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Chair’s Letter

Dear Legal Opinions Committee members:

Following is a brief summary of our Committee’s current activities. It’s a busy little tea cup!

Publications and Listserve

Collected ABA and TriBar Opinion Reports. The third edition of these collected reports is now available for purchase. It is a very convenient, light weight, soft-covered volume, with all current reports. The easiest way to buy it is through a prominent link on the home page of our Committee (http://www.abanet.org/dch/committee.cfm?com=CL510000). Many thanks again to Committee member Carol Lucas for diligently editing this volume.

Committee Listserve. I again urge our members to make use of the listserve when you have an opinion practice issue.

Committee Structure

Membership. Since our last issue of the Newsletter, Anna Mills of the Van Winkle firm in Asheville, North Carolina (amills@vwlawfirm.com) has agreed to serve as our Membership Chair. She brings great energy and enthusiasm to the job.

About the same time, Jeffrey Franklin, our 1,000th member, joined us. I’m not sure whether Anna will claim him as her first major triumph. Elsewhere in this issue under “Membership” you will find an article on Jeffrey by Jim Fotenos, our Newsletter Subcommittee Vice Chair, and primary editor of this issue (along with Subcommittee Chair Martin Brinkley, who edited the summary of WGLO reports in the Addendum). We will meet Jeffrey (albeit on the telephone) at the meeting of the Committee in Chicago, and I will present him in absentia with a lavish gift.

Please ask your friends and colleagues to join the Committee.

Other Opportunities. We are looking for more members for our Technology, Programs, Listserve, and Meetings Subcommittees. If you are interested, please email me at johnpower@earthlink.net.

Meetings and Programs

Annual Meeting in Chicago, August 2009. Our Committee will meet from 10:30 a.m. to 12:30 p.m. on Sunday, August 2 at the ABA Annual Meeting in Chicago. I strongly urge you to attend. We’ll have a full agenda, with reports on recent developments, discussions of our cross-border opinions project and our office practice survey project, and exploration of such other topics as the enforceability of arbitration clauses and the enforceability of choice of law clauses. If you have agenda items you wish to add, or recent developments you would like to discuss, please drop me an email.
Attendance by telephone will be available. The call-in numbers are 800 640 7899 (North America, toll-free) and +1 416 641 6202 (Canada, toll); passcode: 72 63 028.

Gail Merel is effectively and efficiently planning our Committee reception on August 2 from 5:30 to 7:00 p.m. The breaking news is that Kirkland & Ellis LLP has graciously offered to host the reception. Thanks so much to K&E and to Gail for making this event possible. Members of the TriBar Opinion Committee and participants in the Working Group on Legal Opinions, as well as members of our Committee, are invited. Similar events at the spring meetings in Dallas in 2008 and Vancouver earlier this year were very well-attended and provided a great opportunity to mingle and converse with nationally recognized gurus in opinion practice.

**Spring Meeting in Vancouver April 2009.** Our Committee meeting in Vancouver was a lively event. The agenda included a report by Jim Rosenhauer on the work of a task force on diligence memoranda, a discussion led by Ettore Santucci on the draft Committee report on outbound cross-border opinions, a report by Carolan Berkley and Arthur Cohen on the Committee’s law office opinion practice survey project, a lightning round summary of pending and recently issued bar reports, and reports by Arthur Field, Don Glazer and others on recent cases. Reports of meetings of related ABA committees are found under “Spring Meeting of the ABA Section of Business Law” in this issue.

The Committee co-sponsored two spectacular programs in Vancouver. In one, jointly sponsored with the Section’s Committee on Professional Responsibility, Don Glazer’s and Bob Mundheim’s segment addressed ethics issues presented when the opinion giver’s client engages in questionable behavior. That program is summarized by Bill Freivogel (Chair of the Committee on Professional Responsibility) in this issue. In the other, jointly sponsored with the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities, Dick Howe (Subcommittee Chair), Don Glazer and Andy Pitt discussed the Subcommittee’s recently published report on negative assurance (see 64 Bus. Law. 395 (Feb. 2009)). Materials for both programs are available on the ABA website. (Go to www.abanet.org, then to Business Law Section, Meetings and Materials, 2009 Meetings (Spring Meeting), Nos. 130, 131 and 106, 107.)

The drafting committees for the Committee’s proposed report on outbound cross-border legal opinions and survey of office practices also met in Vancouver, and each is making great progress – to be reported on in Chicago. We also enjoyed a successful and fun Committee reception, generously co-sponsored by members Carolan Berkley, Truman Bidwell, Arthur Field, Don Glazer, Dick Howe, Stan Keller, Linklaters LLP, John Power, Jim Rosenhauer, Ettore Santucci, and Steve Weise.

**Working Group on Legal Opinions in New York, May 2009.** WGLO’s semiannual seminar was again very successful. Attached to this issue are summaries of the programs and breakout sessions there. Elsewhere in this issue, under “Spring Meeting of the Working Group on Legal Opinions” are reports of meetings of the related law firm and bar association advisory boards, by Jim Rosenhauer and Steve Hazen, respectively.

**Global Business Forum in Hong Kong, June 2009.** This program, sponsored by the ABA Section of Business Law, was cancelled in light of the world economic recession and concerns about the flu pandemic. Our Committee was to present a program on cross-border opinions.
Bar Association Reports and Related Programs

Among the summaries of WGLO programs attached to this issue, you will find a chart of recently published and pending bar association reports. See pages A-10 – A-11. We discuss those reports in the Newsletter as they are published.

In this issue, we include under “State and Local Bar Reports” brief articles on the following recently published reports: a report on substantive consolidation opinions of the Association of the Bar of the City of New York (article by Jim Gadsden); the 2009 North Carolina Bar Association Legal Opinion Committee’s Supplement to Report (article by Kenny Greene); and Supplement No. 4 of the Texas Legal Opinions Committee (article by Steve Tarry). Links to the reports are found in the Legal Opinion Resource Center accessed through the home page of this Committee.

The number of bar reports published in the last few years is striking. Equally striking is the number of new reports likely to be published in the next year. A partial list includes reports by: (1) our Committee (outbound cross-border legal opinions) and a related task force (diligence memoranda); (2) California (sample closing opinion and report on venture capital opinions); (3) Florida (comprehensive report); and (4) TriBar (opinions on LLC membership interests and transfers of securities). Also, a proposed survey of office opinion practices by our Committee will be distributed in the next several months, and the results will be reported sometime thereafter. In addition to covering these reports in this Newsletter, we expect to present programs on subjects addressed in several of them in conjunction with future meetings of our Committee.

I also draw your attention to an article in this issue by Bob Thompson summarizing three recent programs on legal opinions in real estate transactions.

Recent Developments

This issue also includes an article by Jim Gadsden on the Vision Development Group case, holding that a debtor-in-possession was equitably estopped from asserting usury claims or seeking re-characterization of pre-petition debt because of the earlier delivery of counsel’s legal opinion on these issues.

Special thanks to Jim Fotenos for editing this issue, and to Martin Brinkley for editing the WGLO summaries addendum. They are indefatigable workers in the cause of producing this Newsletter.

See you in Chicago.

- John B. Power, Chair
O’Melveny & Myers LLP
johnpower@earthlink.net

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Future Meetings

ABA Section of Business Law Annual Meeting
Sheraton Chicago Hotel & Towers, Chicago, Ill.
July 30-August 3, 2009

Sunday, August 2

Meeting of Committee on Legal Opinions
10:30 a.m. - 12:30 p.m.
Parlor C, Level Three
Dial-in access:
1-800 640 7899 NORTH AMERICA Toll-Free
1 4166416202 CANADA Toll
Passcode: 7263028

Meeting of Committee on Professional Responsibility
12:30 p.m. - 1:30 p.m.
Parlor A, Level Three

Meeting of Committee on Audit Responses
1:30 p.m. - 2:30 p.m.
Parlor C, Level Three

Meeting of Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities,
4:30 p.m. - 5:30 p.m.
Ohio, Level Two

Legal Opinions Committee Reception
5:30 p.m. – 7:00 p.m.
Location to be provided through the listserve

Working Group on Legal Opinions
New York
October 20, 2009

October 19, 2009 Related meetings of the Association Advisory Board and Law Firm Advisory Board of WGLO
Spring Meeting of the ABA Section of Business Law

The spring meeting of the Section of Business Law was held in Vancouver April 16-18, 2009. See the Chair’s letter reporting on the meeting (pages 1-2 above). Following are additional reports of interest to opinion practitioners.

Meeting of Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities

The Subcommittee met on April 17, 2009. The main topic discussed was Exhibit 5 opinions rendered in connection with shelf registration statements filed with the SEC. An earlier email to the members of the Subcommittee had quoted the following question and answer from the Compliance and Disclosure Interpretations (“C&DI’s”) published by the Division of Corporation Finance in January 2009:

Question: Can a registration statement under Rule 415 be made effective without an opinion of counsel as to the legality of the securities being issued when no immediate sales are contemplated?

Answer: No. However, when sales are not expected in the near future, the registrant may file a qualified opinion of counsel and have its registration statement be made effective, subject to the understanding that an unqualified opinion will be filed prior to the time any sales are made or contracts of sale are entered into with regard to securities covered by the registration statement. An updated opinion of counsel with respect to the legality of the securities being offered may be filed in a Form 8-K report rather than a post-effective amendment to a Form S-3 shelf registration statement.

The consensus of the meeting was that the procedure envisaged by the C&DI is unrealistic and seems to have resulted from confusing the concept of “sale” in the “time of sale” rules adopted by the SEC as a part of Securities Offering Reform with the concept of “sale” that occurs at the closing of a registered securities offering. Most people felt that it would be realistic and normal for a final opinion of counsel to be prepared and filed at or before the closing of an offering but that it would be unrealistic and burdensome to attempt to file an opinion with an 8-K after the terms of the securities had been determined but before the first “contracts of sale” were entered into, as envisaged by the interpretation. On the other hand, many people concluded that the Subcommittee should develop a workable solution that could be presented to the SEC staff to persuade the staff to revise the interpretation. To address this problem, several members of the Subcommittee volunteered to form a small group to develop the solution and present it to the staff. The group consists of Andy Pitts (Chair), Bob Buckholz, Dick Howe, John Huber, Stan Keller, Jeff Rubin and Ann Yvonne Walker. Its mission is to persuade the staff to issue a revised
C&DI that will enable practitioners to avoid the “speed bump” that would be required by the C&DI as presently written, and to do so promptly.

In the course of discussing the problem with the recent C&DI, Mr. Howe distributed to the meeting a description of common assumptions made in Exhibit 5 opinions in universal shelf registrations statements, prepared by Keith Higgins. Some assumptions are so sweeping that they remove any meaningful content from the opinion. The C&DI states that a qualified opinion may be included in the registration statement at the time of effectiveness, but an “unqualified” opinion must be filed before the “sale” takes place. The subject merits further exploration.

Mr. Howe also noted that the stock exchanges have recently abolished their requirements that opinions of counsel be delivered to the exchanges at the time of listing securities to be traded on the exchange, with the result that the only legal opinions that are required at all now are those contained in registration statements. Of course, investment bankers or institutional investors may require legal opinions to be provided covering securities that they purchase.

Mr. Howe observed that one may question the basis for requiring legal opinions in connection with registered offerings. Item 29 of Schedule A to the Securities Act of 1933 requires “a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language.” This might be read to say that an opinion should be filed only if one exists, not to require that such an opinion be prepared, but the staff has never interpreted the Act in this manner. Mr. Howe said that it may be timely to reconsider the requirement for an opinion ab initio.

- Richard R. Howe, Chair
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Meeting of Committee on Audit Responses

The Audit Responses Committee met on April 18, 2009. The meeting began with a report from Stan Keller, Chair, on the status of the FASB proposal to revise the disclosure requirements of FAS 5. He noted that the most significant event since the Committee’s last meeting was the roundtable sessions held by FASB on March 6, 2009. Mr. Keller participated in the morning session, which he thought was constructive. The issue was raised at both sessions whether the “Treaty” needed to be revised. Mr. Keller said that he had the opportunity to make the case that the Treaty works as is notwithstanding changes in accounting standards as evidenced by this Committee’s Report on the Effect of FIN 48 on Audit Responses (which appears in the February 2009 issue of The Business Lawyer). Transcripts of the roundtable sessions are available on the FASB website at http://www.fasb.org/accounting_for_contingencies.shtml.

Mr. Keller reported that the other significant development regarding accounting for loss contingencies was FASB’s issuing FSP 141(R)-1 providing that FAS 141, rather than FAS 141(R), shall apply to contingencies acquired in connection with business combinations, such as assumed contingent liabilities. The effect of this is to leave the FAS 5 probable/remote framework in place for the time being for loss contingencies acquired in business combinations.

The meeting then turned to its main topic, an informative discussion of the Canadian counterpart of the ABA Statement and issues involved in cross border audit responses. Rob
Collins of Blakes in Toronto gave the presentation on the Canadian approach to audit responses and Roger Fross of Locke Lord discussed U.S. responses to requests from Canadian companies. Rob Collins noted that Canadian audit responses are provided under the 1978 Joint Policy Statement developed by the Canadian Bar Association and the Canadian Institute of Chartered Accountants. In addition, there is a Canadian Bar Association Report on Best Practices in Responding to U.S. Audit Enquiries. In general, Canadian lawyers respond in accordance with the Canadian Joint Statement and state this expressly. Roger Fross indicated that a similar approach was followed by U.S. lawyers responding to Canadian requests. It was the consensus of the group that U.S. lawyers should respond in accordance with the ABA Statement based on U.S. GAAP and GAAS and should make that clear in the response. An outline of Rob Collin’s presentation can be obtained from the Audit Responses Committee’s website under “Past Meetings” and at http://tinyurl.com/llvbhc.

The Audit Responses Committee will be meeting at the ABA Annual Meeting in Chicago on Sunday, August 2, 2009 at 1:30 p.m.

- Stanley Keller, Chair
Edwards Angell Palmer & Dodge LLP
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Committee on Professional Responsibility Program

On April 16, 2009, the Committee on Professional Responsibility conducted a seminar entitled, “‘You Can’t Say That!’ ‘Watch me.’ Client Fraud and the Ethics Rules.” The Committee on Legal Opinions co-sponsored this program.

The first segment consisted of a panel discussion of several hypotheticals dealing with the ethics of negotiating and giving legal opinions. The panelists were Donald Glazer and Robert Mundheim. Subjects included opinion giving in the face of materially adverse litigation, a competitor’s technological breakthrough, a client’s law violation, and a client’s accounting irregularities.

The second segment was a discussion by Sue Friedberg of the legal proceedings spawned by the sudden collapse of Refco, Inc. in 2005. This included suits by the Refco bankruptcy trustee, securities class actions, and actions by creditors, all against Refco’s principal outside law firm. Ms. Friedberg also discussed the federal criminal proceeding against a partner of that law firm.

Finally, Geoffrey Hazard discussed the landscape for law firms in the context of corporate wrong-doing and the current enforcement of legal ethics rules in that context.

Materials from the seminar are available to members of the Business Law Section through the ABA’s website (www.abanet.org) through the Business Law Section’s “Meetings Portal” (Meetings and Materials/2009 Meetings/Spring Meeting/Materials - no. 131).
Spring Meeting of the Working Group on Legal Opinions

The following are reports on the WGLO advisory board meetings held May 18, 2009 in New York. Summaries of the panel sessions and breakout groups held the following day are included as an addendum to this issue of the Newsletter.

Law Firm Advisory Board

Champerty. Larry Safran and Arthur Field began by discussing Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc. v. Love Funding Corp., 556 F. 3d 100 (2d Cir. 2009), and the implications of the case for transactions involving debt acquired for the purpose of bringing an action to collect the debt. Arthur Field reported on the case in the April 2009 issue of this Newsletter (pages 9-10). Larry noted another recent case (SCR Joint Venture LP v. Warshawsky, 559 F. 3d 133 (2d Cir. 2009)) decided after Love Funding, in which the Second Circuit held that Section 489 of New York’s Judiciary Law is not violated if the assignee’s primary goal is found to be satisfaction of a valid debt and the assignee only intends to bring suit absent full performance of the debt. Arthur Field noted that a determination of whether an assignment violates the New York champerty statute involves determining what is in the mind of an assignee. He raised the question whether a remedies opinion in a transaction in which rights are transferred should be seen as covering the mindset of the assignee. That would not seem to make sense unless the mindset of the assignee is readily apparent to the opinion giver. Larry noted that in some transactions of this type his firm had taken an exception to the remedies opinion for the champerty statute. Arthur indicated that there was no accepted practice on this issue at this time. Arthur also raised the issue of whether an exception to the remedies opinion for New York’s champerty implies that it would otherwise be covered by the remedies opinion, which he believes remains an open question.

Golden Rule. Jim Rosenhauer led a follow-up discussion of the failure of the “Golden Rule” to be followed in many opinion requests from opinion recipients. It was noted that some clients continue to have “standard form” opinion requests that ignore customary practice, including requests that have been described as “inappropriate” in bar reports. It was suggested that some outside counsel are reluctant to advise their clients that certain standard opinion requests are inappropriate, but that outside counsel often work to moderate the request when the opinion giver resists the request. It was again noted that all too often junior associates are left to negotiate opinion issues, and they often do not understand customary practice very well. Participants indicated that continued expansion the acceptance of customary practice and the implementation of the “Golden Rule” is important.
**Customary Practice.** Arthur Field then provided some provocative comments on what he described as “some limits of customary practice,” primarily relating to the practice of delivering opinions to recipients not represented by counsel. He noted that customary practice most clearly relates to how lawyers communicate with each other. He then urged discussion of whether there should be any change in practice in instances in which there is no assurance that the opinion is being reviewed by an opinion recipient’s counsel, such as opinions in lending transactions that specifically allow unidentified subsequent assignees to rely on the opinion, opinions in fund transactions that are sent directly to subscribers for interests in the fund, and opinions in structured financing transactions sent directly to purchasers.

***

**Recipient Counsel.** Reade Ryan then commented on the question of who lead counsel represents in a syndicated lending transaction. He noted that two recent cases from Minnesota shed some light on this question, one case by the Supreme Court of Minnesota (*McIntosh County Bank v. Dorsey & Whitney, LLP* (745 N.W.2d 538 (2008))) and another by the United States Court of Appeals for the Eighth Circuit (*Leonard v. Dorsey & Whitney LLP* (553 F.3d 609 (8th Cir. 2009))). In these cases an investment bank retained a law firm to advise it in connection with loans that were syndicated to 32 banks. The advice of the law firm to the investment bank served as a basis for communications by the investment bank to the syndicate members, but the advice of the law firm was not itself communicated. Because of defaults in repayment under the loans, all 32 participant banks sued the law firm for malpractice – 31 participants sued in the state courts and one participant sued in the federal courts. In the state courts, the participants asserted four theories of liability against the law firm: (1) third-party beneficiary, (2) negligent representation, (3) breach of implied contract, and (4) breach of fiduciary duty. The lower state courts dismissed the claims based on theories of negligent representation and breach of fiduciary duty, but upheld the claims based on theories of third-party beneficiary and breach of implied contract. However, the Supreme Court of Minnesota dismissed both claims, on the ground that there was no communication between the participants and the law firm before or at the closing and that there was no evidence that the law firm was aware that it was expected to represent the participants.

Reade noted that the Eighth Circuit, however, used a different, and in Reade’s opinion a better, analysis, but came to the same conclusion. The Eighth Circuit looked to the contract between the investment banker – the participation agreement – and concluded that the agreement did not give rise to a fiduciary relationship between the investment banker and the participants, but rather that the participation agreement was an “arm’s length” contract. In the participation agreement the participants recited that they were relying on their own independent evaluation of the loans, thereby indicating, to the Eighth Circuit, that the participants were not relying on the investment banker or its counsel. That is consistent with the commonly accepted understanding of syndicated transactions, said the Eighth Circuit. The Eighth Circuit concluded that the law firm, as lead counsel, was bound to protect the interests of its one and only client, the investment banker acting as the lead lender “to the derogation of the participants, if necessary;” and therefore the law firm did not represent the participants so as to owe any duty to disclose potential problems with the loans or to be liable for any alleged malpractice.

Reade suggested the following conclusions:
(a) The contracts that we prepare are important and do make a difference, for lots of reasons, including in this case staving off claims for alleged malpractice.
(b) The Eighth Circuit case supports Reade’s view that a lead counsel does not represent participants, or other lenders in a syndicate, unless counsel expressly says so in writing, regardless of any communications between the lead counsel and the participants or the other lenders. A lead counsel normally represents only the lead lender.

- James J. Rosenhauer
  Secretary,
  Law Firm Advisory Board
  Hogan & Hartson LLP
  jjrosenhauer@hhlaw.com

[Editor’s Note: See also Reade Ryan’s article in the May 2009 issue of The Business Lawyer, “The Role of Lead Counsel in Syndicated Lending Transactions,” 64 Bus. Law. 783.]

Association Advisory Board

The Association Advisory Board (“AAB”) met on May 18 in connection with the sixth iteration of WGLO programs, conducted the following day. The agenda for the meeting can be viewed at http://www.abanet.org/buslaw/wglo/aab.shtml. Three new members were welcomed to AAB at the meeting: the Indiana State Bar Association Business Law Council, the Bar Association of San Francisco and the American College of Mortgage Attorneys. Once again, the AAB was graced by the presence of Judge Thomas L. Ambro (U.S. Court of Appeals for the Third Circuit), whose welcoming remarks drew attention to the growing coordination of practitioners focusing on third-party opinions in corporate transactions with those in real estate transactions.

The AAB continues to refine and advance its role as a conduit between the WGLO and state and local bar associations with active legal opinion programs, as well as affinity associations serving institutional opinion recipients. The meeting included two special presentations focusing on the role of the AAB and its growth: (a) ways to make the AAB more effective in fulfilling its mandate as a bridge between bar/affinity associations and initiatives to identify and publicize national customary practice in connection with legal opinions, and (b) ways to increase the number of affinity associations represented on the AAB. The meeting also received reports on recent publications of interest in connection with opinion practice and the status of opinion reports in process.

Preparations are now underway for the fall meeting of the AAB on October 19, 2009. Members of the Committee should feel free to send suggestions regarding the programs for both meetings to Steve Hazen or Chair John Power, who also serves on the Steering Committee of the WGLO.

- Steven K. Hazen
  Secretary,
  Association Advisory Board
  skhazen@sbcglobal.net
State and Local Bar Reports

Association of the Bar of the City of New York


As described in the Report, its purposes were (1) to review the process required to deliver substantive consolidation opinions in structured finance transactions, (2) to urge that the parties involved and their lawyers take a fresh look at the opinions that are delivered in connection with the closings of these transactions, and (3) to provide a form that may be used by firms that are asked to render an opinion of this nature.

The Report suggests that substantive consolidation opinions should be shortened and simplified, and supplies a form derived from the form of opinion that was published by the Committee on Bankruptcy and Corporate Reorganization as an appendix to Structured Finance Techniques, 50 Bus. Law. 527 (1995).

Recognizing that limited liability companies have replaced corporations as the usual entity of choice for special purpose vehicles, the form substantive consolidation opinion is based on the use of an LLC. The Report includes a discussion of the principal courts of appeals decisions on substantive consolidation, including Judge Ambro’s important Owens Corning decision, reported at 419 F.3d 195 (3d. Cir 2005).

The Committees believe that the most important contributions of the Report are its discussions of the investigation conducted by an opinion giver to deliver a substantive consolidation opinion and of the application of the principles of substantive consolidation to special purpose vehicles and to LLCs.

The final Report benefited greatly from the rigorous comments of Arthur Field, who was the peer reviewer for The Business Lawyer, and Don Glazer. The Report will be posted in the ABA Legal Opinions Committee’s Legal Opinion Resource Center.

- James Gadsden
  Reporter
  Carter Ledyard & Milburn LLP
  gadsden@clm.com

North Carolina

In March 2004 the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association issued the second edition of its Report on Third-Party Legal Opinions in Business Transactions. In the fall of 2007, the Business Law Section reconstituted the Committee and requested that it reexamine the 2004 Report and update it as appropriate to serve the practicing bar in North Carolina.
The Committee prepared a Supplement to the 2004 Report, which was approved by the Council of Business Law in February 2009. The areas addressed by the Supplement include further discussion of when successors and assigns of the addressee of a legal opinion may rely on the opinions expressed; opinions that address matters of Delaware corporation and limited liability company law; and no-litigation confirmations. The Supplement also includes an updated form of an illustrative opinion.

A full copy of the Supplement is available for downloading on the North Carolina Business Law Section’s website at:


An editable version of the updated form of illustrative opinion is available for downloading on the Section’s website at:


- Kenneth M. Greene
  Carruthers & Roth, P.A.
  kmg@crlaw.com

Texas

The Legal Opinions Committee of the Business Law Section of the State Bar of Texas (the “Committee”) and the Business Law Section of the State Bar of Texas has approved the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (the “Customary Practice Statement”) the Legal Opinions Principles (the “Principles”) and the Guidelines for the Preparation of Closing Opinions (the “Guidelines”), each published by the Committee on Legal Opinions.

In approving the Principles and Guidelines, the Committee has issued several clarifications to specific principles and guidelines. The Committee’s Report is available at the website of the Business Law Section of the State of Texas at http://www.texasbusinesslaw.org.

- Stephen C. Tarry
  Vinson & Elkins L.L.P.
  starry@velaw.com

[Editor’s Note: Links to the New York report and the North Carolina and Texas Supplements can also be found in the Committee’s Legal Opinion Resource Center accessed on the home page of the Committee’s website.]
**Programs on Real Estate Closing Opinions**

The last three months have been an exceedingly active period for real estate opinion letter presentations. On March 23, 2009, ALI-ABA presented a Webcast program entitled “Reworking Opinion Letters for the Mortgage Loan and Real Estate Comeback: What’s Necessary vs. What’s Dangerous,” with a panel led by John Hollyfield (Fulbright & Jaworski, Houston) and including Dick Goldberg (Ballard Spahr, Philadelphia) and Susan Talley (Stone Pigman, New Orleans). After discussing the standard of care and appropriate due diligence supporting typical opinions and the opinion giver’s ethical obligations, the panel emphasized now familiar concerns about opinion requests that can be viewed as unjustifiable and unfair, and then noted the trend away from requests for broad enforceability opinions regarding documents prepared by the lender’s counsel where both parties are represented by counsel practicing in the chosen-law jurisdiction. The panel also focused on local counsel opinions and the importance of limiting and defining the role and due diligence expected of borrower’s local counsel in interstate loan transactions. (For a copy of materials, contact www.ali-aba.org.)

On May 1, 2009, Ken Jacobson (Katten Muchin, Chicago) led a panel consisting of Ken, David Miller (Pillsbury Winthrop, Washington D.C.) and the undersigned entitled “Toward an Emerging Consensus in Real Estate Legal Opinion Practice” at the 20th Annual Spring Symposium of the ABA’s Section of Real Property, Trust & Estate Law. After identifying the three generations of state bar real estate opinion commentary—pre-Accord, Accord-based and customary practice reports—the panel discussed the evolution and present status of various forms of the “generic exception” to enforceability, which is nearly universally included in real estate opinions. They then briefly discussed key issues related to enforceability opinions on usury, choice of law, personal property security agreements, assignment of rents, guaranties and environmental indemnities. The presentation concluded with an identification of opinions that ought not be requested nor given, including opinions regarding title to real or personal property and land use and environmental matters, as well as “conduit opinions” (i.e., those based exclusively on third party or public agency certifications or reports). (Materials may be obtained at www.abanet.org/rpte/2009.)

On May 19, 2009, a panel consisting of Pete Ezell (Baker Donelson, Nashville), David Miller and the undersigned, again moderated by Ken Jacobson, presented a program to the Spring meeting of WGLO, entitled “Real Estate Legal Opinion Practice: Selected Issues,” designed to identify and discuss those aspects of opinion practice that are unique or peculiar to real estate opinions. After identifying those matters of particular concern to real estate secured lenders—that is, the collection of the secured debt and/or foreclosure of the mortgage or deed of trust—the panel discussed in some detail the justification for, and alternative versions of, the generic exception to the enforceability opinion, which, as noted, is a standard element of real estate opinions. This analysis provided an informative backdrop for a broader discussion of the increasing use of the generic exception in secured and unsecured loan and other non-real estate business law opinions, a subject that was pursued in at least one breakout session at the same meeting and that will be the subject of a report at the next WGLO meeting in October 2009.

- Robert A. Thompson
  Sheppard Mullin Richter & Hampton, LLC
  rthompson@sheppardmullin.com
Editor’s Note: As formulated by ACREL (American College of Real Estate Lawyers), the generic exception states “that certain provisions in the loan documents may be unenforceable; however, such unenforceability will not render the transaction documents ‘invalid as a whole’ nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provisions of the transaction documents.” See American College of Real Estate Lawyers Attorneys’ Opinion Committee and American Bar Association Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, Real Estate Opinion Letter Guidelines, 38 Real Property, Probate and Trust Journal 241, 251 (2003).

The authors of the Real Estate Opinion Letter Guidelines note, as does Bob Thompson, that some form of generic exception to an enforceability opinion is “nearly universal in real estate secured loan transaction opinions.” Id. at 250. The exception is more controversial in corporate practice, and is generally limited to complex lease and secured financing transactions. See TriBar, Third-Party “Closing” Opinions § 3.4.1 (1998). For a critique, see Glazer and FitzGibbon on Legal Opinions § 9.11 (3rd ed. 2008).]

Recent Developments

Debtor Estopped by Opinion Letter from Contesting Lenders’ Claims

In In re Vision Development Group of Broward County, LLC (Vision Development Group of Broward County, LLC v. TMG Sunrise, LLC), 2009 WL 855958 (Bankr. S.D. Fla. March 20, 2009), the court found that the debtor in possession was equitably estopped from contesting the claims of two creditors because of an enforceability and usury opinion delivered by the debtor’s counsel to the lenders at a pre-petition closing of the loan.

In its Chapter 11 case, Vision sought to have the claims of the lenders disallowed as usurious and to recharacterize the debt as equity. On the lenders’ motion for summary judgment, the court held that, by reason of its delivery of the legal opinion to the lenders, the debtor in possession was equitably estopped from asserting its recharacterization and usury claims. Alternatively, the court concluded that, by reason of the selection of New York law in the loan agreement and promissory notes, the interest charged under the notes was not usurious under New York law.

In reaching its determination on equitable estoppel, the court concluded that the legal opinion was incorporated into the notes delivered by Vision to the lenders and therefore was a “Credit Document.” The loan agreement expansively defined the term to include “documents of any kind relating . . . to the payment or guarantee of [obligations under the Agreement].” The agreement also stated that any “Credit Document” shall be considered to have been relied upon by the lenders in entering into the agreement.
The court did not discuss whether it would have reached the same conclusion based on the delivery of the closing opinion at and as a condition to the closing without the opinion’s incorporation in the notes.

What this case highlights is that what is said in a closing opinion matters: the opinions may be used by an opinion recipient not only offensively (to assert possible claims for professional negligence, negligent misrepresentation, and the like) but also defensively.

- James Gadsden
  Carter Ledyard & Milburn LLP
  gadsden@clm.com

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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 have not visited the website lately, we recommend that you do so. Our mission statement, prior Newsletters, and opinion resource materials are posted there.

**Our 1,000th Member**

Congratulations to Jeffrey A. Franklin ([jfranklin@ryanrussell.com](mailto:jfranklin@ryanrussell.com)) for becoming the Committee’s 1,000th member. Jeff practices with Ryan, Russell, Ogden & Seltzer P.C., in Wyomissing, Pennsylvania (between Philadelphia and Harrisburg). Jeff and his firm concentrate on representing utilities, including electric power companies and alternative energy producers, such as solar and wind farm companies. Jeff’s practice ranges across administrative law, eminent domain, computer law, gaming law, and land use and entitlements. His practice occasionally calls for delivering closing opinions on behalf of his utility company clients, and he joined the Committee for guidance on customary practice.

We welcome Jeff and the thirteen additional members who have followed Jeff in joining our Committee, increasing our membership to 1013.

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**Next Newsletter**

We expect the next Newsletter to be circulated in October 2009. 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)).
Addendum

Working Group on Legal Opinions

Spring 2009 Seminar Summaries
The following summaries have been prepared to provide a general idea of the subjects covered by the panel sessions and breakout groups at the May 19, 2009 WGLO 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 next WGLO meeting in October.

PANEL SESSIONS I:

1. **London Practice Opinions**  
   (Summarized by Robert Gloistein)

   *Donald W. Glazer, Newton, Massachusetts, Co-Chair*
   *Richard R. Howe, Sullivan & Cromwell LLP, New York, Co-Chair*
   *Daniel Bushner, Ashurst, London*
   *John L. Farry, Deutsche Bank, London*

   This panel session focused on negative assurance given in connection with European securities offerings. Coupled with the discussion at the breakout session on this topic (see Kenneth J. Carl’s summary below), the panel provided timely and important insights into the increasing adoption in Europe of the type of disclosure review and negative assurance comfort (sometimes referred to as “10b-5 review”) on disclosure documents already common in the United States.

   The panel contrasted this trend to traditional English “verification notes,” in which every factual statement in the disclosure document is tied back to a specific written or verbal source. Preparing verification notes is a meticulous process but it is not specifically designed to uncover omissions or misleading statements or to address the overall fairness of the disclosures. Verification notes are intended for use by a company’s board of directors in discharging its review obligation, not by underwriters.

   In addition to verification notes, until the 1990s due diligence reports were used in European practice. However, these have gradually disappeared in favor of a disclosure review tied to the regulatory requirements of the country of sale and delivery of a negative assurance letter to the underwriters. Although the statutory underpinnings of the U.S.’s Securities Act of 1933 and Securities Exchange Act of 1934 are lacking in European securities offerings (except for the portion of the offering sold in the United States), there was consensus among the panelists that the U.S.-style disclosure review model is followed not only because underwriters are concerned about liability but also because they believe that U.S. style review is the “gold standard” and is most likely to assure that the disclosure is complete and correct. The model is well tested in United States courts (e.g., the approach to risk factors, MDA, and other disclosure guidelines). The negative assurance letter supports the underwriters’ due diligence as a predicate to obtaining an SAS No. 72 “comfort letter” from the accountants.

   It appears that, in London-based transactions, the due diligence review is typically conducted and the negative assurance letter signed by lawyers licensed to practice in the U.S. but physically located in the London offices of their firms. As the “10b-5 model” has gained traction in Germany, on the other hand, German lawyers have replaced investment bankers as the...
principal drafters of the disclosure documents, and now provide the negative assurance letter
themselves.

**One case study:** Rights offerings are common in the U.K. The use of the “10b-5
model” and negative assurance letters has been much debated in connection with such offerings,
because of the potential need for multiple negative assurances. The typical rights offering
extends over many weeks, with several distinct steps: publication and underwriting
commitment; the start of rights trading; the start of trading in the underlying shares; the sale of
“rump” shares by the underwriters; and the closing settlement date. At each of these steps, a
negative assurance letter may be required, usually from counsel for both the issuer and the
underwriters. If there is a material change and a supplementary prospectus is delivered, there is a
mandatory two-day rescission right for all rights holders. The extended timeline of these
offerings can lead to major concerns in keeping the due diligence review current over many
weeks. Extensive work is done before publication and underwriting commitment, and telephone
bring-down conferences take place at each step.

2. **Real Estate Opinion Practice**

*Kenneth M. Jacobson, Katten Muchin Rosenman LLP, Chicago, Chair*
*Kenneth P. Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville*
*David L. Miller, Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia*
*Robert A. Thompson, Sheppard Mullin Richter & Hampton LLP, San Francisco*

[Editor’s Note: Please refer to the main body of this issue of the Legal Opinions Newsletter for
a summary of this panel discussion by panelist Bob Thompson.]

**CONCURRENT BREAKOUT SESSIONS I:**

1. **Disclosures in Legal Opinions**
   (Summarized by Susan Cooper Philpot)

   *William Freivogel, Ethics Consultant, Chicago, Chair*

   This breakout session discussed disclosures in opinion letters of relationships between
opinion givers and clients. For example, a lawyer in a firm that renders an opinion for a client
may serve on the client’s board of directors, have a family or other business relationship with the
client, or have a investment or financial interest in the client (personally or through the law firm).
Disclosures of these types of relationships do not typically qualify the opinions given, but are
designed to provide information to recipients and to avoid claims that a recipient was misled by
not knowing about the potential for external influences on opinion giving.

   The ABA Committee on Legal Opinions’ report on *Law Office Opinion Practices*, 60
Bus. Law. 327 (Nov. 2004), contains survey data showing that a substantial minority of law
firms report a policy or custom of making disclosures (in descending order of reported
frequency) in the following situations: (1) where a partner in the law firm is a director of the
client; (2) where a partner of the law firm is related to a principal officer or controlling
shareholder of the client; (3) where the individual opinion preparer holds an investment in the
client; and (4) where other lawyers in the firm hold an investment in the client. It is not clear
from the study how much of the positive response to these survey questions resulted from the
SEC rule (Regulation S-K, Item 509) requiring disclosures in registration statements of certain shareholdings in the client held by the lawyers providing opinions on the registration statement.

Although the SEC rule reflects concern about the opinion preparer’s potential bias arising out of client relationships, ethics rules do not require this type of disclosure. Current opinion literature gives it little attention. The majority of law firms do not make these disclosures. Other factors that might influence the opinion even more (e.g., the importance of the client to the lawyer and/or law firm or the fees that will not be collected if the transaction does not close) are apparently never disclosed. There are no reported cases seeking damages for failure to make such disclosures. On these grounds, the discussion generally concluded that this type of disclosure is not required by customary practice and that the need for, and the protective effect of, the disclosure may be limited. Nevertheless, there is no harm in a lawyer or firm making these disclosures, so long as care is taken to follow the chosen disclosure practice consistently and to maintain a system that accurately collects the information that supports the disclosure. (Putting a reliable information retrieval system in place may prove challenging if the firm adopts a broad disclosure policy).

The discussion also highlighted an important related point: Where an opinion includes both a “to our knowledge” limitation and a client relationship disclosure, the opinion preparers should consider disclaiming any knowledge that non opinion preparer lawyers may obtain as a director, officer, shareholder or through another relationship to a client.

2. Education
   (Summarized by Carolan Berkley)

   James Gadsden, Carter Ledyard & Milburn, New York, Co-Chair
   Steven O. Weise, Proskauer Rose LLP, Los Angeles, Co-Chair

   In this breakout session, Steve Weise introduced a template presentation for use in law firm opinion training. The template is designed to foster discussion and encourage sharing of ideas. It includes discussions of how to target audiences for opinion training within the firm, training delivery methods, and training content. Steve Weise’s gating questions included (1) whether the template is useful and (2) whether it can be adapted across firms of different types and sizes.

   The template is intended to be flexible and to recognize that different messages need to be tailored to different audiences (for example, partners versus associates). Training snippets set up for electronic delivery in MP3 format may draw the attention of younger lawyers. The template also includes a discussion of substantive opinion issues in easily digestible power point presentations.

   Discussion focused on training younger lawyers who are drafting and reviewing the transaction documents and preparing initial drafts of opinions. Participants recognized that an apprenticeship model, where a younger lawyer would sit down with an experienced mentor and go through an opinion as a teaching tool, is in many respects ideal but inefficient and often impractical. Some suggested using a bad opinion as a teaching model to discuss what is and is not customary.

   Lori Gordon of ALAS pointed out that liability arises from the transaction and from red flags that are not apparent to the opinion reviewer. She suggested that the real problem is how to help both opinion preparers and those reviewing opinions learn to ask the right questions.
Specific training of senior lawyers regarding obligations to clients and opinion risks was suggested.

Other participants suggested using checklists to highlight issues specific to different types of transactions. Some said they had considered developing annotated model opinion forms with links to relevant opinion literature and other material. All recognized that one danger of opinion forms is that they may encourage opinion preparers to stop thinking and merely “follow the form.”

Lori Gordon indicated that in her experience, firms generally have good models and policies. Her question was how confident firms are that all lawyers are following the internal policies? She noted that compliance by lateral partners can be problematic. Firms should consider what they are doing to help lateral partners become familiar with the firm’s opinion procedures. Suggestions were for a member of the firm’s opinion committee to meet with new lateral partners and discuss how the firm’s opinion policies and practices differ from those of the new partners’ former firms. Another suggestion was to assign a member of the opinion committee to each new lateral partner.

Steve Weise will further refine the template with the goal of making it available for use by WGLO members.

3. The Generic Qualification and Practical Realization
(Summarized by Gail B. Merel)

Philip B. Schwartz, Akerman Senterfitt, Miami, Chair

This breakout session focused on the use of the “generic” or “practical realization” qualification to the scope of the remedies opinion – a qualification that takes a broad brush approach to qualifying the remedies opinion, as compared to a laundry list of exceptions with respect to the enforceability of particular rights and remedies contained in the transaction documents. The essence of the qualification, when taken together with the “comfort” that invariably accompanies it, is to advise the opinion recipient that, while not every provision of a particular transaction document may be enforceable, the opinion recipient will nonetheless receive the basic benefits of its bargain. The breakout session considered various formulations of the qualification and the recent expansion of its use beyond mortgage, lease and other complex secured transactions. Discussion also touched on the relative risks to opinion givers and opinion recipients in using this qualification.

The Chair began with a brief overview of the history of the “practical realization” or “generic” qualification, noting that the qualification originated in the context of mortgage transactions and that, originally, the proviso to the qualification offered assurance that unenforceability of the relevant provisions would not interfere with the practical realization of the principal benefits purported to be afforded by the agreement. Due to uncertainty as to the meaning of the terms “practical realization” and “principal” benefits, practice has moved toward use of what is often called the “generic” qualification, which is illustrated by the “ACREL formulation” – that is (in summary), that the unenforceability of certain provisions will not preclude judicial enforcement of the repayment of principal and interest, acceleration of the note or foreclosure of the collateral in the event of a payment default or, in some versions of the “generic” qualification, in the event of a material breach of a material provision of the agreement. The ACREL formulation can be found in the 1999 “Inclusive Real Estate Secured
Transactions Opinion” issued by the Attorneys Opinions Committee of the American College of Real Estate Lawyers (“ACREL”) and the Legal Opinions in Real Estate Transactions Committee of the Real Property, Trust and Estate Law Section (“RPTE”) of the ABA. (See the Editor’s Note following Bob Thompson’s report on recent programs on real estate opinions in this issue of the Newsletter.) Use of the “practical realization” or “generic” qualification can limit the time and expense otherwise spent in working out a complete laundry list of qualifications to the remedies opinion.

With this as background, the Chair then asked participants to consider the following questions:

1. How does a remedies opinion containing a “practical realization” or a “generic” qualification differ from an opinion containing a “laundry list” of exceptions together with an equitable principles limitation?

2. Does use of the “practical realization” or “generic” qualification change the balance of responsibility between opinion givers and opinion recipients, and is an opinion recipient giving up something by accepting an opinion containing a “practical realization” or “generic” qualification?

3. Will opinion recipients accept an opinion with a “practical realization” or “generic” qualification in non-real estate secured financing transactions and in unsecured financing transactions?

The group’s discussion of these questions began with one of the participants urging greater clarification as to the types of financing transactions under discussion, since in his view the qualification might make sense in the context of a contract of adhesion, but less sense in the context of a heavily negotiated contract. Others in the group pointed out that many heavily negotiated transaction documents also contain numerous provisions that are not heavily negotiated. This is especially true in the context of large loan transactions where the negotiations usually focus on accurately reflecting the business deal of the parties and on the representations, covenants and default provisions in the loan agreement, and not on the remedies provisions of either the main agreement or ancillary documents (which are often quite extensive).

It was the consensus of the group that in secured loan transactions, there seems to be little basis for distinguishing between real property and personal property collateral insofar as the use of a “practical realization” or “generic” qualification is concerned. Further, it was the general consensus that a “practical realization” or “generic” qualification taken with respect to personal property security documents should be generally acceptable. However, the session ended before the group could reach any consensus on the acceptability of the use of a “practical realization” or “generic” qualification with respect to the non-security rights and remedies in loan documents for secured transactions or in loan documents for unsecured financings.

Members of the group noted that counsel to an opinion recipient is responsible for advising its client on the enforceability of the provisions of transaction documents whether or not a “practical realization” or “generic” qualification is included in the opinion. However, some members of the group expressed the concern that the relative burden of this responsibility may vary depending on whether the opinion giver is opining on the laws of a jurisdiction with which opinion recipient’s counsel is already familiar or whether, instead, the opinion recipient’s
counsel is relying on the opinion for a more detailed analysis of the enforceability of the documents under the laws of a particular jurisdiction.

The materials for this breakout session note that there seems to be general agreement among most practitioners as to the following matters relating to the “practical realization” or “generic” qualification:

- It is never acceptable to require the opinion giver to provide assurance that the opinion recipient has all “legally adequate remedies for the realization of the principal benefits intended to be provided by the contracts covered by the remedies opinion.”
- The “generic” or “practical realization” qualification does not override the bankruptcy exception or the equitable principles limitation.

Addendum

Following the breakout session, an ad hoc committee of members of the “Comparison of Third-Party Legal Opinion Reports” committee of WGLO was organized to study three issues with respect to the use of the “practical realization” or “generic” qualification: (1) whether its use, in fact, increases the risks to opinion recipients of accepting an opinion; (2) what is and should be the interplay between the “practical realization” or “generic” qualification, the laundry list of exceptions, and the equitable principles limitation; and (3) what are the suggested language alternatives for an ACREL-style formulation of the “generic” qualification that might be acceptable for use in non-real estate financing transactions. The members of the ad hoc committee are Kenneth M. Jacobson, Jon Cohen, Jerome A. Grossman, Vladimir R. Rossman and Philip B. Schwartz. It is anticipated that the ad hoc committee will report its findings at the fall 2009 meeting of the WGLO.

4. London Practice Opinions and Proposed Cross-Border Legal Opinions Report
(Summarized by Kenneth J. Carl)

Co-Chairs on London Practice Opinions:

Donald W. Glazer, Newton, Massachusetts
Daniel Bushner, Ashurst, London
John L. Farry, Deutsche Bank, London

Co-Chairs on Cross-Border Legal Opinion Report:

Richard R. Howe, Sullivan & Cromwell LLP, New York
Ettore A. Santucci, Goodwin Procter LLP, Boston

This breakout session focused on two topics:

- Negative assurances given by U.S. lawyers in connection with rights offerings conducted in the London securities market (“U.K. Rights Offerings”); and

- Draft report dated April 9, 2009 on Cross-Border Legal Opinions of U.S. Counsel (the “Cross-Border Report”), prepared by the Committee on Legal Opinions, ABA Section of Business Law.
U.K. Rights Offerings

The breakout group discussed the types of negative assurances commonly given by U.S. lawyers in U.K. Rights Offerings, continuing the discussion initiated in the panel session on London Practice Opinions (see the summary by Robert Gloistein, above).

U.K. Rights Offerings are specialized forms of securities offerings governed by English law. A U.S. law firm may be asked to give a negative assurance letter (often referred to as a “10b-5 letter,” in reference to the anti-fraud provisions contained in SEC Rule 10b-5) to the underwriters relating to an offering, containing a statement along the following lines:

We confirm to you that nothing has come to our attention that has caused us to believe that the Prospectus, as of the date hereof, contains any untrue statement of a material fact or omits to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided, however, that we do not assume any responsibility for the accuracy, completeness or fairness of the statements contained in the Prospectus, and we do not express any belief as to the financial statements or other financial or accounting data or information contained in or incorporated by reference in the Prospectus.

In many U.K. Rights Offerings, however, none of the offerees or purchasers have a U.S. nexus entitling them to the protection of U.S. securities laws. Indeed, in many cases an offer or sale in the U.S. may be absolutely ruled out. Nevertheless, even in U.K. Rights Offerings where there is absolutely no U.S. nexus, U.S. lawyers may be asked by the underwriters to give a 10b-5 letter. Why?

There is a perception that the procedures used to comply with U.S. securities laws (even when they do not apply) establish a “gold standard” of diligence. Underwriters view following U.S. securities law diligence procedures (even when they do not apply) as a form of “quality control” for their own internal purposes. Moreover, an underwriter receiving a 10b-5 letter may use it to help establish a fraud defense under another country’s law.

Cross-Border Report

The session Co-Chairs on the Cross-Border Report distributed a draft of the report, noting that it is a work in progress.

Don Glazer asked three questions relating to opinions in cross-border transactions. The questions, and the group’s conclusions, are as follows:

- **Should an outbound choice-of-law opinion be given in a cross-border transaction?**
  Choice-of-law opinions (i.e., opinions stating that a court located in a given U.S. state would honor or give effect to the choice of foreign law set forth in transaction documents) are commonly given by U.S. lawyers in cross-border transactions, where the country whose law is chosen has a reasonable relationship to the transaction or the parties. The Cross-Border Report recommends that these opinions expressly decline to address the question of whether application of the chosen law will violate a fundamental policy of the jurisdiction whose law would apply in the absence of a choice-of-law
provision because they are unlikely to understand how the agreement will be interpreted under the chosen law.

- **May an “as-if” opinion be appropriately requested in a cross-border transaction?** The Cross-Border Report concludes that “as-if” opinions (i.e., opinions stating that contracts governed by foreign law would be enforceable if the contracts were instead governed by the law of the U.S. state where the opining lawyer practices) generally are not appropriate in cross-border transactions. While “as-if” opinions are from time to time given in transactions involving more than one U.S. state, the group’s strong consensus was that this is not the usual practice in cross-border transactions, because the opinion preparers have no way of knowing how a U.S. court will interpret the terms of a contract that have no U.S. counterpart.

- **Should U.S. customary practice govern opinions given in cross-border transactions?** The Cross-Border Report concludes that U.S. customary practice governs the diligence for and interpretation of an opinion given by a U.S. lawyer in a cross-border transaction. How might a U.S. lawyer clarify that the opinion is governed by U.S. customary practice in a cross-border transaction? The Cross-Border Report suggests that the opinion preparer consider including the following statement in the opinion letter: “This opinion letter shall be interpreted in accordance with the customary practice of United States lawyers who regularly give, and lawyers who on behalf of their clients regularly advise opinion recipients regarding, opinions in transactions of this type.” Several participants noted that an explicit reference to customary practice is sometimes objected to in U.S. domestic opinion practice.

**PANEL SESSIONS II:**

1. **How Judges Look at Third-Party Opinions**
   (Summarized by Steven K. Hazen)

   *Hon. Thomas L. Ambro, U.S. Court of Appeals, Third Circuit, Chair*
   *Hon. Allan van Gestel, JAMS, Boston*
   *Hon. Robert Smith, Judge, New York Court of Appeals*
   *John K. Villa, Williams & Connolly LLP, Washington, D.C.*

   In this panel session, Judge Ambro moderated discussions among retired Massachusetts Superior Court Judge Allan van Gestel (who presided over and wrote the opinion in *Dean Foods v. Pappathanasi*, 2004 WL 3019442 (Mass. Super. 2004)), Judge Robert Smith and John K. Villa. At the outset, Judge Ambro noted that there were few reported cases on the issue of opinion giver liability, in part because such cases are often won or lost on motions to dismiss. Many cases in which the law firm’s motion to dismiss is denied are thereafter settled before trial.

   The panel started its discussion with a focus on the scope of the discovery that typically follows a firm’s unsuccessful motion to dismiss, including review of attorney files relating to preparation and delivery of the opinion. The target of inquiry may not be limited to information provided to or obtained by the opinion preparers, but may include the opinion giver firm’s policies and procedures for preparation and delivery of third party opinions and whether they were actually followed. The panel noted that if the law firm has opinion policies and procedures in place, it is important to be able to demonstrate that they were followed for the opinion letter in
question. Written policies and procedures should be very clear, so that opinion preparers can actually comply with them and be recognized in court as having done so.

The panel then discussed how lawsuits over opinions might be defended where no precedent exists in the jurisdiction. There was agreement that seeking precedents outside the legal profession (e.g., professional standards applicable to accountants) could be tricky and potentially even harmful, since the duties of other professionals differ from those of lawyers. The judge may think “What would I have done?” and conclude that the opinion recipient’s perception as to some kind of “special awareness” or “special ability” of the opinion giver is different than the opinion giver’s.

The panel also considered the relative merits of arbitration and litigation, given the uncertainties of how a judge might view a third-party closing opinion. Views ranged from (1) the arbitrator selection process is more reliable than arbitrary assignment by a presiding judge, to (2) arbitration presided over by the right arbitrator is beneficial, but the wrong arbitrator can eliminate the benefit, to (3) even excellent judges seem to bring their own expectations regarding professional standards to bear. There was no clear agreement among the panel as to whether arbitration was faster or less expensive, or even whether it could be, given the complexity of issues likely to be presented by a dispute over an opinion.

In response to a question about the developing trend of including narrow definitions of the phrase “to our knowledge,” the panelists noted that a judge is likely to assume an opinion had some relevant meaning or purpose mutually understood by the parties as providing a benefit. If “to our knowledge” (as defined in an opinion letter) appears to undermine such expectations of the parties, there could be a risk that the judge would ignore the limitations in such a definition on the assumption that both the opinion recipient and the opinion giver could not have understood “to our knowledge” so broadly as to eviscerate the value of the opinion to which it relates.

2. Bar Opinion Report Developments
(Summarized by John B. Power)

John B. Power, O’Melveny & Myers LLP, Los Angeles, Chair
Justin G. Klimko, Butzel Long, Detroit
James J. Rosenhauer, Hogan & Hartson LLP, Washington, D.C.
Stephen C. Tarry, Vinson & Elkins LLP, Houston

Opening this panel session, John Power described changes in the list of recently published and pending bar reports since the October 2008 WGLO seminar. The Michigan Bar’s Background Statement Regarding the Michigan Ad Hoc Committee on Legal Opinions, the Association of the Bar of the City of New York’s report on substantive consolidation opinions, the North Carolina Bar Association’s Supplement to Report on Third-Party Legal Opinions in Business Transactions, and the State Bar of Texas’s Supplement No. 4 Statement on ABA Principles and Guidelines have all been published. They can be viewed in the Opinion Resource Center on the website of the ABA Legal Opinions Committee. Only one report, a Texas update of its comprehensive report, has been added to the pending reports list below.

Jim Rosenhauer reported that the ABA Task Force on Due Diligence Memoranda has prepared a draft report that will soon be available for comment. It discusses the European practice in which counsel delivers a memorandum prepared for a client to third parties, such as
lenders. The memorandum describes the results of counsel’s review of documents or other matters related to an acquisition target. The draft report describes possible risks to counsel if this practice were adopted in the U.S. The draft then describes the U.S. law firm practice of permitting copies of such memoranda to be given to third parties only after obtaining agreement from the third parties that they will not rely on the memoranda. Sample language for a non-reliance letter is included in the report.

Justin Klimko talked about a statement published by the Michigan Bar’s Business Law Section proposing that its ad hoc opinions committee not issue a new comprehensive opinion report. Instead, the statement proposes that the committee identify obsolete provisions of its existing 1991 report, review and recommend existing national literature to Michigan practitioners, make recommendations about unique opinion issues arising out of Michigan law, and provide information on Michigan law underlying transaction opinions.

Steve Tarry discussed the State Bar of Texas’s recently published supplement to its comprehensive report, approving the ABA Principles and the ABA Guidelines and providing some comments on specific sections of each. This was followed by a lively audience discussion of the supplement’s note on “to our knowledge” in factual confirmations, with some arguing that “to our knowledge” should refer to the knowledge of a broader group than is the case in the supplement.

There followed a general discussion of different approaches of state and local bar groups to the publication of opinions reports, as evidenced by the somewhat contrasting directions of Michigan and Texas. Phil Schwartz of Florida joined in the discussion describing the very comprehensive report that Florida is now preparing. Mark Adcock of North Carolina described a recently published supplement to North Carolina’s 2004 comprehensive report addressing issues regarding opinion addressees, opinions on the status of Delaware entities, and no litigation confirmations.

The current status of bar reports is reflected in the following charts:

**Recently Published Reports:**

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<th>Bar</th>
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<td>ABA</td>
<td>2007</td>
<td>No Registration Opinions</td>
<td>Subcommittee on Securities Law Opinions</td>
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<td>2009</td>
<td>Effect of FIN 48</td>
<td>Committee on Audit Responses</td>
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<td>Arizona</td>
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<td>Remedies Opinion Report Update</td>
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CONCURRENT BREAKOUT SESSIONS II:

1. **Education of Younger Lawyers Based on Specific Examples**  
   (Summarized by Carolan Berkley)

   *Robert D. Pannell, Nelson Mullins Riley & Scarborough LLP, Atlanta*

   A second opinion education breakout session (see Carolan Berkley’s summary of the first education breakout session led by Jim Gadsden and Steve Weise, above) focused on training for third to fifth year lawyers. Bob Pannell presented a guide he has used to teach law students about legal opinions. It includes a number of multiple choice questions followed by detailed answers.

   The discussion revolved around different areas of opinion practice and the need to focus on opinions in the context of the transaction and the opinion recipient. Examples included rendering local counsel opinions, delivering opinions to institutional entities, and acting as counsel to an opinion recipient. Participants suggested starting opinion education with simple issues and working up to more sophisticated ones, taking into account different practice areas.

   Bob Pannell recommended that training take place in two to three lunch sessions, each with a 45 minute presentation. He favored a structured instructional approach using an innovative form, in view of the fact that partners cannot always spend time training younger associates individually. Another helpful method of training is to create an opinion riddled with mistakes and have the students identify them.

   Participants agreed to cooperate in an effort to gather training materials. WGLO members were encouraged to share their own training materials with Bob Pannell (bob.pannell@nelsonmullins.com), who will assemble them.

2. **The Opinion Negotiation Process – Compromises that Work**  
   (Summarized by Stanley Keller)

   *Timothy G. Hoxie, Jones Day, San Francisco, Co-Chair*  
   *A. Sidney Holderness, Jr., Andrews Kurth LLP, Houston, Co-Chair*

   This breakout session was designed to explore common opinion issues that are negotiated and to attempt to discern those factors which tend to influence what is reasonable to request and give, and what compromises are reached when issues are negotiated in practice.

   It began by identifying some basic relevant principles:

   - What is the purpose of the opinion – or, asked another way, how does the opinion help the recipient?
   - Be mindful of the Golden Rule (however it is articulated – don’t ask for opinions you would not give or, its variant, don’t ask for opinions it would be unreasonable to ask a lawyer to professionally give).
   - Be prepared to engage in a cost-benefit analysis.

   There was recognition that the factual context -- e.g., deal size, deal type and identity and jurisdiction of counsel -- affects the opinion process. For example, most public and many private M&A transactions no longer involve opinions. Where the agreements are governed by the law of the jurisdiction in which the recipient’s counsel but not the opinion giver practices, there are
several approaches that can be worked out for handling an enforceability opinion, ranging from retention of local counsel, use of an “as if” opinion or a choice of law opinion or a combination, to recipient’s counsel giving an enforceability opinion to its own client.

There also was discussion of the techniques for reaching suitable compromise. Often, the most satisfactory approach is to have a discussion among knowledgeable counsel. Participants recognized that difficulties often arise when the opinion process is controlled, for example, by inside counsel for the underwriters, and that sometimes part of the process involves negotiating with your own client. There also was consensus that the technique of saying “it’s market” in pressing for an opinion can be inappropriate. See “Guidelines for the Preparation of Closing Opinions” § 1.6 (“Market” Opinions) (in accord).

The session wrapped up with recognition that there is a spectrum of opinions lawyers are not comfortable giving, some of which are identified in the program materials.

3. What’s New – TALF and TARP Program Opinion Matters
(Summarized by Gail B. Merel)

Jerome A. Grossman, Luce Forward Hamilton & Scripps LLP, San Diego, Co-Chair
Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair

Many of the new federal economic stimulus programs require legal opinions as part of the closing documentation. This breakout session focused on recent opinion requests in connection with these programs, as well as sample forms of opinion that have actually been delivered (as posted on http://www.financialstability.gov).

Participants in the session were asked to share their experiences with how legal opinion practice is developing under the Term Asset-Backed Securities Loan Facility (“TALF”) and the Troubled Asset Relief Program (“TARP”). More specifically, members of the group were asked how negotiations on these legal opinions were being conducted, whether appropriate qualifications and limitations to these opinions were being accepted, and whether opinion recipients generally recognize customary practice.

A significant number of participants reported some experience, either directly or through others in their firms, with these types of opinions. Most thought that opinion practice has been smoother in the case of TALF transactions, because the form of the opinion is not mandated by the federal government and these opinions are rendered to recipients who are represented by counsel who regularly give opinions and who themselves regularly receive third-party closing opinions. In contrast, greater difficulties appear to be developing with TARP opinions, which are addressed to the U.S. Treasury Department. In some instances when a change to the required form of opinion has been requested, recipient counsel has advised that the request must be referred to an office of the Treasury Department, entailing closing delays unacceptable to the client.

Concern was expressed that opinion practice in these types of transactions may be changing, with qualifications that were accepted earlier in the program being rejected more recently. Some members of the group reported that TARP opinions prepared by their firms have been accepted with the inclusion of customary bankruptcy, equitable principle and severability qualifications. One participant reported that even a customary bankruptcy exception that had been delivered and accepted in an earlier TARP transaction was not accepted in a more recent one.
Much discussion centered on whether it would be feasible to begin a dialogue directly with recipient’s counsel and/or the U.S. Treasury on the need for opinion practice in TARP transactions to follow customary opinion practice, so that opinion givers may take normal and necessary opinion qualifications and exceptions. It was suggested that the ABA Legal Opinions Committee might take the lead in beginning such a dialogue. John Power, Chair of the committee and a participant in the breakout session, agreed to follow up with a number of the other participants in this breakout group to explore setting up a task force to find an appropriate solution.

PANEL SESSIONS III:

1. **Inadvertent Opinions**
   (Summarized by Sylvia Fung Chin)

   *Roderick A. Goyne, Baker Botts L.L.P., Dallas, Chair*
   *Cynthia A. Baker, Chapman and Cutler LLP, Chicago*
   *David L. Bleich, Shearman & Sterling LLP, New York*

   This panel discussed closing confirmations counsel for lending institutions are sometimes asked to give to their own clients. Confirmations discussed were:
   
   1. Compliance with or satisfaction of closing conditions;
   2. Conformity of transaction documents with credit approval or policies of the lender; and
   3. Requirements relating to security interest or lien filings.

   An important concern of counsel providing these confirmations is that the client understand their meaning and limitations. That concern is stronger when, as often happens, the representatives of the client with whom counsel has worked on the transaction are not the ones requesting the confirmation. The situation is worse if tensions are present between client representatives responsible for transactions and administrators who request the confirmations.

   Panelists discussed whether law firms should adopt policies on responding to requests for confirmations and how to sensitize lawyers to the risks in giving them. For example, a firm might adopt a policy requiring that qualifications and limitations expressed orally or by e-mail in the course of discussing the confirmation request with the client be repeated in the final written work product furnished to the client. Otherwise, such qualifications and limitations may not appear to be a critical part of the confirmation.

   In evaluating the risks of providing confirmations, some factors that should be considered include:

   1. The nature of the relationship with the client may affect the risk. For example, there may be institutional understandings between the lawyer and the client as to the extent of diligence and the meaning of the confirmation. These may reduce the potential for misunderstanding.
   2. Requests may be broader than necessary.
   3. Some transactions are more complex than others.
4. The lawyer may not be dealing with the client’s in-house lawyers. This increases the risk that the limited role the lawyer played in the transaction itself may not be understood by the client’s representative to whom a confirmation is given.

The panel then discussed two specific types of confirmations.

1. **Confirmation of satisfaction of closing conditions.**

From the standpoint of increased malpractice liability, some would argue there is no additional risk in providing a confirmation that closing conditions have been satisfied. The lawyer is generally obligated to ensure that closing conditions have been met, whether he or she does so in writing or not. On the other hand, the lawyer’s role in a transaction is necessarily a limited one, and restricts what a lawyer can be expected to do to assure satisfaction of conditions. As noted above, if the law firm has a course of dealing with the client, it will color or inform how advice is provided to the client. In the absence of a course of dealing, care needs to be taken to assure that the client understands what is being said in a confirmation.

A closing condition confirmation typically specifies that it only covers documents: *e.g.*, “All documents required to be delivered have been delivered.” It is best to list with specificity the conditions in the transaction documents the confirmation is intended to cover, and to further specify the documents the lawyer reviewed in arriving at the conclusion that the conditions have been satisfied (e.g., charter, bylaws, officers certificates, etc.). A flat statement that “all conditions have been satisfied” is generally avoided, since, *e.g.*, it could be read to cover a condition “bringing down” the parties’ representations and warranties.

Where satisfaction of a condition depends on underlying facts, the lawyer’s responsibility is to be sure that satisfaction of the condition is supported by appropriate documentation (usually a factual certificate). For example, if a financial condition must be satisfied, the lawyer would normally make sure that there is an appropriate officer’s certificate certifying to the existence of the facts necessary to establish that the condition has been satisfied. Care should be taken to disclose any exceptions clearly: *e.g.*, “We have been informed by the Agent Bank that the following conditions were waived.”

2. **Lien perfection confirmations.**

Frequently, lenders ask their counsel to provide a post-closing summary describing collateral and collateral documentation. Often the lender has a form or questionnaire it instructs counsel to fill out. Questions about liens and security interests can be difficult to answer and may require express or implicit assumptions (e.g., security interests in limited liability company membership interests may not be perfected by possession if the membership interests are not certificated). Junior associates may not be aware of the technicalities. In answering the questions, appropriate disclaimers and qualifications should be considered. This should not be an eleventh hour exercise; the lawyer may need to discuss the disclaimers and qualifications with the client.

If the requested confirmation goes beyond factual recitation of documentation, UCC filings, control agreements and similar matters, and rises to the level of an opinion on perfection or priority, counsel should consider customary practice for opinions of that type.