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Report from the Chair

There’s a lot to report in this issue.

Committee Growth

Our Committee now has more than 900 members.

Section Advisor

Jerry Hyman, a co-founder of the TriBar Opinion Committee, has been selected as an advisor to the ABA Section of Business Law. He will be advising our Committee and other committees of the Section on legal opinions and other subjects, during his two-year term. We look forward to benefiting from Jerry’s sage advice. See the article elsewhere in this issue.

Section Spring Meeting in Dallas

Our Committee meeting in Dallas was well attended, despite unexpected American Airlines flight cancellations due to equipment inspections. We discussed a proposed project on outbound cross-border opinions, led by Sylvia Chin (general principles), Noel Para (inappropriate opinion requests), Jim Rosenhauer (threshold issues), and Ettore Santucci (commonly requested opinions). The Committee approved the project.

We also sponsored a terrific program on the TriBar special report, Duly Authorized Opinions on Preferred Stock. See the summary elsewhere in this issue. During the program Steve Weise also reported on progress on the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions. The Statement is endorsed by our Committee and many local and state bar associations and is now in final form. It will be posted in our Committee’s Legal Opinion Resource Center and published in a forthcoming issue of The Business Lawyer.

Carolan Berkley represented our Committee in a program for the Young Lawyers Institute titled “A Different View on Credit Agreements: Representing the Borrower.” See Carolan’s report below.

The first annual Committee reception, generously hosted by Vinson & Elkins LLP, was a resounding success. Special thanks again to Steve Tarry for planning the event and representing his firm there, and to Committee member Gail Merel and Robert Rupp of the ABA staff for their active support.
Global Business Law Conference

The Section held its first Global Business Conference in Frankfurt, Germany on May 29-30. Our Committee sponsored a program on Customary Practice in Cross-Border Opinions. We also co-sponsored (with the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities) a program on Negative Assurance in Global Offerings.

The panelists in the cross-border opinion program were Don Glazer, Elizabeth Van Schilfgaarde, Steve Weise and me. See the summary elsewhere in this issue. The program on negative assurance, ably chaired by Dick Howe, is also summarized elsewhere in this issue. Panelists and the audience were highly interactive and the programs were well received.

Members of our Committee in attendance in Frankfurt held an informal meeting, with an open discussion of opinion issues.

TriBar Opinion Committee

TriBar Opinion Committee’s special report, *Duly Authorized Opinions on Preferred Stock*, has been published in final form at 63 Bus. Law. 921 (May 2008) and has been posted in our Committee’s Legal Opinion Resource Center (thanks to Stan Keller, Christina Houston and the ABA’s Frank Hillis).

Dick Howe became co-chair of the TriBar Opinion Committee, replacing Don Bernstein, who was appropriately honored for his wonderful leadership at a TriBar dinner on June 24 in New York. Don Glazer continues as the other co-chair.

TriBar is currently working on a report on opinions on limited liability company membership interests and a report on opinions on transfers of securities under UCC Article 8.

Working Group on Legal Opinions

The WGLO, which is co-sponsored by the ABA, state and local bar associations, various law firms and others, had its fourth, highly successful seminar in New York on June 2-3 under the leadership of Arthur Field. A summary of the programs and breakout sessions at the seminar session is attached at the end of this issue.

In addition to programs and breakouts, the June WGLO event also included separate meetings of two advisory boards. One, the Association Advisory Board, is comprised of representatives from state and local bar associations that participate in WGLO. This group discussed a variety of topics, including opinion reports and updates currently under preparation by state and local bar groups. The other board, the Law Firm Advisory Board, discussed potential projects and activities. Both advisory boards plan to meet again at future WGLO meetings.

WGLO plans to hold its fifth meeting in New York on October 27-28, 2008.
Outbound Cross-Border Opinion Project

Following approval of this project in Dallas, a revised outline of a report was prepared, and it is attached to this issue. The Committee task force members are Truman Bidwell, Daniel Bushner, Peter Castelone, Sylvia Chin, Ed Fleischman, Rick Frasch, Don Glazer, Noel Para, Jim Rosenhauer, Larry Safran, Ettore Santucci, Elizabeth van Schilfgaarde and me. Our reporter, Ettore Santucci, is preparing a working draft of the report based on materials prepared by members of the task force. As noted under “Future Meetings” below, we will present a Committee forum on August 10 at the ABA Annual Meeting describing the status of our work and seeking input from the audience.

Updating Survey of Law Office Opinion Practices

Another Committee task force is working on an update of our Committee’s 2002-2004 survey, which was reported on in Law Office Opinion Practices, 60 Bus. Law.327 (Nov. 2004). We will discuss this project at our Committee meeting in New York on August 10.

Listserv, Website and Newsletter

Jeff Rubin has agreed to take responsibility for our Committee listserv. His first effort will be to find ways to increase use of the listserv by our Committee members. I’m sure Jeff will welcome suggestions and help from members of our Committee. His email address is jwrubin@hhlaw.com.

Christina Houston continues her able work on managing and developing our website and Legal Opinion Resource Center. In addition to the TriBar Opinion Committee’s special report on duly authorized preferred stock opinions mentioned above, we have also posted a link to the Pennsylvania Third-Party Legal Opinion Report and Model Opinion Letter, thanks to Carolan Berkley.

And last but not least, Martin Brinkley continues his extraordinary success as editor of this newsletter.

As you can see, we are busy, and we welcome your participation. I look forward to seeing you in New York at our forum and Committee meeting.

- John B. Power, Chair
**Future Meetings**

*ABA Annual Meeting, New York, NY*
*Grand Hyatt New York*
*August 10, 2008*

Committee Forum: Outbound Cross-Border Opinions. 8:00 a.m. to 10:00 a.m., Juilliard and Uris Rooms, Conference Level. See the outline of the report we will discuss, attached to this issue.

Committee on Legal Opinions. 10:30 to 11:30 a.m., Regency Room, Mezzanine Level. A draft agenda for the meeting is attached at the end of this issue. We expect to be able to provide conference call capability and will circulate dial-in information in advance via the listserv.

Audit Response Committee. 4:30 p.m. to 5:30 p.m., Park Avenue Room, Mezzanine Level.

Committee on Professional Responsibility. 11:30 a.m. to 1:30 p.m., Booth Room, Conference Level.

Subcommittee on Securities Law Opinions of the Federal Regulation of Securities Committee. 4:30 p.m. to 5:30 p.m., Regency Room, Mezzanine Level

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**Working Group on Legal Opinions**

Meeting in New York, October 27-28, 2008

*ABA Section of Business Law, Fall Meeting, Ritz Carlton Hotel, Washington, D.C.*
*November 21-22, 2008*

Committee on Legal Opinions. Time and room TBD.

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**Jerry Hyman Appointed Section Advisor**

Jerome E. Hyman has been appointed a Business Law Advisor to the ABA Section of Business Law and will be assigned to the Legal Opinions Committee, the Audit Response Committee, the Professional Responsibility Committee and the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities. According to Don Glazer, one of his nominators: “Jerry is a retired partner of Cleary, a founding member of the TriBar Opinion Committee, former president of PLI, former principal outside counsel for PanAm (before its demise) and one of the smartest lawyers I know.”

Business Law Advisors are distinguished leaders of the profession whom the Section has chosen to involve in the Section activities at its expense. Each year three outstanding business
lawyers are chosen for this honor for a two-year term. Business Law Advisors are individuals who have distinguished themselves as practitioners, teachers, or government officials in one or more of the areas in which committees of the Business Law Section are active. Advisors need not have been active in the Section. The Section looks for senior lawyers with national reputations who have the experience and judgment necessary to help inform and educate younger members of the profession. It seeks individuals who can share the wisdom and knowledge they have accumulated over many years of practice.

Jerry Hyman is senior counsel to Cleary Gottlieb Steen & Hamilton LLP, based in its New York office. His practice focuses on corporate and securities matters. He joined the firm in 1948 and became a partner in 1959. From late 1982 to early 1984, Jerry also served as Senior Vice President and General Counsel of Pan American World Airways, Inc. Prior to joining the firm, Jerry served as a law clerk to Judge John C. Mahoney of the U.S. Court of Appeals for the First Circuit. He also served as an investigator of German cartels in the Office of Military Government for Germany from 1945 to 1946.

Jerry received an LL.B. degree magna cum laude from Harvard Law School in 1947, where he was case editor of the Harvard Law Review and received the Fay Diploma. He received his undergraduate degree Phi Beta Kappa from the College of William and Mary. He was a Trustee, Chairman of the Executive Committee, President and Chairman of the Board of the Practising Law Institute, and is now Chairman Emeritus. Among his numerous other activities, he is a former Chairman of the Committee on Corporation Law of the Association of the Bar of the City of New York and a founding member of the TriBar Opinion Committee. He has held many leadership positions in support of the Harvard Law School, and currently is a member of the Executive Committee of the Advisory Board to the Dean of the Harvard Law School.

Jerry will be a wonderful mentor to our Committee - John B. Power

Program Summaries

Is the Preferred Stock Duly Authorized? Opinions on Preferred Stock

At the spring meeting in Dallas, Stan Keller, Stephen Bigler and Dick Howe presented the February 29, 2008 draft of the TriBar Opinion Committee’s special report, *Duly Authorized Opinions on Preferred Stock*. The report had been approved by TriBar but was still subject to comment. (It has since been published at 63 Bus. Law. 921 (May 2008) and posted in the Legal Opinion Resource Center.) The following is a summary of the panel’s presentation.

1 Julie Allen was scheduled to appear in this program, but was unable to travel to Dallas because of maintenance issues with American Airlines MD80 aircraft. Her portion of the presentation was covered by other panelists, using materials she prepared for the presentation.
In preparing the Report, TriBar asked many lawyers experienced in issues relating to preferred stock what they thought the “duly authorized” opinion means. TriBar found consensus concerning procedural aspects but mixed reactions concerning the substantive terms of the preferred stock. The report summarizes customary practice on the meaning of the “duly authorized” opinion as follows:

- the shares are part of the authorized capital stock;
- when issued, a sufficient number of shares were available for issuance;
- proper corporate procedures were taken to create the shares;
- the charter contains all the substantive terms of the shares required by the state corporate statute; and
- the company has the power under the state corporate statute and its charter to create the rights, powers and preferences provided for the shares.

The report characterizes the first four bullet points as relatively straightforward. It concentrates its analysis on the fifth bullet point because of uncertainty as to whether the “duly authorized” opinion covers, in addition to the first four points, the substantive issues in the last bullet point. The following are key points made by the panel.

First, even if its terms are legally permissible, for preferred stock to be validly issued the board is required to have complied with its fiduciary duties. Compliance is customarily assumed by the opinion giver; however, if the opinion giver has doubts, it should exclude compliance with fiduciary duties from the opinion, especially when the opinion recipients include participants in the board action in question.

Second, although older Delaware decisions tended to treat defective preferred stock as simply void (severability being a relatively new concept), these decisions turned on procedural defects or breach of fiduciary duty. None of these decisions were based on the economic terms being too onerous. When there are problematic provisions (some of which are listed in the report), the opinion giver should either try to correct the provisions or, if the investors are insistent, take an exception to the “duly authorized” opinion (which might go to the validity of the shares entirely unless severability is available).

Third, the report counsels strongly against requesting or giving opinions on the preferred stock formulated in terms like “are enforceable in accordance with their terms.” Even opinions formulated in terms such as “are as set forth in the charter” or “have the rights, powers and preferences set forth in the charter” could be problematic because they might be read as addressing enforceability, which is an inapt concept when addressing stock terms. Rather, the “duly authorized” opinion provides all that is reasonable to give or receive, and if more is requested, it could be handled by stating expressly what is understood to be covered – that the terms of the preferred stock do not violate the state corporate statute or the charter.

- Robert J. Gloistein
  Orrick, Herrington & Sutcliffe LLP
**Young Lawyers Program**

Our Committee, together with the Section’s Commercial Finance Committee and Uniform Commercial Code Committee, sponsored a program at the Young Lawyer’s Institute held at the spring meeting of the Section in Dallas titled “A Different View of Credit Agreements: Representing the Borrower.” Carolan Berkley participated on the panel on behalf of the Committee. She focused on the types of factual and legal due diligence that need to be undertaken as counsel to a borrower in a lending transaction. The program was well received and repeated as a telephone CLE program in June.

- E. Carolan Berkley  
  Stradley Ronon Stevens & Young, LLP

**Customary Practice in Cross-Border Opinions**

Our Committee sponsored a program on Customary Practice in Cross-Border Transactions at the Section’s Global Business Conference in Frankfurt. Panelists were Don Glazer, John Power, Elizabeth Van Schilfgaarde and Steve Weise. Much of the program was devoted to a discussion of the history of third-party legal opinions in the United States, the development and recognition of U.S customary practice, and a general description of how customary practice works. The program also included a segment on litigation risk to opinion givers in the United States to provide insight into legal concerns of U.S. opinion givers, and touched on mitigation of that risk, particularly the imminent publication and use of the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*.

Elizabeth Van Schilfgaarde discussed inbound cross-border opinions (opinions by non-U.S. opinion givers to U.S. recipients). She emphasized the short history of third-party legal opinions in Europe and the scarcity of customary practice principles. She also confirmed that litigation against opinion givers on third-party legal opinions is rare in Europe. Because of the difference in legal systems and opinion practice, she suggested that U.S. recipients of opinions of non-U.S. counsel may wish to engage their own counsel from the non-U.S. jurisdiction to assist in the negotiation and understanding of the non-U.S. opinion.

The panel concluded with a discussion of outbound cross-border opinions (opinions by U.S. counsel to non-U.S. recipients). The primary point is that these opinions are necessarily governed by U.S. customary practice. U.S. opinion givers may be concerned that some non-U.S. recipients may not recognize that, or, if they do, may not understand enough about U.S. customary practice to understand the opinions they receive. Some opinion givers state in their opinions that they are governed by U.S. customary practice or expressly incorporate the ABA Principles by reference (and may incorporate the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* to the same effect in the future). Some recipients resist this approach, even when they understand that U.S. customary practice applies.
From the viewpoint of non-U.S. recipients receiving U.S. opinions, some recognize that, while they know that U.S. customary practice applies, they don’t understand that practice. Their recourse may be to engage their own U.S. counsel to help negotiate and understand U.S. opinions. If the practice of U.S. and non-U.S. recipients engaging separate counsel to negotiate and understand third-party cross-border opinions becomes prevalent, this may result in duplicate efforts and greater expense. Moreover, it raises the question whether the better practice in some transactions is to abandon third-party opinions in favor of receiving the opinion or advice from the recipient’s own counsel.

Other Committee Reports

Committee on Professional Responsibility: Expanding Liability Exposures II

The primary purpose of the Committee on Professional Responsibility’s April meeting was to continue to explore the dynamics of law firm liability arising in corporate practice and ways for law firms to protect themselves from these exposures. This discussion began at the committee’s November 2007 meeting. Before describing the discussion at the April meeting, the November findings are summarized below.

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 or perhaps, in some cases, more. Yet many firms regularly handle transactions involving $1 billion or more. Thus, there is some concern that a claim arising from a routine large transaction could exceed available coverage. Claims can be made by clients alleging the firm made a mistake, by trustees in bankruptcy purporting to “stand in the shoes” of a former client, or by non-clients alleging the aiding and abetting of fraud, the aiding and abetting of 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 law firms that represented the insolvent 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. Bankruptcy courts are appointing examiners to investigate and report on the involvement of professionals, including accountants and lawyers, in the demise of the organization. Examiners’ reports can be quite critical of the professionals and can serve as a roadmap to trustees, creditors, and other plaintiffs bringing proceedings against the professionals. It appears that these reports have become a fact of life in major bankruptcies. We have not

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2 Editor’s note: The following continues the report of the Section of Business Law’s Committee on Professional Responsibility which appeared in our April 2008 issue. The committee held further discussions on the topic at the spring meeting of the Section in Dallas on April 12, 2008.
learned of effective ways to reduce their impact.

Due Diligence Reports and Other Foreign Developments. In transactions in both Europe and the U.S., non-clients such as banks providing services to a client often ask to see due diligence reports prepared by law firms for their clients. European law firms frequently deal with these requests by permitting reliance but obtaining liability limitations from the recipient. (See Bob Gloistein’s summary of a breakout session on this topic from the June WGLO meeting in New York.)

Limiting Liability to Clients. ABA Model Rule 1.8(h) (1) permits a lawyer to obtain an agreement from a client limiting the lawyer’s malpractice liability to the client if the client is independently represented in making the agreement. Although a number of states have adopted Model Rule 1.8(h) (1), the professional responsibility rules of some commercially important jurisdictions, including California, New York and D.C., continue to prohibit lawyers from seeking limitations of malpractice liability from clients.

Limiting Liability to Non-Clients. No ethics rule prohibits a lawyer from obtaining a limitation of liability from non-clients. An open question is whether, to be effective, the non-client must specifically agree to the limitation, or whether a unilateral statement in a diligence report or opinion will be effective.

April 2008 - An Insurance Perspective. At the April meeting we heard from Gary Blitz, a specialized insurance broker with Aon Risk Services in Washington, D.C. and New York. Aon is the largest insurance broker in the world. Among other things, Mr. Blitz works with transaction parties in obtaining representations and warranties coverage, coverage for tax opinions, and other highly specialized insurance policies. He discussed the possibility of writing malpractice coverage for law firms on a transaction-by-transaction basis, something that he had not seen until recently. At the time of the meeting he was working on one such proposal but could make no prediction as to whether it would be successful. If it succeeds, it will be the first one he knows of. Mr. Blitz was not prepared to predict the limits available, or the cost of, such insurance. If he has anything to report for the committee’s August 2008 meeting, he will attend and report or we will pass it on.

August 2008 Meeting - Wrap-Up on Liability. The Committee on Professional Responsibility meets on August 10 at the ABA Annual Meeting in New York. (For meeting details, see “Future Meetings” elsewhere in this issue.) In addition to possibly hearing more from Mr. Blitz about transaction insurance, we will discuss ways to implement procedures to obtain liability-limitation agreements from non-clients. That will probably conclude the committee’s consideration of the liability subject.

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

The Subcommittee on Securities Law Opinions of the Section of Business Law’s Committee on Federal Regulation of Securities met on April 11 in Dallas to review the revised draft of the updated report on negative assurance in securities offerings. The updated report is intended to supersede the Subcommittee’s previous report, *Negative Assurance in Securities Offerings*, 59 Bus. Law. 1513 (August 2004). It will reflect changes in practice in light of securities offering reform and continued expansion in the use of offering documents that incorporate by reference.

The new report includes a revised form of negative assurance. The report’s discussion of the form is now contained entirely in the report, with cross-references in the footnotes to the form. There was a lively discussion of the issues at the meeting in Dallas, which was summarized in minutes of the meeting that were distributed to members of the Subcommittee.

After the meeting, a revised draft of the report (dated April 30, 2008) was prepared to reflect many of the comments made at the meeting and was distributed to the Subcommittee and to the participants at the Section of Business Law’s Global Business Law Conference in Frankfurt. (See John Power’s account of the GBLC in his Chair’s Report elsewhere in this issue.) A program on “negative assurance in global offerings” was presented in Frankfurt that included the following participants: Daniel Bushner, Partner, Ashurst LLP, London; John Farry, Managing Director, Global Banking Legal, Deutsche Bank AG, London; Don Glazer; and Laura A. Holleman, Managing Director, General Counsel – Investment Banking Division, Goldman Sachs International Limited, London; as well as Richard R. Howe, Chair of the Subcommittee on Securities Law Opinions.

The discussion in Frankfurt focused primarily on the use of negative assurance letters in offerings conducted outside the United States. After the meeting, some of the Frankfurt participants collaborated with colleagues in Europe and suggested various footnotes for the report which will be incorporated in the next draft.

A new draft dated July 16, 2008 was circulated to the members of the Subcommittee for discussion at the next meeting in New York City on August 10. (For meeting details, see “Future Meetings” elsewhere in this issue.) It is hoped that the new negative assurance report will be approved at that meeting and published in the next issue of *The Business Lawyer*.

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

Committee on Audit Responses

The Audit Response Committee met on April 12, 2008 at the Section of Business Law’s spring meeting in Dallas. The Committee continued its discussion of a draft statement on the effect of FIN 48 on audit responses. There was a consensus on the following points:
• For purposes of the audit response, the lawyer should not be assessing whether the client is “more likely than not” to prevail on its tax position. Rather, that is for the client to determine, with such advice of counsel as it chooses consistent with the nature of counsel’s engagement.

• In advising the client of its disclosure obligations, counsel should be mindful of the requirements of FIN 48 when that is relevant to counsel’s engagement. For example, the “more likely than not” standard applies to whether the entire tax liability must be recorded. In addition, in assessing a potential unasserted tax claim, the client must assume that the claim will be asserted.

• Overtly threatened and pending tax claims should continue to be handled as they have been in the audit response letter.

• FIN 48’s amendment of FAS 5 to exclude tax claims does not change the professional responsibility of lawyers to advise the client on disclosure of tax matters when that is required in connection with the lawyer’s engagement.

The Committee also noted that FASB was proposing to revise the disclosure requirements of FAS 5 and FAS 141R with respect to loss contingencies to require more timely disclosure covering more loss contingencies and to significantly increase the amount of quantitative and qualitative disclosures required. It was noted that the proposed revision, if adopted, would have implications for audit responses and the responsibility of lawyers in advising clients on their disclosure obligations. A program on this topic was held at the spring meeting with the Law & Accounting Committee.

The Audit Response Committee will meet at the ABA Annual Meeting in New York. (For meeting details, see “Future Meetings” elsewhere in this issue.) The committee expects to finalize its statement on the effect of FIN 48 and to discuss further the proposed revision of FAS 5, focusing on the actual FASB Proposed Statement issued June 5, 2008 and the ABA comments on it.

- Stanley Keller, Chair
  Committee on Audit Responses

Recent Developments

Case Law Update

*Ohio Federal District Court Holds that No Violation of Law Opinion Does Not Cover Compliance With Blue Sky Laws: In re National Century Fin. Enters., Case No. 2:03-md-1565 (S.D. Ohio, May 2, 2008).*

In this case, an Ohio federal district court judge granted an opinion giver’s motion to dismiss claims brought against it by the third-party recipient of a no violation of law opinion on a
stock offering. The plaintiff had alleged, among other things, that the opinion giver had committed fraud and made negligent misrepresentations because the disclosure materials for the offering were deficient and hence violated the Ohio Blue Sky Law.

First holding that Ohio law applied because that was where the opinion giver and its client were located and where the opinion was prepared (the plaintiff received the letter in Tennessee), the court then held that the opinion did not cover the Ohio Blue Sky Law because the opinion incorporated the ABA Accord by reference and the Accord expressly excluded compliance with state securities laws from opinions that adopted it. The court then went on, however, to state that even if the Accord did not apply, it would have reached the same result because the no violation of law opinion covers prohibitions on execution of the purchase agreement and issuance of the stock, and not what is disclosed in offering materials.

This decision confirms the virtue of incorporating the ABA Principles by reference. The Principles like the Accord make clear that opinions do not cover securities laws, and thus the Court presumably would have granted the motion to dismiss on the same ground if the opinion in question had incorporated the Principles rather than the Accord. The dictum on what no violation of law opinions cover apart from the Accord also, of course, is helpful but convincing a court to grant a motion to dismiss without an express exclusion (such as the one provided by the Principles) is likely to be more difficult.

- Donald W. Glazer

Administrative Law Update

Counsel to Statutory Underwriter Who Provides ‘33 Act Exemption Opinion He Knew or Should Have Known Was Incorrect Consents to Cease-and-Desist Order for “Causing” the Client’s 33 Act Violations – Kenneth M. Christison, Securities Act Release No. 8892 (February 7, 2008)

Rule 504 of the SEC’s Regulation D provides an exemption from registration for limited offers and sales of securities not exceeding an annual aggregate amount of $1 million. Under limited circumstances general solicitation is permitted and non-restricted, “freely tradable” securities may be issued in a Rule 504 offering. One of these conditions is that the securities be sold exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to “accredited investors” (as defined in Rule 501(a) of Regulation D). Rule 504(b)(1)(iii). See generally 7A J. William Hicks, Exempted Transactions Under the Securities Act of 1933, § 7:169 et seq. (2008).

Mr. Christison’s client had a prior history of securities law violations (Mr. Christison had represented him in a 2002 Commission action), and, with respect to the transactions at issue in this administrative proceeding, the client had been found liable for market manipulation in a Commission civil enforcement action. Counsel rendered opinion letters that facilitated the market manipulation. Apparently addressed to the transfer agents for the issuers of the securities, counsel concluded, citing Rule 504 and the Texas Administrative Code, that “if the proposed purchasers qualified as accredited investors who purchased with investment intent, the offerings were exempt from registration and there would be no restriction on the resale of the securities issued.”
In this consent order, in which Mr. Christison neither admitted nor denied the Commission’s findings (other than as to jurisdiction), the SEC concluded that he was in possession of information “signaling” his client’s “intent to distribute securities to unaccredited investors.” Despite being in possession of such information, counsel “when preparing his opinion letters, performed insufficient due diligence regarding the facts and circumstances underlying the proposed distributions.” The SEC’s order continued: “In each instance, [Christison] knew or should have known that his issuance of an opinion of counsel letter would contribute to [his client’s] unregistered public distribution of securities through non-exempt transactions.”

In light of these findings, the Commission concluded that counsel “caused” the client’s violations of Section 5(a) and 5(c) of the Securities Act of 1933, as amended, and entered its order requiring counsel to cease and desist from committing or causing violations or any future violations of Sections 5(a) and (c).


The SEC’s finding of “cause” in these consent decrees does not reflect the plain meaning of “cause.” In none of the proceedings at issue was counsel the actor who directly violated the relevant SEC statute or rule or who directed the actor to violate securities law. What counsel did or is alleged to have done was to facilitate violations by his client by delivering opinions or rendering advice that counsel knew, or should have known, was wrong, or in withholding information (Google and Isselmann) that counsel knew or should have known was material to the client’s decision. In reading the facts of these uncontested consent decrees, it is apparent that the SEC concluded that counsel knew, or clearly should have known based upon the known facts, that his opinion or advice was wrong (or, in the case of Messrs. Drummond and Isselmann, failed to present clearly relevant facts and analysis to the decision maker, in Mr. Drummond’s case, Google’s board of directors and, in Mr. Isselmann’s case, to his employer’s audit committee, board of directors, and auditors).

These enforcement actions remind us that when we are dealing in the securities area, we need a heightened sense of who our client is, what is the nature of the client’s activities, and how our opinion letter will be used.

- James F. Fontenos
  Greene Radovisky Maloney Share & Hennigh LLP
Membership

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

Next Newsletter

We expect the next newsletter to be circulated in the fall. Please forward cases, news and items of interest to John Power (johnpower@earthlink.net) or Martin Brinkley (mbrinkley@smithlaw.com).
American Bar Association Section of Business Law

Meeting of Committee on Legal Opinions

August 10, 2008
10:30 a.m.  

Grand Hyatt New York
Regency Room, Conference Level

1. Introductory Remarks                             John Power

2. Reports and Announcements

   - Recent and Upcoming Publications
   - Recent and Upcoming Programs

   - Committee Newsletter                              Martin Brinkley

   - Committee Website                                 Christina Houston

   - Meetings of Other Committees
     • Audit Response
     • Professional Responsibility
     • Securities Law Opinions

   - Working Group on Legal Opinions

   - TriBar Opinion Committee

3. Upgrading Use of Committee Listserv                Jeff Rubin

4. Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities   Dick Howe


6. Report on National Century case                   Don Glazer


3 Domestic and international dial-in numbers and access codes will be announced via the Committee listserv prior to the meeting.
Program Outline

Outbound Cross-Border Opinions

1. Introduction: Survey of Opinion Requests

   A. What the report is about

   B. Assistance to both U.S. opinion givers and counsel for non-U.S. opinion recipients

   C. The context of cross-border opinions

2. General Principles

   A. In general, outbound opinions by U.S. opinion givers are the same as opinions given in U.S domestic transactions

   B. Threshold question

      (1) What is non-U.S. practice in asking for legal opinions?

      (2) 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?

      (3) 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?

      (4) What is the standard for determining whether an opinion is appropriate in cross-border deals? Cost/benefit?

   C. U.S. customary practice applies to outbound cross-border 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 this 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.

         (c) Recipients may consider engaging U.S. counsel to assist in the opinion process.
(2) Should opinion givers expressly incorporate the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions in their opinions?

(a) Will recipients accept this?

3. Commonly Requested Cross-Border Opinions That Are the Same as or Similar to Opinions Commonly Requested in Domestic U.S. Transactions.

   A. 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 practice.

   B. However, cross-border transactions may present special issues:

      (1) “As if” enforceability opinions
      
      (2) Choice of non-U.S. law

      (3) Choice of non-U.S. forum

4. Requests for Opinions Commonly Found in Cross-Border Transactions but not (in the Same Form or at All) in Domestic U.S. Opinions.

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

   B. The following opinions have been identified:

      (1) Whether a U.S. court will enforce a judgment by a court of the non-U.S. jurisdiction, or a non-U.S. arbitration award

      (2) Immunity of one or more parties from suit

      (3) Service of process

      (4) Need for non-U.S. recipient to qualify to do business

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

5. Special Problems in Secured Transactions.

   A. Choice of law opinions on perfection of security interests
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 created under a U.S. security agreement

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

E. Opinions as to the UCC classification of certain collateral


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

B. The “golden rule”: Special issues presented by cross-border opinions

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

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

   (i) Some recipients may not be sophisticated about the role of legal opinions.

7. Recurring Sources of Friction between U.S. Opinion Givers and Non-U.S. Counsel Representing the Opinion Recipient.
The following summaries have been prepared to provide a general idea of the subjects covered by the panel sessions and breakout groups at the June 2, 2008 WGLO 4 meeting in New York. The summaries were prepared in most cases by members of the audience. Breakout group reporters are preparing separate summaries for the concurrent breakout sessions that will be available in the materials at the WGLO 5 meeting in late October.

**PANEL SESSIONS:**

1. **Bankruptcy-Related Opinions in Structured Finance Transactions**  
   (Summarized by John B. Power⁴)

   *Hon. Thomas L. Ambro, U.S. Court of Appeals for the Third Circuit, Moderator*  
   *Donald Scott Bernstein, Davis Polk & Wardwell, New York*  
   *Richard Levin, Cravath, Swaine & Moore LLP, New York*

   This panel addressed opinions in the specialized context of structured financings. In the simplest form of these transactions, assets (usually financial assets) are sold by the originator to a special purpose entity (“SPV”), often a Delaware limited liability company established under the direction of the originator and designed to be remote from the originator’s bankruptcy. The SPV pays for the assets with a borrowing or equity financing based on the value of the assets. The legal isolation of the assets enables a lender or purchaser of securities backed by the assets to rely solely on the creditworthiness of the assets. Where the assets consist of accounts receivable, the originator often continues to service them under an agreement with the SPV.

   There are two primary factors that affect whether the desired remoteness from bankruptcy is achieved: (1) the assets must not be property of the originator’s bankruptcy estate (Bankruptcy Code § 541(a)(1)), subject to the automatic stay (§ 362(a)), or subject to turnover (§ 542); and (2) the SPV, which is typically a subsidiary of the originator, must be able to withstand a substantive consolidation attack invoking the bankruptcy court’s general equitable powers. Legal opinions on these issues are often requested by financiers, rating agencies and accountants (in the latter case often addressed to the originator). In fact, there are requirements for such an opinion under SFAS 140.

   To satisfy the first requirement, the asset transfer must be a “true sale” (and not a secured loan transaction) under state law. State and federal courts (which apply state law under the *Erie* doctrine) have identified various factors to determine whether a transaction is a true sale, and have not always applied them consistently.

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⁴ With significant input from Martin Brinkley and Peter Munoz.
As to the second requirement (no substantive consolidation), there is a question whether the bankruptcy court’s equitable powers survived the enactment of the 2005 amendments to the Bankruptcy Code. This question may be addressed by the Supreme Court. Some commentators have speculated that there is no constitutional authority for substantive consolidation. Like the true sale requirement, substantive consolidation is affected by some inconsistent approaches in case law across federal circuits.

Reaching common agreement on true sale opinions requested by auditors can present issues of circularity because accountants typically require a legal opinion that the transaction is a sale for legal purposes, but many opinion givers seek to include an assumption that the transaction will be booked as a sale. An analogous issue of potential circularity exists for substantive consolidation opinions for auditors, since the conclusion depends in part on what others (including creditors of the originator) knew or believed. What the “market” believes, however, depends in part on how the originator books the transaction.

The organizational documents of the SPV are typically written to prevent the originator from causing the SPV to file a bankruptcy petition. A line of cases holds that an agreement not to file a bankruptcy petition is unenforceable. So governance procedures are used instead. A typical approach is to require at least one independent SPV director (or manager) and to require a unanimous vote of the board to authorize filling of a bankruptcy petition. Third parties rely on the board’s fiduciary duty to protect the legal entity. Opinions are often requested on enforceability of the unanimity provision in and out of bankruptcy.

If the SPV is a limited liability company rather than a corporation, issues may be more complicated because LLCs are largely creatures of contract. No case has addressed whether the operating agreement is an executory contract, subject to assumption or rejection in the originator’s bankruptcy case.

Issues in this area are unsettled, remain subject to case law developments, and are often heavily dependent on specific facts and circumstances. Thus, opinions in the structured finance context are usually reasoned or otherwise detailed in presentation. They may alert the opinion recipient to contrary or adverse authority, so that the recipient has the opportunity to obtain the views of its own counsel. Opinion givers continue to refer (sometimes explicitly in their opinions) to the TriBar Opinion Committee’s report, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 Bus. Law. 718 (Feb. 1991). *Structured Financing Techniques*, 50 Bus. Law. 527 (Feb. 1995), by the Committee on Bankruptcy and Corporate Reorganization of The Association of the Bar of the City of New York, also contains helpful background.
2. The Subprime Mess and Potential Lawyer Liability  
(Summarized by E. Carolan Berkley)

Donald W. Glazer, Newton, MA, Chair  
John K. Villa, Williams & Connolly LLP, Washington, DC

This session was presented by Don Glazer and John Villa. John, from Williams & Connelly LLP, has represented many law firms in high profile cases involving potential liability over legal opinions.

The panel pointed out that the savings and loan crisis of the 1980s led to a number of cases against lawyers. Since that time bankruptcy examiners take apart a company and lay out the areas of potential liability (including lawyer liability) in a written report, which is then used by plaintiff’s lawyers to bring litigation. So far there have been almost no lawsuits against lawyers as a result of the “subprime mess.” One suit has been filed alleging that the residual calculation in disclosure documents was false and that the law firm knew it was false. An uptick in bank failures will likely result in scrutiny of the law firms that represented the failed institutions. The issue is not usually negligence in preparing the legal opinion, but assisting with a transaction that goes bad with a bad client.

The panel also stressed that lawyers need to recognize that the ethics rules are not the outer limits of potential liability. When we see conduct that goes to the edge, we may have a responsibility to withdraw from the transaction or from representation of the client altogether. We need to be more forceful in advising clients who like to operate in the “gray zone.” That is where, even if the client’s conduct is not clearly illegal, liability with the benefit of hindsight may ensue when the business fails. Of course, assisting the client with such conduct also may result in litigation against the law firm. Even if that litigation is ultimately unsuccessful, it is expensive and stressful for the lawyer and the firm.

Two other areas of concern were discussed. The first was a proposed amendment to New York’s Martin Act to permit large institutional investors and pension plans to bring private actions under the Act. The second was the issue of determining the parameters of collective knowledge of lawyers in the law firm. John indicated this is an area that has just now come to a head in a case argued in the Second Circuit in January. (The case was decided after the WGLO meeting. See Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital Inc., -- F.3d --, No. 06-2902, 2008 U.S. App. LEXIS 13449 (2d Cir. June 26, 2008)). Although the case does not involve a claim against lawyers, it is instructive. The district court found that a corporation can be held liable in a securities class action case based on the collective knowledge or scienter of corporate employees, regardless of their position or role in making alleged misstatements about the company's financial matters. The Second Circuit reversed, saying that the district court had erred in finding that a Dynex bondholder had successfully stated a claim of scienter against Dynex despite failing to find scienter with respect to any specific officer or employee.
3. **Audit Responses**  
(Summarized by Susan Cooper Philpott)

*Stanley Keller, Edwards Angell Palmer & Dodge LLP, Boston, Moderator  
Steven K. Hazen, Los Angeles  
James J. Rosenhauer, Hogan & Hartson LLP, Washington, D.C.*

Statement of Auditing Standards 12 requires accountants performing an audit of a company’s financial statements to seek verification from the company’s lawyers regarding loss contingencies under Financial Accounting Standards Statement No. 5. This verification by a lawyer to a non-client regarding the status of threatened and pending litigation involving the company risks waiving the attorney-client privilege and the attorney work product privilege. Historically, the clash between the accounting profession and the legal profession over the scope of these audit inquiries and lawyers’ responses led the two professions to jointly agree upon the ABA Statement of Policy Regarding Lawyers’ Responses to Auditor’s Requests for Information and the corresponding AICPA Statement of Auditing Standards No. 12, in 1975. The ABA Statement has worked well over the years. However, recently the détente between the two professions has been under pressure. Perhaps spurred by changes under the Sarbanes-Oxley Act, including creation of the PCAOB and the prospect of auditor liability over some notorious business failures, more and more auditors now are issuing audit request letters that go beyond the scope of the ABA Statement.

Almost all law firms respond to audit letter inquiries within the framework of the ABA Statement. Typically this has meant issuing a standard form response letter supported by carefully documented and largely automated back-up procedures and prepared in accordance with the firm’s policies, in some cases overseen or reviewed by a firm committee. Currently, an inquiry that goes beyond the parameters of the ABA Statement is identified and response to that portion of the inquiry letter is expressly disclaimed in the law firm’s response letter. Frequently seen non-conforming requests include unasserted claims, illegal activity, violations of securities laws, ERISA compliance, tax qualification of employee benefit plans and existence of UCC security interests.

This trend toward overbroad inquiry letters is likely to continue as the accounting profession has adopted and is considering further changes to audit rules that rely more on fair value based accounting. Under current Financial Accounting Standards Statement No. 5, a company typically does not have to disclose loss contingencies for which the likelihood of a loss is “remote.” However, the adoption in 2006 of Financial Accounting Standards Board Interpretation No. 48 on Accounting for Uncertainty in Income Taxes is an express exception to Standard No. 5 and requires the evaluation of tax positions under the standard of whether the company is “more likely than not” to prevail, and a measurement of tax benefit that is “greater than 50% likely” to be realized. Similar inroads to the traditional standards also appear in Financial Accounting Standards Board Interpretation No. 49 on environmental cleanup costs. Most recently, the Financial Accounting Standards Board issued an exposure draft of a proposed Statement, Disclosure of Certain Loss Contingencies—an amendment of FASB Statements No. 5 and 141(R) that seeks to further expand disclosures of loss contingencies such as pending or threatened litigation, including loss contingencies assumed in a business combination, by
requiring increased quantitative and qualitative disclosures and covering more loss contingencies.

A number of cases involving the ultimate question as to whether disclosures to a company’s auditors constitute a waiver of the attorney-client or work product privileges are working their way through the court systems and may provide some future guidance in this area. Meanwhile, lawyers should expect to see even greater pressure from auditors to expand the scope of lawyers’ disclosures without any real protection against damaging waivers of the privilege. As a result, the ABA Audit Response Committee is once again working with the accounting profession on the scope of lawyers’ responses to audit inquiries.

4. **Discussion of Pending and Recently Issued Bar Reports**
   (Summarized by John B. Power)

   *John B. Power, O’Melveny & Myers LLP, Los Angeles, Moderator
   Richard R. Howe, Sullivan & Cromwell LLP, New York
   James G. Leyden, Jr., Richards, Layton & Finger, P.A., Wilmington
   Steven O. Weise, Heller Ehrman LLP, Los Angeles*

   A breakout session on bar opinion reports at the WGLO 3 meeting in October 2007 reached consensus that information on pending and newly published reports should be readily available. The Legal Opinion Resource Center at the home site of the ABA Legal Opinions Committee now provides access to recently published reports.

   This panel presented information as follows on current pending and recently published reports:

   **Recently Published Reports:**

   - ABA: No Registration Opinions
   - California: Remedies Opinion Report Update
   - Maryland: Comprehensive Report Update
   - Pennsylvania: Update
   - TriBar: Due authorization of Preferred Stock

   **Pending Reports:**

   - ABA: Negative Assurance
   - Outbound Cross-Border Opinions
   - Audit Letter Response Issues
California Model Opinion
Venture Capital Opinions

Florida Comprehensive Report Update

New Mexico

North Carolina Update

South Carolina

Texas ABA Principles and Guidelines

TriBar Issuance/Transfers of Securities
LLC and Limited Partnership Interests

Multiple Bar Associations Customary Practice Statement

The panel discussed four pending reports, and the audience commented and asked questions on each:

**Negative Assurance.** Source: ABA Section of Business Law’s Committee on Securities Regulation, Subcommittee on Securities Law Opinions. Dick Howe reported on this subcommittee’s progress in updating its 2004 negative assurance report to reflect changes in law and practice following enactment of securities law reforms.

**Outbound Cross-Border Opinions.** Source: ABA Section of Business Law’s Committee on Legal Opinions. John Power said that this report will discuss the applicability of U.S. customary practice and the golden rule to cross-border opinions, will cover commonly requested opinions in the cross-border context, and will comment on inappropriate opinion requests.

**Issuance and Transfers of Securities.** Source: TriBar Opinion Committee. Steve Weise stated that this report will provide guidance on the applicability of Article 8 of the Uniform Commercial Law to issuances and transfers of securities.

**Issuance of Interests in Limited Liability Companies and Limited Partnerships.** Source: TriBar Opinion Committee. Jim Leyden said that this supplement to TriBar’s LLC report will discuss the appropriateness of using “validly issued, fully paid and non-assessable” in opinions on LLC and LP interests.
5. **Opinions in Syndicated Lending Transactions**  
(Summarized by Steven K. Hazen)

*Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Chair*  
*Warren F. Cooke, Milbank Tweed Hadley & McCloy LLP, New York*  
*Manley W. Roberts, McGuire Woods LLP, Charlotte*

The issues addressed in this session primarily revolved around the unique situation faced by lender counsel where there are multiple lenders, some of whom may not actually be identified until after the transaction has closed. Who does counsel to the lead lender represent? From whom does the lead lender’s counsel take instructions? To whom are counsel’s duties with respect to confidentiality and the attorney-client privilege owed — the lead lender or the syndicate as a group? Discussion of these topics varied depending on the particular transaction and the ways in which the questions were or could be addressed in such communications as engagement letters, transmittal messages circulating draft documents, or closing opinions (if delivered by lender’s counsel).

The general view was that, barring express statements to the contrary, counsel to the lead lender has a duty of professional care only to that lender, except where counsel renders a closing opinion to members of the syndicate. In that case the duty broadens to that which is owed by an opinion giver. Similarly, the general view was that instructions to counsel were properly given only by authorized representatives of the lead lender and only properly acted upon by counsel when received from them. In that context, the attorney-client privilege would be held by the lead lender rather than the syndicate.

The discussion also focused on problems that arise when an officer or other representative of the lead lender gives directions regarding waiver of a loan condition and counsel recognizes that doing so could expose the lead lender to liability, including potentially to other members of the syndicate. Among other things, principles of “reporting up” under ABA Model Rule of Professional Conduct 1.16 were identified as affecting actions to be taken by counsel when that occurs. That issue also played a role in a discussion of varying practices regarding delivery of closing opinions by the lead lender’s counsel, in contrast to confirmation that conditions had been satisfied or that the loan documents conform to the term sheet. Reference was made to practices in the U.K., where closing opinions are customarily delivered by lender’s counsel rather than borrower’s counsel.

A brief discussion was also held on a recent Minnesota Supreme Court decision, *McIntosh County Bank v. Dorsey & Whitney*, 745 N.W. 2d 538 (Minn. 2008), in which the duties of the lead bank’s counsel were held not to extend to participating lenders unknown to the law firm when it represented the lead bank.
6. **Kitchen Sink Opinions**  
(Summarized by Jerome Grossman)

*Arthur Norman Field, Field Consulting LLC, New York, Co-Chair*  
*Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair*

This panel addressed the trend of some firms to include long lists of exceptions in their enforceability opinions without regard to whether the transaction documents give rise to the issues addressed by the exceptions (i.e., throwing everything but the kitchen sink into their opinions). Arthur Field traced the practice to the adoption of the ABA Accord: even though the Accord never became widely accepted, many firms took to incorporating its exceptions into their opinions, either by including them in the body of the opinion letter, or by putting them into schedules that are attached to the opinions and incorporated by reference.

Arthur commented that from the standpoint of customary practice, kitchen-sink opinions are inappropriate. The 1998 TriBar Report, for example, states (at Section 1.9(i)):

> The opinion preparers, therefore, have done their job when they have identified an issue of sufficient concern to warrant an exception and have brought that issue to the attention of the opinion recipient.

A kitchen-sink approach, by including exceptions that are not applicable to the transaction at hand, allows opinion givers to avoid that responsibility, and could result in no one really considering the issues raised by a transaction.

There are, however, reasons why opinion givers prefer the kitchen-sink approach: since it involves the use of an all-inclusive form, it helps to ensure that the opinion reflects the firm’s policies and procedures. It also helps ensure that a possible problem will not be overlooked.

Arthur and Andrew addressed such issues as whether the use of a kitchen-sink opinion is fair to the recipient; whether it is efficient overall; whether it is ethical; whether it is really in the best interest of the opinion giver’s client (e.g., by endangering a closing if counsel for the recipient and the opinion giver get into a dispute over the opinion giver’s use of such an opinion); and whether the inclusion of an extensive list might deprive the opinion giver of the protection that customary practice might afford with respect to an exception inadvertently omitted from the list.

Counsel for opinion recipients often have worked with opinion givers to ensure that appropriate due diligence is being performed, notwithstanding use of the kitchen sink approach, and draw comfort when opinion givers are willing to review the list and to exclude those exceptions that clearly do not apply to the transaction at hand. There is still not agreement as to whether the “kitchen sink” opinion should be abandoned in its entirety, but Andrew stated that lists may be scaled back as consensus grows regarding the scope of customary practice, in particular the appropriateness of certain stated exceptions and the understood presence of many unstated exceptions.
7. **LLC Opinions**  
(Summarized by Martin H. Brinkley)

*Louis G. Hering, Morris, Nichols, Arsh & Tunnel LLP, Wilmington, Chair*  
*Paul M. Altman, Richards, Layton & Finger, P.A., Wilmington*

This panel addressed issues that often arise in rendering opinions on limited liability companies in general and Delaware LLCs in particular. In many transactions, LLCs are now being used in place of corporations or limited partnerships. Based on the records of the Delaware Secretary of State, Delaware appears to be very often the jurisdiction of choice for LLC formation. Given the relatively recent availability of the LLC as an entity, and its novelty, customary practice for LLC opinions is still under development and advice available to opinion givers is limited. This situation is slowly improving, particularly with the TriBar Opinion Committee’s publication in 2006 of *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679 (the “2006 TriBar LLC Report”), which covers status, power and authority opinions and other basic matters, as well as the proposed TriBar report on whether LLC membership interests are “legally or validly issued.” In rendering all but the most straightforward LLC opinions, practitioners are still moving in uncharted waters to a substantial degree. Novel issues often arise.

The panel covered the following major topics:

**Due formation opinions on “shelf LLCs”**. Delaware LLCs are required to have an LLC agreement. See Delaware LLC Act § 18-201(d). Thus, an opinion that an LLC has been “duly formed” cannot be rendered with respect to a “shelf” LLC (one in which a certificate of formation is filed but no LLC agreement has been entered into). See 2006 TriBar LLC Report § 2.0. Section 18-201 of the Act contains helpful “relation back” language that permits an LLC agreement to be made effective as of the date on which the certificate of formation was filed. The panel recommended adopting this approach to avoid any gap in formation between the date of filing and the date the LLC agreement is entered into.

**Due authorization opinions**. The panel stressed that practitioners should not minimize the difficulties that can arise when rendering the opinion that an LLC has “duly authorized” the execution, delivery and performance of a contract. For example, what approvals are required to authorize a merger of a manager managed LLC? Section 18-209(b) of the Act requires that a merger be approved by at least 50% of the members (and by 50% of each class or group of members if there is more than one class or group) “[u]nless otherwise provided in” the LLC agreement. Difficult issues of interpretation can arise when the LLC agreement is silent as to the need for member approval or purports to vest control of “the business and affairs” of the LLC solely in the managers. There is relatively little direct LLC case law on these and similar questions, such as (1) the status of actions taken between filing a certificate of formation and entering into an LLC agreement (see above on “shelf” LLCs); (2) the effects of limiting purpose and powers clauses; and (3) supermajority vote requirements in some contexts. Case law in the limited partnership area may be instructive.
LLC agreement enforceability opinions. Practitioners generally recognize that rendering an enforceability opinion on an LLC agreement involves applying Delaware contract law. For that reason, many non-Delaware lawyers refuse to render enforceability opinions on Delaware LLC agreements (see 2006 TriBar LLC Report (§ 6.0 & n.76)). LLC agreement provisions that are particularly problematic include (1) provisions choosing law non-Delaware governing law; (2) provisions purporting to eliminate information rights; (3) mandatory distribution provisions; (4) waivers of rights to seek judicial dissolution; and (5) prohibitions on transfers of rights to LLC interests or under LLC agreements by operation of law or otherwise.

CONCURRENT BREAKOUT SESSIONS I:

1. **Assignable Opinions**  
   (Summarized by Gail Suniga)

   **Gail Merel, Andrews Kurth LLP, Houston, Chair**  
   **Abraham L. Zylberberg, White & Case LLP, New York**

   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. This reflects loan agents’ belief that permitting such reliance enhances post-closing marketability of loans and puts initial and future lenders on an equal footing. However, opinion givers are concerned that (a) such reliance may not be reasonable given that the facts and the law may have changed and that many assignees do not understand an opinion’s coverage and limitations, (b) such reliance may not be actual because the recipient may neither have received nor read the opinion and (c) permitting reliance by increasing numbers of loan buyers and sellers may increase the risk that the opinion giver could be sued on its opinion in costly lawsuits in numerous jurisdictions, perhaps resulting in application of the laws not anticipated at the time the opinion was rendered.

   During the session, participants discussed the following proposals to reduce the risks to opinion givers that result from permitting loan assignee reliance:

   **“Wachovia” Limitation.** Statements in the opinion that: (a) the opinion speaks only as of its date; (b) the opinion giver has no obligation to update the opinion to take into account changes in the facts or the law; and (c) any reliance by an assignee must be actual and reasonable under the circumstances.

   **Unitary Action Requirement.** Language in the borrower’s loan documents, or in the opinion itself, requiring that any lawsuit on the opinion be brought as one unitary action in a specified jurisdiction. This unitary action would be brought by the loan agent upon the approval of a majority-in-interest of the lenders.

   **Choice-of-Law Provision.** An express choice-of-law provision in the opinion for any lawsuit on the opinion.
Limitations on Reliance. A provision limiting the reliance period to the period during which the agent continues to market the loans or to a predetermined period of time.

Participants in the session expressed strong interest in addressing the problems caused by open-ended reliance by an unknown number of lenders for an indefinite period. However, none of the proffered solutions was felt to be comprehensive enough for the opinion giver’s needs or to balance legitimate concerns of lenders regarding syndicated loan marketability. The participants favored continued discussion of this topic, perhaps by a smaller group of individuals who would present their results at the next WGLO meeting.

2. Education of New Lawyers
(Summarized by Martin H. Brinkley)

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

This breakout session discussed “best practices” for educating those in the front lines of opinion letter practice on how to do their jobs right. Under Steve Weise’s leadership, the breakout group recognized that opinions are often prepared and negotiated by junior lawyers who don’t fully understand the meaning of customary opinion language and may not recognize difficulties inherent in seemingly innocuous changes requested by counsel to the opinion recipient. In the rush to close, senior lawyers may not give sufficient review to opinions, and the opinions committee or reviewing partner, if they exist, may not have been given sufficient time to conduct a careful review.

The breakout group engaged in a wide-ranging discussion of this problem area, touching on the following main points:

The challenge of how to train associates (and partners) about customary practice. What do the words in an opinion letter mean? Where are the hard and fast rules? Where is there flexibility? Participants generally agreed that the first year of practice, when the new lawyer has very little practical transactional experience, is probably too early to provide meaningful opinion training that will “stick.” Firms may need to engage in education or re-education of mid-level and senior associates, as well as partners. Good training takes plenty of energy.

The size and culture of the firm are relevant to training methods. Practice among firms varies, with some firms holding required group sessions and maintaining annotated opinion forms, while others rely more on informal training in the course of deals. The size of the firm and whether its practice is multi-jurisdictional in character appear to have great influence on the formality of training procedures. Opinion committee members and reviewing partners who are perceived as supportive of the transaction are more likely to be consulted about problems and to have the opportunity to provide training in “real time,” as the deal moves toward closing. Some firms use internal websites with opinion letter forms and links to customary practice reports via the Legal Opinions Resource Center of the ABA Committee on Legal Opinions.

Some practical steps can help with training. Encouraging junior lawyers to start with the firm’s own opinion form, rather than the recipient’s form or “the opinion we gave in the last
“deal,” can help build competence (as well as avoid problems) in opinion practice. Getting the opinion recipient’s form or list of opinions early, when the transaction is beginning to unfold, and giving it to an opinion committee member for review and comment (where that is the firm practice) can offer a good training opportunity and avoid a last minute “fire.”

3. **Opinions Received in Multi-Investor Transactions**  
   (Summarized by John B. Power)

   *Martin Carmichael, Goodwin Procter, LLP, Boston*

   This breakout session discussed issues for counsel for one or more investors in multiple investor transactions where the opinion provided by the issuer is arguably inadequate. The following issues were addressed:

   1. How does recipient counsel avoid situations where a non-client can cogently allege that it relied upon that counsel’s advice? For example, recipient counsel is asked by another investor about its or its client’s satisfaction with the documents or the transaction. Where there is a risk of non-client reliance, counsel should consider expressly disclaiming representation of the non-client in a letter or email.

   2. How does recipient counsel respond when the client directly or indirectly requests less than a full review of the transaction or the documents, for example by very substantially limiting fees? While it might otherwise be desirable, documenting the limited nature of the representation adds to the difficulty of accurately describing the limitations.

   3. If recipient counsel represents one investor, what difficulties are presented if it is later requested to represent a second investor in the same transaction? Is the consent of the first client required? If not, is disclosure to the first client required?

   Finally, there was discussion of problems for the opinion giver where the legal opinion is included in a package of documents sent by its client to potential investors in the transaction. Often the opinion giver does not know who the proposed investors are, or whether they are represented by counsel. While in general the opinion giver may assume that the recipient understands customary practice, are there special risks in this kind of transaction? Should it consider including in its opinion letter a statement that understanding legal opinions is complicated, and recipients should consider engaging a lawyer to review the opinion?
CONCURRENT BREAKOUT SESSIONS II

1. **Distribution of Due Diligence Memoranda**  
   (Summarized by Robert J. Gloistein)

   *A. Mark Adcock, Moore & Van Allen, PLLC, Charlotte, Co-Chair*  
   *Lou R. Kling, Skadden, Arps, Slate, Meagher, Flom, LLP, New York, Co-Chair*  
   *John T. Gathings, Jr. Moore & Van Allen, PLLC, Charlotte*

   This breakout session addressed customary practice in the U.S. regarding the delivery of due diligence reports ("Reports") to non-client third parties. The session focused on Reports that are prepared by a law firm in connection with its client’s acquisition of a business, and the question posed is the extent to which the Report can be furnished to and relied upon by the financing parties (lenders), if at all. (Reports more and more also are being prepared for a client selling a business, and in many cases potential bidders and their lenders are given access to the Reports.)

   There were two main points made in this breakout session. First, unlike the European practice in which Reports generally are delivered to lenders and lender reliance is allowed with a cap on liability, law firms in the U.S. generally are holding firm on non-reliance, with some law firms not allowing delivery to the lender at all. Second, U.S. lenders are more regularly receiving Reports subject to executing a non-reliance confirmation and agreeing not to distribute the Reports to syndicate members without a similar confirmation. Some lenders also are agreeing to indemnify the law firm against claims based on the Report. In both European and U.S. practice it is conceded that protective provisions may not stand against a claim of intentional fraud on the part of the law firm.

   The following were comments from several of the participants in the breakout session:

   - Regardless of any restrictions a law firm may place on use or delivery of a Report, borrower clients may give copies of the Report to lenders anyway. This can pose a problem for the law firm preparing the Report if it knows or should know that the client will provide a copy of the Report. Under Section 552 of the Restatement of the Law Governing Lawyers, the law firm could be liable for negligent misrepresentation in this circumstance. Thus, in some cases it may be safer to authorize delivery but not reliance and obtain a written confirmation of non-reliance.

   - In private equity transactions, on the other hand, the practice is that the Report is not given to the lenders because the borrower typically gives a 10b-5 representation as to all information furnished to the lender.

   - One area that received considerable attention is the dilemma posed by the fact that the Report almost certainly will not contain, or even identify, the substance of all of the due diligence discussions between the law firm and its client. For one thing, the content of the Report is initially the result of cost-benefit decisions made by the client in light of its knowledge...
if the business and areas of investigation that it considers important. As a result, Report preparers want a lender confirmation containing an acknowledgement that the Report was prepared to address specific questions of interest to the client and may not cover questions that are relevant to or should be considered by the lender in deciding to make the loan. In some instances, the client will request that a redacted version of the Report be prepared for delivery to third parties, deleting sensitive discussion (for example analysis of aspects of the transaction, such as change of control laws) on which the client has made a business risk assessment and does not believe are material to the lender. The obvious danger to the law firm in having “two reports” was noted, and at a minimum Report preparers should consider whether the lender should be told of the fact of redacting. Another suggestion was to focus redacting on deleting all legal analysis and limiting the delivered Report to factual descriptions only.

- Another area of concern is the difficulty posed by the U.S. offices of a multinational law firm taking a position against reliance and demanding a non-reliance confirmation, when its European offices are permitting delivery of and reliance on the Report. At least for transactions domiciled in Europe with ancillary U.S. aspects, Report preparers may want to consider the extent of reliance on the U.S. portions of the Report.

- Finally, one anomaly in European customary practice was noted: although European law firms appear to be in the forefront of permitting third parties to rely on due diligence reports (albeit subject to a monetary limit on liability), European firms uniformly do not give assignable opinions. This may be influenced somewhat by the fact that European firms, unlike their U.S. counterparts, tend to deliver minimal opinions to third party lenders.

James Rosenhauer is chairing an ABA Task Force on Due Diligence Reports and can be contacted concerning this project at jirosenhauer@hhlaw.com.

2. Ethics and Opinion Practice  
(Summarized by Martin H. Brinkley)

*William Freivogel, Ethics Consultant, Chicago, Chair*  
*James A. Smith, Foley Hoag LLP, Boston*

This breakout session considered a handful of issues that crop up at the intersection of various professional ethics rules and opinion letter practice, using the ABA Model Rules of Professional Conduct as the applicable standard. Under Bill Freivogel’s leadership, participants discussed the following major points:

Opinion letters that have the effect of aiding/abetting client fraud. Model Rule 1.2(d) provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .” Model Rule 1.0(f) provides that knowledge can be “inferred from the circumstances.” At what point does a lawyer who “smells a rat” in what the client has told the lawyer or other parties to the transaction have a duty to refuse to render an opinion letter? Even if the opinion covers only customary matters and is correct on its face, what if its effect is or was to promote a closing that results in a fraud?
**Efforts to limit the firm’s liability.** Although a topic of discussion at recent WGLO seminars, at this time there does not appear to be movement toward asking recipients to agree to a limitation on the opinion giver’s liability, presumably because recipients would not agree. As discussed in recent WGLO programs and reported in the January and April 2008 issues of this Newsletter, Model Rule 1.8(h)(1) permits a lawyer to obtain an agreement from a client limiting the lawyer’s liability for malpractice if the client is independently represented in making the agreement. A number of states have adopted Model Rule 1.8(h)(1), but some important jurisdictions (California, New York, D.C.) adhere to the old ABA Model Code of Professional Responsibility’s absolute prohibition on limitations of the lawyer’s malpractice liability to clients. There does not appear to be any ethics rule that bars a law firm from obtaining a limitation of liability from a non-client (such as a third-party opinion recipient), however.

**Rendering opinions on the laws of a state in which the lawyer is not licensed: unauthorized practice of law?** Model Rule 5.5(b)(4) (which is in effect in Delaware) allows a lawyer to render an opinion as to the law of a jurisdiction in which the lawyer is not licensed to practice provided the opinion is “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” Not all states have adopted a version of Model Rule 5.5(b)(4), however. Lawyers who render opinions on the laws of other states should review the local ethics rules. Apparently there is no evidence of bar disciplinary prosecutions against lawyers providing legal opinions in multistate transactions.

3. **Law Office Opinion Procedures**
   (Summarized by E. Carolan Berkley)

   *Arthur A. Cohen, Haynes and Boone, LLP, Washington, DC, Co-Chair*
   *Kenneth R. Blackman, Fried, Frank, Harris, Shriver & Jacobson, LLP, New York, Co-Chair*

   This breakout session discussed law office opinion practices. As was found when the ABA Committee on Legal Opinions prepared its report on Law Office Opinion Practices (60 Bus. Law. 327 (Nov. 2004)), there is not uniform opinion practice among firms. That being said, some form of second partner review or consultation does appear to be practiced by most firms. After-the-fact review of opinions and use of a formal checklist do not appear to be part of the opinion process in many firms.

   Two areas that were addressed are the need for better client intake procedures, especially where an opinion will be requested, and on-going training of partners and associates in opinion practice.

   In light of participants’ interest in this topic, a task force of the Committee has begun to work on updating the Law Office Opinion Practices report. If you have thoughts on areas that should be addressed that were not addressed in the original report, please contact John Power at jpower@earthlink.net. The Law Office Opinion Practices report, including the list of questions used for that report, is posted in the Legal Opinion Resource Center.