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Chair’s Letter

Dear Legal Opinions Committee members:

I announced at our August Committee meeting in Chicago that Stan Keller has agreed to serve as Vice Chair of our Committee this year. Stan is a hugely respected figure in the business law field. In addition to his major contributions to legal opinion practice touched on by Noël Para elsewhere in this issue, Stan has provided leadership in other broad aspects of the business law practice. For example, he currently chairs the ABA Section of Business Law Audit Responses Committee, has chaired the Section’s Committee on Federal Regulation of Securities, and has served on the Council of the Section. We welcome him to our leadership.

August in Chicago

The weather was perfect, and Don Glazer and some other members played hooky from some aspects of the ABA Annual Meeting to tour surrounding architectural highlights with Jerry Hyman’s expert wife Isabelle. But all were present at our productive Committee meeting, which is thoughtfully described by Noël elsewhere in this issue.

I particularly note that the Committee heard in Chicago a brief report from a new Committee task force (chaired by Andy Kaufman and Jerome Grossman) formed to discuss issues relating to legal opinions given to federal government agencies. We also were introduced to our new Business Law Ambassador, Wena Poon, who is the subject of an article by Tarik Haskins in this issue.

Important meetings of the Audit Responses Committee and the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities, our sibling committees in related fields, are summarized elsewhere in this issue.

Kirkland & Ellis LLP generously hosted a reception for members of the Committee, as well as members of the TriBar Opinion Committee and participants in the Working Group on Legal Opinions. With approximately 70 in attendance, it was a great success and provided an excellent opportunity for interaction. We plan to arrange a similar event at the spring 2010 meeting in Denver.

Fall Meeting in Washington, D.C.

Our Committee will meet from 9:00 to 11:00 a.m. on Friday, November 20, 2009 at the ABA Section of Business Law Fall Meeting in Washington, D.C. We’ll have a full agenda, including discussions of recent developments, California’s soon-to-be published sample opinion (led by its reporter, Tim Hoxie), a draft report of an inter-committee task force on diligence memoranda (led by its chair Jim Rosenhauer), and other Committee projects. Attendance by telephone will be available. In a few weeks I will circulate the agenda and the call-in information on the Committee Listserve. If you have agenda items you wish to add, please drop me an e-mail (johnpower@earthlink.net). I strongly urge you to attend; to register for the
meeting, go to the home page of the ABA Section of Business Law and click on 2009 Fall Meeting.

At noon on November 20, our subcommittee on cross-border opinions will have an open drafting session on its report on outbound cross-border opinions.

The Committee will also sponsor in Washington an important program on venture capital opinions, including a soon-to-be published California report on that topic, on Saturday November 21 at 8:00 a.m. The California report may be the first-ever bar association report on this topic.

Other News

Membership. Anna Mills, our membership chair, hit the ground running in that job. She reports elsewhere in this issue on our recent success in attracting new members. Bottom line: Since she became chair last spring, membership has increased well over 11%.

Committee Projects. Excellent progress has been made on all of our Committee projects, as we will summarize at the November meeting in Washington:

- Report on outbound cross-border opinions
- Survey of office practices
- Task force on opinions to federal agencies
- Task Force on diligence memoranda (with other committees)

Committee Listserve. The Committee Listserve has been quite active, with some very interesting discussions since our last issue. Jim Fotenos summarizes them in his Lessons from the Listserve, elsewhere in this issue.

Recent Developments. The adoption of a new statute in New York regarding powers of attorney given by individuals has occasioned some consternation by those who are requested to give opinions on documents including or signed pursuant to such powers of attorney. Stan Keller and Arthur Field comment on that statute elsewhere in this issue.

Working Group on Legal Opinions, New York, October 2009. WGLO will have its seventh semiannual seminar in New York on October 20. We will report on the seminar in our next issue.

Collected ABA and TriBar Opinion Reports. This is a reminder that the third edition of this publication is still available for purchase, through a link on the Committee home page.

Many members provide me major support in my work as Chair of the Committee, including particularly all of the former chairs and numerous others as well. I wouldn’t be able to do this job without their help. I want to express particular gratitude here to Don Glazer, who attends all meetings, has creative ideas for Committee activities, provides major leadership in writing projects, comments and advises with intelligence and insight on all other Committee matters, and generally makes life easier for the Committee, including me. He is fun to work
with, even though (Steve Weise has commented) he probably would have detailed drafting comments on his own birth certificate. Thanks, Don!

And finally, a special thanks to our great editor Martin Brinkley for taking responsibility for this issue, with assistance from Jim Fotenos.

See you in Washington.

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

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**Future Meetings**

*Working Group on Legal Opinions*

*New York*

Tuesday, October 20, 2009

*ABA Section of Business Law Fall Meeting*

Ritz-Carlton Washington
Washington, D.C.
November 20-21, 2009

**Committee on Legal Opinions**

Friday November 20, 2009

- Committee Meeting. 9:00-11:00 a.m. Plaza II, Ballroom Level (Dial in access: To be provided via Listserve)

- Subcommittee Meeting on Cross-Border Legal Opinions. 12:00-2:00 p.m. Jefferson Room, Ballroom Level

Saturday, November 21, 2009

- Program: Venture Capital Legal Opinions. 8:00-10:00 a.m. Salon IIIA, Ballroom Level

**Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions.**

Friday, November 20, 2009
8:00-9:00 a.m., Salon IIIA, Ballroom Level

**Committee on Audit Responses.**

Friday, November 20, 2009
2:00-3:00 p.m. Jefferson Room, Ballroom Level
August 2009 Meeting of the Committee

The Legal Opinions Committee met at the ABA Annual Meeting on August 2, 2009. The agenda included a discussion of the Committee’s pending projects and announcement of a new Committee Vice Chair.

Chair John Power opened the meeting by announcing the Committee’s 1,000th member (Jeff Franklin of Pennsylvania) to the standing-room-only on-site crowd and those participating by phone. Membership Chair Anna Mills credited the success of the Committee to its relevance, the active participation of members in meetings and on the Committee’s listserv, and the quality of the Committee’s publications. John invited all members who wish to help with membership activities to contact Anna at amills@vwlawfirm.com.

The Chair also welcomed the ABA Business Law Section Ambassador to the Committee, California attorney Wena Poon (see the article by Tarik Haskins elsewhere in this issue), and recognized the work of Business Law Section Advisor Jerry Hyman, an early member of the TriBar Opinion Committee and one of the deans of U.S. opinion practice.

In the introductory portion of the meeting, John congratulated the first recipient of the James J. Fuld Award, former Committee Chair Arthur Field, and called for submission of nominations for the 2009 Fuld Award.

John then turned to the first substantive matter before the Committee, the report on outbound cross-border opinions. A draft of several sections of the report had been distributed prior to the meeting. The first section addresses the “threshold question,” stressing the need to balance the benefit of an opinion to the opinion recipient against the cost of negotiating and preparing the opinion. The next section reports on the applicability of U.S. customary practice to outbound opinions by U.S. opinion givers; Stan Keller and Arthur Field expressed concern about a foreign opinion recipient’s possible lack of familiarity with U.S. opinion practice or its applicability. Don Glazer made a plug for endorsement of the approach of the Boston Streamlined Opinion Report to expressly incorporate by reference U.S. customary practice. Gail Merel and other participants suggested that it should be understood that U.S. opinion givers necessarily operate under and must be guided by U.S. customary practice. This issue will be addressed by the drafting committee.
Don Glazer explained the cross-border report’s treatment of “as if” opinions, concluding that a request for a U.S. “as if” opinion is generally inappropriate where the agreement is governed by non-U.S. law. The reporter for the project, Ettore Santucci, offered clarifying comments about the treatment of enforceability opinions on choice of law clauses, explaining that the report recommends expressly excluding fundamental policies of any jurisdiction from coverage. Justin Klimko and other participants cautioned against addressing professional liability issues in the report.

John then turned to another pending project, the update of the Committee’s 2004 report on law office opinion practices (Arthur Field, reporter, Don Glazer, and Carolan Berkley, co-reporters). Arthur Cohen explained the draft survey prepared to support the revised report. Dick Howe, Steve Hazen and other participants emphasized the importance of keeping confidential the identity of firms that return the survey.

A brief discussion followed on issues for opinion givers in preparing and delivering opinions to federal governmental agencies under TARP and similar programs. Participants expressed frustration at the difficulty of negotiating modifications to forms of opinions consistent with customary practice. Andy Kaufman, co-chair of a Committee task force considering issues for opinion givers in TARP and TARF opinions, agreed that the task force would also look at other questions involved in giving opinions to federal agencies, including the insistence by some agencies on enforceability opinions choosing federal law.

John closed the meeting with the announcement that Stan Keller will serve with him as Vice Chair of the Committee. Stan is well known to the Section of Business Law for his long career of distinguished bar service. His contributions to the opinion field include service on the TriBar Opinion Committee, in which he worked on the 1998 “Third-Party Closing Opinions” report, the 2004 special report on the remedies opinion, the 2006 report on limited liability company opinions, and the 2008 special report on “Duly Authorized Opinions on Preferred Stock” (serving as reporter for the 2004 and 2008 reports), as well as his work on the Boston Bar Association’s Legal Opinions Committee.

- Noël J. Para
   Alston & Bird LLP
   noel.para@alston.com

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Other Committee Reports

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

The Subcommittee on Securities Law Opinions met on August 2, 2009 at the ABA Annual Meeting in Chicago.

The principal topic discussed at the meeting was the time of filing Exhibit 5 opinions as a result of Compliance and Disclosure Interpretation (“C&DI”) 212.05. Tom Kim, Associate
Director and Chief Counsel of the Division of Corporation Finance, attended the meeting. Tom was familiar with the issue, having been briefed by a small group from the Subcommittee that was appointed at the April meeting in Vancouver. The C&DI reads as follows:

**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.

A draft letter had been prepared and shown to Tom to make the arguments for allowing the opinion to be filed by the closing rather than prior to the time contracts of sale are entered into. As discussion got underway, Tom said he had listened to the arguments and agreed that the C&DI should be revised to allow the unqualified opinion to be filed later. He indicated that he would see that this was done promptly after his return to Washington. Accordingly, the members of the Subcommittee who assisted in this effort have been helpful and effective in service to the profession by achieving a result which should be satisfactory to all.

In response to the Subcommittee’s request, the Division has modified the answer to C&DI 212.05, effective August 14, 2009, to read as follows:

**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 declared effective, subject to the understanding that an unqualified opinion will be filed no later than the closing date of the offering of the 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. This position is limited to opinions of counsel regarding the legality of the securities being offered, which are required to be filed in connection with shelf takedowns.

After this discussion, the meeting continued to refer to another problem that is coming up in connection with Exhibit 5 opinions, namely opinions concerning LLC membership interests. The TriBar Opinion Committee is working on a report on LLC interests that is likely to express the view that “fully paid and nonassessable” language may not be appropriate for LLC opinions, but that language is nevertheless what the SEC’s rules seem to require. After a brief discussion, Tom noted the issue and indicated that he looks forward to reviewing the TriBar report.
Tom expressed interest in attending meetings of the Subcommittee in the future, and an invitation was extended to him to attend the next meeting of the Subcommittee, which will be in Washington, D.C. on November 20 or 21, 2009.

Finally, it was reported that Andrew J. Pitts has become Chair of the Subcommittee.

- Richard R. Howe, Outgoing Chair
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Committee on Audit Responses

The Audit Responses Committee met on August 2, 2009 at the ABA Annual Meeting in Chicago.

The first item discussed was the FASB Accounting Standards Codification, which was effective July 1, 2009 for financial statements for periods ending after September 15, 2009. Although the Codification purports not to change generally accepted accounting standards, it changes the nomenclature and references. Thus, Subtopic 450.20 replaces FAS 5. The question was raised what to do about references to FAS 5 in our audit responses. One reaction was to see how the requests are framed. Subsequent to the meeting there was an informative exchange of views on the Committee’s listserv. One formulation suggested replacing the reference to FAS 5, at least for a transitional period, to: “The FASB Accounting Standards Codification Subtopic 450.20 (originally issued as FASB Statement No. 5, Accounting for Contingencies).”

The Chair then reported on the status of the FASB project to consider revision of the disclosure requirements for loss contingencies. He indicated that the project was active and that FASB had scheduled a meeting of the Board for August 19 to deliberate on certain issues involved in the project. That meeting took place as scheduled and information related to this subject, including conclusions reached by the Board at the meeting, can be found on the FASB website. Although the FASB did not act on extending the target date for the revisions to take effect, the practical reality is that they will not be effective for this year.

Also of interest is the decision of the IASB not to change the proposed revision of IAS 37 to accommodate U.S. concerns over disclosure regarding litigation contingencies. There is an interesting IASB staff paper on the subject, available on the IASB’s website. It clearly reflects input from the FASB staff. It was recognized at the meeting that changes to the accounting standards regarding loss contingencies will put increasing pressure on efforts to revisit the ABA Statement/SAS 12 auditing standard.

There was then a discussion of future activities the Committee might undertake, including the need at some point for an update to the Auditor’s Letter Handbook.
The Committee will next meet at the Section of Business Law’s Fall Meeting in Washington, D.C. on Friday, November 20, 2009 at 2:00 p.m.

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Wena Poon, Business Law Ambassador

Wena Poon, an international corporate and securities attorney and Business Law Section Fellow, has been appointed to serve her fellowship with the Committee on Legal Opinions. Poon, a partner of Virtual Law Partners, LLP, in California, is one of four Fellows selected to serve during the 2009-2011 term of the Business Law Ambassadors Program. The Business Law Section designed the Business Law Ambassadors Program to engage attorneys of color in the substantive work of the Business Law Section. Under the program, the Business Law Section facilitates a Fellow’s involvement in the Section. Each Fellow chooses the Section committee he or she would like to become involved with. Poon selected the Legal Opinions Committee because of her interest in the work of the Committee and because in her practice she regularly delivers and receives opinions.

Poon has a broad transactional practice working with investors and companies around the world. Poon regularly advises both private and public companies on cross-border transactions, private equity, finance, 144A/Reg S global equity and debt offerings, and European and Asian listings. Poon advises clients on the full life cycle of an enterprise from company formation to product development to exit strategies. Poon also practices in the securities and finance markets, representing issuers and underwriters on the “sell side” and hedge funds and proprietary traders on the “buy side”.

A native of Singapore, Poon is fluent in Mandarin and Cantonese and has worked in New York, California, Paris and Hong Kong. Poon’s background and work experience give her a unique perspective on international transactions. Poon is particularly interested in our Committee’s Cross-Border Legal Opinions project. She believes the project can serve an important educational function for non-U.S. recipients of cross-border opinions and help establish a common understanding between U.S. opinion givers and non-U.S. opinion recipients and their counsel. Through her involvement with the Committee, Poon hopes to help improve the process for delivering and receiving cross-border opinions. Her mentor on the Committee is Peter Munoz, the Committee’s diversity chair.

Poon graduated magna cum laude and Phi Beta Kappa from Harvard College and received her J.D. from Harvard Law School, where she was Deputy Editor-in-Chief of the
Harvard International Law Review. Poon is admitted to practice law in both New York and California. Poon is a published author and has written and published a number of fictional and non-fictional works, including her most recent work, Lions in Winter, which has been considered for various fictional and literary awards.

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Lessons from the Listserve

[Editor’s Note: Dialogues on the Committee’s listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Subscribers to the listserve may review the comments referred to below by clicking on the “Archives” link under “listserves” on the Committee’s website. If you do not currently subscribe to the listserve, and would like to do so, go the text box (“Join the Committee’s Listserve”) at the end of this summary of the listserve dialogues. You must be a member of the Committee to subscribe.]

Since the publication of our July 2009 issue, there have been several spirited dialogues on opinion issues on the Committee’s listserve, which are summarized here.

1. Rendering Opinions on ISDA Swap Agreements

In July Rick Goldfarb of Stoel Rives LLP, Seattle, asked for the listserve’s experience in rendering an enforceability opinion under New York and U.S. law on certain ISDA (International Swaps and Derivatives Association, Inc.) swap agreements. Participants’ responses ranged from the view that such opinions can be given, with appropriate qualifications and exceptions, to advice that the opinion not be rendered, given the uniform nature of the ISDA swap Master Agreement and the availability of legal opinions on the enforceability of ISDA swap agreements.

The pro-opinion view was articulated by Rebecca Simmons of Sullivan & Cromwell LLP, New York:

“There is no reason not to give an opinion on an ISDA master agreement (including the schedule and specified confirmations), as long as you are satisfied that the transactions under the opinions do not raise enforceability issues. There are different questions with respect to different types of swaps, and you must satisfy yourself that the swaps covered by the particular master agreement do not raise any such questions that would impair enforceability. You also must be specific in your opinion as to what you are covering — i.e., you may not want to cover a master agreement without
specifying that you are addressing only the specific swaps that have been entered into at the time you give the opinion and expressly disclaim any impact on your opinion of transactions that might be entered into under the same master agreement in the future.”

Rebecca later added that, in rendering an enforceability opinion on a swap agreement, the opinion giver would take appropriate exceptions for certain of the agreement’s contractual terms, similar to what an opinion giver does in rendering an enforceability opinion on any contract.

Representative of the “give no opinion” sentiment were Christine Nicholas of Moffatt Thomas, Boise, Idaho, and Joe Heyison, Senior Vice President and Associate General Counsel of Daiwa Securities America, Inc., New York. They noted that there is no good reason to give an opinion on the ISDA Master Agreement as a whole, and that giving an opinion on specific transactions included in a confirmation is almost unheard of outside of municipal bond practice. Joe closed his email with an appeal to keep transactional legal opinions out of ISDA practice.

The ISDA’s own website refers to its extensive “library” of legal opinions:

“ISDA continues to expand the number of countries covered by netting opinions to over 50. The scope of the opinions now includes enforceability of the termination, bilateral close-out netting and multibranch netting provisions of the 1987, 1992 and 2002 Master Agreements. ISDA also solicits legal opinions on the enforceability of the ISDA Credit Support Documents in various jurisdictions. These opinions are also updated on an annual basis and are available to members [of ISDA] on this website.”

2. Enforceability Opinions on Documents Governed by U.S. Federal Law

Peter Dopsch of Morrison & Forrester’s LLP’s New York office triggered a lively exchange with his inquiry of July 21, 2009 concerning an enforceability opinion to a federal agency on a loan transaction when the loan documents are, by their terms, governed by U.S. federal law. As quoted by Peter (the underlying transaction, he related, involved a federal program mandating such a choice of law), the loan document reads as follows:

“This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the United States of America and not the law of the several States.” (Emphasis in original.)

Peter’s request for others’ experience with such an opinion request triggered more than a dozen responses.

As several responders pointed out, there is no federal common law following the Supreme Court’s 1938 decision in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). See also O’Melveny & Myers v. FDIC, 512 U.S. 79 (1994).
Several participants pointed out that federal law may be incomplete and inadequate to address the foundational principles of any enforceability opinion: (i) that a contract has been formed, (ii) that the remedies expressly provided for in the agreement will be given effect, and (iii) that a legal remedy will be available for each agreement or that each agreement will otherwise be given effect.

Several participants suggested language to qualify the scope of the opinion insofar as it addresses the choice of law clause, ranging from a suggestion that the opinion giver take an exception from the scope of the opinion for the choice of law clause to a suggestion that the opinion giver state an assumption that a court would, to the extent that federal law does not provide guidance on an issue, look to the law of a particular state (such as the state in which the opinion giver practices).

Jim Barnes of Baker & McKenzie LLP, Chicago, questioned the exclusion of state law (“and not the law of the several States”), to the extent that it directs a court to “find or fashion federal law for everything, starting with the forum’s conflict of laws rules.”

Bill Satchel of O’Melveny & Myers LLP, Washington, D.C., gave detailed background on the Erie principle that there is no federal common law, including case citations, and suggested (with others) that the role of federal common law in the formulation of opinions would be a worthwhile project for the Committee.1

3. Opinions Rendered in Connection with FHA Insured Projects

The difficulty of rendering opinions in compliance with government opinion forms was raised by Barry Hunter of Kaufman & Canoles, P.C., Norfolk, Virginia, in his July 21 request for guidance on the mortgagor’s counsel opinion requirements adopted by the U.S. Department of Housing and Urban Development in its form of opinion to be rendered in connection with FHA insured loans. See HUD Form 91725, “Guide for Opinion of Mortgagor’s Counsel,” including instructions (April 2003). Firms that assist clients with FHA insured mortgage loans give the opinions, but often after struggles with the mortgagee’s counsel and HUD’s in-house counsel. Obtaining approval of variations from the mandated form, even variations that are necessary to reflect customary practice and/or applicable law, can be difficult. As Steve Weise commented:

“This is a broader issue that sometimes comes up with government lenders. Because the lawyers for the lenders are not in the business of giving opinions, they may not have had occasion to learn or become familiar with customary practice. Further there is often less flexibility in varying from the regulatory ‘requirements.’”

1 As a result of this and the following listserv exchange on FHA opinions, and the discussion at a breakout session at the Spring 2009 session of the Working Group on Legal Opinions, the Committee has formed a task force on opinions to federal agencies, co-chaired by Jerry Grossman and Andrew Kaufman. Among other issues, the task force is expected to address complaints by some lawyers that some federal agencies are unwilling to accept exceptions and assumptions that are customary in U.S. legal opinion practice. See “August 2009 Meeting of the Committee,” elsewhere in this issue.
4. **M&A Opinions on Conversion of Capital Stock, Options, and Warrants**

Our editor Martin Brinkley posed to the listserv on August 17 whether it is customary to request the following opinion in an M&A transaction from the target’s counsel:

> “Each outstanding share of the Company Capital Stock, Company Option, and Company Warrant has been converted as provided in the Merger Agreement. As a result of the Merger, the Company is a wholly-owned subsidiary of Parent.”

Dick Howe of Sullivan & Cromwell LLP, New York, commented that this opinion calls for an interpretation of the merger agreement in the light of applicable law, and that it or a variation is not uncommon in public company merger practice although, as Stan Keller points out, legal opinions have pretty well disappeared in that context. Dick commented that the requested opinion is relevant and is a legitimate concern of both parties.

Several commenters asked for further detail on how the company options and company warrants were to be converted. Stan Keller’s interpretation of the opinion was as follows:

> “The opinion calls for being satisfied that the merger is effective under the applicable corporate law or laws and then opining as to the consequences of the merger provided for those laws and in accordance with the merger agreement. The opinion is often phrased in the future — i.e., when the certificate of merger is filed with the Secretary of State the merger will be effective, etc. …”

Since, as Stan and others pointed out, the options and warrants are matters of contract, the opinion as to the “conversion” of the options and warrants would have to be analyzed in accordance with the terms of the contracts, *i.e.*, do the options and warrants contain an automatic adjustment provision and/or grant authority to the board to make adjustments in the event of a change in control transaction, or, failing either of those, have the holders’ consents been secured?

As Joel Greenberg of Kaye Scholer LLP, New York (former Chair of the Section of Business Law’s Mergers & Acquisitions Committee) noted, this opinion would require counsel “to identify all outstanding options, warrants and convertible securities and to conclude that they provide for appropriate adjustment in the merger.” This can be a lot of work.

5. **Reliance on a Closing Opinion by Parties Other Than the Addressee(s)**

Jerry Grossman of Luce, Forward, Hamilton & Scripps LLP, San Diego, and Chair of the California State Bar’s Business Law Section’s Opinions Committee, asked the listserv on September 10 what the current practice is with respect to permitting successors and assigns of a lender to whom an opinion letter is addressed to rely on the opinion. This topic has been discussed at several WGLO meetings and continues to generate interest. Steve Goldberg of Saul Ewing LLP, Wilmington, Delaware, gave the traditional response, namely, that his firm does not permit “any party any than the addressee or other identified party to rely upon our opinions.”
This is also the “default” formulation of the TriBar suggested forms of closing opinion (see Appendices to the 1998 TriBar Report, 53 Bus. Law. 591). Kenny Greene of Carruthers & Roth, P.A., Greensboro, North Carolina, who has co-chaired the Legal Opinions Committee of the North Carolina Bar Association’s Business Law Section, points to the recent 2009 Supplement to North Carolina’s Legal Opinion Report permitting reliance by assignees, but circumscribed as follows (quoting from the 2009 Supplement):

“At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [___] of the Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.”

Where a loan will be securitized, it is also not unusual for the opinion giver to permit reliance on the opinion by the rating agency and any credit enhancer providing support for the securitization.

For further background, see the Committee’s “Guidelines for the Preparation of Closing Opinions,” 57 Bus. Law. 875 (2002) (“On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as — but to no greater extent than — the addressee.” ¶ 1.7); Glazer and FitzGibbon §§ 2.3.1, 2.3.2 (3d ed. 2008).

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Recent Developments


[Editor’s Note: The following memorandum was jointly prepared by Art Field and Stan Keller for distribution to members of the ABA Legal Opinions Committee, the TriBar Opinion Committee and the Working Group on Legal Opinions. It was sent to members of the Committee on the Listserve in September.]

A new law in New York effective September 1, 2009 establishes requirements for powers of attorney executed in New York by individuals. The new law, which revises Title 15 of Article 5 of the General Obligation Law (GOL - § 5-1501 et seq), raises issues for opinion givers.

The operative provision (§ 5-1501B) provides in relevant part as follows:  

Section 5-1501B. Creation of a valid power of attorney; when effective. 1. To be valid, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by an individual, must:

(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof;
(b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of

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2 The term “power of attorney” is defined (Section 5-1501(10)) to be “a written document by which a principal with capacity designates an agent to act on his or her behalf.”
a conveyance of real property,
(c) Be signed and dated by any agent acting on behalf of the principal with the
signature of the agent duly acknowledged in the manner prescribed for the
acknowledgment of a conveyance of real property. A power of attorney executed
pursuant to this section is not invalid solely because there has been a lapse of time
between the date of acknowledgment of the signature of the principal and the date
of acknowledgment of the signature of the agent acting on behalf of the principal
or because the principal becomes incapacitated during any such lapse of time,
(d) Contain the exact wording of the: (1) “Caution to the Principal” in paragraph
(a) of subdivision one of section 5-1513 of this title; and (2) “Important
Information for the Agent” in paragraph (n) of subdivision one of section 5-1513
of this title.

Section 5-1512, on the other hand, recognizes the effectiveness of powers executed by
individuals (wherever domiciled) outside New York.

Powers of attorney are often involved in transactions in which legal opinions are given.
The power of attorney may be in a separate instrument or it may be embedded in a transaction
agreement; it may be labeled as such or it may appear as contractual authority granted to a party.
Powers of attorney can be found, for example, in limited partnership and LLC agreements,
guarantees, pledges and other security agreements, and underwriting agreements.

To illustrate some of the opinion problems the new law can raise, consider two common
situations:

• A new investment fund based in Massachusetts is organized as a Delaware LLC.
The LLC Operating Agreement provides that the members by entering into the
Operating Agreement give the Manager certain specified powers. You represent a
Massachusetts partnership and its individual general partner who are each
purchasing LLC interests in the fund. The general partner signs the LLC
Operating Agreement when in New York on a business trip. The new law would
appear to apply, at least insofar as the general partner signs individually, and if its
requirements for signature and acknowledgment (both by the principal and the
agent) and cautionary language are not met the powers of attorney in the
Operating Agreement would not be valid.5 This would create an opinion problem
if New York law were covered by the opinion. Even if not covered, having just
learned about the new New York law and recognizing the issue, you may need to
consider whether giving the opinion is appropriate. Moreover, consider the
problem for counsel for the opinion recipient, the fund, if the new law is not
complied with.

3 While the New York statute appears to be aimed at the abuse of powers given by the elderly and in estate planning,
there is no exclusion for commercial transactions. It may be arguable that the new law has narrower application
than appears and that it is not intended to affect non-statutory powers that do not effect a “major gift.” However, the
pre-existing statute dealt only with a statutory form, while the new statute deals with powers of attorney generally.
Further, § 5-1501(A)(4) states that “Nothing in this title shall be construed to bar the use of any other or different
form of power of attorney desired by a person other than an individual as defined in Section 5-1501 of this title.”
• You are representing a group of selling shareholders, a number of whom are individuals, in an underwritten public offering by a Delaware corporation through a New York-based underwriter. The Underwriting Agreement, which states that it is governed by New York law, requires that separate powers of attorney be delivered by each selling shareholder at the time the Underwriting Agreement is signed and that an opinion of counsel for the selling shareholders be delivered at the closing three days later covering, among other things, due execution and enforceability of the powers of attorney. The underwriter insists on a New York opinion. You understand that all individual selling shareholders live outside New York, you receive a faxed power of attorney from one of them bearing a 212 area code origination number and you receive an electronically executed power of attorney by email from another individual selling shareholder. While the statute sanctions powers properly executed outside New York (§ 5-1512), execution in New York by some individuals may have occurred.

As these examples show, the new law’s application is not confined to New York. It applies to all powers of attorney executed by individuals in New York, even though the individual may be resident or domiciled elsewhere and the agreement or instrument containing the power is governed by non-New York law. Because of its newness, there are a number of other unresolved issues under the statute that could affect opinions. For example, one question is whether powers of attorney executed by an individual granting authority to exercise powers held by that individual as a fiduciary or an officer of an entity are to be treated as powers executed by an individual under the new law.

This description does not purport to describe all provisions of the statute or to identify all the issues. It is intended to alert you to this legislation that will be of importance in transactions and to opinions that are given in connection with them.

Membership

Membership in the Committee continues to grow. We have added 117 new members following a recent email campaign, bringing the total number of members to 1,149. New members provide the Committee an expanded audience for our offerings and new insights to our projects.

To our current members who are in leadership positions in their firms’ opinion practices, please encourage newer lawyers who are drafting opinions to become members of this Committee. The Committee provides resources covering a broad range of opinion issues – formal reports, committee meetings that provide insight into recent developments, programs on important opinion areas, our website, the Newsletter and our Listserve. These resources can enhance your firm’s opinion practice in a cost- and time-effective manner.
Finally, I would encourage you to forward this Newsletter to colleagues with an interest in legal opinions, with an invitation to become a member of the Committee. To join the Legal Opinions Committee, simply follow this link: http://www.abanet.org/dch/committee.cfm?com=CL510000 and select “Join Our Committee”. Committee members must be members of the American Bar Association.

-Anna S. Mills
Membership Chair
Van Winkle, Buck, Wall, Starnes and Davis, P.A.

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**Next Newsletter**

We expect the next newsletter to be circulated in January 2010. Please forward cases, news and items of interest to John Power (johnpower@earthlink.net), Martin Brinkley (mbrinkley@smithlaw.com), or Jim Fotenos (jfotenos@greeneradovsky.com).