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Chair’s Letter

Dear Committee Members:

Committee Leadership

This is a time of healthy transitions for our Committee. At the end of the Section of Business Law’s annual meeting in August, Stan Keller will succeed me as Committee chair. He is an outstanding bar leader, having held many leadership positions in the ABA Section of Business Law and elsewhere. In particular he has a long history of cutting edge work in the legal opinions field. The impact of his acute intelligence, experience and collegiality will take our Committee to a new level.

ABA 2010 Annual Meeting

We are rapidly approaching that meeting in beautiful San Francisco, and I hope you will attend. In particular, please attend our Committee activities on Sunday, August 8.

Committee Meeting

At our Committee meeting, we will hear and discuss updates on our cross-border opinions report, our survey of law office opinion practices, our task force on opinions to federal government agencies, and other recent developments. I will shortly send a draft agenda out on the listserve, and welcome suggestions for agenda items. If you are unable to attend in person, please participate by telephone (I’ll send out dial-in information on the listserve when it is available).

Programs

On the same day, Sunday, August 8, panelists Jim Rosenhauer, Jerry Hyman, Stan Keller, Morris Hirsch and Sylvia Chin will try to answer the age old question, by Californians and others: “Why Are We Asked to Give These Opinions?” Our Committee is also co-sponsoring, with the Real Property Section on that day, an important program entitled “Legal Opinions for Federal Agencies: Does Customary Opinion Practice Matter?” which will include discussion of the work of our task force on that topic.

Reception

You are also cordially invited to our fifth Committee reception at 5:30 p.m. that same evening. Invitees include all Committee members, participants in the Working Group on Legal Opinions, TriBar Opinion Committee members, and members of other state and local bar opinion committees. The reception is generously hosted by Sheppard Mullin Richter & Hampton LLP, represented by Ken Carl. Our sincere thanks to Ken and his firm for making this event possible.

For more information on the times and locations of all these events, see “Future Meetings” below.

Committee Spring Meeting in Denver

At our Committee meeting in Denver, summarized by Rick Frasch below under “Spring Meeting of the ABA Section of Business Law,” we had lively discussions and valuable reports. Importantly the Committee approved its survey of office opinion practices. We had an excellent program on two pending TriBar reports, covering opinions on secondary sales and on issuance of LLC membership interests, with Steve Weise, Jim Leyden, Sandra Rocks, Don Glazer, and Elisa Maas. See the discussion of these reports
in our April 2010 issue. And we had another successful Committee reception generously hosted by Burns, Figa & Will, P.C., represented by Herrick Lidstone.

**WGLO’s Spring Meeting and National Customary Practice Project**

At the meeting of the Working Group on Legal Opinions Steering Committee in conjunction with WGLO’s spring 2010 meeting, it was agreed that our Committee and WGLO will work together on a project involving all interested bar groups to identify and describe national customary practice. Plans are in development, and we will have a report on this project at our San Francisco meeting.

As has been our custom, this issue summarizes WGLO’s spring meeting, including its semi-annual seminar. There is much to learn from the array of seminars and breakout sessions, which are summarized in the addendum included with this issue.

**Survey of Office Opinion Practices**

By the time of the San Francisco meeting we will have launched our Committee survey. Over 300 law firms across the country have signed up to respond. If you have not, please let Rick Frasch know at rnfrasch@gmail.com; it may not be too late. We will talk about the survey at our meeting, but it will be too early to report results.

**Section Advisor: Jerome Hyman**

The term of Jerry Hyman as advisor to the Section of Business Law and our Committee will end at the August meeting. I have mentioned in several issues of this newsletter the huge contribution Jerry has made during his two-year term. Suffice it to say here that Jerry has actively participated in every aspect of the Committee’s work, has attended every meeting of the Committee and almost every meeting of its substantive subcommittees, has provided important input on each of our substantive projects, and has given extensive and always sound advice to me as Chair. Thank you Jerry! Please continue your engagement with our Committee.

**Newsletter: Martin Brinkley**

This is the last issue in which Martin Brinkley will serve as an editor - at least for now. It was recently announced that Martin has been elected President-Elect of the North Carolina Bar Association. Unfortunately, he feels that the responsibilities of that position and of the Presidency that follows will preclude him from editing our newsletter.* I tried to explain to Martin that he should give up his North Carolina bar activities in favor of working on our newsletter, but he politely demurred. We wish him well, and hope that he will return to active Legal Opinions Committee involvement in a couple of years.

The newsletter has become a marquee service of our Committee. Thank you, Martin. And thanks to both Martin and Jim Fotenos for producing this fine issue.

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* Martin first edited the October 2007 issue, and he has had editorial responsibility ever since. In February 2009, we formed a Newsletter subcommittee with Martin as Chair and Jim Fotenos (an active contributor to the newsletter) as vice chair. Thereafter they shared editorial responsibility, alternating lead responsibility with each issue. This spring, at Martin’s request, Jim became the chair of the subcommittee and Martin the vice chair. Martin actively continued his editorial role through the completion of this issue, as to which he was the primary editor of the addendum summarizing the spring WGLO seminar.
My term expires at the end of the August Annual Meeting, so this is my Chair’s Letter swan song. It has been a busy and fun three years, and it has been a privilege working with so many of you.

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

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**A Tribute**

This is a tribute to John Power to acknowledge his extraordinary leadership of the Legal Opinions Committee as he reaches the end of his three-year tenure as its Chair. Under John’s leadership, the Committee has thrived operationally as an organization and substantively as a national and international leader of the legal opinion world. Let me list some of the particulars.

First, operational matters:

- During John’s tenure, the Committee’s membership has grown more than 50% from 800 members to over 1200 members. This is no accident but rather is attributable to John’s hard work, creativity and leadership skills (and good sense in appointing Ana Mills as the Committee’s membership chair).

- John has developed, expanded and organized the Committee’s leadership, and created opportunities for more members and new people to be involved.

- With John’s direct involvement, the Committee’s newsletter has become a regular and authoritative source of information about current developments in the legal opinion world and related areas.

- Our Committee’s website has been revitalized and the listserv has become an active source for the timely exchange of valuable information. The Legal Opinion Resource Center, which can be accessed from the Committee’s website, has been kept current as the most valuable and convenient resource for locating opinion materials. Also, the Collected ABA and TriBar Reports publication was reissued in its updated 2009 version.

- John has been instrumental in reaching out and coordinating with other groups, such as the Working Group on Legal Opinions and state bar groups, so that the ABA remains central in the development of a national opinion practice.

- Last for this part of the list, but not least, John has been responsible, with help from Gail Merel, sponsoring law firms and others, in establishing the wonderful Committee social tradition of a Legal Opinion Committee reception at Section meetings.

Next, substantive matters:

- Under John’s leadership a breakthrough report on Outbound Cross Border Opinions is well along and should be completed soon. The report analyzes this area in a way that has not been done before and with a depth of information that will prove invaluable.
• John (along with his predecessor Carolan Berkley) led the way for the Committee to be one of the lead sponsors of the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, published in the August 2008 issue of *The Business Lawyer* (63 Bus. Law. 1277), for which Steve Weise served as primary draftsperson.

• An expanded Law Firm Opinion Process Survey developed under John’s leadership is in the process of being distributed to over 300 law firms that have volunteered to participate. It will provide important information that will assist law firms by informing their opinion processes and risk mitigation efforts.

• John has led the Committee’s efforts in participating in the Section’s task force on diligence reports. The task force’s report, which is being finalized, is helping to set appropriate standards in this emerging area.

• Prompted by the demands of the TARP program, John formed a task force on opinions to federal agencies, which has been collecting useful information.

• Finally, John saw to it that almost all the Section meetings included one or more informative programs sponsored by the Committee on legal opinion matters.

These are an account of some of John’s accomplishments as Chair. It does not do justice to the most important aspects of John’s leadership – his great wisdom, his sound judgment, his commitment to the success of the Committee and the development of legal opinion practice, and his warmth and friendship that so many of us were privileged to share. Succeeding John as Chair of the Committee will be a daunting challenge, but one I look forward to.

- Stanley Keller
  Edwards Angell Palmer & Dodge LLP
  stanley.keller@eapdlaw.com
Future Meetings

ABA Section of Business Law Annual Meeting
Fairmont Hotel, 950 Mason Street
San Francisco
August 5-10, 2010

Committee on Legal Opinions

Sunday, August 8, 2010

- Program: “Why Are We Asked to Give These Opinions?” 8:00 a.m. – 10:00 a.m., French Room, Lobby Level, Fairmont Hotel. Chair: James J. Rosenhauer.

- Committee Meeting. 10:30 a.m. – 12:30 p.m. Empire Room, Lobby Level, Fairmont Hotel.

- Program: "Legal Opinions for Federal Agencies: Does Customary Opinion Practice Matter?" 3:45 - 5:15 p.m. CLE Center, Moscone Center West.

- Legal Opinions Committee Reception hosted by Sheppard Mullin Richter & Hampton LLP., 5:30 – 7:00 p.m. Loggia Room, Lobby Level, Fairmont Hotel

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

Sunday, August 8, 2010

- Subcommittee Meeting: 4:30 – 5:30 p.m. Crystal Room, Lobby Level, Fairmont Hotel.

Committee on Audit Responses

Sunday, August 8, 2010

- Committee Meeting. 1:30 – 2:30 a.m. Grand Ballroom Lounge, Grand Ballroom Level, Fairmont Hotel.

Working Group on Legal Opinions

New York, New York
October 19, 2010

October 18, 2010

Related Meetings of the Steering Committee, Association Advisory Board and Law Firm Advisory Board
**Spring Meeting of the ABA Section of Business Law**

The spring meeting of the Section of Business Law was held in Denver on April 22-24, 2010. Following are reports on the meeting.

**Meeting of the Committee on Legal Opinions**

The Committee met on April 23, 2010. The agenda included discussions of pending Committee projects, recent opinion programs, a new bar report, and a recent case development.

After introductory remarks, Chair John Power turned to the first substantive matter before the Committee: a discussion led by Arthur Cohen on the status of the Survey of Office Opinion Practices. Arthur began with a recital of the history of the 2½ year-old drafting project. The current project is an update of a survey originally done in 2002, but in an expanded format. The most recent draft of the survey was distributed to the members of the Committee prior to the meeting. Arthur summarized the scope of the survey and asked for comments from Committee members. Various concerns were raised:

- What were the procedures to be utilized to protect the confidentiality of the responses?
- Would the responses in whatever form be subject to subpoena by litigants?
- Would physical copies of the questionnaires (to the extent that responses were not provided in electronic form) be kept?
- Should responses be provided on behalf of the various law firms or only on behalf of individuals in the firms who complete the surveys?
- The survey should be clearer as to the purposes for which the survey is being circulated.
- The drafting committee should clarify the questions concerning choice of law opinions (these questions were subsequently dropped from the survey).

After extensive discussion, the Chair asked for a vote by Committee members to authorize the distribution of the survey (subject to minor changes by the drafting committee to the survey form for clarity and improved form) for completion by lawyers both inside and outside of the Committee. No objection being raised by the members, the Chair requested that the drafting committee proceed to finalize and distribute the survey.

The next item was a report by Andy Kaufman of the Task Force on Legal Opinions to Federal Governmental Agencies. Andy updated the Committee on the various projects undertaken by the task
force. Among other things, the task force is working with the Real Property, Trusts and Estate Law Section’s Opinions Committee to host a joint program at the Annual Meeting in San Francisco.

The next item was a report by Ettore Santucci on the Report on Cross-Border Opinions. A draft of the section of the Report addressing international arbitration in cross-border transactions had been distributed prior to the meeting. Ettore gave an update on the status of sections of the Report dealing with enforceability opinions on agreements, enforceability opinions on choice of foreign law provisions, and enforceability opinions on choice of foreign forum provisions. An extensive discussion ensued concerning the enforcement of foreign arbitral awards under the New York Convention (a treaty) and the Federal Arbitration Act. Issues discussed included whether an email could satisfy the requirement under federal law that an arbitration agreement must be in writing in order to be enforceable. After the Committee meeting, a special drafting session was to be held on the section of the Report dealing with opinions on the enforceability of choice of foreign forum provisions.

Two Committee members reported on recent developments of general interest. First, Phil Schwartz of the Florida Business Law Section presented a summary of the recently released exposure draft of the Florida Report on Opinions. Afterwards, a brief discussion ensued with comments from Committee members concerning certain opinion issues arising under the Florida Report. Second, Tom Thompson of the Business Law Section’s Mergers and Acquisitions Committee briefed the Committee members on the drafting of standard form acquisition opinions by the M&A Committee to accompany a newly revised Model Stock Purchase Agreement. The M&A Committee had sought input from the Opinion Committee on the model acquisition opinions and a task force had been appointed by the Chair to provide comments. The model acquisition opinions should be published by the summer of 2010.

- Richard N. Frasch
rmfrasch@aol.com

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

The Subcommittee met on April 23, 2010. The principal topic discussed at the meeting was the proposed update to the report by the Task Force on Securities Law Opinions (a joint effort by the Committee on Legal Opinions and the Subcommittee) on “Legal Opinions in SEC Filings” for developments since the report was published in 2004. An initial draft of the updated report was distributed in advance of the meeting. The principal modifications to the report relate to securities offering reform, shareholder rights plans (poison pills), and other “shelf” offering opinion issues.

The Subcommittee was fortunate to have Tom Kim, Chief Counsel and Associate Director, of the SEC’s Division of Corporation Finance, join its meeting. At the beginning of the meeting, Mr. Kim stated that any comments he made were his own views and not necessarily those of the SEC or the SEC Staff. Although he had not seen the draft updated report and did not comment on it, Tom generally was supportive of efforts to improve the efficiency of the Staff’s review of Exhibit 5 opinions. He indicated that the Staff had commenced its own review of Exhibit 5 opinions, and that Larry Hamermesh, a Delaware corporate lawyer and law professor, was leading the Staff’s efforts in this regard. The Subcommittee agreed that it would be sensible to coordinate any publication of the updated report with any new Staff guidance resulting from its review.

The Subcommittee also discussed with Mr. Kim 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 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. Although Mr. Kim did not reject this idea, he suggested that he did not believe there were any significant problems with the current system and, accordingly, that modifications to the Exhibit 5 opinion regime was unlikely to be a Staff priority.

The Subcommittee also discussed the possibility of preparing a form of Exhibit 5 opinion for use in connection with initial (non-takedown) shelf filings. There was a consensus that this would be a useful undertaking for the Subcommittee.

The next meeting of the Subcommittee will be in San Francisco on August 8 or 9, 2010, at the ABA Annual Meeting.

- Andrew J. Pitts, Chair
  Cravath, Swaine & Moore LLP
  apitts@cravath.com

Committee on Audit Responses

The Audit Response Committee met on April 24, 2010. Mr. Keller, the chair, reported on the then pending petition for certiorari before the United States Supreme Court in the Textron case and on a similar case involving Dow Chemical and its auditor, Deloitte, awaiting decision in the United States Court of Appeals for the District of Columbia Circuit. These cases are discussed separately in this Newsletter under “Recent Developments.” He also reported on the IRS proposal to require certain business entities to file a schedule of uncertain tax positions. This ties in to the approach of the FASB’s Financial Interpretation Number 48 (“FIN 48”) for tax contingencies, although FIN 48 contemplates disclosure on an aggregate rather than on an individual basis. Mr. Keller noted that the IRS proposal raises concerns regarding impinging on the protections of the attorney-client privilege and work product doctrine and that the ABA would be submitting comments to the IRS.

The chair then introduced William D. Hildebrand, the Practice Fellow at the FASB with primary responsibility for the proposed revision of Financial Accounting Standard 5 (Accounting Standards Codification 450-20), and asked him to update the Committee on the status of the project. Mr. Hildebrand explained that the purpose of the revision was to improve the quality and timeliness of information, both qualitative and quantitative, regarding loss contingencies such as litigation reserves so as to enable users to understand their nature, potential timing and potential magnitude. He indicated that the Board considered the concerns raised in comment letters and roundtables regarding the original proposal and has sought to address them, emphasizing factual rather than predictive information. The Board reached some decisions at its meeting of April 14, 2010, which can be found on the FASB’s website, and these are being incorporated into a statement that is expected to be issued by the end of the second quarter of 2010, which will be subject to a 30-day comment period. The Board hopes to issue a final statement in the fall of 2010, to be effective for fiscal years ending after December 15, 2010 (i.e., the current fiscal year for calendar year companies), except that it will be effective for nonpublic entities for the first annual period beginning after December 15, 2010.
Mr. Keller noted that, although the FASB project is not aimed at changing the remote-probable threshold framework, the FASB is proposing to require disclosure of remote contingencies with the potential to have a severe impact. This could raise an issue whether the ABA Statement and the Statement on Auditing Standards 12 (together, the “treaty”) will work with a new disclosure threshold. Mr. Keller indicated that he believed the treaty would continue to work with lawyers having to take this requirement into account in advising clients on their disclosure obligations. He added that another issue under the current FASB proposal is the proposed requirement for quarterly tabulation of changes in loss contingencies, especially given the disaggregation based on types of loss contingencies being called for. The ABA will be commenting on the draft statement once it is issued.

Mr. Keller reported that in a related development the International Accounting Standards Board (“IASB”) had proposed further revisions to its proposed amendment of International Accounting Standard 37 (“IAS 37”) dealing with contingencies to address measurement issues. In an IASB staff paper, the staff has sought to clarify that there is still a two-step test and that a company has to determine that a claim is “valid” before getting into measuring it for accrual. Mr. Keller noted that unfortunately there was no guidance on how one is to determine if a claim is valid, what presumption applies and what probabilities, if any, are to be used, and that the IASB seemed to be approaching claims as either being valid or not, without appreciation for the difficulties and uncertainties. The ABA will be submitting comments to the IASB on the IAS 37 revision proposal.

The next meeting of the Committee will be on Sunday, August 8, from 1:30 to 2:30 p.m. at the ABA Annual Meeting in San Francisco.

- Stanley Keller, Chair
Edwards Angell Palmer & Dodge LLP
stanley.keller@eapdlaw.com

Spring Meeting of the Working Group on Legal Opinions

On May 11, 2010 in New York, WGLO had a well-attended and active semi-annual seminar, featuring panel discussions and breakout sessions on timely opinion practice issues. Summaries of the panel sessions and breakout groups are included as an addendum to this issue of the Newsletter.

The Steering Committee of WGLO met on May 10, 2010, and approved WGLO’s participation in the National Customary Practice project mentioned in the Chair’s Letter. Following are reports on the WGLO Association Advisory Board and Law Firm Advisory Board meetings held the same day.

Association Advisory Board

The Association Advisory Board (“AAB”) held its 6th semi-annual meeting on May 10, 2010 in conjunction with the WGLO seminar the following day. As many readers of the Newsletter are aware, the AAB consists of various state and local bar associations that conduct programs and other activities in the area of third-party closing opinions, as well as a number of affinity associations having similar activities or otherwise focusing on closing opinions.

The keynote address was given by John K. Villa, a member of the WGLO Steering Committee and a partner in the firm of Williams & Connolly LLP, whose practice includes defending law firms
against claims on third-party legal opinions. The topic of his presentation was “From the Parapets: Role of Bar Reports in Litigation.” He began by noting that, in lawsuits against lawyers and law firms, plaintiffs have come to realize that lawyers do not usually make big mistakes. So they focus on two issues: (1) whether there is a basis to assert a breach of ethical standards, for example, a conflict of interest, and (2) whether there is some other duty that can be asserted against an attorney or firm and whether that duty has been breached. The latter prong served as the springboard for a discussion of the role that bar association reports play in determining whether the duty of care has been breached. In that context, Mr. Villa expressed the view that courts will look to bar reports to provide authoritative interpretations of terms used in opinion letters, as well as the customary practice of opinion givers. While he recommended that opinion givers specifically reference applicable reports in their opinions, he stated that even without express reference, reports will be helpful to the courts’ understanding of opinion terms and practices. At the same time, he recommended that bar reports provide clear standards so opinion recipients are on notice of the intended meaning of opinions and the diligence undertaken to render opinions. The goal is to provide clear guidance in order to make it easier to resolve litigation at the motion stage and thus to avoid costly and expensive litigation.

Members of the AAB were also informed that an exposure draft of the report from the Florida Bar Association’s Business Law Section is available for review and comment. It can be obtained by going to the Florida Bar website (http://www.floridabar.org/tfb/flabarwe.nsf) and navigating through the “Sections and Divisions” link to the Business Law Section webpage. [Editor’s Note: Please see the summaries of the WGLO panel sessions touching on the Florida report: a panel on customary practice in the context of transactions in which the opinion recipient is located in a state other than the state where the opinion giver practices (page A-6), and a presentation by Phil Schwartz on other aspects of the Florida report as part of a panel on bar opinion report developments and statutory and case law updates (page A-7) in the addendum.]

John Power reported that the ABA Legal Opinions Committee is in the final stages of distributing a survey on law firm opinion practices, and sought assistance from those present in attracting broad participation in the survey.

The AAB will hold its next meeting on October 18, 2010 in conjunction with the fall seminar of the WGLO. As before, readers of this newsletter wishing to propose for membership in the AAB a state or local bar association or representatives of affinity associations should feel free to contact the undersigned at the email address indicated or the AAB Chair, Leonard Gilbert, at leonard.gilbert@hklaw.com.

Steven K. Hazen
Secretary,
Association Advisory Board
skhazen@sbcglobal.net

**Law Firm Advisory Board**

At the meeting of the WGLO Law Firm Advisory Board on May 10, Chair Reade Ryan introduced John Power, who asked participants to identify partners in their firm who would respond to the law firm opinion practices survey being prepared by the ABA Legal Opinions Committee.

Several members were asked to describe the level of debt financing activity in their cities. The reports generally described increased activity compared to 2009, but still reduced activity compared to previous years. In several markets restructurings continue to predominate. Some strong borrowers find
lenders competing for their business and can negotiate favorable terms. Project financings are picking up, often with lender “clubs.” Real estate collateral is often required for loans, but real estate, and real estate finance, continues to be weak in several markets. Securitization remains down.

Arthur Field reported that the WGLO Steering Committee has set October 18 and 19, 2010, as the dates of the next WGLO meeting. It also voted to authorize a group led by Kenneth Jacobson, Vladimir Rossman and a representative of the ABA Legal Opinions Committee to develop plans on how a statement concerning commonly agreed Customary Practice might be prepared — to see if there is a “national policy” on some issues.

Tom Thompson reported that M&A model opinions will be part of the Model Stock Purchase Agreement project, and that members of the ABA Legal Opinions Committee had played a helpful role in commenting on the draft of the opinions. He noted that the commentary to the model opinions discusses the declining use of opinions in not only public, but also private, M&A transactions, and noted that his experience in developing the model opinion confirmed that the trend toward fewer opinions seemed justified.

Arthur Field and Tom Thompson discussed whether there is any basis for questioning the appropriateness of stating that an opinion relies as to factual matters on representations and warranties in an agreement given that there is always a possibility that the parties have treated the representations and warranties as risk allocation mechanisms, rather than as attempts to state facts accurately. This presentation was intended as a preview of a possible future WGLO program.

- James J. Rosenhauer
  Secretary,
  Law Firm Advisory Board
  Hogan Lovells US LLP
  jjrosenhauer@hoganlovells.com

Notes From the Listserve

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

Since the publication of our April 2010 issue, three substantive opinion issues have been addressed by our members on the Committee’s listserve.

1. Whether a Loan Modification Constitutes a Novation

On March 23, 2010, one of our members requested the listserve’s reaction to a request for this opinion, under the law of North Carolina:
“Under the laws of [North Carolina], the [loan modification] will not constitute a novation, payment and re-borrowing or termination of the obligation set forth in the Security Documents.”

Our member understood that the purpose of the request was to provide the lender assurance that the priority of its existing lien on the real property securing the loan would not be affected by the loan modification. The member observed that under North Carolina law “various circumstances could affect whether a modification of an existing contract constitutes a novation.” The member had never seen this opinion request before and was inclined not to give it, but understood from colleagues that the request is being made with increasing frequency, given the large number of real estate loan modifications currently under way.

The six responders to this request were uniform in their view that this is an opinion that should neither be requested nor given, and that an endorsement to the policy of title insurance (if title insurance was originally obtained by the lender) is the appropriate assurance to provide to the lender. As Edward L. Wender of Venable LLP, Baltimore, Maryland, observed, “we neither give nor request such an opinion unless there is very clear authority directly on point or some statutory underpinning.” James L.S. Cobb of Wyrick Robbins Yates & Ponton, LLP, Raleigh, North Carolina, noted that novation in North Carolina is a “facts and circumstances” test without defined lines or safe harbors, and that his firm had been asked but had resisted giving this opinion, directing the lender instead to rely on its title policy.

Joining the chorus in expressing the view that this type of opinion should not be requested or given were Jon S. Cohen of Snell & Wilmer, Phoenix, Arizona, Robert W. Barron of Berger Singerman, Ft. Lauderdale, Florida, and Sterling Scott Willis of Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., New Orleans. As Scott pointed out, the opinion is a “back door attempt to obtain a security interest priority opinion.” A lender should be directed to securing an endorsement, as Brian L. Holman of Musick, Peeler & Garrett LLP, Los Angeles, observed, “to the original title policy assuring the lender that the modification will not result in loss of priority.”

[Editor’s Note: For an endorsement such as that suggested by Brian Holman, see, e.g., ALTA Form 11, “Mortgage Modification.” For a discussion of Article 9 priority opinions, see the TriBar Opinion Committee’s Special Report on U.C.C. Security Interests Opinions — Revised Article 9, 58 Bus. Law. 1449, 1477 et seq. (2003) reprinted in the Collected ABA and TriBar Opinion Reports 2009 and included in the Committee’s Opinion Resource Center, accessible on the Committee’s website.]

2. TOUSA and the Bankruptcy Exception to the Remedies Opinion

In Official Committee of Unsecured Creditors of TOUSA, Inc. v. Citicorp North America, Inc., 422 B.R. 783 (Bankr. S.D. Fla. 2009), the Bankruptcy Court avoided over $400 million of liens and co-borrower obligations on the basis that their grant constituted fraudulent conveyances under Section 548 of the Bankruptcy Code and applicable state fraudulent transfer law. In his request to the listserv of May 26, 2010, Michael F. Jones of Salt Lake City, Utah, noted that the Court ignored the “savings clauses” in the loan agreements which qualified the liens and/or obligations to an amount that would not result in a fraudulent conveyance. Mike asked whether the results in TOUSA fall within the ambit of the standard bankruptcy exception to the remedies opinion.

The answer to this question was a unanimous yes, by Sandra M. Rocks of Cleary Gottlieb Steen & Hamilton LLP, New York (a member of the TriBar Opinion Committee), Peter S. Munoz of Reed Smith LLP, San Francisco, and Edward L. Wender of Venable LLP, Baltimore. As noted by Ed, the “result in Tousa was unremarkable and that is why the standard exceptions on enforceability eliminate any fraudulent conveyance opinion.”
Joel I. Greenberg of Kaye Scholer LLP, New York, issued a note of caution with respect to the Court’s holding that the savings clauses in that case were unenforceable as a matter of New York contract law, at least where the clauses qualify more than one obligation. The Court found the clauses to be indeterminate, since they did not address how the reduction called for by the clauses should be applied to the various obligations. As noted by Joel, “it is not clear to me that the standard opinion exceptions concerning bankruptcy and fraudulent conveyance cover this part of the analysis.”

[Editor’s Note: As stated in the TriBar Report on Third-Party “Closing” Opinions, “[f]raudulent conveyance (or transfer) laws are included in the laws covered by the [bankruptcy] exception.” TriBar Report § 3.3.2, 53 Bus. Law. 591, 624 (1998). See also the summary of the WGLO panel session on “Fraudulent Transfer Savings Clause Opinions after TOUSA” at page A-2 of the addendum.]

3. General Growth Properties and Substantive Consolidation Opinions

By his request to the listserve of May 8, 2010, Thomas D. Kearns of Olshan Grundman Frome Rosenzweig & Wolosky, New York, asked for the listserve’s assessment of the impact of the General Growth Properties bankruptcy on substantive consolidation opinions. The General Growth case, and its impact on the use of special purpose entities in structured financings, was the subject of Pam Holleman’s presentation at the Fall 2009 WGLO seminar, and was summarized by Pam in the January 2010 of this newsletter, at pages 20-22. As noted by Pam, in its decision denying the lenders’ motions to dismiss the filings by General Growth’s 100 or so SPE subsidiaries as having been made in “bad faith,” 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 entities — an issue that was not before the court.”

Consistent with Pam’s observations, the response of the listserve to Tom’s inquiry was that, notwithstanding General Growth, a well-drafted non-consolidation opinion can still be given (Steven Goldberg, Saul Ewing LLP, Wilmington, Delaware; Herrick K. Lidstone, Jr., Burns, Figa & Will, P.C., Greenwood Village, Colorado (and Herrick attached to his email response of May 8, 2010 the draft of a paper he had prepared on General Growth for a seminar before the Colorado Bar Association); and Sandra Rocks. For those interested in the use of SPEs in structured financings, see Sandra’s and Steven Goldberg’s listserve dialogue in response to Tom’s inquiry on the use of a “non-economic member” of a LLC SPE in addition to or instead of an “independent” director to forestall a bankruptcy filing. See also the summary of the WGLO panel session on bar opinion report developments and statutory and case law updates for Pam Holleman’s report on the Lehman Brothers bankruptcy case, page A-8 of the addendum.

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Recent Developments

Audit Letter Responses

Textron. On May 24, 2010 the United States Supreme Court denied the petition for certiorari filed by Textron, Inc., thus leaving in place the en banc decision of the U.S. Court of Appeals for the First Circuit in United States v. Textron, Inc., 577 F.3d 21 (1st Cir. 2009). The First Circuit held that Textron’s tax workpapers, which were shared with its auditor, were prepared in the ordinary course in connection with preparing its annual financial statements and were not case preparation materials prepared “because of” or “for use in” litigation, and were therefore not subject to protection from an IRS summons under the work product doctrine.

The Supreme Court’s denial of certiorari leaves the strict First Circuit test in place, which is in conflict with tests applied in other circuits. For example, the test in the Second Circuit, applied in United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998), is whether the materials were prepared “in anticipation of” or “because of possible” litigation. This was the test previously applied by the First Circuit in Maine v. United States Dept. of Interior, 298 F.3d 60 (1st Cir. 2002). The Fifth Circuit applies a stricter test but still not as strict as the First Circuit’s test in Textron. In United States v. El Paso, 682 F.2d 530 (5th Cir. 1982), the Fifth Circuit required the prospect of litigation to be the “primary motivating factor for the preparation of the documents.”

Deloitte/Dow Chemical. In contrast to the First Circuit’s Textron decision, on June 29, 2010, the D.C. Court of Appeals upheld the District Court's decision denying the IRS access to three documents.
relating to the tax treatment of two partnerships owned by Dow Chemical that were in the possession of Dow's auditor, Deloitte. *United States v. Deloitte LLP*, 2010 WL 2572965.

Two of the documents were a memorandum prepared by a Dow in-house accountant and attorney and a tax opinion prepared by Dow's outside counsel, both of which were furnished to Deloitte in connection with the audit to verify the adequacy of the tax contingency reserve for the transactions. The Court found that these documents were attorney work product entitled to protection, as conceded by the government, and that the protection was not waived by the documents being furnished to Deloitte. This is the first Court of Appeals decision holding that disclosure to independent auditors did not waive work product protection. The Court found that the auditor was not a potential adversary or conduit to an adversary and that Dow had a reasonable expectation that Deloitte would maintain the confidentiality of the documents, relying on professional standards requiring auditors not to disclose confidential client information.

The third document was a memorandum prepared by Deloitte that summarized a meeting with Dow officials and outside counsel to discuss potential litigation over the transactions. The Court held that this memorandum could be work product protected, notwithstanding that it was prepared by the auditor, because it reflected the thoughts and opinions of counsel with respect to anticipated litigation. The Court rejected the government's argument that the memorandum could not be work product because it was prepared in connection with the annual audit, adopting the "because of" anticipated litigation test applied by most courts. It rejected the "primary motivating purpose" test of the Fifth Circuit and both distinguished the First Circuit’s *Textron* decision as based on the particular documents there at issue (ordinary tax workpapers) and rejected *Textron* to the extent that it adopted a more stringent "prepared for use in possible litigation" test as suggested by the dissent in *Textron*. Because the evidentiary record was insufficient to establish that all the information in the Deloitte memorandum was work product protected, the Court remanded to the District Court to review the memorandum in camera.

The *Deloitte/Dow Chemical* decision is also notable because the Court clearly distinguished the Supreme Court's decision in *Arthur Young* (*United States v. Arthur Young & Co.*, 465 U.S. 805 (1984)) as relating solely to whether there is accountant's work product protection and not to whether attorney work product protected information continues to be protected in the hands of an accountant. The Court noted the importance of preserving this protection because "independent auditors have significant leverage over companies" since "[a]n auditor can essentially compel disclosure by refusing to provide an unqualified opinion otherwise" and waiver under these circumstances "might discourage companies from seeking legal advice and candidly disclosing that information to independent auditors."

**Conclusion.** Until clarified by the Supreme Court in another case, there is uncertainty on the status of tax workpapers and other materials shared with auditors. At least in the First Circuit, companies share such materials with their auditors at their peril.

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**Legal Opinions**

*Fortress v. Dechert, LLP*. On June 10, 2010, Judge Ramos of the New York State Supreme Court (New York’s trial court) denied Dechert LLP’s motion to dismiss the December 2009 complaint brought against it by Fortress Credit Corp. and an affiliate. Fortress’ complaint, alleging fraud, negligent misrepresentation, legal malpractice, negligence, and breach of fiduciary duty, followed Marc Dreier’s
May 2009 plea of guilty to securities fraud, wire fraud, and money laundering, involving a scheme to sell $700 million in fictitious promissory notes. One of Dreier’s victims was Fortress, which advanced $50 million to Solow Realty under a loan agreement and related documents purportedly entered into by Solow with Fortress. Dreier forged the loan documents. Dechert rendered a closing opinion to Fortress on the loan agreement purportedly on behalf of its client, Solow Realty.

The basis for Judge Ramos’ decision to reject Dechert’s motion to dismiss was that it was premature. He characterized it as a summary judgment motion that would normally be appropriate only after discovery.

For a discussion of the allegations made by plaintiffs and the arguments advanced on the motion to dismiss, see the WGLO panel session “Need to Know the Client: Issues from the Fortress Dechert Case,” page A-14 of the addendum.

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New York Statute on Powers of Attorney

For a discussion of the current status of the proposed amendment to the New York statute on powers of attorney, see the WGLO discussion of recent developments at page A-7 of the addendum.

Bar Reports

Tennessee Bar Association’s Discussion Draft of Report on Third Party Closing Opinions

The Joint Opinion Committee of the Sections of Real Estate Law and Business Law of the Tennessee Bar Association has released a discussion draft of the Committee’s Report on Third Party Closing Opinions. The draft Report may be viewed here [CTRL + Click].* The Committee hopes to have the final Report issued by late summer. Comments should be addressed to Kenneth P. Ezell, Jr. of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., 211 Commerce Street, Nashville, Tennessee 37201, pezell@bakerdonelson.com.

The Report is inclusive, addressing opinions respecting corporations and limited liability companies; the enforceability opinion and its qualifications; opinions on real estate secured transactions; UCC security interest opinions; other commonly requested opinions; and opinion assumptions.

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 new–letter, 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.

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Next Newsletter

We expect the next newsletter to be circulated in October 2010. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eapdlaw.com) or Jim Fotenos (jfotenos@greeneradovsky.com).
Addendum

Working Group on Legal Opinions

Spring 2010 Seminar Summaries
WORKING GROUP ON LEGAL OPINIONS

SPRING 2010 SEMINAR SUMMARIES

The following summaries have been prepared to provide a general idea of the subjects covered by the panel sessions and breakout groups at the May 11, 2010 WGLO meeting in New York. The summaries were prepared in most cases by members of the audience. Breakout group reporters are preparing separate summaries for the concurrent breakout sessions that will be available in the materials at the next WGLO meeting in October.

PANEL SESSIONS I:

1. Law Firm General Counsel
   (Summarized by Steven K. Hazen)

   Philip H. Schaeffer, White & Case LLP, New York, Chair
   Patrick J. Sharkey, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Boston
   James Paul, Clifford Chance, New York

   This panel consisted of two general counsel and one risk manager of law firms actively engaged in delivering closing opinions. The panelists agreed that for opinion giving purposes, the general counsel and risk manager roles are essentially the same. In this summary, the roles are referred to as “firm counsel.”

   The panel’s initial focus was the role firm counsel normally plays in a firm’s opinion process. All three panelists participate in the process for their respective firms. Their uniform recommendation was that firm counsel should be a member or ex officio member of the firm’s opinion committee (if the firm has one), whether the person is a transactional lawyer or not. The panelists emphasized the importance to the firm of having opinion procedures, regularly publishing them internally, holding educational programs for lawyers involved in opinion preparation and review, and supervising the firm’s opinion protocols to determine whether procedures are being followed. In response to an inquiry from the floor, the panelists noted that direct monitoring or supervision of the firm’s opinion practice by firm counsel is usually impractical, while reliance on firm procedures and trust in colleagues are essential. In response to a separate question, the panel also noted that one of the most important supervisory roles of firm counsel in the opinion process is in intake of clients and transactions.

   The panelists discussed whether firm counsel should recommend that the firm maintain a central repository for opinions given by the firm and, if so, whether the repository should be electronically searchable. That led to a discussion about the value and potential drawbacks of templates and forms. The panel agreed that firms would normally be well-advised to urge caution in use of form opinions and opinions given in previous transactions. Facts or particular features of a transaction may be critical in deciding whether to give an opinion and if so in what form. Moreover, the most important facts may not be reflected in the text of the sample opinion.

   The panelists also noted that an important part of their role is trying to assure that “second partner review” selections (where the firm has such a process) are made in a way likely to ferret out sensitive or critical issues. The panelists agreed that “second partner review” procedures should not be immutable. They agreed that firm counsel may from time to time be called on to examine situations in which procedures have not been followed.
2. **Fraudulent Transfer Savings Clause Opinions After TOUSA**  
(Summarized by Kenneth J. Carl)

Richard Levin, Cravath, Swaine & Moore LLP, New York, Chair  
Donald Scott Bernstein, Davis Polk & Wardwell LLP, New York  
Hon. James M. Peck, United States Bankruptcy Court for the Southern District of New York  
Sarah M. Ward, Skadden, Arps, Slate, Meagher & Flom LLP, New York

This panel led a discussion of fraudulent transfer savings clauses in guaranties, as addressed in *In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009), and opinion issues raised by the *TOUSA* case.

Guaranties by one member of a corporate family of another family member's obligations are common in modern financing transactions. Fraudulent transfer laws create potential risk for the beneficiaries of guaranties, especially guaranties by subsidiaries of their corporate parents' (or affiliates') obligations. A transfer or obligation is avoidable as a fraudulent transfer if the transferor (a) failed to receive reasonably equivalent value for the transfer and (b) was insolvent (or rendered insolvent by the transfer), or had an unreasonably small capital at the time of (or as a result of) the transfer. There is no requirement of actual fraudulent intent.

To address the fraudulent transfer risk, many guaranties include fraudulent transfer savings clauses. These contractual devices come in a number of formulations, each attempting to limit the amount recoverable under a guaranty so that the guaranty will not constitute a fraudulent transfer. In *TOUSA*, the subsidiary guaranties had the following language:

> if such [subsidiary's] joint and several liability hereunder . . . would, but for the application of this sentence, be unenforceable under applicable law, such joint and several liability . . . shall be valid and enforceable to the maximum extent that would not cause such joint and several liability . . . to be unenforceable under applicable law, and such joint and several liability . . . shall be deemed to have been automatically amended accordingly at all relevant times . . . .

The *TOUSA* case is interesting from an opinion standpoint not because of the fraudulent transfer issues involved. If a lawyer renders a remedies opinion with respect to a guaranty, it is accepted that the opinion does not cover fraudulent transfer laws. Rather, *TOUSA* is interesting because the Florida bankruptcy judge considering the case found that the fraudulent transfer savings clauses in the guaranties under consideration were unenforceable as a matter of New York contract law. Because there were multiple guaranties (and guaranteed obligations) in *TOUSA*, the judge was particularly concerned with circularity issues in determining the amount owing under each guaranty. The judge found the terms of the fraudulent transfer savings clauses so vague and indefinite that there was no basis or standard for deciding whether they had been kept or broken, no basis for fashioning a remedy, and no means by which the terms could be made certain. 422 B.R. at 865.

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1 The TriBar 1998 Report and other opinion commentary makes clear that the bankruptcy exception removes fraudulent transfer laws from the coverage of the remedies opinion. See TriBar Opinion Committee, Third Party “Closing” Opinions, 53 Bus. Law. 591, 624 (1998). Additionally, the commentary to the 1998 TriBar Report notes that the bankruptcy qualification is “understood to be applicable to the remedies opinion even if . . . not expressly stated . . . .” Id. at 623. Other opinion commentary is in accord.
The *TOUSA* decision was rendered after a contentious 13-day trial. The panel members noted that the facts of *TOUSA* were unusual and distinguishable from “garden variety” guaranty transactions. In *TOUSA*, the original loan transaction was to a joint venture that had “gone bad.” The guarantors were not party to the joint venture but signed guaranties in connection with a subsequent financing to pay off the joint venture's lenders. Each guarantor was close to insolvency at the time it executed its guaranty. One panelist expressed the view that the bankruptcy court's comments regarding New York law were *dicta*. Another panelist noted that a bankruptcy court decision only binds the litigants, so its precedential value is limited.

Despite these distinguishing factors and *TOUSA*’s limited precedential value, the panelists noted that it might be “prudent” for an opining lawyer to take an exception when rendering a remedies opinion with respect to a guaranty containing a fraudulent transfer savings clause, unless and until *TOUSA* is overturned on appeal. Examples of such a qualification include:

( ) We express no opinion as to enforceability of the provisions contained in Section [ ] of the Guaranty [*identify savings clause*] to the extent that such provisions limit the obligation of the Guarantor under the Guaranty [or any right of contribution of any other party with respect to such Guaranty].

( ) We express no opinion as to enforceability of the provisions contained in Section [ ] of the Guaranty [*identify savings clause*] to the extent that such provisions limit the obligation of the Guarantor under the Guaranty [or any right of contribution of any other party with respect to such Guaranty] or as to the effect of any such provisions on the enforceability of the Guaranty.

*Editor’s Note: See also the listserve discussion of the *TOUSA* decision under “Notes from the Listserve” in this issue of the newsletter.*

**CONCURRENT BREAKOUT SESSIONS I:**

1. **Internal Opinion Standards (Redux)**
   (Summarized by Stephen C. Tarry)

   *Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair*
   *Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair*
   *Stephen C. Tarry, Vinson & Elkins LLP, Houston, Reporter*

   This breakout session was a continuation of a breakout session at WGLO’s Fall 2009 meeting that discussed law firm policies and procedures used to decide what opinions to give or decline to give. The session focused on various factors that influence a firm’s decisions, the dynamics that bear on the process, and how firms deal with the relevant issues.

   Andy Kaufman and Reade Ryan posed three illustrative opinion practice problems and invited participants to discuss how their firms would go about resolving them. The focus of the discussion was not on the particular firm’s answer, but on the firm’s process for addressing the problem. The co-chairs raised two questions to be highlighted in the discussion: (1) Notwithstanding firms’ different approaches, do any recommendations for internal firm procedures emerge?; and (2) Should certain “red flags” generate a different internal response or prompt heightened scrutiny?
The first illustrative problem involved a law firm that had been asked to render an opinion that a company’s new credit facility did not breach or violate the provisions of certain existing bonds and a related bond indenture. The new credit facility replaced an existing credit facility and, like the existing facility, was to be secured on a pari passu basis by the same collateral that secured the bonds. Although the bond indenture expressly permitted “Refinancing Indebtedness” to be secured by the same collateral that secures the debt being replaced or refinanced, the intercreditor agreement that allowed pari passu liens on the collateral referred specifically by name to the existing credit facility “as amended or modified from time to time.” The intercreditor agreement was silent as to replacements or refinancings of the existing credit facility. Although the lender for the new credit facility was willing to proceed even if its liens were junior to the liens securing the bonds, the lender for the new facility still required a “no breach or default” opinion as to the bonds. Participants were asked to consider whether significant additional issues would be raised if the law firm had represented the borrower in connection with the issuance of the bonds.

Participants generally agreed that regardless of the internal process a firm uses for delivering opinions (e.g., having a second partner or opinion committee member review the opinion), the attorneys working on the transaction would have to have had enough experience to recognize the problems raised by the lender’s “no breach or default” opinion request in order to enable the firm to make an informed decision about rendering the opinion. If the lawyers working on the transaction either failed to spot the issues or did not bring them to the attention of the opinion reviewer, risk management partner or other appropriate person, the risk to the firm in rendering the opinion might not be fully vetted. Once the issues have been raised with the appropriate firm decision makers or experts, most firms have some formal or informal process by which such questions may be resolved. As to the co-chairs’ factual variant in which the firm had previously represented the borrower in connection with the issuance of the bonds, participants agreed that this fact could potentially present significant additional issues. In this situation, the opinion should be subjected to heightened scrutiny.

The issues posed by the second illustrative problem related to a pro bono engagement in which a firm represented a community development organization with 25 separate subsidiaries -- one for each of the 25 states in which the CDO operated. When the CDO approached a lender for a $250,000 working capital facility, the lender required that each subsidiary guaranty the debt and that the law firm provide an opinion as to each subsidiary covering status, power, due authorization, and execution and delivery of the transaction documents. Some of the subsidiaries were organized in states in which the law firm did not have offices, and the firm had a standard policy that corporate housekeeping opinions would only be given as to entities organized in Delaware and in jurisdictions in which the firm has offices. On the second illustrative problem, participants generally agreed that the firm should have formal or informal procedures by which the attorneys working on the CDO loan transaction would be aware of firm policies about such corporate housekeeping opinions and would raise the issue with an opinion committee member or other appropriate person so that an informed decision could be made about whether to render the opinion.

The third illustrative problem was based on the Dean Foods case: a firm was asked to render an opinion to an acquirer in an M&A transaction that there was no pending or threatened litigation against or governmental investigation of the target entity. One of the firm’s litigation partners had “guesstimated” that a previous inquiry by the U.S. Attorney’s Office had gone away, and the client was adamantly opposed to any disclosure of the inquiry. Participants generally agreed that the risk management issues raised by rendering such an opinion would be significant, that the firm should have formal or informal procedures by which such opinion policy decisions could be made through an opinion committee, general counsel, risk management partner or other process, and that the firm’s attorneys should have sufficient training in order to recognize and raise the issues in an appropriate manner.
2. **IP Opinions in Corporate Transactions and Negative Assurances on IP Disclosures**  
(Summarized by Ettore A. Santucci)

Ettore A. Santucci, Goodwin Procter LLP, Boston, Chair  
Duncan A. Greenhalgh, Goodwin Procter LLP, Boston, Reporter  
Patrick O’Brien, Ropes & Gray LLP, Boston, Reporter

This breakout session started with the acknowledgment that, historically, third-party closing opinions on intellectual property matters have spanned a wide range, from knowledge-based confirmations of factual matters to technical patent opinions. There is a need for greater consistency in requests for IP opinions. Moreover, in underwritten public offerings, particularly IPOs of life science and technology companies, underwriters typically request both IP opinions and negative assurance letters from special IP counsel. Whether the latter are appropriate and the appropriate relationship between opinions and negative assurances are also important topics.

Intellectual property practice has evolved over the last decade to the point where many general corporate firms now advise clients on IP matters (including patent prosecution) and many boutique IP firms have broad corporate practices. This evolution has created both an opportunity for greater involvement of IP specialists in corporate transactions and some tension between the roles of transactional corporate counsel and special IP counsel.

The discussion reflected broad consensus on two points:

1. “Backstop” opinions are often requested on IP issues. Special IP counsel are sometimes asked to make sweeping statements, usually with a “knowledge” qualification, as to infringement, patent coverage, and the absence of third party claims or infringing patents. Requests for such broad opinions are not appropriate.

2. In capital markets transactions where (a) IP assets are strategic and central to the enterprise and (b) IP counsel is involved throughout the transaction (including having meaningful input into the drafting of disclosure statements), it is appropriate for IP counsel to give IP closing opinions.

The issue of special IP counsel furnishing to underwriters a negative assurance letter in addition to an opinion, however, continues to be controversial. The question is whether IP counsel has the necessary securities law expertise or is adequately supported by the firm’s securities lawyers so as to be able to make the appropriate disclosure recommendations and materiality judgments. The ABA report on negative assurance posits that such a confirmation is the exception, not the rule. Nevertheless, if the transaction process is properly planned to allow IP counsel to do what is necessary to give negative assurance, there is nothing inherently wrong with IP counsel furnishing a negative assurance letter on IP-specific disclosures.

The discussion also reflected a wide range of views on the following matters:

A. It is not appropriate for a law firm that has handled patents and other IP matters for a company, but is not otherwise representing the company in the offering, to be asked to give a non-IP third-party closing opinion to the underwriters. It may be appropriate,

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however, for the IP firm’s lawyers to be available to underwriters and their counsel for due diligence purposes.

B. Insofar as IP lawyers routinely give IP opinions (e.g., non-infringement, patentability, freedom to operate) to their own clients, there is nothing wrong with giving properly scoped opinions to third parties (including underwriters) on matters of law (as opposed to factual confirmations).

C. In most situations, there is no reason to distinguish between IP lawyers and other experts (lawyers and non-lawyers) who play a role in corporate transactions but are not asked for either opinions or negative assurance letters. These experts usually make themselves available to assist with preparing disclosure and to put the issuer’s corporate counsel and underwriters’ counsel in a position to give opinions and negative assurance.

D. Negotiating an appropriately narrow scope for IP opinions to underwriters can be very difficult. It is often preferable from a risk standpoint to offer a negative assurance letter but not an opinion.

E. Giving both a focused IP opinion that avoids knowledge-based factual confirmations and a targeted negative assurance letter may be appropriate, so long as some clear rules of engagement are followed:

   • Involve IP counsel early on and allow him/her to have meaningful input;
   • Allow IP counsel to bring in securities lawyers at his firm to provide proper support on disclosure issues and materiality judgments; and
   • Ensure that underwriters’ counsel does not expect a “backstop” opinion (the historically extravagant form of IP opinion many form underwriting agreements include).

PANEL SESSIONS II:

1. **Customary Practice in the Context of Transactions in which the Opinion Recipient is Located in a State Other than the State Where the Opinion Giver Practices**
   (Summarized by E. Carolan Berkley)

   David L. Miller, Pillsbury Winthrop Shaw Pittman, LLP, McLean, Virginia, Co-Chair
   Philip B. Schwartz, Akerman Senterfitt, Miami, Co-Chair
   Donald W. Glazer, Boston
   Robert A. Thompson, Sheppard, Mullin, Richter & Hampton, LLP, San Francisco

   This breakout session addressed whether customary practice in third-party closing opinions is determined on a state-by-state basis or in accordance with a national customary practice.

   The Florida Bar recently released a draft Report on Standards for Third-Party Opinions of Florida Counsel (the “Florida Report”), which expresses the belief of the Committee responsible for its preparation that the proper standard for determining customary practice is the community where the lawyer practices and that local bar reports are the best resources for determining what customary practice is in the relevant community. The report is a joint report of the Florida Bar’s Business Law Section and
Real Property, Probate and Trust Section. Philip Schwartz chaired the report for the Business Law Section’s Committee on Legal Opinion Standards.

Phil Schwartz believes that the source of customary practice is largely local and that there is little if any national customary practice. Don Glazer responded that no bar opinion report is now writing on a clean slate, and that many issues, including the meaning of many customary terms, are subject to a national consensus. Reliance by an opinion giver on a local bar association report without bringing differences between local and national practice to the opinion recipient’s attention (especially where the recipient is represented by counsel unfamiliar with local practice) is, in Don’s view, inappropriate and unlikely to be honored by the courts, especially courts of the state of a non-Florida recipient. Don observed that, in light of the position taken in the Florida Report, some out-of-state opinion recipients might require that closing opinions on Florida law explicitly disclaim reliance on the Florida Report.

Bob Thompson indicated that the real estate bar feels that opinion givers should be up front about differences in local practice in the opinion letter itself. Thus, he recommended setting forth explicitly the diligence the opinion giver has undertaken and the opinion giver’s assumptions about the application of local customary practice standards. He believes that these techniques provide a measure of protection against judges misinterpreting the opinion.

After the panel concluded, Arthur Field commented that a great many third-party closing opinion practices have been well defined in national customary practice. He wondered what made Florida lawyers confident that opinion recipients in other states would bring actions against Florida opinion givers in Florida or that courts would follow positions taken in the Florida Report that are inconsistent with what the opinion recipient, based on its knowledge of national customary practice, would reasonably expect.

2. Discussion on Bar Opinion Report Developments and Statutory and Case Law Updates
(Summarized by John B. Power)

John B. Power, O’Melveny & Myers LLP, Los Angeles, Moderator
Pamela Smith Holleman, Sullivan & Worcester LLP, Boston
Richard R. Howe, Sullivan & Cromwell LLP, New York
Philip B. Schwartz, Akerman Senterfitt, Miami
Thomas M. Thompson, Buchanan Ingersoll & Rooney PC, Pittsburgh

Recent Legal Developments.

1. New York Statute on Powers of Attorney

Richard Howe reported on efforts to deal with issues arising out of the enactment in 2009 of a New York statute on powers of attorney, reported under Recent Developments in the Fall 2009 and Winter 2010 issues of this newsletter. He said that identical bills were introduced in 2010 in both houses of the New York legislature amending the statute to resolve the major problems. The amendments would take effect on the 30th day after enactment, and would be retroactive to August 31, 2009. Subsequently, the revised bill was adopted by the Assembly on May 11, 2010 and the State Senate on June 1, 2010, but as of July 6 it has not yet been sent to the Governor for signature. Once it has been sent to the Governor, the Governor is expected to sign it. There has been no indication when this will occur.
2. Lehman Brothers Bankruptcy Case on “Springing Subordination” Provisions

Pam Holleman reported on this case, as she did in the Spring 2010 issue of this newsletter. She expressed her concern that the court’s refusal to enforce an *ipso facto* clause based on the bankruptcy filing of an entity related to the contract obligor may be viewed as part of a line of cases in which bankruptcy courts focus on the needs of a corporate group and not individual entities, without effecting a formal substantive consolidation. She feels that this may give rise to the need for special consideration by those giving substantive consolidation and enforceability opinions in structured finance transactions.

[Editor’s Note: See also the listserv discussion on the General Growth bankruptcy under “Notes from the Listserv” in this issue of the newsletter.]

Bar Opinion Reports

1. Opinion Exhibits to Proposed Revised Model Stock Purchase Agreement by the ABA Mergers and Acquisitions Committee

Tom Thompson reported that the ABA Committee on Mergers & Acquisitions expects to publish in the next few months its revised Model Stock Purchase Agreement, with attached annotated sample legal opinions. See Tom’s article in the April 2010 issue of this newsletter. Tom thanked a task force of the ABA Committee on Legal Opinions (Stan Keller, Carolan Berkley, Don Glazer, and Steve Weise) for their extensive comments on the opinion exhibits, designed to confirm their consistency with other current opinion publications. He did not note any significant issues raised by the exhibits.

2. Florida Report

Phil Schwartz led a discussion, with substantial audience participation, on significant aspects of the Florida Bar’s proposed report, not including its discussion of customary practice, but including other issues, for example its approach to the enforceability opinion. See Carolan Berkley’s summary of the breakout session on customary practice issues raised by the Florida Report, above.

3. Pending and Recently Published Reports

John Power described the status of bar opinion reports as of March 31, 2010, as reflected in the chart below. Three pending reports were added since a similar chart was presented at the October 2009 WGLO seminar: (i) a comprehensive report from Tennessee (a draft has been published for comment), (ii) a report from Michigan, and (iii) an update of a report on Legal opinions in SEC filings by the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities of the ABA Section of Business Law. One report, the California Sample Opinion, moved from the pending category to published.

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Recent and Pending Bar Reports on Legal Opinions

March 31, 2010

Recently Published Reports:

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<td>No Registration Opinions - Subcommittee on Securities Law Opinions</td>
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4 Available or soon to be available in the Legal Opinions Committee Resource Center in then web site of the ABA Legal Opinions Committee. [http://www.abanet.org/buslaw/home.html](http://www.abanet.org/buslaw/home.html).
Recently Published Reports (Con't):

Texas

Comprehensive Report Update

TriBar

Transfers of Securities

Limited Liability Company Membership Interests

3. Tax Opinions

(Summarized by Susan Cooper Philpot)

Peter Blessing, Shearman & Sterling LLP, New York, Chair

Jerome E. Hyman, Cleary Gottlieb Steen & Hamilton, LLP, New York

Bryan Skarlatos, Kostelanetz & Fink, LLP, New York

Tax opinions differ from corporate third-party closing opinions in a number of significant respects.

First, unlike third-party closing opinions, tax opinions typically do not take exceptions or have carveouts in their analysis. Tax opinions give bottom line conclusions, taking into account all known facts and law.

Second, unlike third-party closing opinions (which tend to treat an issue as either capable of being opined on or not), tax opinions frequently express judgments on uncertain positions by expressing the strength of the conclusion through different levels of opinion language, ranging from the “will” opinion (the strongest expression of comfort), to “should” opinions (a strong opinion but with some doubt on one or more issues), to “more likely than not” opinions (expressing a conclusion that is only slightly stronger than the contrary analysis), to “substantial authority” opinions (for a conclusion that is supported by authority but may not even be the most likely resolution of the issue). Other language variations in tax opinions may express even finer gradations of comfort levels, with the levels coming directly out of applicable tax statutes.

Generally, “will” opinions look very similar to closing opinions. Opinions at comfort levels below the “will” standard, however, are reasoned opinions. Opinions to third parties are usually given at the stronger end of the opinion level spectrum, since it may be imprudent to give a lower-level opinion to a stranger who may not fully appreciate the risk suggested by a weak opinion. Large firms rarely give opinions below the “substantial authority” level, even as opinions to clients.

Lastly, tax opinions are regulated by the U. S. Treasury Department and Internal Revenue Service, through its Office of Professional Responsibility. In particular, the IRS’s Circular 230, 31 CFR part 10, prescribes ethical standards for tax practitioners who issue written advice on Federal tax issues, including detailed standards for tax opinions. Violations of those standards may result in censure, suspension or disbarment of the opinion giver from practice before the IRS. In addition, section 822 of the American Jobs Creation Act of 2004 authorizes the imposition of monetary penalties on tax practitioners and their firms for violations of Circular 230, up to the amount of the gross income received from the conduct giving rise to the penalty.
CONCURRENT BREAKOUT SESSIONS II:

1. ABA Guidelines and Principles – Third Party Opinions: Selected Issues, Their Treatment in Bar Association Reports and Their Impact on Multijurisdictional Opinion Practice
   (Summarized by Gail Merel)

   Kenneth M. Jacobson, Katten Muchin Rosenman LLP, Chicago, Chair
   Vladimir R. Rossman, McDermott Will & Emery LLP, New York, Chair
   Gail Merel, Andrews Kurth LLP, Houston, Reporter

   Introduction. This breakout session focused on the preliminary findings of a study undertaken by an ad hoc committee of WGLO to identify areas of existing consensus, crossing jurisdictional and specialty lines, in third-party legal opinion practice. The Co-Chairs for this breakout session, who also served as Co-Chairs of the ad hoc committee, began with a brief history of the project. Because ad hoc committee members believed that lawyers practicing in different states are generally familiar with the ABA Principles and Guidelines, the committee decided to focus on a select number of Principles and Guidelines to try to determine the extent to which they have been adopted or accepted by various bar association reports issued or updated since 1998. The committee’s findings are based on a combination of the committee’s own review of the reports and responses provided by representatives of some of the relevant bar groups to a questionnaire created by the committee. A preliminary, working draft report of the ad hoc committee was available to the participants in the session.5

   Noting that it is not always clear whether bar reports are providing normative standards or statements of best or common practices, Ken Jacobson advised the group that the ad hoc committee found substantial similarity among the various jurisdictions with regard to the limited number of ABA Principles and Guidelines studied as part of the project.

   Summary of Breakout Group Discussion. The breakout session considered a number of questions relating to customary legal opinion practice. The group began with the question of whose customary practice applies when the opinion giver and the opinion recipient are located in different jurisdictions – a question raised at a panel presentation earlier in the day – and whether the answer to that question makes a difference. As to the limited number of matters addressed by the ad hoc committee the Co-Chairs suggested that, even if there is no single statement of a national practice, there may be sufficient similarity in the practices of various jurisdictions so as to result in there being little practical difference as to whose customary practice would apply.

5 The areas addressed in the draft report are the following:

1. Express endorsement of BLS Guidelines and Principles
2. Adherence to the “Golden Rule”
3. Legal Opinion as Expressions of Professional Judgment and Not a Guarantee
4. Implied Client Consent to Delivery of Opinion
5. Presumption of Regularity and Continuity
6. Exclusion of Opinions on Local Law and Fraudulent Transfers
7. Opinions or Confirmations as to Lack of Knowledge of Particular Facts
8. Misleading Opinions
9. Factual Assumptions that Need Not Be Expressly Stated
10. Customary Diligence
11. Recipient’s Duty to Verify
12. Internal Inquiries
13. Assumption Regarding Recipient’s Familiarity with Customary Practice
There was a general consensus among the participants in this breakout session that their own opinion practices follow the ABA Principles and Guidelines. However, a number of participants noted that the application of the Principles and Guidelines often requires a more nuanced analysis. For example, it was observed that most lawyers agree in principle with the “Golden Rule” (i.e., that an opinion should not be requested that counsel for the opinion recipient would not give). However, participants suggested there could be differing views on how that principle should be applied when an opinion recipient wishes to require an opinion that its own outside counsel would not give.

Similarly, while there was consensus in the group about widespread acceptance of ABA Guideline 1.5 – that an opinion giver should not render a misleading opinion, some participants suggested that there is less agreement on how that Guideline should be applied in particular circumstances. A number of hypotheticals were discussed regarding the operation of this Guideline in practice.

The group was asked to consider next steps for continued study of similarities and differences among legal opinion reports and whether continued study might foster either a national legal opinion practice or substantially similar state-by-state practices. Some expressed the view that, absent some compelling justification, the issue might best be left where it currently stands. Others suggested that working to further a national consensus would be a useful project. One participant noted it would be useful to develop a more uniform understanding of those laws commonly excluded from the scope of a “typical” third-party opinion. Most participants that expressed an opinion during the session seemed to agree that it would be helpful to build off of the draft ad hoc committee report to identify common expectations of opinion givers and recipients.

2. Panel Discussion: Ethical Considerations in Opinion Giving
(Summarized by Louis G. Hering)

Donald W. Glazer, Boston, Co-Chair
Robert H. Mundheim, Shearman & Sterling LLP, New York, Co-Chair
Louis G. Hering, Nichols, Arsh & Tunnell LLP, Wilmington, Reporter

This breakout session was a follow-up to a panel on the same subject from the fall 2008 WGLO meeting. It involved a discussion of the following six hypotheticals:

1. A request for an opinion that counsel is not aware of any threatened litigation against the client when a litigator in the opinion giver’s firm is conducting settlement negotiations relating to a threatened suit that, if the plaintiff had the financial ability to bring, could be material to the borrower and which the borrower does not wish to disclose.

2. A request to deliver a due incorporation and valid issuance opinion that on its face is straightforward and easy to give, but that relates to a stock offering that would close after the opining attorney learned at a board meeting of a rumor that a competitor of the issuer had made a technological breakthrough that could render much of the issuer’s product line obsolete, which rumor has not been disclosed to the potential investors.

3. A request for a due authorization opinion relating to a sale of assets transaction involving controlled substances when a required government approval has not been obtained so that the sale is technically in violation of applicable law.

4. A request for a corporate status opinion for a company about to be sold whose general counsel had previously asked the opining attorney some questions regarding payments by
the company allegedly made to government officials in several countries where it did business and about which the opining attorney has heard nothing further.

5. A request that the attorney prepare paperwork for a borrowing and give a related security interest and perfection opinion when the proposed borrowing will be made immediately prior to the end of each fiscal quarter of the borrower, suggesting that it has something to do with the borrower’s quarterly financial statements.

6. A request for an opinion on the accuracy and completeness of the disclosures in the prospectus of the regulatory status of the issuer’s products in connection with a public offering when the opining partner has learned from another partner in his firm of the existence of a yet unpublished academic study indicating that a significant product of the issuer has serious side effects and when the opining attorney has been terminated from the matter after advising the issuer that the attorney’s firm cannot give the opinion unless the risks created by the publication of the study are disclosed.

The discussion of these hypotheticals related to the risks associated with giving the requested opinions, the need under certain circumstances to get client consent to disclosure, the question of whether the opining attorney had “knowledge” of a potential criminal violation, and potential reporting up duties including to former clients. The Model Rules discussed included 1.0, 1.2(d), 1.6, 1.13, 2.3 and 4.1.

3. What’s Different About Some Opinions: Bond Opinions, Securities Opinions and Opinions to Government Agencies

(Summarized by Roderick A. Goyne)

Stanley Keller, Edwards Angell Palmer & Dodge LLP, Boston, Chair
Jerome A. Grossman, Luce, Forward, Hamilton & Scripps LLP, San Diego
Andrew J. Pitts, Cravath, Swaine & Moore LLP, New York
Allen K. Robertson, Robinson, Bradshaw & Hinson, P.A., Charlotte
Roderick A. Goyne, Baker Botts L.L.P., Dallas

This breakout session explored whether there is in fact a difference in practice regarding the inclusion of qualifications, exceptions or underlying reasoning in opinions rendered in connection with tax-exempt bond financings, public securities offerings and transactions involving United States government agencies. The discussion considered whether, in some practice areas, opinion recipients’ resistance to qualifications, exceptions or reasoning is implacable, and whether in some cases opinion givers should address the resistance head-on and try to persuade the recipient. The session also touched upon the issue of how opinion givers in these practice areas justify the exclusion of exceptions and qualifications that would be routine in most other types of third-party closing opinion practice.

In the area of opinions in tax-exempt bond financings, market expectations and the historical roots and purpose of opinions of this type have shaped opinion practice – especially where the financing involves general obligation bonds. Given the “high stakes” of the core issues (validity of the security, availability of remedies and exemption of interest from federal income taxation), the market has required that opinions on general obligation bonds contain no exceptions other than insolvency, equitable principles and post-issuance tax compliance. In other types of tax-exempt bond financings, such as those involving conduit financings or the issuance of revenue bonds, the existence of ancillary documents and collateral necessarily affect the scope of the opinion and the need for exceptions and qualifications. By tradition, opinions in the tax-exempt financing area do not contain express limitations as to who may rely
on the opinion. This originates from the initial purpose of bond counsel opinions, namely to assist in making governmental obligations marketable by having the opinion printed on the bonds themselves.

The Securities and Exchange Commission does not permit language limiting reliance in the case of Exhibit 5 opinions in securities offerings. With issuances of equity or unsecured debt securities, opinion exceptions and qualifications are not necessary except for those regarding insolvency and equitable principles (and then only in the case of debt issuances). In the context of other types of securities issuances, requests for additional qualifications are examined closely, since they may implicate risk factors or pose other disclosure concerns. Opinions to underwriters, which are intended to assist them in their diligence efforts, may involve exceptions and qualifications, but even in those situations there is pressure to limit them to those that are essential since any exceptions or qualifications that are not routine raise the question of the need for corresponding disclosure.

Where the opinion recipient is a government agency, the recipient may take the position that its requested form of opinion is non-negotiable and that qualifications and exceptions will therefore not be accepted. Whether reliance is justified when the opinion recipient is so inflexible (particularly when the recipient’s counsel has been informed of the opinion giver’s concerns and, if the roles were reversed, would express similar concerns) was discussed at some length. Although opinion givers may take some comfort in questioning whether there was actual reliance, the panelists concluded that, when confronted by a recipient’s determination to resist exceptions and qualifications, the opinion giver must ultimately decide whether the exceptions and qualifications are truly material and therefore, if at all possible, should be made explicit. Finally, members of the audience expressed the view that in the case of contracts stating they are to be governed by federal law, opinion givers often assume expressly that, as to relevant matters in which there is no clearly applicable federal statute or regulation, federal law would be the same as the laws of the State of New York (or the state the opinion giver is able to cover in the opinion).

In sum, to the extent there are fewer exceptions and qualifications in these areas, there may be various explanations, including a need, because of historic practice and recipient expectations or resistance, to be discriminating in the exceptions and qualifications and to limit them to those that are really necessary.

**PANEL SESSIONS III:**

1. **Need to Know the Client: Issues from the Fortress Dechert Case**
   (Summarized by Stanley Keller)

   *John Villa, Williams & Connolly LLP, Washington, D.C., Chair*
   *Hon. Thomas L. Ambro, United States Court of Appeals for the Third Circuit*
   *Stanley Keller, Edwards Angell Palmer & Dodge LLP, Boston*

   This breakout session focused on the allegations and arguments of the parties in the action filed in the Supreme Court of New York on December 21, 2009 by Fortress Credit Corp. and FCOF UL Investments LLC (“Fortress”) against the law firm Dechert LLP (“Dechert”) for providing an incorrect and misleading opinion with respect to certain notes purportedly of Solow Realty that were purchased by Fortress. In fact, the notes were forged as part of a complex scheme by Mark Dreier, a New York lawyer, one of whose clients was Solow Realty. Dreier had arranged for Dechert to provide the opinion as “independent” counsel for Solow because Dreier was a guarantor of the notes and therefore his law firm was not considered independent.
John Villa, as a litigator, along with Judge Ambro, focused on the language within the four corners of the opinion letter. Stan Keller, as a transactional lawyer, focused on whether Dechert complied with customary practice and whether there were special circumstances that required it to do more than would be required under customary practice. As John Villa noted, focusing on the language of the opinion itself is the best opportunity to prevail on a motion to dismiss, since the opinion’s qualifications and limitations would be before the court. He noted the express assumption regarding genuineness of signatures and the statement regarding the absence of independent investigation. Thus, he would argue that the opinion itself was correct.

Judge Ambro asked what the difference was between the agreement’s requiring an opinion of “independent counsel” and the opinion’s reciting that Dechert was “special corporate counsel,” and whether that difference was significant. Stan Keller responded that the two can have different meanings but that it was not clear that any difference mattered here since, in his view, use of the term “special” did not clearly negate the “independent” requirement. He added that generally the opinion itself controls regardless of the requirement of the agreement if it is accepted by the recipient. The key issue in the case was whether Dechert misrepresented its role as independent or special counsel because it relied on information provided by Dreier rather than dealing with the client directly.

Stan Keller expressed the view that Dechert appeared to perform the customary diligence required of opinion givers in ordinary circumstances which permits lawyers to rely on sources it believes reliable and to assume the genuineness of documents and signatures without so stating. He added that opinion givers often rely on documents provided to them by persons other than the client. He stated that the issue here is whether the circumstances, either expressly or implicitly, required Dechert to do more because it knew independent counsel was required. He doubted that was necessary here because the common understanding is that independence is designed to ensure that objective legal conclusions are reached and does not in itself require additional factual investigation absent red flags.

There was consensus that regardless of the ultimate outcome, the Dechert case, as well as the attention on the Linklater’s true sale opinion in the Lehman Repo 105 transactions, highlights the importance to opinion givers, as a matter of risk management, of being sensitive to and understanding the context in which the opinion is being given. Stan Keller noted in this regard, by analogy, the recently issued Alert No. 5 of the PCAOB on “Auditor Considerations Regarding Significant Unusual Transactions,” which emphasizes the importance of understanding the context and rationale for a transaction and considering the risk factors for fraud and any corresponding mitigating controls.

NOTE: Subsequent to the breakout session, on June 10, 2010, the court denied Dechert’s motion to dismiss. Although the court acknowledged that Dechert’s counsel had raised interesting issues, it stated that they were better considered at the motion for summary judgment stage. The oral argument on Dechert’s motion focused on the statement in the opinion letter that Dechert represents Solow Realty although they never had direct communications with them but only with Dreier and the meaning of the requirement for “independent” counsel – did it require independence from Dreier, as plaintiff alleges, or just independence from the transaction, as Dechert asserts?
2. Limited Role Opinions – Are the Risks Worth the Reward?
(Summarized by Timothy G. Hoxie)

William A. Yemc, Richards, Layton & Finger, P.A., Wilmington, Chair
Scott Stengel, Orrick, Herrington & Sutcliffe LLP, Washington, D.C.
Frank T. Garcia, Fulbright & Jaworski L.L.P., Houston

It is common for lawyers to be asked to render opinions in transactions where they are not the primary counsel handling the overall matter for the client. Rather, their role is limited, either to opining on an aspect of the transaction as local counsel, or opining on a particular aspect of the transaction as a specialist in a particular area of law important to the deal. The most common example of the former might be acting as a local counsel in a secured financing, where the firm is asked to opine on the enforceability of collateral documents or the creation and perfection of security interests in collateral in the firm’s jurisdiction. Examples of the latter might include being asked to opine on a particular issue (such as in giving a true sale opinion, an opinion on a state tax issue, or perhaps an IP opinion) that might either be outside the expertise of the lawyers leading the transaction or a matter that the client has traditionally asked the opining lawyer to handle.

Limited role opinions present different risks to the opinion giver than those normally faced by lawyers leading the transaction or regularly involved with the client. A lawyer giving a limited role opinion may not be in a good position to spot “red flags” in the overall transaction that might suggest caution in rendering an opinion. For this reason, the opinion giver could wind up rendering an opinion that, while correct on its face, facilitates a transaction that is later determined to have been improper, if not fraudulent. Similar risks can arise from the fact that lawyers rendering limited role opinions may have limited or no direct contact with their clients, dealing instead with the attorneys responsible for the overall transaction.

Customary practice establishes the scope of factual and legal diligence opinion givers are expected to undertake in support of the opinions they give. If narrower diligence is undertaken, opinion givers communicate that clearly in the opinion itself, so that the recipient is advised of the limited nature of counsel’s role and investigation. Simply stating that counsel acted as “local” or “special” counsel may not be sufficient.

It is equally important for limited role opinion givers to communicate with the client so that they understand the limitations of the opinion giver’s role. Lawyers accepting limited engagements should, as a matter of risk management, clearly describe their limited role in an engagement letter (which is essential, whether or not otherwise required under applicable law or ethics rules). It is equally important to communicate clearly with the lawyers primarily responsible for the overall transaction so that deadlines are understood, and so that the primary lawyers are aware of materials the limited role opinion giver will need to render the requested opinions.