Chair’s Letter

Fall Committee Meeting

Our fall meeting in Washington D.C. on November 21, 2008 was well-attended and a great success. Among the highlights were remarks by Section advisor Jerry Hyman on the threshold issue of whether an opinion should be requested at all, a report on the Committee’s outbound cross-border opinion project, and discussions of recent cases and other developments.

Jerry’s remarks, and an introduction by Don Glazer, appear below. The recent developments section in this edition includes summaries of reports given at the meeting.

Ettore Santucci, the reporter for the cross-border project,1 told us that early portions of the report are nearing completion, including discussions of the applicability of U.S. customary practice to outbound opinions, the cost-benefit analysis required in deciding whether to ask for or give such opinions, the inadvisability of giving an “as if” enforceability opinion where the agreement is governed by non-U.S. law, and the complications of giving an opinion on the enforceability of a choice of law provision that chooses non-U.S. law. Other segments in progress cover opinions on choice of forum provisions, enforceability of foreign judgments, enforceability of arbitration clauses and foreign arbitration awards, sovereign immunity, service of process, and the requirement to qualify to do business, as well as inappropriate opinion requests.

Newsletter Subcommittee is Formed

This Newsletter has been published for many years to keep our members abreast of Committee activities and recent developments in opinion practice. It always has been enthusiastically received. Our success during the last 18 months is primarily attributable to the energy, timeliness and care of our editor Martin Brinkley, supplemented in recent months by the talents of Jim Fotenos. We now formalize this arrangement by establishing a newsletter subcommittee with Martin as chair and Jim as vice chair. Initially, Martin and Jim will edit alternating editions; this one is Jim’s.

Several of you have indicated an interest in helping with the newsletter; now is the time to join the subcommittee and lend a hand in this work. Articles, reports and other material in the newsletter are provided by a broad cross-section of our members. Please also help us by submitting opinion articles, news and reports for publication to Martin, Jim or me (johnpower@earthlink.net, mbrinkley@smithlaw.com, or jfotenos@greeneradovsky.com).

1 Other subcommittee members are Truman Bidwell, Daniel Bushner, Sylvia Chin, Ed Fleishman, Rick Frasch, Don Glazer, Noel Para, Jim Rosenhauer, and Elizabeth Van Schilfgaarde. Jerry Hyman, Section advisor, is attending meetings and providing advice.
Other Committee Projects

Update of Office Practice Survey. A task force\(^2\) was formed last spring to update our Committee’s 2002 survey on law office practices (published in the November 2004 edition of *The Business Lawyer*). It will re-formulate the survey questions, distribute the survey to law firms utilizing a new ABA survey program, and collate and summarize the answers for publication in *The Business Lawyer*. The task force meets by telephone approximately monthly and the first phase is well under way. We expect to solicit comments on the survey questions in the near future. If you wish to participate in this task force, please drop me an email at johnpower@earthlink.net.

Diligence Memoranda. The Committee is also participating in a task force of the ABA Section of Business Law, headed by Jim Rosenhauer, that is preparing a report on diligence memoranda. Diligence memoranda are prepared by counsel for a client typically to provide information about an acquisition target company. Jim’s status report on the work of the task force appeared in the October 2008 issue of this Newsletter.

Future Events

We will have a two-hour committee meeting at the Section Spring Meeting in Vancouver, British Columbia. We hope to arrange for telephonic participation. In addition, we will co-sponsor two programs there, one on negative assurance with the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities, and one on client fraud and legal ethics with the Committee on Professional Responsibility.

Don Glazer and I will be co-chairing a Committee program entitled “Toward One World: Customary Practice in Cross-Border Transactions” at the Section’s Global Business Law Forum in Hong Kong in June.

See below (“Future Meetings”) for detailed information.

- John B. Power, Chair

\(^{2}\) Current task force members are Carolan Berkley, Arthur Cohen, Rick Frasch, Don Glazer, Doug Haas, Steve Hazen, Christina Houston, Tim Hoxie, Jonathan Lipson, and John Power. Jerry Hyman is attending our meetings and advising us.
Jerry Hyman’s Remarks at Fall Meeting

[Editor’s Note: Following is the text of Jerry Hyman’s remarks at the November 21, 2008 meeting of the Committee on Legal Opinions in Washington D.C. As noted in the July 2008 edition of the Newsletter, Jerry is working with our Committee and various other committees in his capacity as the ABA Business Law Section Advisor on legal opinions. Don Glazer’s introduction of Jerry also follows.

Jerry’s reference to the California Report on Legal Opinions is to the 2004 version of State Bar of California Business Law Section, Report on Third-Party Remedies Opinions, and the reference to the Threshold Report is to Appendix 4 of that Report, entitled “Report of the Threshold Committee”. The current 2007 version of the California Report is found on our Committee’s web site in the Legal Opinion Resource Center.]

Introduction by Don Glazer

Jerry Hyman is a retired partner of Cleary Gottlieb in New York and past President of the Practising Law Institute. He has been a member of the TriBar Opinion Committee since almost its inception and of the ABA Legal Opinions Committee for many years. Jerry is one of the most highly respected business lawyers in New York. But besides all that, Jerry is among the most perceptive people I know. Frequently, his comments on a difficult issue—often beginning with a disarming “I don’t understand . . . .”—can turn a room around. I can remember one instance, for example, when Jerry steadfastly refused to back off his minority position of one in a room of TriBar members impatient to move on to the next issue. As time passed, Jerry systematically beat down his opposition, and several meetings later the Committee adopted Jerry’s view.

Jerry has an unassuming manner, and he speaks softly. But he is tough as nails. And his words bear close attention. We on the Legal Opinions Committee are fortunate, indeed, that Jerry has agreed to serve as our advisor.

Remarks by Jerry Hyman

Thank you Don for that gracious introduction. Hearing it reminds me of the story, with which you may be familiar, of the man who after receiving a flattering introduction said he was sorry his parents hadn’t lived to hear it – his father would have been very proud and his mother would have believed every word of it.

It is a privilege for me to be here as a Business Law Advisor to the Section, and I am deeply grateful for the opportunity to participate in the important work that you are doing. I am particularly pleased to be here because John is chairman of this Committee.

I first met John several years ago when the Opinions Committee of the California State Bar Business Law Section of which John was chairman was working on its 2004 report on Legal Opinions I was impressed by the consideration being given by John, Morris Hirsch and others to what became the Threshold Report and to its wise recommendations. No other bar association group to my knowledge had made a serious study of when third party opinions should be
required. A subcommittee of TriBar after making a preliminary survey recommended that TriBar pursue a project in this area. The full TriBar Committee, however, rejected the proposal by a divided vote. In the interest of full disclosure I should note that I was co-chair of the subcommittee.

I had long held the view that third party opinions in many cases serve no purpose and represent a waste of economic assets. Although I am not an expert in comparative law it is my understanding that other legal systems function very well without third party opinions.

I believe that one reason there has been little in the way of an organized movement to limit third party opinions is that the arguments in favor of such a limitation are often presented as an all or nothing approach. In many ways the market has moved beyond that and third party opinions are no longer required in a great number of transactions. At the recent Working Group on Legal Opinions seminar\textsuperscript{1} one lawyer stated that in his recent experience, third party opinions had not even been requested in more than 50% of private equity placements. The TriBar subcommittee report to which I referred earlier listed numerous areas in which market forces had led to the foregoing of third party opinions.

Let me make a few suggestions as to a way to deal with this question, and I would venture to hope that this Committee would make this a project. One way to start would be to make a survey of areas and situations where third party opinions are no longer, or rarely, being given.

First, let me mention some areas where third party opinions may serve a useful purpose. For example I believe that for obvious reasons there is little objection to third party opinions about authorization and other matters relating to the lawyer’s own client.

Third party opinions also may be appropriate when the transaction and structure is one that has been put together by a sponsor and its lawyers, e.g., many structured finance transactions, particularly where the transaction is offered to many parties, who may or may not have their own lawyers closely examine the structure. It may be far more economical and sensible for the lawyer for the sponsor or for the organization being created (who probably prepared the agreements) to give any necessary opinions to the potential investors.

On the other hand, a third party remedies opinion is of little if any value when a company is entering into a loan or credit agreement with a bank or other large lending institution. Most often, the lending institution’s lawyers draft the document, using as a basis a form that the institution and its lawyers have used numerous times before. The institution’s lawyers know the problems that may lurk in certain provisions; they no doubt have researched them thoroughly. What does it add for the borrower’s lawyer to give a remedies opinion? It is hard to believe that in such a situation the institution is really relying on the third party opinion it has extracted or that it could successfully maintain in a lawsuit that it did.

The principal objection that I have heard to not requiring third party opinions is that they have become so customary that even though as an original matter it might be wise to dispense

\textsuperscript{1} Editor’s note: The WGLO session was held on October 28, 2008.
with them in many cases, they have become so traditional that it is too late to change that custom. Whenever I hear that argument I am reminded of Justice Holmes’ statement:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.

[O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).]

I do believe that lawyers and the law serve the public interest, that we do contribute to the working of our political and economic system, that in many situations we are the essential lubricant that keeps the machinery working, and that it is incumbent on us to change with the times when what we have customarily done serves no purpose and is economically wasteful.

To those who say we cannot change, I recommend that we adopt the attitude frequently expressed in the recent presidential campaign and, regardless of whom we voted for, say: Yes we can.

**Future Meetings**

*ABA Section of Business Law Spring Meeting*  
*Vancouver, British Columbia*  
*April 16-18, 2009*

**Thursday, April 16:**

Program: "You Can't Say That!" "Watch Me." Client Fraud and the Ethics Rules, jointly sponsored by the Committee on Professional Responsibility and the Committee on Legal Opinions. 10:30 a.m. - 12:30 p.m. Room 208 & 209, Level Two

**Friday, April 17:**

Committee on Legal Opinions. 8:30 - 10:30 a.m. Room 208 & 209, Level Two

Program: Update on Negative Assurance, jointly sponsored by the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities and the Committee on Legal Opinions. 10:30 a.m. - 12:30 p.m.

Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions. 2:00 - 3:00 p.m. Room 121, Level One

Committee on Professional Responsibility. 3:00 - 4:30 p.m. Room 121, Level Two

Legal Opinions Reception. 5:00 - 7:00 p.m. Room 109, Level One

**Saturday, April 18:**

Committee on Audit Responses. 8:00 - 9:00 a.m. Room 122, Level Two
Working Group on Legal Opinions
New York
May 18-19, 2009

Global Business Law Forum
Hong Kong
June 10-12, 2009

Thursday, June 11

Toward One World: Customary Practice in Cross-Border Legal Opinions, sponsored by Legal Opinions Committee. 1:00 – 3:00 p.m.

Other Committee Reports

Working Group on Legal Opinions — Law Firm Advisory Board

The Law Firm Advisory Board (“LFAB”) consists of representatives – in particular, persons with responsibilities for opinion practice – of leading law firms throughout the United States. The LFAB is part of the Working Group on Legal Opinions (“WGLO”). Its sister group is the Association Advisory Board, which consists of representatives of leading bar associations throughout the United States. The role of the LFAB is to identify for the WGLO those legal opinion issues of greatest importance to law firms and to promote among law firms a national dialogue on the opinion-giving process and the substance of opinions rendered. The goal of that dialogue is to facilitate, through discussion informed by experiences in different practice disciplines and markets, practical resolutions of common opinion issues. That discussion may, in some instances, lead to the publication of practical resource materials.

The LFAB and the WGLO have a website, with material and meeting updates, at:

http://www.abanet.org/buslaw/wglo/home.shtml

At the most recent dinner meeting of the LFAB, at The University Club in New York City on October 27, 2008, the LFAB members discussed aspects of “customary practice” and standardizing certain opinion exceptions, and heard a talk by Diane Vazza, Managing Director and Head of Global Fixed Income Research at Standard & Poor’s, on the challenges facing the financial markets.

- Reade H. Ryan, Jr.
Chair, LFAB

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Section of Business Law Committee on Audit Responses

The Committee on Audit Responses met on November 21, 2008 at the Section of Business Law Fall Meeting. It was noted that the Statement on the Effect of FIN 48 on Audit Responses, as approved by the Committee, was scheduled for publication in the February 2009 Business Lawyer. There was then a discussion of the potential impact of changes in accounting standards on the Treaty, especially those involving a “more likely than not” standard and a fair value accounting approach, including FIN 48, FAS 141R, possible changes to FAS 5, and IAS 37 (as adopted and as proposed to be amended). Regarding the FASB proposal to amend the disclosure provisions of FAS 5, in response to comment letters, including concerns raised by the ABA, FASB is deferring implementation of the FAS 5 disclosure changes and field testing an alternative model that requires less quantitative and predictive disclosure. In the case of FAS 141R dealing with acquisition accounting, which is scheduled to go into effect for 2009, FASB will be modifying the requirements for litigation-related loss contingencies so that they remain subject to the FAS 5/FIN 14 regime. The Chair indicated that the Committee’s FIN 48 Statement illustrates how the Treaty’s probable/remote framework can continue to operate in the face of accounting standards moving to a “more likely than not” regime.

The next meeting of the Committee will be at the Section Spring Meeting in Vancouver on Saturday, April 18, 2009 from 8:00 to 9:00 a.m.

- Stanley Keller, Chair
  Committee on Audit Responses

Recent Developments


As a matter of customary practice an opinion on the enforceability of an agreement containing an arbitration clause is understood to cover the enforceability of that provision. A recent U.S. Supreme Court decision has given opinion preparers something more to think about when considering whether an arbitration clause is enforceable.

In Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008), the Supreme Court addressed the validity of an arbitration clause that allowed a district court to modify, vacate or correct an arbitration award for errors in findings of fact or conclusions of law. Finding that the judicial review called for by the arbitration clause went beyond the review provided for in the Federal Arbitration Act (“FAA”) and finding further that the FAA’s provisions for review were exclusive, the Court held that the arbitration clause in question was invalid. For opinion givers, the lesson of Hall Street is that, when giving an enforceability opinion on an agreement containing an arbitration clause, the opinion preparers must consider
whether the terms, if any, for judicial review of an arbitration award as well as other terms of the clause run afoul of the FAA.

Fortunately, although *Hall Street* raises an issue that must be addressed, the arbitration clauses lawyers typically use in routine transactions ordinarily should not present a problem from an opinion standpoint. Nevertheless, *Hall Street* serves as a reminder that heavily negotiated clauses and even changes to standard clauses that appear on their face to be minor may raise issues under the FAA that require that an exception be taken to an enforceability opinion. Whether *Hall Street* will lead law firms, concerned about their corporate lawyers’ lack of FAA expertise, to consider including a standard exception for arbitration clauses in their form opinions is now an open question.

- Donald W. Glazer

[Editor’s Note: Just five months after the U.S. Supreme Court handed down its decision in *Hall Street Associates*, the California Supreme Court reached the opposite conclusion under California’s arbitration statute, California Code of Civil Procedure §§ 1280-1298.8. *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229 (2008): “The California rule is that the parties may obtain judicial review of the merits by express agreement.” 82 Cal. Rptr. 3d at 233.

California’s *DIRECTV* decision provides an avenue for those who wish to tailor arbitration clauses to provide for merit review by a court, assuming they can establish grounds for the application of California substantive law to the agreement. Given the procedural labyrinth now created by the dichotomy between *Hall Street* and *DIRECTV*, opinion givers should consider taking an exception to a remedies opinion for the enforceability of any arbitration clause that permits judicial review of an award’s factual or legal basis.]

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**Delaware Courts Look to Other Entity Law When Deciding Issues Relating to Delaware LLCs — In re Seneca Investments LLC, 2008 WL 4329230 (Del. Ch. 2008).**

In *Seneca Investments* the Delaware Court of Chancery denied a petition for judicial dissolution. This case reaffirms that Delaware courts, when interpreting issues relating to the Delaware Limited Liability Company Act (the "LLC Act"), will often look by analogy to statutes and case law governing Delaware business entities other than limited liability companies.

Michael Tierney ("Tierney") petitioned the court for judicial dissolution of Seneca Investments LLC ("Seneca"), alleging that Seneca had abandoned its business and should therefore be dissolved. Seneca, in response, sought to dismiss the petition.

In deciding whether to grant Tierney's petition, the court began its analysis by observing that the relevant statutory provision was Section 18-802 of the LLC Act, which permits a court to order a decree of dissolution when "it is not reasonably practicable to carry on the business [of a
limited liability company] in conformity with a limited liability company agreement.\(^1\) Noting the absence of extensive Delaware case law on the meaning of "reasonably practicable" in Section 18-802, the court looked for guidance to cases interpreting the analogous provision in the Delaware limited partnership statute and other relevant cases in the limited partnership and corporate contexts.\(^2\) Adopting the approach taken in those other cases and applying it to the *Seneca* facts, the court denied Tierney's petition.

The lesson for opinion preparers is that Delaware courts may look to Delaware partnership, corporation and trust law when deciding issues relating to a Delaware LLC.\(^3\) Thus, opinion preparers, when giving opinions on Delaware LLCs, should consider Delaware law relating to partnerships, trusts and corporations if applicable to the matters covered by their opinions.

- James G. Leyden, Jr.
  Richards, Layton & Finger, P.A.

- Donald W. Glazer

\(^1\) Slip op. at 5-6.

\(^2\) *Id* at 6 nn. 13-16 [citing *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005) (noting that without much case law applying Section 18-802 of the LLC Act, the court will look by analogy to the dissolution statute for limited partnerships, which contains the essentially the same words as the LLC statute); *Haley v. Talcott*, 864 A.2d 86, 89 (Del. Ch. 2004) (ordering dissolution of a limited liability company by applying Section 273 of the Delaware General Corporation Law (the "DGCL")); *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, 1996 WL 506906, at *3 (Del. Ch. Sept. 3, 1996) (looking to purpose clause in partnership agreement to determine purpose of the partnership); *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, 1989 WL 63901, at *6 (Del. Ch. June 8, 1989) (ordering dissolution of a limited partnership where its purpose was to acquire and operate certain real property and that purpose was frustrated because the sole lessee of the property became insolvent and market conditions made finding a new tenant "practically impossible").

\(^3\) In addition to those cases cited by the court in *In re Seneca Investments LLC*, in numerous other cases Delaware courts, when interpreting issues relating to the LLC Act or the Delaware Revised Uniform Limited Partnership Act (the "LP Act"), have looked by analogy to statutes and case law governing other types of Delaware business entities. *See, e.g., Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1998) (applying observations regarding the LP Act to interpret similarly worded provisions of the LLC Act); *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992) (drawing analogies to corporate law in the limited partnership context with respect to the determination of whether a fiduciary duty lawsuit is derivative or direct in nature); *Boesky v. CX Partners, L.P.*, 1988 WL 42250 (Del. Ch. Apr. 28, 1988) (applying Sections 280 and 282 of the DGCL by analogy in interpreting Section 17-804 of the LP Act); *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *22 (Del. Ch. June 6, 1996) (applying "corporate opportunity" doctrine in the limited partnership context).

In Olson v. Halvorsen, another recent decision by the Delaware Court of Chancery, the court granted defendants’ motion for summary judgment and found that, as a matter of law, the statute of frauds applies to a limited liability company operating agreement (an "LLC agreement"). This was an issue of first impression under Delaware law and potentially limits the ability of a limited liability company to operate under an oral LLC agreement.

The plaintiff, Brian Olson, and the defendants were former partners and founders of an investment management and hedge fund firm, Viking Global ("Viking"). In addition to Viking, the parties formed various Delaware entities through which Viking conducted its business, including Viking Global Founders LLC ("Founders"). When Founders was formed, its LLC agreement was never signed and the parties disputed whether they had ever reached an agreement on the terms stated in the unsigned agreement, including whether the agreement included a provision entitling a retiring member to a multi-year earnout of his interest in Viking upon leaving Viking. The plaintiff was removed from Viking and subsequently filed suit, including a breach of contract claim seeking to collect money under the earnout provision of the unsigned LLC agreement. The defendants filed a motion for summary judgment seeking to dismiss the claim.

In determining whether the statute of frauds should apply to an LLC agreement, the court pointed out that the LLC Act allows oral LLC agreements but does not address whether the statute of frauds applies to such agreements. The court considered arguments for and against the applicability of the statute of frauds, including whether the drafters of the LLC Act specifically intended to override the statute of frauds. In Delaware, the statute of frauds provides "that an agreement ‘that is not to be performed within the space of one year from the making thereof’ must be reduced to writing and signed by the party against which the agreement is to be enforced."

Noting that "the statute of frauds does not apply to any contract which may, by any possibility, be performed within a year," the court observed that few oral LLC agreements would contain terms that could not possibly be performed within one year and thus ordinarily the statute of frauds would not limit the enforcement of oral LLC agreements. Nevertheless, in the case before it, the court held that the earnout provision at issue violated the statute of frauds because it could not be performed within a year and none of the exceptions to the statute of frauds was applicable. Thus, it found the earnout provision to be unenforceable and granted summary judgment to the defendants on the plaintiff’s breach of contract claim.

The lesson for opinion preparers, as recommended in the TriBar Opinion Committee LLC Report, is that, even when an LLC statute permits operating agreements to be oral, opinion

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4 Olson v. Halvorsen, slip op. at 8.

preparers ordinarily should insist that the operating agreement for the LLC on which they are being asked to give an opinion be reduced to writing before giving the opinion.

- James G. Leyden, Jr.
  Richards, Layton & Finger, P.A.

- Donald W. Glazer

Claim that Misstatement by Counsel to Non-client Violates Section 10(b) Withstands Motion to Dismiss — Thompson v. Paul, 547 F. 3d 1055 (9th Cir. 2008).

Warning: The Ninth Circuit’s opinion and the district court’s decision were in the context of a motion to dismiss a complaint under Rule 12(b)(6) of FRCP. That means both courts took the allegations of the complaint to be true. The “facts” that follow were taken from Ninth Circuit’s opinion, which, in turn, came from the complaint.

Pamela Thompson was CFO of YP.Net until May 2002, when she resigned over the failure of top management to make certain disclosures to the SEC. Upon her resignation she reported her misgivings to the SEC. YP.Net then sued Thompson, and Thompson counterclaimed. That case settled with YP.Net agreeing to give Thompson a considerable amount of YP.Net stock. Three days after the settlement was signed, the CEO of YP.Net was "indicted on 29 counts of fraud, conspiracy, money laundering, and orchestrating a Ponzi scheme." The indictment had a negative effect on the value of the YP.Net stock Thompson received in the settlement.

Because of her loss in the stock’s value, Thompson brought this case against the lawyers ("Lawyers") who had negotiated the settlement on behalf of YP.Net. Thompson claimed that Lawyers had represented to her that the CEO of YP.Net was not under criminal investigation when Lawyers knew that the CEO was, in fact, under investigation. Thompson further claimed that she did not know about the investigation. One of the counts in Thompson's complaint was that the lawyers' misrepresentation about the CEO's troubles violated Section 10(b) of the Securities Exchange Act of 1934. Lawyers moved to dismiss the complaint. The trial court granted the motion, holding, among other things, that under Arizona law, Thompson had no right to rely on the representations of YP.Net's lawyers. In this opinion the Ninth Circuit reversed, holding that state law standards do not apply to claims under Section 10(b). The Ninth Circuit acknowledged that at the summary judgment or trial stage it may well develop that Thompson knew much more about the CEO's problems than she claimed in her complaint.

Thompson is not about a written legal opinion. However, it should be of interest to opinion givers for at least two reasons: First, it is strikingly similar to Dean Foods Co. v. Pappathanasi, No. 01-2595 BLS, 2004 Mass. Super. LEXIS 571 (Mass. Super. Dec. 3, 2004), which also involved claims of misrepresentations by lawyers about whether a party was under criminal investigation. A difference is that in Dean Foods the representations appeared in a written opinion and in the representations and warranties. In Thompson Lawyers’ representations were oral.
Second, the Ninth Circuit cited with approval *Kline v. First Western Gov’t Securities*, 24 F.3d 480 (3d Cir. 1994). *Kline’s* significance to opinion givers involves the Third Circuit’s holding that third parties may hold a law firm accountable for statements in an opinion even though the opinion says third parties may not rely on the opinion. This has proven particularly nettlesome to the Task Force on Delivery of Document Review Reports to Third Parties, being chaired by Jim Rosenhauer. *Kline’s* significance to the Ninth Circuit in *Thompson* is *Kline’s* holding that when a lawyer makes a misstatement to a non-client, that lawyer can be liable to the non-client under Section 10(b). That is, when a lawyer makes a statement to a non-client in connection with a securities transaction, the statement should be true.

- William Freivogel, Chair
  Committee on Professional Responsibility

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In *Quilling v. Humphries*, the federal district court for the Northern District of Texas held a lawyer liable for more than $9 million for giving an incorrect “opinion” that funds provided to his client were “secured in a brokerage account at a major investment institution” and that the “principal amount of the funds are insured against losses of every description.” Granting summary judgment to the opinion recipient, the court found that counsel did not exercise “reasonable care or competence” and thus had made a negligent misrepresentation by copying the opinion, drafted by his client’s president, onto his letterhead and delivering it without conducting any independent investigation.

The facts here are egregious, and one might well question whether the court would have come out the same way if counsel had drafted the opinion himself and, to support it, had obtained a carefully drafted certificate from the client. The problem, however, is that in reality what counsel was providing was not an opinion at all but a factual confirmation, and, when a statement a lawyer provides a third party does no more than track the client’s representation, it invites a court to ask whether counsel had an obligation to do something more to support it.

*Quilling* is one more example of a case in which a factual statement by counsel to a third party gave rise to liability. The case underscores the need for opinion givers to think long and hard before including factual confirmations in their closing opinions.

- Donald W. Glazer

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*New York Stock ExchangeEliminates Opinion Requirement*

The NYSE has eliminated the requirement for a legal opinion for the listing of shares and instead will require copies of Exhibit 5 opinions filed with the SEC in connection with recent
offerings or, if no opinion exists, a certificate of good standing from the jurisdiction of incorporation. This puts NYSE in line with Amex and Nasdaq, which do not require opinions of counsel with listings. See SEC Release No. 34-58649 (Sept. 25, 2008).

- Stanley Keller  
  Edwards Angell Palmer & Dodge LLP

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**Membership**

If you know someone who would like to join the Committee and receive our newsletter, please direct him or her to the ABA Section of Business Law website: [http://www.abanet.org/buslaw/home.html](http://www.abanet.org/buslaw/home.html), click “Committees” and scroll to Legal Opinions. If you haven’t visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there.

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**Next Newsletter**

We expect the next newsletter to be circulated in April. Please forward cases, news and items of interest to John Power ([johnpower@earthlink.net](mailto:johnpower@earthlink.net)), Martin Brinkley ([mbrinkley@smithlaw.com](mailto:mbrinkley@smithlaw.com)) or Jim Fotenos ([jfotenos@greeneradovsky.com](mailto:jfotenos@greeneradovsky.com)).

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