# Legal Opinion Newsletter

**Martin H. Brinkley and James F. Fotenos, editors**

Volume 9 – Number 2

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The 2009 Fuld Award

The Fuld Award was given to Don Glazer at a memorable ceremony in New York on October 20, 2009, during lunch at the fall seminar of the Working Group on Legal Opinions. Julie Allen began the ceremony with remarks on behalf of Proskauer Rose LLP, which generously sponsors the award in memory of its partner James J. Fuld, the father of modern opinion letter practice. Arthur Field announced that Don was the recipient to a standing ovation, and described many of Don’s accomplishments in the opinion field. A surprised Don Glazer graciously accepted the award, and recounted with humor his first encounter with Arthur Field, as a result of which Don changed his view on the remedies opinion, from supporting the “essential provisions” approach to “each and every.”

The award, inaugurated by the WGLO in 2008, is presented annually to an individual who has made a significant contribution to the field of legal opinions in business transactions. Arthur Field was the first recipient in 2008.

Donald W. Glazer

Don Glazer is a giant in the legal opinions field.

Perhaps his single most important contribution is as the principal author of Glazer and FitzGibbon on Legal Opinions, a centrally important authoritative work on legal opinions. He has also authored or co-authored numerous important articles on legal opinions, including most recently No-Litigation Opinions Can Be Risky Business, 14 Business Law Today No. 6
(July/August 2005) (with Arthur Field), and Courting the Suicide King, 17 Business Law Today No. 4 (March/April 2008) (with Jonathan Lipson). Both of these articles are posted in the Legal Opinions Resource Center, found on the home page of the ABA Legal Opinions Committee: http://www.abanet.org/dch/committee.cfm?com=CL510000.

Don’s extraordinary talent for clear and incisive writing is also evident in numerous authoritative bar association reports in which he has taken a leading role. He served as co-reporter for the ABA Legal Opinions Committee’s Legal Opinion Principles, co-reporter for the TriBar Opinion Committee’s 1998 report Third-Party Closing Opinions and its 2006 Third-Party Legal Opinions: Limited Liability Companies, and as editor-in-chief of TriBar’s 2004 special report, The Remedies Opinion – Deciding When to Include Exceptions and Assumptions. As a member of the Members Consultative Group for the American Law Institute’s Restatement (Third) of the Law Governing Lawyers, Don had a significant influence on the Restatement’s approach to closing opinions. He has commented on and provided drafting assistance for numerous other bar opinion letter reports, and is currently deeply involved in two ABA Legal Opinions Committee projects, a report on outbound cross-border opinions and a survey of office opinion practices.

Don Glazer is also a particularly gifted presenter on panels, and as a result has had a significant impact on education on legal opinions.

Exercising his leadership in opinion practice, Don is co-chair of the TriBar Opinion Committee, a member of the steering committee of the Working Group on Legal Opinions, past chair of the ABA Legal Opinions Committee, and past co-chair of the Boston Bar Association’s Section of Business Law Legal Opinions Committee (as well as past chair of that Section).

On top of being an indefatigable worker on opinion projects, Don is fun to be around. Knowledgeable on many topics and a world traveler, he enjoys having a good time with colleagues and friends, and turning working committees into intellectually stimulating and delightful encounters.

We congratulate Don Glazer!

- Carolan Berkley
  Arthur Field
  Dick Howe
  Jerry Hyman
  Stan Keller
  John Power
  Steve Weise
Dear Legal Opinions Committee Members:

This Issue. Two successful opinion events in the October/November 2009 time frame provide this issue with a wealth of materials: the fall meetings of the ABA Section of Business Law (and our Committee) and the Working Group on Legal Opinions. I think you will be impressed by the number of quality meetings held and the variety of substantive topics ably addressed.

In addition, this issue covers the first meeting of a new task force of our Committee — on opinions to federal governmental agencies — and includes another excellent column by Jim Fotenos summarizing issues discussed recently on our listserv. Lest they be overlooked, I draw your attention to three articles toward the end of this issue on the following important recent developments: answers by the New York Court of Appeals to questions on New York champerty law posed by the Second Circuit in the Love Funding case (by Lori Gordon), activities under way to amend a seriously flawed statute recently adopted in New York raising questions about the validity of certain powers of attorney (by Dick Howe), and the impact of the General Growth Properties bankruptcy case on opinions given in structured finance transactions using “bankruptcy remote” special purpose entities (Pam Holleman).

Spring Meeting. Our Committee will meet in Denver on Friday, April 23 at 8:30 a.m. We will also sponsor a wonderful program on April 22 at 10:30 a.m. (Steve Weise and Jim Leyden in charge). At 5:00 p.m. on April 23, we will again sponsor an opinions reception for all members of our Committee, all participants in the WGLO, and all members of Tri Bar and state and local bar committees on legal opinions. The Colorado firm of Burns, Figa & Will, P.C. will generously host the reception, and it will as always be coordinated by Gail Merel for our Committee.

It is not too early to make your plans for the spring meeting of the ABA Section of Business Law; I urge you to attend.

Webcast with ABA Real Property Section. On Wednesday, February 24, 2010 at 2:00 p.m. Eastern time, Sandy Rocks, Reade Ryan, Bob Thompson and I will do a teleconference/audio webcast, jointly sponsored by our Committee and the Legal Opinions Committee of the ABA Real Property, Trust & Estate Law Section. We will compare and contrast opinions in real estate transactions with those in general business transactions. I hope you will listen to this webcast.

Leadership Opportunities. Opportunities for active participation in leadership of our Committee have multiplied as a result of its rapid growth over the last few years (this growth has occurred in large measure due to the work of our membership chair Anna Mills, as well as increased recognition of the value of our publications and programs to opinion practitioners). For example, we need a technology chair, and could use a program chair and a meetings chair. Perhaps more importantly, the time may have arrived to set up sub-specialized groups within the Committee, for example a subcommittee for opinions in secured transactions to work with the Commercial Finance Committee and others on issues in giving and receiving opinions in secured
transactions. Participating in Committee leadership is fun and valuable to your practice, and I hope you will contact me at the email address below with your interest.

Thanks. Huge thanks to Jim Fotenos, the editor of this issue, for his wonderful work, ably assisted by our Newsletter Chair Martin Brinkley. These two breathe life into this effort, and have made our Newsletter a great success. Thanks also to all of our authors who provide us the content that makes the Newsletter sing.

- John B. Power, Chair
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Future Meetings

ABA Section of Business Law Spring Meetings
Sheraton Denver Downtown Hotel
Denver
April 22-24, 2010

Legal Opinions Committee

Thursday, April 22

Steven O. Weise and James G. Leyden, Jr., Chairs
10:30 a.m. – 12:30 p.m.

Friday, April 23

Meeting of Legal Opinions Committee
8:30 a.m. – 10:30 a.m.

Reception Sponsored by Legal Opinions Committee
5:00 p.m. – 6:30 p.m.
Other Section of Business Law Committees

Friday, April 23

Meeting of Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities
2:00 p.m. – 3:00 p.m.

Meeting of Committee on Professional Responsibility
3:00 p.m. – 4:30 p.m.

Saturday, April 24

Meeting of Committee on Audit Responses
8:00 a.m. – 9:00 a.m.

Working Group on Legal Opinions
New York
May 11, 2010

May 10, 2010

Related Meetings of the WGLO Association Advisory Board and Law Firm Advisory Board

ABA Teleconference /Audio Webcast
February 24, 2010
2:00 to 3:30 p.m. (Eastern time)

Program Co-Sponsored by the Legal Opinions Committees of the ABA Business Law Section and the ABA Real Property, Trust & Estate Law Section: “Comparing and Contrasting Opinions in Real Estate Transactions with Opinions in Other Business Transactions”

ABA Section of Business Law Annual Meeting
San Francisco
August 5-10, 2010
Meeting of the Legal Opinions Committee

The Committee met at the Section of Business Law’s fall meeting on November 20, 2009 at the Ritz Carlton in Washington, D.C. The agenda included discussions of pending Committee projects and a presentation on the sample California third-party legal opinion for business transactions.

After introductory remarks, Chair John Power turned to the first substantive matter before the Committee, the Report on Cross-Border Opinions. A revised draft of several sections of the Report had been distributed prior to the meeting, reflecting further work on the draft discussed at the August 2009 ABA Annual Meeting. Reporter Ettore Santucci gave a general update, but detailed discussion was deferred to a special drafting session held later that day. The later drafting session was well attended, especially by several non-U.S. lawyers who shared perspectives from the point of view of offshore opinion recipients. Much of the discussion focused on the position to be taken in the Report on incorporation by reference of U.S. customary practice, either directly, implicitly, or by mention of the ABA’s Legal Opinion Principles.

The next item was a report by Jerry Grossman of the Task Force on Legal Opinions to Federal Governmental Agencies. The task force has held its organizational meeting and is currently focusing on reviewing and categorizing agency opinion requests. [Editor’s Note: See Jerry’s report under “Task Force on Opinions to Federal Government Agencies” below.]

Tim Hoxie led a discussion of the November 2009 draft of the sample California third-party legal opinion for business transactions. Tim stated that while the sample California opinion in general reflects California practice as described in California opinion reports, it also aspires to influence discussions of national customary practice. Tim stressed that the sample California opinion was intended as illustrative, not prescriptive. Stan Keller offered some counterpoints based on his involvement in developing the Boston Bar’s streamlined form of opinion (see 61 Bus. Law. 389 (Nov. 2005)). There was some discussion of the decision in the California sample opinion not to refer expressly to customary practice, which the Boston sample does by referencing the ABA Legal Opinion Principles. Tim reported that the current California thinking was not to incorporate by reference any particular opinion report or the ABA Legal Opinion Principles; the belief is that such incorporation is not necessary. Don Glazer explained that while the Boston Bar’s form of opinion incorporates the ABA Principles by reference, the practice differs among Boston firms, some dispensing with incorporation by reference of the Principles, while firms including incorporation are increasingly finding acceptance of that approach.

John Power then turned to an update of the Committee’s 2004 Report on Law Office Practices (see 60 Bus. Law. 327 (2004)). A working group continues to refine the form of the survey and explore practical issues related to the collection and processing of responses in light of confidentiality issues.
Attendees at the meeting also heard updates on projects by other opinion committees. Steve Weise gave an update on the near-complete Special Report of the TriBar Opinion Committee on Opinions in Secondary Sales of Securities. A primary theme in the pending report is to focus on what transferees receive, rather than what transferors had. Dick Howe reported that the TriBar Committee is soliciting SEC comments on its pending report on opinions addressing LLC interests.

Two Committee members reported on recent developments of general interest. Lori Gordon traced results in the *Love Funding* case, 499 F. Supp. 2d 314 (S.D.N.Y. 2007) dealing with the law of champerty under New York’s Judiciary Law Section 489. Dick Howe described initiatives for legislative relief from the unintended effects of the recent New York amendments to the General Obligations Law related to powers of attorney. [Editor’s Note: See Lori’s and Dick’s reports under “Recent Developments” in this issue of the Newsletter.]

- Noël J. Para
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**Program on Venture Capital Legal Opinions**

The Legal Opinions Committee sponsored a program at the fall meeting of the Section of Business Law on venture capital legal opinions. The panel was co-chaired by Stan Keller of Edwards Angell Palmer & Dodge LLP, Boston, and Rick Frasch, Atherton, California, and included Julie Allen of Proskauer Rose LLP, New York, Michael Kendall of Goodwin Procter LLP, Boston, and Paul (“Chip”) Lion of Morrison Foerster LLP, Palo Alto, California. The panel addressed the following two reports and model form venture capital financing opinion: (1) “Report on Selected Opinion Issues in Venture Capital Financing Transactions” (the “Cal VC Report”) recently issued by the Opinions Committee of the Business Law Section of the State Bar of California, (2) the Tribar Preferred Stock Opinion Report (the “Tribar Report”), and (3) a form venture financing opinion recently published by the National Venture Capital Association (“NVCA”).

The Cal VC Report, more than four years in the drafting, was published in the November 2009 edition of *The Business Lawyer* (65 Bus. Law. 161). The Cal VC Report drafting committee consisted of representatives from a number of California firms, with a majority coming from Silicon Valley firms. The NVCA form opinion, published in November 2009 and posted on the NVCA website, was developed over two years by a national group of law firms and lawyers working for venture capital firms. The Tribar Report was published in the May 2008 edition of *The Business Lawyer*, 63 Bus. Law. 921.

The panel compared and contrasted some of the key topics in these materials:

(a) **Laws covered.** The Cal VC Report recognizes that the current practice among lawyers in California is to utilize Delaware or California as the situs of organization for start-up companies. Therefore, the Cal VC Report acknowledges that many California lawyers give
opinions under both California and Delaware law. The panel discussed the degree to which California lawyers customarily opine on Delaware law, with many lawyers limiting their opinions to “routine matters” under the Delaware General Corporation Law. The panel noted that opinions by non-Delaware lawyers covering the DGCL include coverage of case law interpreting the statute, but generally do not cover Delaware common law. A discussion followed on the extent to which California lawyers opine, if at all, on Delaware contract law when giving opinions on LLCs.

(b) Capitalization opinions. The panelists noted that some aspects of capitalization opinions (opinions on the number of outstanding shares and their status as duly authorized, validly issued, fully paid and nonassessable) are among the most controversial topics in venture capital opinions. Some firms consider aspects of capitalization opinions sometimes requested (such as the number of outstanding shares) to be merely factual and are unwilling to give even the qualified capitalization opinions suggested in the Cal VC Report, particularly in light of recent litigation against law firms relating to factual confirmations (such as the Dean Foods decision [2004 WL 3019442 (Mass. Super. Ct.)]). The panel discussed the diligence required for capitalization opinions, the shares covered by the opinion (all outstanding shares versus the shares being issued in the financing), and whether the opinion should cover options, warrants and other stock rights (with the panelists and the Cal VC Report concluding they should not).

(c) Preferred stock provisions. The panel discussed the meaning of the opinion that preferred shares are “duly authorized.” The Tribar 1998 Report concludes that these opinions cover both procedural matters and the issuer’s power to create stock with the rights, powers and preferences of the preferred stock in question. The Cal VC Report agrees with this approach. Regarding charter-based pay-to-play provisions, the panelists noted that although the Cal VC Report cautions against giving unqualified opinions on pay-to-play provisions, the practice by lawyers in other states, including Delaware, may be different; it appears that unqualified opinions are often given on such provisions where different corporate statutes support that approach.

(d) Voting agreements. The panel discussed the approach suggested in the Cal VC Report regarding opinions on voting agreements and similar arrangements. The Cal VC Report analyzes such opinions by first dividing them into two classes: voting agreements on matters involving sales of the company and voting agreements covering all other matters. The Cal VC Report states that requests for California opinions on voting agreements that require shareholders to approve certain sales transactions (e.g., “drag along provisions”) are inappropriate given the uncertainty of the law in California on such questions as the application of dissenters’ rights to such contractual provisions. Opinions on voting agreements that do not involve M&A transactions also may be inappropriate because, among other reasons, the standard equitable remedies limitation that is stated expressly or implied in all enforceability opinions may make such opinions meaningless for all practical purposes.

- Richard N. Frasch
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Other Section of Business Law Committee Reports

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

The Subcommittee on Securities Law Opinions met on November 20, 2009 at the ABA Annual Meeting in Washington, D.C. The first topic discussed at the meeting was a proposal to update the report on “Legal Opinions in SEC Filings” for developments since it was published in 2004. There was a consensus that such an update was desirable. Anticipated topics to be addressed include securities offering reform, shareholder rights plans (poison pills) and other “shelf” offering opinion issues.

The Subcommittee also discussed approaching the SEC about the possibility of the SEC’s accepting an approach whereby issuers omit opinions from shelf registration statement filings on the theory that the qualified opinions included with the shelf filing are of limited value and that the opinions filed in connection with specific offerings are the only important opinions relative to such offerings. In effect, the proposal would be that the legal opinion be treated as Rule 430B information and thus eligible to be omitted from the registration statement at the time of effectiveness. Consistent with CD&I [Compliance and Disclosure Interpretation] 212.05, if an issuer omitted the opinion at the time of effectiveness, an unqualified opinion would be required to be filed prior to the closing of each offering pursuant to the registration statement.

In addition, the Subcommittee discussed requesting further information from the Capital Markets Group of the International Section of the ABA regarding that group’s proposal with respect to a possible supplement to the recently published negative assurance report covering negative assurance letters in the context of non-U.S. offerings. There was also a suggestion that the Subcommittee discuss at an upcoming meeting best practices with respect to (a) “compliance as to form” opinions and (b) opinions as to the accuracy of specified sections of offering documents, such as federal income tax disclosure and descriptions of securities.

The next meeting of the Subcommittee will be in Denver, Colorado on April 23, 2010.

The Subcommittee expresses its deep gratitude to Richard R. Howe of Sullivan & Cromwell for his many years of contributions to the Subcommittee (and other ABA activities) and his capable and inspired chairmanship of the Subcommittee.

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Committee on Audit Responses

The Committee on Audit Responses met on November 20, 2009 at the Section of Business Law’s fall meeting in Washington, D.C.

The first item addressed was a committee statement, a draft of which was circulated before the meeting, on the effect of the FASB’s Accounting Standards Codification on audit response letters. FAS 5 dealing with loss contingencies has been codified as ASC 450-20. A number of helpful comments on the statement were provided. The consensus of the committee was to note several alternatives for dealing with the Codification in audit response letters, to make clear that they all have the same meaning and to refrain from recommending any particular alternative, leaving it to firms to decide how best to handle their response letters. On the next page in the text box is a revised statement in final form reflecting the comments from the meeting.

The Chair reported on the status of the FASB’s project to consider revisions to the disclosure requirements for loss contingencies and, in particular, the tentative decisions reached by the FASB at its August 19, 2009 meeting as part of its reconsideration of this project. The minutes of that meeting are posted on the FASB’s website.

The next meeting of the Committee will be at the Section’s Spring Meeting in Denver on April 24, 2010 at 8:00 a.m. (subject to change).

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Statement on the Effect of the FASB Codification on Audit Response Letters

The Financial Accounting Standards Board has codified its accounting standards under a unified format known as the FASB Accounting Standards Codification. The Codification replaces prior accounting pronouncements of generally accepted accounting principles for financial statements for periods ending after September 15, 2009. The FASB has stated that the Codification does not change generally accepted accounting principles (see FAS No. 168, Summary and FASB News Release July 1, 2009).

The Codification affects audit response letters because the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, including the illustrative forms of response, refers to Statement of Financial Accounting Standards No. 5, which has been codified as ASC 450-20. Although the Committee believes that references in the ABA Statement and illustrative forms to FAS 5 should be fairly read to encompass the codification of FAS 5 in ASC 450-20, lawyers may wish to consider whether to leave their form of response as is with the reference to FAS 5 or to reference ASC 450-20 by either (i) adding after the reference to FAS 5 a reference to the Codification (e.g., “now codified as FASB Accounting Standards Codification Subtopic 450-20, Contingencies – Loss Contingencies”) or (ii) referring to the Codification in place of FAS 5, possibly with a reference for transitional purposes to FAS 5 (e.g., “FASB Accounting Standards Codification Subtopic 450-20, Contingencies – Loss Contingencies (a codification of Statement of Financial Accounting Standards No. 5)”).

The Committee believes that any of these approaches is acceptable and that they all have the same meaning. Moreover, the Committee expects practice to evolve over time as request letters change to reflect the Codification and as the need for transitional references fades.

Audit response letters are sometimes still provided for periods ending on or before September 15, 2009. These typically would continue to refer to FAS 5. Some firms that have chosen to refer to the Codification have adopted a single form, for administrative convenience, to bridge the transition by referring, for example, to “Statement of Financial Accounting Standards No. 5 or its codification under FASB Accounting Standards Codification Subtopic 450-20, as applicable.”

ASC 450-20 is the subtopic on Loss Contingencies under the general topic ASC 450 on Contingencies. There may be circumstances, for example when gain contingencies are being addressed, when reference to ASC 450 would be appropriate.
Task Force on Opinions to Federal Government Agencies

The Legal Opinion Committee’s task force on federal government opinions held an organizational conference call on September 23, 2009. Participants acknowledged generally that, while the flurry of TARP transactions involving investments by the federal government in the capital stock of bank holding companies has abated, opinion issues that came to light with respect to those transactions could recur. The task force decided that initially there were two major issues to address:

(1) What are the opinion issues that have proved to be problematic in the context of third-party closing opinions delivered to federal agencies?

(2) How do we best deal with a federal bureaucracy that has little patience for attorneys’ questions about the government’s opinion mandates?

The group reached a consensus that choice-of-law provisions used in some agreements with federal agencies raise serious opinion issues, but that other issues may be lurking as well. It concluded that a policy statement of various bar associations, similar to the recent statement on customary practice (see 63 Bus. Law. 1277 (2008)), addressing opinions to federal agencies was likely to have little persuasive force. A better approach, it was felt, would be to attempt to work with the legal counsel's offices for the major agencies to develop a consensus that might be applied more broadly.

The group decided that the task force would work to identify the issues, prepare proposed opinion language reflecting the current state of practice or law relating to those issues, and then consider how best to have the proposed language accepted.

Ken Carl has developed a matrix to (1) identify those federal agencies and programs that require the delivery of third-party closing opinions, the underlying authority for those requirements, and any regulatory or other formal guidance addressing the form of the required opinions (including any mandated form), and (2) provide as an attachment redacted examples of opinions that have actually been delivered and accepted in transactions under those programs. Ken has assembled, as an exemplar, a set of the indicated information and sample opinions with respect to TARP. That exemplar will be circulated to the task force (probably early in January), and volunteers will be solicited to complete the matrix. The task force anticipates coordinating the work with interested parties from the Real Property, Trust and Estate Law Section of the ABA who are familiar with federal housing financing programs.

- Jerome A. Grossman
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Fall Meeting of the Working Group on Legal Opinions

The following are reports on the WGLO advisory board meetings held October 19, 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

Reade Ryan, Chair of the Law Firm Advisory Board, welcomed the members and introduced the agenda. Elizabeth van Schilfgaarde summarized the current deliberations of a subcommittee of the ABA Legal Opinions Committee that is drafting a report on outbound cross-border legal opinions. She noted that the subcommittee has identified failures of meaningful communication arising because of differences in language, opinion practices and legal systems, as a major problem with such opinions. Jim Rosenhauer noted that the subcommittee would distribute drafts in anticipation of the Committee’s meetings in Washington, D.C. in November 2009. [Editor’s Note: Please refer to “Fall Meeting of the ABA Section of Business Law – Meeting of the Legal Opinions Committee” in this issue of the Newsletter]

Several speakers reported an increase in bank lending, but with a focus by lenders on quality borrowers.1 They also noted increased borrowing costs and shortened terms for most new lending. Amendments, extensions and restructurings appear to be more common than new financings. Asset-based lending with full collateralization is more common. Securitizations of the types that previously were routine are quite rare.

Arthur Field spoke on establishing facts for legal opinions. He noted that, as a matter of customary practice, lawyers rely upon certificates of officers as to the facts necessary to support an opinion. He also noted, however, that increasingly clients are insisting on cost reductions in connection with transactions, and that as a result there is much less direct contact between the opinion preparers and the officers who may be signing officers’ certificates, that the certificates are often prepared in connection with the closing together with a large number of other documents under considerable time pressure, and that the amount of time spent by the preparer(s) discussing the certificate with the signing officers has frequently been significantly reduced. He suggested that opinion preparers still attempt to make an extra effort to avoid having the person signing the certificates sign without understanding all of the elements of the certificate.

- James J. Rosenhauer
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1 The current state of lending transactions was addressed by the following speakers with respect to their respective cities/states: Reade H. Ryan, Jr., Shearman & Sterling LLP, New York; James A. Smith, Foley Hoag LLP, Boston; Robert M. Siegel, Bilzin Sumberg Baena Price & Axelrod LLP, Miami; Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago; Roderick A. Goyne, Baker Botts LLP, Dallas; Jerome A. Grossman, Luce, Forward, Hamilton & Scripps LLP, California; and A. Mark Adcock, Moore & Van Allen, PLLC, Charlotte.
**Association Advisory Board**

The Association Advisory Board (“AAB”) also met on October 19, 2009 in connection with the WGLO programs. The AAB consists of representatives of 28 state and local bar associations and seven affinity associations of opinion recipients and lawyers specializing in areas of law in which third-party closing opinions play a key role. This was the fifth semi-annual meeting of the AAB since its inception in 2007.

Judge Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit once again filled his traditional role at AAB meeting by extending a formal welcome to those in attendance. He also gave the keynote presentation, speaking solely in his individual capacity as a former Chair of the ABA Section of Business Law and a long-time participant in efforts to recognize and foster common understanding of a national legal opinion practice. The topic of his presentation was “Public Policy: What Is It and When Is It Appropriate as an Exception to a Third-Party Opinion?” Judge Ambro identified and discussed each of the three branches of government as sources of public policy. He specifically addressed public policy issues relating to the governance of alternative legal entities (such as limited liability companies) and the validity of their actions. Discussion ensued on how the uncertainties of public policy are treated by the ABA Guidelines and their impact on enforceability opinions and the assumptions on which they are customarily based.

Judge Ambro’s presentation proved a thought-provoking springboard to other topics on the agenda, including such recent choice-of-law cases as *Brack v. Omni Loan Company Ltd.*, 164 Cal. App. 4th 1312 (4th Dist. 2008) and *Feeney v. Dell*, 908 N.E. 2d 753 (Mass. 2009). The topic was also addressed in the report of activities in progress by the TriBar Opinion Committee, specifically with respect to choice-of-law provisions and the enforceability of contract provisions in light of the chosen law.

As in the past, the meeting included round-robin reports by members of the AAB on the status of their activities. Updates were given on the status of bar association opinion reports in California, Florida and Maryland, as well as reports by the American College of Real Estate Lawyers and the National Association of Bond Lawyers. A report was also given on projects underway by the ABA Committee on Legal Opinions, including ways that the ABA Committee could serve as a resource for AAB members and for the members of local and specialized bar associations. Although there is evidence of a growing convergence in national opinion practice, participants at the meeting commented on the number of bar reports currently in preparation and their importance to opinion practice.

The AAB will hold its next meeting on May 10, 2010 in conjunction with the eighth WGLO meeting. As before, readers of this Newsletter wishing to propose for AAB affiliation a state or local bar association or an affinity association of traditional opinion recipients should contact the undersigned or the AAB Chair, Leonard Gilbert, at leonard.gilbert@hklaw.com.

- Steven K. Hazen  
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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 listserv e dialogues. You must be a member of the Committee to subscribe.]

The following exchanges on opinion issues have taken place since the publication of the October 2009 issue of the Newsletter.

1. Including the Opinion Giver’s Client as an Addressee of a Closing Opinion

Bonnie Roe of Davies Ward Phillips & Vineberg, New York, New York, posed to the listserve the question of including one’s client as an addressee of a closing opinion. Bonnie’s clients are non-U.S. partners of a company that is involved in an infrastructure project. Bonnie’s firm was rendering a customary closing opinion to the lenders, which included opinions on no conflicts of the transaction documents with applicable law, the making/securing of all required governmental filings and consents, and the enforceability of the financing documents under New York law.

Bonnie noted that the firm had concluded that the clients would be entitled to rely on the conclusions stated in the closing opinion “whether or not addressed to them in an opinion.” However, foreign counsel to the clients had requested Bonnie’s firm to specifically address the opinion to the clients or at least permit the clients to rely on specified portions of the opinion, including enforceability, no conflicts, and governmental consents.

The general consensus of the responders was that it is unusual to identify one’s client as a recipient of a third-party opinion. Some commented that opinions given to a third party are not well suited for, in Joseph Heyison’s words, “echoing back to the client.” Jack Freese of Freese & March, P.A., Tulsa, Oklahoma, cautioned that an opinion giver should consider questions of confidentiality and waiver of attorney-client privilege in addressing an opinion to one’s client and to third parties.

Other responders noted that there are many contexts in which rendering an opinion to one’s client is customary, such as underwriter’s counsel rendering an opinion to the underwriter and a lead bank’s requiring an opinion from its counsel, although such opinions, addressed only to counsel’s client, do not raise the issues presented by Bonnie in addressing opinions jointly to third parties and to one’s client.

The consensus of the listserve was that it would be “cleaner” (Steve Weise) to render a separate opinion to the client. As Arthur Field observed:
“I think you should consider constructing a separate opinion letter for the client. Your duty to the client is not measured by the 3d party opinion letter, although your duty to the 3d party is measured by it. Diligence for 3d party opinion letters is covered by customary practice. To some extent that may not be the case for an opinion letter to the client.”

John Miller of Robinson, Bradshaw & Hinson, Charlotte, North Carolina, referred the listserv to Charles McCallun’s and Bruce Young’s article, “Ethics Issues in Opinion Practice,” 62 Bus. Law. 417 (2007). Also very helpful is Arthur Field’s and Jeffrey Smith’s chapter 15 (“Closing Opinions to Clients”) in their treatise, Legal Opinions in Business Transactions (2d ed. 2009). Messrs. Field and Smith confirm Bonnie’s instinct that one’s client is probably entitled to rely on the advice set forth in an opinion giver’s third-party opinion:

“…. when an opinion giver provides an opinion recipient with a closing opinion letter, both the third party and the client probably receive advice. The advice to the third party is limited to the contents of the opinion letter. Advice to the client may be implied from a third-party opinion. The advice to the client, even if not stated to the client, is ordinarily no less than that contained in the third-party closing opinion letter.”

_Id._ § 15:9 (footnote omitted).

**Editor’s Note:** For a discussion of opinion limitations in the contexts of both third-party opinions and opinions rendered directly to clients, see Gail Merel’s summary of the breakout session on “Opinion Limitations—What’s Appropriate, What’s Effective and What Else Matters?” in the Addendum under “Concurrent Breakout Sessions I.”

2. **Opinions Addressing Use of Transaction Documents as “Evidence”**

Russell Leblang of Landay & Leblang, Boston, Massachusetts, requested the listserv’s reaction to the following opinion request of his firm, as borrower’s counsel:

“No consent, authorization, order, license or approval of, the giving of notice to or registration, qualification or filing with, any Governmental Authority is required prior to commencement of any applicable litigation in order for any of the Financing Documents to be admitted as evidence in a New York court or the United States District Court for the Southern District of New York.”

The consensus of the listserv was that this opinion should be resisted if made by U.S. opinion recipients. Its derivation, as several responders commented, is from cross-border transactions. As John Miller pointed out, in some countries, such as Brazil, the registration or publication of credit documents is necessary in order for the documents to be accepted into evidence in a court proceeding. Understandably then, this opinion request is sometimes made of U.S. counsel acting as foreign counsel for a party. John cited for further guidance the
publication “Legal Opinions in International Transactions: Foreign Lawyers’ Response to U.S. Opinion Requests” (2d ed. 1989) (Int’l Bar Ass’n). Jim Tilden, Kansas City, Missouri, gave a domestic example of this requirement — in order to introduce a Kansas mortgage into evidence in a Kansas case or to obtain a judgment enforcing the mortgage, all mortgage registration taxes due must have been paid, which may be done at any time prior to its introduction or enforcement (Kansas Statutes Annotated § 79-3107).

Peter Hosinski of Becker, Glynn, Melamed & Muffly LLP, New York, New York, articulated the form of opinion on this issue he had seen, a formulation other responders agreed was more sensible:

“To ensure the enforceability or admissibility in evidence of each of the Agreements in the State of New York it is not necessary that either of the Agreements or any other document be filed or recorded with any court or other authority in the State of New York or that any stamp or similar tax be paid on or in respect of either of the Agreements.”

3. Responding to Dated Bond Indenture Opinion Requirements

Tom Ruby of Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, asked for the views of the listserve on an old bond indenture’s requirement for an opinion that an alternate letter of credit provided as security for a debt would not constitute a voidable preference in the event of the bankruptcy of the debtor. Tom observed that these opinions are not now requested for initial or alternate letters of credit, and asked for the listservers’ experience with them.

Numerous responders pointed out that the trustee has no option but to request the opinion, since the requirement is set forth in the indenture, although if an unqualified opinion is no longer thought to be appropriate, qualifications and assumptions might be used to narrow the scope of the opinion. Louis Michael Bell of Griffith & Jacobsen, LLC, Chicago, Illinois, noted that the opinion may be a vestige from a time when there was some concern about a court’s injunction against payment under letters of credit arising from the Twist Cap case (In re Twist Cap, Inc., 1 B.R. 284 (Bankr. M.D. Fla. 1979)). Bill Bryson of Jones Day LLP pointed out that in the one opinion he gave on this topic some 25 years ago, his then-firm relied upon an accounting firm opinion on the solvency of the obligor to render the opinion. Alissa Sandin of Kutak Rock LLP, Irvine, California, suggested looking at the security the provider of the alternate letter of credit was obtaining. If that security is a junior position in the security offered under the indenture, then the opinion might be predicated upon the fact that the security was granted contemporaneously with the issuance of the original debt and thus would not be subject to recovery as a preferential transfer.

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Recent Developments

The New York Champerty Statute Revisited


The Trust had been assigned a defaulted financial obligation as part of a litigation settlement. The Trust sued Love Funding to enforce rights of the Trust’s predecessors in interest, but the district court ruled that the assignment was void because it was champertous. On appeal to the U.S. Court of Appeals for the Second Circuit, the court determined that it could not rule on the appeal without definitive interpretations of certain unresolved questions of the New York champerty law. The Second Circuit certified those issues to the New York Court of Appeals. See 556 F.3d 100, 114 (2d Cir. 2009). The questions certified were:

1. Is it sufficient as a matter of law to find that a party accepted a challenged assignment with the “primary” intent proscribed by New York Judiciary Law § 489(1), or must there be a finding of “sole” intent?
2. As a matter of law, does a party commit champerty when it “buys a lawsuit” that it could not otherwise have pursued if its purpose is thereby to collect damages for losses on a debt instrument in which it holds a pre-existing proprietary interest?

3. (a) As a matter of law, does a party commit champerty when, as the holder of a defaulted debt obligation, it acquires the right to pursue a lawsuit against a third party in order to collect more damages through that litigation than it had demanded in settlement from the assignor?

(b) Is the answer to question 3(a) affected by the fact that the challenged assignment enabled the assignee to exercise the assignor’s indemnification rights [against a third party to recover] reasonable costs and attorneys’ fees?

The New York Court of Appeals concluded that questions 2 and 3 should be answered in the negative, and that in light of its answers to those questions, it was unnecessary to answer the first question. It ruled that the assignee of a defaulted financial obligation who accepts the assignment with the intent to enforce it by means of a lawsuit does not violate New York’s champerty statute. See Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc., by and through Orix Capital Markets, LLC as Master Servicer and Special Servicer v. Love Funding Corp., 13 N.Y.3d 190, 2009 WL 3294928 (2009). Fortunately, the New York Court of Appeals’ interpretation of the champerty statute returns the interpretation of that statute to what many assumed it was before the federal district court’s decision.

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[Editor’s Note: Having received the New York Court of Appeal’s interpretation of the champerty statute, the Second Circuit ruled on January 11, 2010 that, as a matter of law, the trial record could not support a finding of champerty, and therefore reversed the district court and remanded the case for entry of judgment in favor of the Trust. 2010 WL 59276. Citing the Court of Appeals, the Second Circuit concluded that an assignment of a promissory note “is not champert[ous] simply because the party intends to [enforce its rights] by litigation.” Slip Opinion at 12 (citing Trust v. Love Funding, 13 N.Y.3d at 200).]

**New York’s Power of Attorney Statute**

As discussed in the October 2009 issue of this Newsletter, New York enacted a statute, effective September 1, 2009, that established new requirements for powers of attorney. This statute has created concern regarding the validity of a wide variety of powers of attorney used in commercial and business transactions. There have been several efforts to address these issues.

The New York State Bar Association has formed a working group consisting of representatives of several of its sections that are affected by the changes in the law. This group has drafted an amendment of the statute that has been approved by the Executive Committee of
the NYSBA and is being presented to the New York Law Revision Commission for review prior to its introduction in the Legislature in January 2010. It is believed that there will be widespread support for the amendment and that it will be enacted, with retroactive effect to September 1, 2009. The draft amendment contains a lengthy section that would exclude from the definition of “power of attorney” covered by the statute a wide variety of customary powers of attorney used in business, commercial and real estate transactions.

Separately, a group of New York lawyers has drafted a white paper on the interpretation of the statute, which is being circulated widely among New York law firms and lawyers who are expected to sign on to it. This white paper examines principles of New York and federal law to conclude that substantial portions of the statute do not apply to (1) proxies for shares of New York corporations and non-New York corporations, (2) powers of attorney executed in connection with the registration of transfer of certificated securities or (3) many powers of attorney granted in connection with the formation and governance of non-New York limited liability companies and non-New York limited partnerships. The white paper also recommends language for use in proxies to clarify that the granting of a proxy is not intended to revoke prior powers of attorney granted by the person signing the proxy.

The white paper will provide comfort for business lawyers who have been concerned about compliance with the statute until the amendment of the statute is effective. Because of the uncertainty of legislative action in New York, there can be no assurance as to the timing of legislative action on it. What can be said is that a wide consensus has emerged in New York regarding the need for the amendment.

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General Growth Properties

[Editor’s Note: We include here Pam Holleman’s summary of her presentation at the fall WOLO seminar on developments in the Chapter 11 bankruptcy of General Growth Properties involving special purpose entities. As she notes in her summary, these developments are of particular interest to counsel in structured financings who give (or receive) substantive consolidation opinions. See generally TriBar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 Bus. Law. 717 (1991); Committee on Structured Finance and Committee on Bankruptcy and Corporate Reorganization, Association of the Bar of the City of New York, Special Report on the Preparation of Substantive Consolidation Opinions, 64 Bus. Law. 411 (2009).]

Recent court decisions in the Chapter 11 bankruptcy case of shopping center owner General Growth Properties, Inc. have shaken the world of structured finance, particularly as it relates to the use of “special purpose entities” (“SPEs”).1 After General Growth and more than

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1 Case No. 09-11977 (ALG) (Bankr. S.D.N.Y.) (jointly administered), filed April 16, 2009.
one hundred of its SPE subsidiaries filed for bankruptcy protection on April 16, 2009, the court authorized the debtors – over the objection of certain pre-petition lenders – to “upstream” the SPEs’ cash surplus to finance the operations of the entire debtor group. Later, the court denied the lenders’ motions to dismiss the SPEs’ cases as “bad faith” filings. The SPEs were Delaware limited liability companies formed to hold title to individual properties and were designed to be “bankruptcy remote”: their charters required unanimous consent of all their managers, including so-called “independent” managers, in order to file or consent to a bankruptcy filing. The charters also contained “separateness” provisions designed to reduce the risk of “substantive consolidation” – a doctrine whereby a court can determine that the assets of one entity should be made available to satisfy the debts of a parent or affiliated company. One lender warned that permitting the solvent SPEs to remain in bankruptcy, circumventing contractual commitments to the lenders, “may well signal the demise of a form of non-recourse, commercial real estate financing that has been efficacious, less expensive and in other ways beneficial to borrowers and their equity holders.” In denying the motions to dismiss, however, the court emphasized that it was not ruling on the issue of whether or not the assets and liabilities of the SPEs could appropriately be substantively consolidated with the assets and liabilities of any other entity – an issue that was not before the court.

Contrary to widespread perception, the bankruptcy court’s decisions to date in General Growth are consistent with precedent and have not appreciably increased the bankruptcy risk associated with SPE borrowers. The court allowed the debtor group to utilize the proceeds of accounts receivable and inventory of the SPEs as cash collateral, but granted the lenders replacement liens and other adequate protection of their interests. The court’s refusal to dismiss the SPEs’ cases was grounded in the established principle that a filing is not made in bad faith where there is a possibility of a successful reorganization, whether or not the debtor is insolvent. The court found that all of the SPEs “were in varying degrees of financial distress,” particularly as it was uncertain that the collateralized mortgage backed securities market would revive within the next several years when the SPEs’ debt must be refinanced. While the SPEs had terminated their “independent” managers shortly before the filing, without advance notice to the managers or to the lenders, the court found (citing Delaware law) that the entities had not violated their charters and held that the replacement managers acted properly in taking into consideration the needs of the entire debtor group in approving the bankruptcy filings. As the court observed: “[I]f [the lenders] believed that an ‘independent’ manager can serve on a board

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3 Post-Trial Memorandum in Support of ING Clarion Capital Loan Services LLC’s Motion to Dismiss the Clarion Debtors’ Bankruptcy Cases filed July 2, 2009, Chapter 11 Case No. 09-11977 (ALG) (Bankr. S.D.N.Y.).
4 See, e.g., In re Kingston Square Assocs., 214 B.R. 713 (Bankr. S.D.N.Y. 1997) (denying a motion to dismiss the involuntary bankruptcy cases of special purpose entities); compare In re LTV Steel Co., Case No. 00-43866 (Bankr. N.D. Ohio) (unpublished op.) (granting, on an interim basis, debtors’ motion to use cash collateral to finance their bankruptcy cases, including the proceeds of accounts receivable and inventory that had been sold, pre-bankruptcy, to wholly-owned, bankruptcy-remote affiliates of the debtors).
5 See, e.g., Kingston Square Assocs., 214 B.R. at 725.
solely for the purpose of voting ‘no’ to a bankruptcy filing because of the desires of a secured creditor, they were mistaken.”9 Whether or not an SPE is “bankruptcy remote” is in any event largely irrelevant to the issue of substantive consolidation (on which the court did not rule): if an entity conducts its business in conformity with the separateness requirements included in the typical SPE charter, the risk of substantive consolidation is remote, regardless of whether or not the entity files for bankruptcy protection.10

While recent case law (such as the U.S. Court of Appeals for the Third Circuit’s decision in In re Owens Corning) suggests that substantive consolidation orders may become increasingly rare,11 General Growth may signify an ironic new paradigm: a case in which the court makes no findings as to whether a parent and its SPE affiliate were operated as separate entities, and does not substantively consolidate the entities’ assets and liabilities, but nonetheless authorizes the parent’s sale or use of the SPE’s assets without lender consent. Those who deliver (and rely on) “non-consolidation” and “true sale” opinions must consider and assess the significance of this new paradigm in structuring future transactions and in crafting reasoned opinions. From a structural perspective, suggested responses have focused on enhancing an SPE’s “bankruptcy remoteness,” as by forming the SPE in a jurisdiction where the law permits a member or director to be accountable only to creditors. Given the courts’ focus upon the possibility of a successful reorganization, however, such approaches may be unsuccessful, and efforts to exclude traditional common law duties may create new and unanticipated problems and risks. From an opinion giver’s perspective, counsel should consider disclaiming any opinion as to whether a court, in the bankruptcy case of an SPE’s parent or affiliate, would authorize the sale, use or lease of the SPE’s assets without making appropriate findings and effecting a substantive consolidation of the entities.

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9  Id. at 64 (emphasis added).
10  Compare In re Bonham, 229 F.3d 750, 766-67 (9th Cir. 2000) (substantively consolidating the assets of a debtor and its non-debtor affiliate); accord In re 1438 Meridian Place, 15 B.R. 89, 96 (Bankr. D.D.C. 1981) (holding that non-debtor affiliate could be subject to jurisdiction of the bankruptcy court where the affiliate was an alter ego of the debtor and “clear and manifest injustice” had been worked on the creditors).
11  See In re Owens Corning, 419 F.3d 195, 210 (3d Cir. 2005) (describing substantive consolidation as “extreme”, since “it may affect profoundly creditors’ rights and recoveries”, and concluding that “this ‘rough justice’ remedy should be rare …”).
Membership

If you are not a member of our Committee and would like to join, or 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, click “Committees” and scroll to Legal Opinions. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

Next Newsletter

We expect the next newsletter to be circulated in April 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).
Addendum

Working Group on Legal Opinions

Fall 2009 Seminar Summaries
WORKING GROUP ON LEGAL OPINIONS

FALL 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 October 20, 2009 WGLO meeting in New York. The summaries were prepared by panelists, participants or 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 May 2010.

PANEL SESSIONS I:

1. Defense of an Opinion Claim

   (Summarized by Steven K. Hazen)

   John K. Villa, Williams & Connolly LLP, Washington, D.C., Chair
   Judge Colleen McMahon, U.S. District Court for the Southern District of New York
   George Spellmire, Spellmire & Sommer, Chicago

   This presentation was a follow-up to the one at the Spring 2009 WGLO program on how judges view legal opinions. The panel was introduced by Judge Ambro of the U.S. Court of Appeals for the Third Circuit, who facilitated its presentation. The hypothetical addressed involved a Rule 144A private securities offering in which the issuer utilized its regular counsel and also retained a Wall Street firm to serve as special co-counsel, with each firm delivering a negative assurance letter to the underwriter regarding a disclosure statement. The hypothetical focused on whether information that came to the attention of the issuer’s regular counsel contradicted statements made in its negative assurance letter and whether the special co-counsel firm had made inquiry that might have elicited such information prior to delivering its own, separate letter. Pension funds brought suit against the lawyers on the negative assurance letters. Mr. Villa argued a motion to dismiss and Mr. Spellmire argued against that motion, after which Judge McMahon “ruled” on the motion. Mr. Villa introduced the hypothetical and informed the audience that the presentation had not been pre-planned or rehearsed and would take its natural course as it unfolded.

   Mr. Villa’s argument for dismissal initially focused on the issue of reliance and the fact that both negative assurance letters expressly limited reliance to the addressees: the underwriter. Judge McMahon noted that the underwriter held the securities for a nanosecond and that such simplistic analysis of reliance essentially rendered the letters meaningless. Without conceding that argument, Mr. Villa argued that each letter was limited to a statement of actual belief and that such argument could be interpreted to mean that it was impossible for the letter ever to be wrong, absent actual fraud. In passing, she asked, “What conceivable function could any such letter actually serve?” She noted that the letter had been requested and given, so the assumption had to be that it served some meaningful function and thus actually could be “wrong.”
In the rebuttal argument by Mr. Spellmire, Judge McMahon focused on the differences between the issuer’s regular counsel and the special Wall Street co-counsel with regard to whether anything actually did come to their attention that might contradict statements made in the negative assurance letters. Mr. Spellmire pointed out that his case against the Wall Street co-counsel was based on negligent misrepresentation, not fraud, as co-counsel had made no inquiry that might otherwise have elicited the information. As he put it: “In order to excuse them, we have to accept that they did not have any professional responsibilities.” He then raised the question whether the standard of care is objective or subjective, noting that compliance with the standard is always a matter of fact and thus the motion to dismiss should be denied.

At the end of the session, Judge McMahon “ruled” that the case could go forward against the issuer’s regular counsel but would be dismissed against the special co-counsel. She concluded that the information was sufficient to put the issuer’s regular counsel on notice that the matter needed to be investigated further, but that the special co-counsel had no such notice. In response to an inquiry from Judge Ambro, Mr. Villa noted that, in assessing the standard of care required of counsel in each situation in the absence of relevant case law, judges would normally look to professional responsibility rules, the Restatement (Third) of the Law Governing Lawyers and treatises on lawyers’ ethics. In response to a question from the floor, Judge McMahon acknowledged that counsel defending claims like this one might well win an argument that customary practice establishes the meaning of negative assurance letters, but only after the trier of fact has been educated on this point and not at the motion to dismiss stage.

CONCURRENT BREAKOUT SESSIONS I:

1. Teaching Lawyers How to Deal with Facts in Third-Party Opinions

(Summarized by Donald W. Glazer)

Arthur Norman Field, Field Consulting LLC, New York, Co-Chair
Donald W. Glazer, Newton, Massachusetts, Co-Chair
Steven O. Weise, Proskauer Rose LLP, Los Angeles, Co-Chair
Hugh Robertson, Milbank, Tweed, Hadley & McCloy LLP, New York, Reporter

Arthur Field introduced this breakout session by explaining that the session was intended to provide lawyers unfamiliar with opinion practice an introduction to the process for establishing the factual underpinnings of an opinion and that it was being recorded in the hope that it could serve as a useful educational tool. He said that after the panel members had spoken he would ask those in attendance for suggestions on how the presentation might be improved and whether they would use it to educate younger lawyers in their firms.

Don Glazer began the panel by asking Arthur Field and Steve Weise a series of fourteen questions. The questions were designed to illustrate the point that establishing facts requires compliance with customary practice and that customary practice, rather than calling for an independent investigation of the type conducted by a company’s auditors on its financial statements, permits opinion preparers to rely on factual representations by company officials and others so long as they (i) are made by persons knowledgeable about the subject matter (or more
senior officers to whom those persons directly or indirectly report) and (ii) are made under circumstances that do not make reliance unwarranted. Steve Weise concluded the panel by asking Don Glazer seven further questions on the same theme, for example on the circumstances under which opinion preparers can properly rely on unstated factual assumptions and on the need to define “to our knowledge.”

Arthur Field finished the session by soliciting comments from those in attendance. The comments were generally supportive but underscored the importance of packaging the presentation in ways that are user friendly, in particular by making it available in a variety of electronic formats and breaking it down into short segments that users can view or listen to intermittently between or while doing other things (such as commuting to and from work).

2. The “Practical Realization” Qualification or the “Generic” Qualification – Take II

(Summarized by Reade H. Ryan)

Reade H. Ryan, Shearman & Sterling LLP, New York, Co-Chair and Reporter
Philip B. Schwartz, Akerman Senterfitt, Miami, Co-Chair
Robert A. Thompson, Sheppard Mullin Richter & Hampton LLP, San Francisco, Co-Chair

This breakout session discussed the “generic” qualification to the remedies opinion, which has three forms:

(i) The “practical realization” qualification:

Certain remedies, waivers and other provisions of the transaction documents might not be enforceable; however, such unenforceability does not render the transaction documents invalid as a whole or substantially interfere with the practical realization of the principal benefits purported to be provided by the transaction documents.

(ii) The ABA/ACREL “material breach” qualification:

Certain remedies, waivers and other provisions of the transaction documents might not be enforceable; however, such unenforceability does not render the transaction documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Company to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the transaction documents/note, (ii) the acceleration of the obligation of the Company to repay such principal, together with such interest, upon a material default by the Company in the payment of such principal or interest, and (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the collateral created by the security documents upon maturity or upon the acceleration pursuant to (ii) above.

A-3
(iii) The ABA/ACREL Plus “material breach” qualification, which is the ABA/ACREL “material breach” qualification plus the addition to clause (ii) of the phrase “or upon a material default in any other material provision of the transaction documents.”

There was consensus among the participants that the “generic” qualification may take any of the three forms set forth above. Participants also commented that the “generic” qualification in any of these forms is generally acceptable in financing transactions secured by real estate. In those transactions, the “generic” qualification would customarily qualify the remedies contained in all of the transaction documents, not just the remedies contained in the security documents.

Participants reached a further consensus that it is inappropriate to ask an opinion giver to state in the opinion that notwithstanding the qualifications to the remedies opinion contained in the opinion, the opinion recipient will receive the practical realization of the principal benefits purported to be provided by the transaction documents (thus overriding the qualifications).

There was also consensus that it is not inappropriate for the opinion recipient to request that the opinion giver eliminate one or more qualifications to the scope of the remedies opinion as part of the negotiation of the opinion.

Finally, there was consensus that use of the “practical realization” form of “generic” qualification in the historical context of complex lease and secured financing transactions as set forth in the 1998 TriBar report (Third-Party “Closing” Opinions, 53 Bus. Law. 591, § 3.4) remains acceptable.

Participants discussed the following additional issues, but reached no consensus on them:

A. Whether it is appropriate for local counsel rendering a remedies opinion based on the assumption that the law governing the transaction documents is the law of the jurisdiction where the local counsel practices (if different from the law selected by the parties to govern the transaction documents) to qualify the remedies opinion with a “generic” qualification. While there is consensus among real estate lawyers that it is appropriate to use a “generic” qualification under these circumstances, there is no such consensus among non-real estate lawyers.

B. Whether or to what extent there is a risk to an opinion recipient or the opinion recipient’s counsel of accepting a remedies opinion that includes a “generic” qualification.

C. Whether and to what extent use of a “generic” qualification eliminates the need for a list of specific qualifications.

D. Whether and to what extent a “generic” qualification should be acceptable in unsecured financing transactions or financing transactions secured by personal property.

E. Whether cost-to-benefit principles should affect the acceptance or non-acceptance of a “generic” qualification in the context of non-real estate transactions.
There was a consensus, however, that the “generic” qualification is being used more often now than in the past in non-real estate financing transactions.

Several non-real estate lawyers who participated in the session commented that it is now customary practice to use a “generic” qualification in opinions in non-real estate financing transactions. These same non-real estate lawyer participants suggested that the scope of the “generic qualification applies to all of the loan documents and not just to the security documents. However, there was no consensus among the non-real estate lawyer participants regarding this issue.

3. **Opinion Limitations – What’s Appropriate, What’s Effective and What Else Matters?**

(Summarized by Gail Merel)

*William Yemc, Richards, Layton & Finger, P.A., Wilmington, Chair*

*Norman M. Powell, Young Conaway Stargatt & Taylor LLP, Wilmington, Reporter*

This breakout session focused on the use of opinion limitations in the contexts of both third-party opinions and opinions rendered directly to clients. With the now-pending New York Supreme Court case, *Santo Nostrand, LLC v. Cozen O’Connor*, No. 602415/08 (N.Y. Sup. Ct. July 14, 2009), as a starting point for the discussion, the session explored the appropriateness and effectiveness of certain express limitations contained in legal opinions rendered to clients and third parties and in engagement letters with clients. The session also considered the duties of an opinion giver to clients and to third-party opinion recipients.

The chair began the session by briefly summarizing the *Santo* case as follows: In April 2009, the New York Supreme Court (New York’s trial court) ruled against a motion to dismiss a legal malpractice claim relating to an opinion which the defendant law firm had rendered concerning a zoning matter. The opinion was addressed to both the firm’s client and a third-party lender. The opinion included the following scope limitation:

> We have been asked by the Borrower to render an opinion as to certain zoning matters related to the project. In rendering this opinion, we have reviewed the laws, records, documents and plans as are expressly listed below and have made such other investigation of the facts and circumstances as, in our judgment, is appropriate for the purpose of issuing this opinion. *Id.* at p. 6 (emphasis supplied by the Court in its Order).

The opinion’s concluding paragraph included the following date and notification limitations:

> This opinion speaks only as of its date, and we expressly disclaim any obligation to inform the addressee of any changes in law, regulations, or interpretations, or new or changed facts, which come to our attention. *Id.* at p. 6.
The engagement letter for the matter stated that the law firm would “analyze the plans provided . . . by the project engineer/architect and research the relevant provisions of the New York City Zoning Resolution” in the form of an opinion letter. Id. at p. 2.

The law firm argued that the limitations set forth in its engagement letter and in the opinion were sufficient grounds for the court to grant the firm’s motion to dismiss the malpractice claim. The Santo court, however, denied the motion, ruling that the express language of the opinion could be construed as encompassing matters relating to the alleged malpractice – namely, failing to check for pending changes in zoning law – and that there were factual issues to be resolved.

Against the background of the Santo case, participants in the breakout session considered circumstances in which it might be appropriate to include clients as addressees (or permitted reliance parties) of what are otherwise third-party opinions, and considered threshold issues relevant when doing so. The chair noted that an e-mail discussion had recently taken place on the Listserve for the ABA Committee on Legal Opinions on this very same topic. [Editor’s Note: See “Lessons From the Listserve” in this issue of the Newsletter.]

The discussion began with acknowledgment that an opinion giver’s duties to third-party opinion recipients are determined by different rules, and are generally narrower, than those owed to the opinion giver’s own client (for the former, see, generally, Sections 51, 52, and 95 of the Restatement (Third) of The Law Governing Lawyers (2000) (hereinafter referred to as the “Restatement”); for the latter, see generally Sections 16, 19, 50, and 52 of the Restatement; for general discussion of a lawyer’s duty of care, see Sections 48 and 49 of the Restatement). Most participants in the breakout session disfavored adding the client as an addressee or reliance party to a third-party opinion letter in most circumstances. There was also general agreement that, since opinion givers usually begin from a third-party form when preparing a written opinion primarily addressed to a non-client recipient, an opinion giver planning to add its own client as an addressee of the opinion would need to reconsider the form very carefully since many of the standard third-party assumptions, exceptions, qualifications, and limitations may be inappropriate or ineffective vis-à-vis a client addressee of the opinion. It was noted, for example, that it may not make sense to address certain types of opinions to the client, such as an opinion that the transaction documents are enforceable against the client or a no-litigation assurance based solely on reasonable inquiry of the client’s own officers.

Some participants observed, however, that in the context of certain bank loan transactions it is commonplace to address routine closing opinions to both the client and third-parties. A number of participants expressed the view that, where the scope of an opinion is sufficiently co-extensive with the opinion giver’s duty to its client and the opinion is narrow, specific, and not significantly dependent upon factual matters, the addition of the client as an addressee or reliance party may be acceptable — with the caution that the opinion giver should understand the client’s intended use of the opinion and consider its appropriateness for such use.

Considering the same issue where the opinion giver is serving as local, rather than lead, counsel, participants noted that, while the analysis was the same, the analysis would more likely support issuing the opinion to the client in the same form as to the third-party recipient. This

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would especially be the case where the opinions are narrow in scope, such as security interest perfection or entity status opinions.

Participants also discussed the question raised by the *Santo* case as to whether and how limitations set forth in a third-party opinion letter that is also addressed to a client might limit the scope of the representation or restrict the duties owed to the client, in much the same way as an engagement letter. It was noted, for example, that local counsel are often engaged at the last minute with insufficient time to obtain a signed engagement letter from the client. In those circumstances and where the role of the local counsel rendering a third-party opinion is limited, some participants suggested that adding the client as a named recipient of the third-party opinion may help to articulate the limits of the engagement. Other participants felt this approach was somewhat unusual and perhaps confusing. While Section 19 of the Restatement permits a lawyer to limit the scope of his or her duties with the informed consent of the client, there was a general consensus that it would be preferable to establish those limitations through a signed engagement letter whenever possible.

Finally, the participants considered whether and how limitations on fees might relate to the appropriateness of limitations in opinions to third parties and clients or to limitations on the scope of an engagement. The consensus was that fee limitations might be one factor to be considered in assessing the reasonableness of a proposed limitation of duty. Noting the general requirements of reasonableness of, and informed consent to, limitations on lawyers’ duties, several participants indicated they would likely alert their clients to irregularities that came to their attention, even if outside the intended or agreed-upon scope of their representation or fee arrangement. It was generally agreed that the brevity or comprehensiveness of any scope limitation, or of any disclosure of irregularities, should vary with the nature of the issue and the sophistication of the client’s representative(s) with whom such limitations or irregularities are discussed.

**PANEL SESSIONS II:**

1. **Venture Capital Legal Opinions**

   *Editor’s Note: This panel session was chaired by Rick Frasch and included Julie Allen of Proskauer Rose LLP and Mike Kendall of Goodwin Procter LLP. The substance of this presentation was in large part included in a program on venture capital legal opinions presented at the fall meeting of the ABA’s Section of Business Law. That program is reported on in this issue of the Newsletter under “Fall Meeting of the ABA Section of Business Law – Program on Venture Capital Legal Opinions,” and accordingly a report on this breakout session is not presented here.*

(Summarized by Stanley Keller)

*Barry J. Bendes, Edwards Angell Palmer & Dodge LLP, New York, Co-Chair*

*Richard R. Howe, Sullivan & Cromwell LLP, New York, Co-Chair*

New York has enacted new power of attorney legislation that applies to every power of attorney executed in New York by an individual after September 1, 2009.¹ The new law covers powers of attorney executed in New York, and certain of its provisions may apply to powers imbedded in documents governed by New York law. The new law does recognize as valid a power of attorney executed in another jurisdiction that is effective under that law.

In order to be valid under the new legislation, a power of attorney executed by an individual in New York must be acknowledged before a notary public and must contain a prescribed statement to the principal and a notice to the agent. Particularly problematic is that, unless specifically provided otherwise, execution of a power of attorney revokes all prior powers of attorney executed by the individual. The legislation contains no exceptions for powers executed in routine commercial and business transactions, such as powers executed to permit real estate agents, stock brokers or insurance brokers to act for individuals or banks to act for individual borrowers in commercial transactions.

The panelists described additional examples of the use of powers of attorney in commercial transactions that could be affected by the new law, such as stock powers and proxies. They also described actions that are being taken to address the new law, such as removing powers of attorney from operative documents and having separate powers and executing documents outside New York. They also discussed a draft of corrective legislation that has been circulated among various groups for comment. It is unlikely, however, that any technical corrections will be passed before 2010.

[Editor’s Note: For further commentary on the New York power of attorney statute, see Richard R. Howe’s report under “Recent Developments - New York’s Power of Attorney Statute” in this issue of the Newsletter.]

¹ Title 15 of Article 5 of the General Obligations Law, Section 5-1501 et seq.
3. Bar Opinion Report Developments

(Summarized by John B. Power)

John B. Power, O'Melveny & Myers, LLP, Los Angeles, Moderator
Sharon A. Kroupa, Venable LLP, Baltimore
Philip B. Schwartz, Akerman Senterfitt, Miami

Opening this panel, John Power described the status of bar reports as of September 30, 2009, as reflected in the chart below. Fewer bar reports were pending then than a year earlier, in part because several reports had been published and only one new pending report had been added. Ten reports were pending in the fall of 2008, of which four were reports of the American Bar Association and two of the TriBar Opinion Committee. At the time of the October 2008 WGLO seminar thirteen reports were pending, including the same ABA and TriBar reports. A total of 22 reports were pending or had recently been published in 2008, in contrast to 25 in September 2009.

Sharon Kroupa reported on the 2009 amendments to the Maryland 2007 Report on Lawyers’ Opinions in Business Transactions. She stressed the three most significant changes: The amendments (1) change Maryland’s position that the “duly issued” opinion does not cover compliance with preemptive rights to a position that the duly issued opinion cannot be given if the company’s charter or bylaws explicitly restrict the issuance of stock that violates preemptive rights, (2) delete from the expression of an assumption in illustrative opinion letters the words “and to our knowledge there are no facts inconsistent with,” so as to avoid any implied negative assurance, and (3) adopt the position that the Maryland report reflects customary practice in Maryland, in place of the position that the report is incorporated, whether or not so specified, into any opinion letter covering Maryland law.

Phil Schwartz reported that Florida hoped to have its comprehensive report completed by the end of 2009. He reported that the current draft included language close to the original “incorporation by reference” formulation in the Maryland report. That observation gave rise to a lively discussion of incorporation of state and local reports into opinions, with participation by the panel and several members of the audience. Phil also commented briefly on the Florida report’s likely approach to the remedies opinion, which may be at variance with that in reports from a number of other bar groups.
Recent and Pending Bar Reports on Legal Opinions

As of September 30, 2009

Recently Published Reports:

ABA 2007 No Registration Opinions - Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities
2009 Effect of Fin. 48 - Committee on Audit Responses
2009 Negative Assurance - Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities
Arizona 2004 Comprehensive Report
California 2007 Remedies Opinion Report Update
2007 Comprehensive Report Update
2009 Venture Capital Opinions
Maryland 2007 Comprehensive Report Update
Michigan 2009 Statement
New York 2009 Substantive Consolidation - Association of the Bar of the City of New York
North Carolina 2009 Supplement to Comprehensive Report
Pennsylvania 2007 Update
Texas 2009 Supplement to Comprehensive Report

TriBar 2008 Preferred Stock
Multiple Bar Associations 2008 Customary Practice Statement

Pending Reports:

ABA Outbound Cross-Border Opinions - Committee on Legal Opinions
Survey of Office Practices Update - Committee on Legal Opinions
Diligence Memoranda – Task Force on Diligence Memoranda
Sample Opinions - Committee on Mergers and Acquisitions
California Sample Opinion
Florida Comprehensive Report Update
South Carolina Comprehensive Report
Texas Comprehensive Report Update
TriBar Transfers of Securities
LLC Membership Interests

2 Available (or soon to be available) in the Legal Opinion Resource Center on the home site of the ABA Legal Opinions Committee: http://www.abanet.org/buslaw/home.html.
4. **Discussion of Case Law Developments**

[Editor’s Note: Pam Holleman’s summary of the discussion of recent developments in the bankruptcy case of General Growth Properties regarding special purpose entities is included in this issue of the Newsletter under “Recent Developments - General Growth Properties.”]

5. **Bond Counsel and Other Public Finance Opinions**

(Summarized by Stanley Keller and E. Carolan Berkley)

Robert D. Pannell, Atlanta, Chair  
Steven K. Hazen, Los Angeles  
Allen K. Robertson, Robinson, Bradshaw and Hinson, P.A., Charlotte

The panel discussed the customary practice of bond counsel in giving opinions in public finance transactions, focusing on the differences and increasing similarities with traditional third-party opinion practice in commercial transactions.

Opinion practice in the public finance sector has been influenced by a series of opinion reports issued by the National Association of Bond Lawyers (“NABL”) beginning in the early 1980s, with the fourth and current report having been issued in 2003. This latest report moves public finance opinion practice closer to traditional opinion practice and cites various sources of customary practice applicable to traditional opinion practice.

Nevertheless, there are some differences in practice arising from historical foundations and the purpose of bond opinions, especially those relating to general obligation bonds. For example, opinions on general obligation bonds tend to be conclusory, going right to the validity of the obligation without spelling out the various predicates needed to reach that conclusion. On the other hand, opinions on revenue bonds and conduit financings tend to be more like traditional commercial opinions. Also, in public finance parlance an “unqualified” opinion, which is the market standard, is an opinion without reasoning. This contrasts with traditional third-party opinion practice, in which a reasoned opinion can be either qualified or unqualified. Another difference is that bond counsel proceeds on the basis that the world can rely on the opinion. This stems from the original purpose of bond opinions: to make governmental obligations marketable instruments, with the opinion often printed on the bond itself.

The purpose of providing an approving opinion of bond counsel to increase the marketability of government bonds also led to the need for a high degree of certainty in order to deliver the opinion. The early NABL reports explained the standard as bond counsel having to be convinced that a court could not reasonably conclude otherwise. This standard was rephrased in the 2003 NABL report as the opinion giver being “firmly convinced” that the highest court of the applicable jurisdiction would reach the legal conclusions stated in the opinion. The report equated this standard to the “high degree of confidence” standard it considered applicable to opinions in traditional commercial transactions. Thus, the emphasis of the 2003 NABL report is on convergence of opinion practices.
6. The Release of Diligence Reports to Third Parties

(Summarized by John B. Power)

Joel I. Greenberg, Kaye Scholer LLP, New York
James J. Rosenhauer, Hogan & Hartson LLP, Washington, D.C.

This panel discussed a report currently in preparation by an ABA Section of Business Law task force, chaired by Jim Rosenhauer, on the delivery of counsel’s “diligence” memoranda to a third party. This situation arises when counsel is requested by its client to prepare a report about a proposed acquisition target and is then asked by the client to deliver the report to a third party, for example a financer of the acquisition. In the U.K. and some other parts of Europe a practice has arisen of delivering such reports to third parties and permitting the third parties to rely on them (although often with disclaimers of or caps on liability, which are permissible there).

In the United States, lawyers are reluctant to permit such reliance. The principal concern arises out of potential liability to the third party. Among several reasons for this concern are: (1) uncertainty as to the bases for liability or the standard of care that would be claimed by the third party if it seeks recovery on the report, (2) issues regarding the report’s scope, which may be suitable for the client but not necessarily the third party, (3) the effect on potential liability of the necessity to excise materials to preserve the attorney-client privilege, (4) the tendency for clients to urge low fees and tight time schedules for this work, when measured against the potential for liability to the third party, and (5) the potential costs of defending an action based on the report.

The task force report will indicate that, although U.S. firms are increasingly receiving requests to deliver such “diligence reports” to third parties, they regularly refuse to permit third parties to rely on them. Some U.S. firms will deliver copies of the reports to a third party only when the third party confirms in writing that it will not rely on them. The report will provide sample language to use in a “diligence report” to the effect that no third party should rely on it and the reasons why. The report also will provide a sample non-reliance letter for signature by the third party. The non-reliance letter covers various issues, including (1) the limited client purpose for which the report was prepared, (2) the possible existence of redactions (for attorney-client privilege reasons), (3) the limited use of the report by the third party, (4) confidentiality, and (5) the absence of an attorney-client relationship between the preparing counsel and the third party.
CONCURRENT BREAKOUT SESSIONS II:

1. **Opinion Compromises – Finding Compromise in Common Understanding**

(Summarized by Timothy G. Hoxie)

*Timothy G. Hoxie, Jones Day, San Francisco, Co-Chair*
*A. Sidney Holderness, Jr., Andrews Kurth LLP, Houston, Co-Chair*
*Louis G. Hering, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Reporter*

This breakout session explored the hypothesis that opinion compromises are grounded in common understandings about the proper reasons for requesting opinions, and in commonly accepted norms regarding the form and manner of giving opinions. Subject to further discussion, participants agreed that proper reasons for requesting opinions include satisfying a legitimate due diligence need, understanding the applicability of laws with which the opinion recipient is not familiar, and ensuring that the other party and its counsel share a common understanding of the transaction and its legal effects. Participants agreed that the form and manner of giving opinions depend on such principles and recurring concerns as the golden rule, the need to reduce transaction costs, and the need to access the expertise of the opinion giver.

The session then turned to several commonly requested opinions and how common understandings and norms help determine the appropriateness of these requests. Examples included opinions on status, power, authorization and enforceability. The discussion emphasized the relevance of context to determining the appropriateness of opinion requests. For example, a domestic U.S. transaction may call for an enforceability opinion in a situation where, if the same opinion were requested of U.S. counsel by a non-U.S. recipient in a cross-border transaction, it might be inappropriate, (for example, to request an “as if” enforceability opinion where the agreement chooses non-U.S. law).

The session concluded with a lively debate about the appropriateness of giving opinions on “outbound choice of law.” While some (including the discussion leaders) posited that such opinions were becoming more common in states that follow the Restatement approach, the view was expressed that, given recent judicial decisions declining to enforce choice-of-law clauses in contexts where the court held that the choice violated a fundamental policy of the state whose law would apply in the absence of a choice of law provision (often the forum state), such opinions involve a high degree of risk, at least where they are given without taking an exception for fundamental policy. However, since the state whose law would apply is often also the state whose law is covered by the opinion, there is often resistance by recipients to a fundamental policy exception. The result of this tension could well be that such opinions will be given less frequently.
2. “Houston, We’ve Had a Problem” (Or, “A Paragraph Was Dropped Out of Our Opinion”): Ethics Implications of Mistakes

(Summarized by William Freivogel)

William Freivogel, Chicago, Chair
James A. Smith, Foley Hoag LLP, Boston, Reporter

This breakout session discussed the legal and practical aspects of a law firm’s response to learning that it might have made an error in an opinion. The legal aspects include the ethics rules on keeping a client informed as well as the attorney-client privilege rules for law firm internal communications.

ABA Model Rule 1.4 requires a lawyer to keep the client informed of things the client needs to know to make decisions about the subject of the representation. All agreed that making a significant mistake in an opinion is something the law firm must tell the client – at some point. There was discussion about the timing of such a disclosure.

As to privilege, the group discussed recent decisions holding that communications among firm lawyers about a possible mistake are not privileged if the firm continues to represent the client at the time of the communications.

A major focus of the discussion was a proposed one-page “how-to” directive to be given to all lawyers who prepare legal opinions. The one admonition that all participants seemed to accept was that all initial communications within a law firm about a potential opinion mistake ought to be oral.

3. Internal Opinion Standards

(Summarized by Philip B. Schwartz)

Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Chair
Philip B. Schwartz, Akerman Senterfitt, Miami, Reporter

This breakout session focused on policies and procedures that law firms employ in determining what opinions to give and to accept. It focused on the practical rather than the theoretical, with a goal of seeking constructive input from participants as to how opinion practices actually work at their law firms. To encourage frank discussion, the breakout session was operated on a "no attribution" basis.

As a starting point, it was clear from the discussion that firm history and culture often drive the policies and procedures that a particular firm follows in its opinion practices. Many firms approach the same issues in different ways, and most participants expressed the view that there is no overriding right way or wrong way for a firm to handle its opinion practices. At the same time, many of the policies and procedures that are followed at various firms are similar, and these common themes were evident from the discussion. Further, several breakout session
participants reported that firm history and culture can sometimes get in the way of a firm developing better opinion giving and opinion receiving practices.

It was also very clear from the discussion that many firms today have an opinion committee. However, the role of the committee in connection with a particular firm’s opinion practices and policies, and the size of the committee, are different from firm to firm. While many firms have large opinion committees that include partners from all or most of the firm's offices and practice groups, other firms have smaller opinion committees. Some of the key points made during the discussion on the subject of opinion committees included:

(i) There appears to be differences in how firms try to reach a balance between the functionality of the opinion committee on the one hand (availability of a sufficient number of committee members to allow for timely reviews of firm opinions) vs. the ability of each member of a large opinion committee to be well versed in customary opinion practice and to perform consistent, high quality reviews of proposed firm opinions;

(ii) While it appears that many firms are moving to a structure which requires that opinions to be issued by the firm must be approved by a member of the firm's opinion committee, there are many other firms that appear not to be moving in that direction. Representatives of firms which have moved in that direction expressed the view that risk management (particularly in firms that have grown laterally outside their home base) and a desire for more consistent firm opinion practices drove this change. Other breakout session participants expressed the view that for their firms, this type of requirement is unnecessary, unworkable or both. Lawyers on both sides of this issue expressed concerns, however, about risks associated with forum shopping for a reviewing partner; and

(iii) Few firms appear to have formal policies that cover opinion practices in representing recipients of opinions, relying generally on the "golden rule" of opinion practice, although many participants suggested that their firms might consider the development of more formal opinion receiving policies.

It also appears that many firms struggle with finding an appropriate balance between the risk management aspects of the opinion review process, the role of an opinion committee in that process, and the cost/benefit of that process. Some of the discussion points raised included whether the reviewing partner needs to be independent of the deal or the client, the scope of the review of the opinion that is required to be undertaken, the need to have discussions about the opinion with the primary transaction partners earlier in the deal to determine what issues, if any, may be problematic with respect to the particular opinion or deal (getting to the heart of the real deal to determine whether any "red flags" exist that raise issues about the particular opinion or deal), and whether specialized expertise needs to be brought in to review a particular issue in a particular opinion (such as a bankruptcy lawyer's involvement in a true sale and non-substantive consolidation opinion). There was also a view expressed that no opinion review process may be effective to stop the rogue partner from issuing an opinion on behalf of the firm. Finally, there was a view expressed that an opinion committee review process might be helpful in providing cover for attorneys who see issues with a deal or an opinion that is being overseen by an
important partner at the firm and who might otherwise be reluctant to bring those issues to the firm's management for consideration (where the opinions committee becomes a shield).

With respect to the role of the opinion review in the context of a firm's risk management process, different firms appear to handle things in different ways. In firms that require an opinion committee member's review of each outbound opinion, there appeared to be a consensus that the opinion review process is often one of the processes used by the firm for risk management. However, others expressed the view that when a firm handles risk management through its practice groups or a separate risk management committee, the opinion review process may be less important for risk management. Again, it was clear that all of this remains firm specific (generally based on the history and culture of the firm).

One of the other issues that was discussed at the breakout session was whether firms should be auditing opinion files to assess compliance with firm opinion policies (does the firm have a "file and forget" policy or does the firm assess compliance in a manner that is similar to how it assesses compliance with other firm policies). It appears that few firms audit their opinion files, although there was a consensus that doing so would probably be instructive. There was also a discussion on how opinion committees can get better information about what opinions are being rendered by the firm (other than requiring firm lawyers to self report). One suggestion was a check-off box in a new matter approval form that would alert the opinion committee to follow up with the partners handling the transaction. Another was delivery of an e-mail from the firm's file management personnel when files are opened for new transactions asking the partner who opened the file if an opinion will be delivered in connection with the transaction.

Another focus of opinion committees in many firms is the education of firm lawyers about opinion issues. There appears to be a consensus that the education of firm lawyers at different levels about opinion practice is necessary. There was a discussion in that regard about the challenges of educating opinion committee members about customary practice and about handling the opinion review process in a meaningful fashion.

Further, there was a discussion about firm opinion forms and firm opinion manuals. Again, how firms are handling this appears to be very firm specific, with some firms requiring the use of prescribed forms of opinions, other firms giving firm partners different choices of firm opinions (often in some type of formal or informal manual) or recommended language, and some firms having no form opinions, but rather checklists to be followed by firm attorneys in rendering opinions. There was also discussion about whether firms require back-up materials supporting the opinion to be retained (all said they require this) or backup supporting memoranda (some said they require this).

Finally, there was a consensus that a future session at WGLO on the opinion review process and on the education of opinion committee members about the opinion review process would be beneficial.
PANEL SESSIONS III:

1. **Criminalization of Tax and Other Legal Practice: Cautions for Opinion Givers**

(Summarized by Susan Cooper Philpot)

*Henry P. Bubel, Patterson Belknap Webb & Tyler LLP, New York, Co-Chair  
Stanley Keller, Edwards Angell Palmer & Dodge LLP, Boston, Co-Chair*

The presenters of this panel session discussed the potential for criminal penalties arising from legal opinions, particularly on tax matters. In the last few years, government authorities have brought a substantial number of criminal prosecutions against attorneys for giving inappropriate legal opinions. The largest volume of prosecutions has occurred in the tax field, but the criminal charges put forward in the indictments typically include not only tax crimes but also general anti-fraud statutes applicable to all practitioners. Many if not most, of these tax opinions are not third-party opinions, but rather are opinions to the opinion giver’s client. Recently securities lawyers as well have been named in criminal indictments and SEC enforcement proceedings as a result of legal opinions they have given.

In reviewing the numerous criminal tax cases, it is difficult to explain when everyday opinions cross the line and become a basis for criminal liability. For the most part, the opinions were given by major law firms and national accounting firms, which presumably had both knowledgeable attorneys and firm internal opinion policies and procedures. Nor were these cases of attorneys becoming too closely identified with an unworthy client; typically the actual tax evaders — taxpayers who relied upon the objectionable opinions and in fact failed to pay the required taxes — were never charged with any crime. Moreover, some tax practitioners who have studied these criminal cases believe that the degree of aggressiveness in the tax positions taken in the opinions is no greater than that underlying tax opinions given by a broad array of tax lawyers in the ordinary course of their practice.

So what characterizes the opinions involved in these criminal cases and distinguishes them from run-of-the-mill opinions? Many were opinions on designed products seeking a transaction rather than ordinary transactions characterized by unique facts and circumstances. Many involved facts that resulted from the attorney coaching the client as to what facts and purposes were needed to secure the desired tax position, rather than facts and purposes that existed prior to the coaching. Many involved the issuance of identical opinions on cookie-cutter transactions for large numbers of clients. Notwithstanding the carefully crafted legal analysis, many of these opinions came to conclusions that were simply “too good to be true” and involved excessive fees to the opinion giver. Many of the opinions were “sold” with questionable marketing materials. Many of the opinion givers clearly had taken care to reduce the likelihood that the transaction would be found on audit by the relevant authorities. Finally, public wrath after the fact may have caused the government to search for someone to take the responsibility/blame for an untenable situation.
The lessons to take away from these cases are that the opinion giver needs to be scrupulous that the facts opined on are the true facts; that the opinion is being given in response to a genuine business/client need; that substantively the opinion is reasonable in relation to the law; and that the larger context in which the opinion is given meets the basic “smell test.”