
   -  Ethical Issues
   -  Threshold Issue
   -  Reliance

5. Next Meeting

   -  Location: New York City
   -  Date: ABA Annual Meeting in August

ABA SECTION OF BUSINESS LAW
LEGAL OPINIONS COMMITTEE
CROSS-BORDER OPINION INITIATIVE

DRAFT
3-31-08

OUTLINE

Outbound Opinions

1. Introduction
   A. What the report is about
   B. Assistance to both U.S. opinion givers and counsel for non-U.S. recipient

2. General Principles
   A. In general, outbound opinions by U.S. opinion givers are no different than opinions given in U.S domestic transactions
   B. Customary practice: U.S. customary practice should apply to these opinions.
      (1) An opportunity for misunderstanding may arise if the opinion recipient and its counsel do not understand U.S. customary practice - the diligence for and meaning of the opinion
         (a) How should that problem be addressed?
         (b) In general, the result should not be any different if a customary legal opinion practice exists in the recipient’s country, or the country of recipient’s counsel, or other jurisdictions relevant to the opinion and the underlying transaction or transactions.
      (2) Should opinion givers incorporate the Statement on Customary Practice in their opinions?
         (a) Will recipients accept that?

3. Commonly requested cross-border opinions that are the same as or similar to opinions commonly requested in domestic U.S. transactions.
   In general the issues presented are no different than for domestic opinions, except for concern about whether the recipient and/or its counsel understand customary meaning and customary diligence.
4. **Requests for opinions commonly found in cross-border transactions and not (in the same form or at all) in domestic U.S. opinions.**

   A. The Committee has requested from its members sample outbound opinions and requests. To date, the response has been disappointing.

   B. The following topics in this area have been identified:

   (i) Enforcement of judgments

   (ii) Choice of law (often found in domestic transactions, but the issues can be different)

   (iii) “As if” opinions

   (iv) Choice of forum

   (v) Public policy issues

   (vi) Immunity of one or more parties from suit

   (vii) Submission to jurisdiction

   (viii) Service of process

   (ix) Need for recipient to qualify to do business

   (x) Tax withholding and tax treaties

   (xi) Pari passu treatment

   C. Are there others? How many can we realistically cover?

5. **Inappropriate opinion requests.**

   A. Sample opinions and requests. See 4A above.

   B. A U.S. opinion giver should not be asked to give an opinion that it would be inappropriate for it to be asked to give in a domestic U.S. transaction.

   C. Role of counsel in helping potential recipients to achieve legitimate goals without requesting an inappropriate opinion.

   (i) Some potential recipients are not sophisticated about the role of legal opinions
D. Are there opinions as to which U.S. customary practice differs in a cross-border transaction from customary practice in a totally domestic U.S. transaction?

6. Threshold Question.

A. What is non-U.S. practice in asking for legal opinions?

   (i) Are opinions now being requested in non-U.S. transactions where they have not been historically? Is this practice evolving? If so, why? Is the U.S. exporting its opinion practice?

B. Should U.S. counsel give a legal opinion when non-U.S. counsel for another party is not being asked to give an analogous opinion, or the golden rule is not being observed?

C. What is the appropriate standard for determining whether an opinion is appropriate in cross-border deals? Cost/benefit?

D. Should any discussion or report on this topic be combined with the discussion currently in process of the threshold question in domestic U.S. transactions?

7. Due Diligence Memoranda.¹

A. Should due diligence memoranda be given to third parties outside the U.S.? In domestic U.S. deals? What is customary practice in this area?

B. If given, what if any precautions should the “opinion giver” take? Non-reliance letters? Caps on liability? Indemnification from the recipient? Other?

8. Limiting liability on outbound opinions.²

A. Monetary cap?

B. Choice of law?

C. Choice of forum?

D. Reliance limitations?

¹ This topic may be undertaken by a joint task force involving the Legal Opinions Committee and other committees of the Section.

² Any report may touch on this issue, but may not take a position.
9. Special problems in secured transactions.\(^3\)

A. Choice of law opinion on perfection

B. Specification of which collateral can be perfected by the filing of UCC financing statements

C. Opinion that no other action or filing is necessary for perfection of a security interest under US security documents

D. Opinion that no U.S. filing or approval is necessary in connection with foreign law governed security agreement (or specifying which filings are required)

E. Opinions as to the UCC classification of certain collateral

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\(^3\) Need to discuss whether, in light of other literature on this topic and its complexity, this should be done as a supplemental report.