Dear Committee Members:

This is my first letter as Chair of the Committee. I am pleased to be succeeding John Power but that is a daunting task. John did a superb job in leading the Committee the last three years and I hope I can do nearly as well and keep in place the wonderful Committee superstructure John created (of which this newsletter is one example). I take comfort in knowing that John will remain actively involved. I will not recount again John’s accomplishments. Some of these are listed in my tribute to him in the last issue of the newsletter (July 2010) and I did that several times at the ABA Annual Meeting in San Francisco. Again, John, thanks from all of us.

You will be hearing from me more on plans for the Committee going forward but let me briefly identify a few things. There are two significant projects begun under John’s tenure that we need to bring to completion. One is the Report on Cross-Border Closing Opinions of U.S. Counsel. This is an important project that will make a major contribution to legal opinion learning, particularly in the international context. The Report is well along as you can tell from the draft excerpts you have seen. We hope to finish it soon.

The other project is completion of the updated and expanded survey on law firm opinion practice. The response has been overwhelming, with many times the number of respondents compared to the Committee’s previous survey. We are rounding up the remaining stragglers (take that as a reminder) and will soon move to the compilation and reporting phase of the project. With the expanded survey and the large number of responders, this project will provide invaluable information about law firm practices and be an important tool to be used to improve opinion policies and procedures.

The Committee has undertaken an important joint project with the Working Group on Legal Opinions, as co-sponsors, to examine and identify areas of legal opinion practice on which there is widespread consensus among various bar groups and different areas of practice in order to develop a common opinion language and describe in a readily accessible manner customary practice on which there is such a consensus. This will be an all-inclusive effort with involvement of various state and other bar groups and other interested parties that include, along with commercial transactional opinion givers, those involved in real estate, M&A, tax and other areas of practice. A coordinating committee is in the process of being formed and reporters for the project have been identified. The first task will be an examination of the Legal Opinion Principles to determine the extent to which there is consensus about them and then to move on to other areas, such as selected items in the Guidelines for the Preparation of Closing Opinions. The objective is to issue a series of short, easy to read reports, like the Customary Practice Statement, that are agreed to by a broad array of groups and which together can form a compendium of customary legal opinion practice. It is an ambitious project but one well worth doing. Stay tuned, because this Committee will be actively involved in this effort.

The last item I want to mention for now is the Committee’s listserv. It has been a valuable resource for information and the exchange of views on topical issues (thanks in no small measure to Jim Fotenos’ compilation of listserv activity for the Newsletter — see below under “Notes From the Listserv”). I think it can be even better and used more regularly for current topics and practical advice.
I plan to focus, together with Carol Lucas, who has taken on responsibility as listserv coordinator, on the listserv and urge you to think about raising issues, providing current information and engaging in the discussion. We will also work to keep the listserv from being intrusive.

Thanks for giving me this opportunity to contribute to the Committee. I look forward to working together.

- Stan Keller
Edwards Angell Palmer & Dodge LLP
stanley.keller@eapdlaw.com

Remembrance of Sid Holderness

We lost our friend and colleague Sid Holderness this past July. Sid was a long time leader of the legal opinion community. He was a member of the TriBar Opinion Committee for over 20 years and contributed to many of its reports. He also was a member of this Committee. Sid belongs to that handful of legal opinion gurus who have written treatises on the subject, having co-authored, with Brooke Wunnicke, his treatise entitled “Legal Opinion Letters Formbook” (Aspen Publishers, Third Edition). Tragically, the new Third Edition went to the printers the day before Sid unexpectedly died.

Sid was unusually thoughtful, insightful and analytic. When he spoke, which he did with restraint, we all listened and learned. He was a superb draftsman and editor supreme. But when he critiqued your work, whether it was your writing or your thought process, he did it with exceptional gentleness and good humor.

Sid’s personality and talent, and his contribution to legal opinion scholarship, can best be discerned from these excerpts from his treatise:

After reading the preceding list [of legal opinion reports], the lawyer who is preparing or reviewing an opinion letter may be tempted to agree with Talleyrand’s warning, here paraphrased: if we go on explaining, we shall cease to understand one another. Nevertheless, this warning heed: the lawyer who renders legal opinions today without regard to the increasingly well-defined customary practice for opinion-giving justifiably risks being like Little Johnny Possum, “Full of tales half heard and very badly told.” § 1.02

* * * *

Avoid using empty words. For example, do not start a sentence with the empty words “it is” or “there are.” Instead, start with the subject of the sentence – if you don’t know what the subject is, neither will the reader. § 2.02

* * * *
Use the right word to express the meaning intended. As Judge Learned Hand cautioned, “there is a critical breaking point . . . beyond which no language can be forced. . . . [I]n approaching that limit the strain increases.” § 2.02

* * * *

Legal opinion practice is more often cursed than blessed – and not without some reason. The form and substance of transactional opinions are often discussed (for the first time) late in the deal, at a time when the parties have finally concluded that, yes, they do want to stop negotiating and consummate their transaction – and as quickly as possible, thank you! Almost invariably, last-minute haggling over opinions will visibly slow the deal’s progress and elevate its costs at a time when client tolerance is likely to be at its lowest. Under such circumstances, do not be astonished that clients often see the issues presented by opinions as unjustified, indeed unjustifiable, obstacles to commerce presented by lawyers to other lawyers and – worse yet – for the economic benefit of lawyers. . . . Hence, opinion discussions generally engender in the client a sensation of horrified helplessness unmatched in other aspects of his or her participation in the deal. And if all the foregoing were not enough, counsel (with perplexing regularity, even experienced counsel) often appear to work deliberately to heighten client frustration by conducting opinion discussions as if they were engaging in some mannered ritual dance, or telling jokes by the numbers, or simply engaging in “mind games” on a level intended to impress (but exclude) the client. § 13.03

* * * *

In today’s legal world, third-party legal opinion practice is a living organism, growing, changing, and becoming more complex. The purpose of third-party legal opinions does not change: formal clarification of a business transaction to facilitate its success. The overarching standard for the third-party legal opinion practitioner – whether giver or proxy for the recipient – also does not change. The standard is the Golden Rule. Inherent in the Golden Rule is that the giving and receiving of a third-party legal opinion is not an adversary proceeding. Hence, for the lawyers involved to perceive and then tally their wins and losses is inappropriate. § 13.03

* * * *

We will miss Sid but we and the opinion world are better off because of his having been among us.

- Stan Keller
**Future Meetings**

*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*

*ABA Section of Business Law Fall Meeting*
*Ritz-Carlton Hotel*
*Washington, D.C.*
November 19-20, 2010

**Committee on Legal Opinions**

Friday, November 19, 2010

- Committee Meeting. 9:00 a.m. – 11:00 a.m.
- Program: “Cross-Border Legal Opinions,” 12:00 p.m. – 1:30 p.m.

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

Friday, November 19, 2010

- Subcommittee Meeting. 8:00 a.m. – 9:00 a.m.

**Committee on Audit Responses**

Friday, November 19, 2010

- Committee Meeting. 2:00 p.m. – 3:00 p.m.

**Committee on Professional Responsibility**

Saturday, November 20, 2010

- Committee Meeting. 10:00 a.m. – 11:00 a.m.

*ABA Section of Business Law Spring Meeting*
*Westin Hotel*
*Boston, MA*
April 14-16, 2011
ABA 2010 Annual Meeting

The ABA held its annual meeting in San Francisco August 6-9, 2010. Following are reports on meetings of interest to members of the Committee.

Meeting of the Committee on Legal Opinions

The Committee met on August 8, 2010. Chair John Power had previously circulated the agenda for the meeting by email to the members of the Committee.

Cross-Border Closing Opinions Report. With reporter Ettore Santucci on vacation in Italy (although Ettore participated in the meeting through the conference call line), Don Glazer led the discussion of the Cross-Border Legal Opinions of U.S. Counsel Report. The last draft of portions of the Report was circulated to the members of the Committee on April 13, 2010. Don anticipates that the next draft of the report will be circulated in late 2010 or early 2011.

Don focused his presentation on the subcommittee’s struggles with “choice-of-forum” opinions, which are related to choice-of-law opinions. Choice-of-law opinions are addressed in the current draft of the report under Section II(B) (“Enforceability of Choice of Non-U.S. Law as Governing Law”). Opinion literature, to the extent it addresses “choice-of-forum” opinions at all, suggests that these opinions are typically difficult to give. After identifying the questions an opinion giver should address in considering a choice-of-forum opinion, Don reported that the subcommittee’s tentative conclusion is that a choice-of-forum opinion is meaningful and can be given, subject to appropriate exceptions, as will be detailed in the next draft in the report.

Opinions to Federal Government Agencies. Andy Kaufman previewed the presentation to be made later that day at a Committee-sponsored program entitled “Legal Opinions for Federal Agencies: Does Customary Opinion Practice Matter?”, summarized below. The challenge confronting opinion givers in dealing with governmental agencies is the often peremptory nature of their opinion requests, since some agencies typically dictate the form of the opinion and take the position that the form is non-negotiable. A primary objective of the task force is to attempt to engage one or more agencies in a dialogue on opinion practice. Steve Weise noted that opinion givers rendering opinions to state agencies confront the same challenges as those dealing with federal agencies, giving, as one example, opinions rendered to New York’s state housing agencies.

Stan Keller reported that the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities is engaged in a project with the staff of the SEC to update the staff’s policy on Exhibit 5 opinions required of issuer’s counsel in Securities Act registrations (see the report of the subcommittee, below).
Survey on Opinion Practice. John Power reported that more than 300 law firms have committed to complete and return the survey on opinion practice. Responses are now being returned to the staff of the ABA. The responses will be maintained in confidence. A digest of the responses will be prepared by the Committee and circulated.

Project on Description of Opinion Practice. The members of the Committee present approved its participation with the Working Group on Legal Opinions (“WGLO”) in a project to review state bar reports and articulate areas of “common understanding” among state bar reports on opinion practice. The project will be jointly sponsored by WGLO and the Committee, and will seek broad involvement by many bar associations and other relevant groups. John Power had appointed Stan Keller as the Committee’s representative and co-chair, and WGLO had appointed Ken Jacobson and Vladimir Rossman as its representatives and co-chairs. Steve Weise shall serve as reporter for the project, with Ken Ezell and Steve Tarry as co-reporters.

Bar Association Reports. John Power referred to the Committee’s Legal Opinion Resource Center on its website (“State and Local Bar Reports”) for a listing of recent state bar reports, including those of Tennessee, Florida, and Michigan. Tennessee’s and Florida’s are in draft form and not yet final.

In 2009 Michigan issued its “Background Statement Regarding the Michigan Ad Hoc Committee on Legal Opinions,” which takes the position that its Legal Opinions Committee will not update its 1991 opinion report but will continue to “study and report” on closing opinion matters “to further the goal of development of national standards for delivery and interpretation of opinions while identifying Michigan-specific issues that [Michigan] state lawyers should consider.” Michigan’s first such “study and report” was, at the time of the meeting, in preparation. [Editor’s Note: This study and report was just published, and we plan to include a report on it in the next issue of the newsletter.]

Don Glazer reported on the gestation of two TriBar reports, one on secondary sales of securities and one on LLC interests. Both have encountered delays as different constituencies express their viewpoints on the substance of the reports.

Leadership Transition. With this meeting John Power ended his three-year term as Chair of the Committee, to be succeeded by Stan Keller. John expressed his gratitude to the Committee members for their support. John also paid tribute to Jerry Hyman, who is completing his two-year term as advisor to the Committee and to the Section of Business Law.

The meeting closed with a tribute by Stan Keller to John’s tenure as Chair of the Committee. (See also Stan’s tribute to John in the July 2010 issue of the newsletter.)

- James F. Fotenos
  Greene Radovsky Maloney Share & Hennigh LLP
  jfotenos@greeneradovsky.com

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

The Subcommittee met on August 8, 2010. The principal topic discussed at the meeting was a chart outlining the contents of Exhibit 5 opinions filed by different law firms in connection with the initial filings of “universal” shelf registration statements (a registration statement on Form S-3 or Form F-3 identifying the types of securities covered by the registration statement (which may be debt or equity or both) for sale from time to time but not identifying the specific terms of any particular type of security to
be offered). The chart compared the various assumptions and qualifications included in five of these opinions, and the group discussed the necessity of each item included by various firms. Bill Williams of Sullivan & Cromwell LLP volunteered to prepare a revised version of the chart that would streamline the information by identifying the substance of each such item, rather than the specific words used by individual firms, with a view towards further discussing these items at a substantive level. The revised chart will be distributed in advance of the Subcommittee’s next meeting for further discussion with the expectation that it will allow the Subcommittee to develop a consensus on appropriate qualifications and assumptions and thus serve as the starting point for a form Exhibit 5 opinion for initial shelf registration statement filings.

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

Committee on Audit Responses

The Audit Response Committee met on August 8, 2010. Stan Keller reminded the Committee members that Jim Rosenhauer is succeeding Stan as Chair of the Committee. Jim thanked Stan for his extraordinary contributions over many years as Chair first of the Ad Hoc Audit Response Committee and then of the Committee when it was given full committee status. Jim noted that Stan is the incoming Chair of the Committee on Legal Opinions, but Jim reported that Stan has committed to stay actively involved in the affairs of the Audit Response Committee, and that Stan’s continued active involvement will be key to the continuing success of this Committee. Jim stated that Stan has uniquely contributed to issues of importance to the Business Law Section and to all transaction lawyers, as a key player in matters relating to audit responses, opinions, corporate law and securities law. Jim reminded those in attendance that Stan will now be chairing his third committee. There was applause expressing the appreciation of Committee members for Stan’s many outstanding accomplishments.

The Textron and Deloitte/Dow Chemical cases were discussed. These cases involved challenges to attorney-client privilege and attorney work product protections. The D.C. Court of Appeals decision in Deloitte/Dow Chemical is more favorable to the protection of documents from disclosure than the First Circuit Court of Appeals decision in Textron. Because of differences in issues, there can be a danger that the attorney-client privilege is inadvertently waived, even though attorney work product protections are preserved (e.g., uncommunicated internal legal research memos). However, the definition of work product can be uncertain, and if work product is shared with or created in conjunction with auditors outside the context of litigation, its status may be challenged. (For further discussion of these two cases, see the “Recent Developments – Audit Letter Responses” note (by Stan) in the July 2010 issue of this Newsletter (at pages 14-15).)

The Committee then discussed the FASB’s proposed changes to ASC (Accounting Standards Codification) 450-20, and in particular their relationship to the “Treaty” between the accounting and legal professions (consisting of the ABA’s Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (1975) and AICPA’s Statement on Auditing Standards 12) governing audit letter responses. The FASB exposure draft contains a statement that there should be a discussion of the implications of the proposed changes on audit response letters. The ABA is expected to take the position that no change to the Treaty is necessary. The proposed changes may impact the type of information that an attorney provides to auditors under the Treaty, and may affect the way that lawyers advise clients about disclosure when that kind of advice is within the scope of the engagement. But the proposed changes should not have any effect on the ground rules governing responses given by lawyers to auditors.
Tom White of WilmerHale, Washington, D.C. presented a comprehensive summary of the principal changes to ASC 450-20 in the FASB proposal. The ABA will be submitting comments explaining why several of the proposals are undesirable, which will include the position that no change to the Treaty is necessary. The comments to the FASB will be made available to Audit Response Committee members.

- James J. Rosenhauer, Chair
Hogan Lovells US LLP
james.rosenhauer@hoganlovells.com

[Editor’s Note: The ABA’s comments on the FASB proposal, submitted by Stephen Zack, President of the ABA, were submitted on September 20, 2010. President Zack’s cover letter, together with the detailed comments of the ABA, will be posted on the Audit Responses Committee’s website.]

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Committee Programs Presented at ABA Annual Meeting

The Committee on Legal Opinions sponsored two programs at the ABA’s 2010 annual meeting in San Francisco. Summaries of the two programs follow.

Program Summary: “Why Are We Asked to Give These Opinions?”

Jim Rosenhauer of Hogan Lovells US LLP, Washington, D.C., moderated this two-hour program. The panelists included Sylvia Chin, White & Case LLP, New York; Morris Hirsch, Senior Executive Vice President & General Counsel, Union Bank, San Francisco; Jerry Hyman, Senior Counsel, Cleary Gottlieb Steen & Hamilton LLP, New York; and Stan Keller, Edwards Angell Palmer & Dodge LLP, Boston.

The program examined the underlying rationale for legal opinions of various types and addressed the factors that go into determining whether opinions should be requested and given at all and, if so, which opinions should be requested and given, including which laws need to be addressed. The discussion included consideration of cost/benefit analyses and whether other factors are relevant to the decision of whether to request or give a legal opinion.

Sylvia Chin gave a brief history of the issuance of legal opinions, and reviewed (i) the standard closing opinions given during the last 30 years, including corporate authority, existence, and good standing opinions; (ii) the current thinking on negative assurance opinions, no litigation opinions, and no violation of law opinions, all of which have often been given by law firms in the past but which are now being re-thought; (iii) the evolution of views concerning appropriate due diligence with respect to common opinions; and (iv) the qualifications and exceptions that are taken with respect to common opinions.

Jim Rosenhauer noted that legal opinions have evolved from relatively simple, concise letters to more complicated letters with significantly more qualifications and exceptions. Some firms have changed their legal opinion practice by refusing to provide certain opinions that were traditionally given but are now deemed to be more in the nature of factual confirmations. In addition, many firms used to provide
unqualified legal opinions on topics on which they will no longer provide such opinions (at least not without significant qualifications and exceptions), often based on bar reports concluding that the opinions are inappropriate.

The panelists observed that the hesitancy of firms to provide some opinions (at least without qualifications) may be related to the changing nature of legal practice: (i) in “prior times,” law firms often represented clients in all or most legal matters and had a much “deeper” relationship with their clients than today, when clients are often represented by many different firms; (ii) until the last 10-20 years, clients generally did not assert claims against their law firms or against other law firms for legal malpractice and related theories in contrast to the legal environment of today; and (iii) a recognition that the legal analysis conducted years ago by law firms may not have been as rigorous as that conducted today.

Sylvia Chin noted two additional reasons for this trend towards more elaborate and detailed legal opinions: (i) law firms and clients were smaller in size and the legal issues involved in transactions were often more focused and fewer in number, and (ii) common opinions were often not interpreted in such an expansive manner as they are today, such as the remedies opinion on the enforcement of contracts, which in the past may have been viewed by some as meaning that the provisions of the contract were “generally enforceable” with the “understanding” that provisions of “lesser importance” in the contract might not be enforceable.

Jim Rosenhauer then commented on customary practice in some foreign jurisdictions with respect to the issuance of opinion letters. U.K. solicitors (and lawyers in some other countries) generally do not issue opinions to third parties and, when they do, limit them to “mundane” issues such as corporate authority and capacity. The reason often given to justify this practice is that U.K. lawyers do not wish to become “adverse” to their clients.

Morris Hirsch reviewed the cost benefit paradigm for determining when opinions are appropriate, and from which law firm, particularly when a transaction involves several parties represented by separate counsel. This approach was discussed in depth in a paper prepared by the Business Law Section of the State Bar of California as part of its “Report on Third-Party Remedies Opinions” as its Appendix 4 (2004, updated 2007) (this, and the two articles cited in the balance of this summary are available from the Committee’s Legal Opinion Resource Center on its website). The cost benefit analysis paradigm was further discussed in an article published in 2008 by Jonathan C. Lipson, “Cost Benefit Analysis and Third-Party Opinion Practice,” 63 Bus. Law. 1187 (2008).

Stan Keller referred to criticisms of the cost benefit approach, including the difficulty in quantifying the costs and the benefits associated with the issuance of opinion letters. However, he noted that the issuance of opinion letters in public merger and acquisition transactions used to be a common occurrence but is no longer seen in many such transactions, and this change may be due, in part, to the realization by parties that opinion letters in such transactions are not justified under a cost benefit analysis.

Jerry Hyman, noting that the topic of the panel was “Why are we asked to give these opinions?” said he had often asked that question but had never received a satisfactory answer. He distinguished between (i) third-party opinions where a lawyer might appropriately be asked to give an opinion on subjects he or she was more familiar with or where the lawyer was in a better position to obtain information about the subject than the lawyer for the recipient, such as opinions on corporate authorization, and (ii) opinions requested of borrower’s counsel where counsel is not in a better position to give the opinion, such as on the enforceability of a loan agreement where the agreement was drafted by the opinion recipient’s lawyer based on a form commonly used by the recipient. Jerry finds
unsatisfactory one of the reasons commonly given for requesting such opinions -- that they are traditionally given. Another alleged justification is that it is reassuring to know that the two parties are in agreement and to have two opinions confirming the agreement, but he noted that the recipient’s lawyer does not typically give an opinion to the other side, and further that institutions commonly enter into many major transactions without getting opinions from the lawyer for the opposing side.

Jerry also noted that advocates of third-party opinions sometimes argue that they are helpful because as a practical if not legal matter they may “estop” the opinion giver from representing its client in a lawsuit that might arise concerning the agreement. He suggested that, aside from the possible ethical impropriety of a lawyer trying to foreclose or hinder the practice of another lawyer, if that is the purpose, then why doesn’t the recipient try to negotiate a covenant that the party will not bring suit on the agreement or at least will not retain the opinion giver in any such litigation? He left it to the audience to judge the practicality of obtaining such an agreement or the enforceability of such a provision if it were obtained. Jerry also noted the cost of third-party opinions, the apparent lack of interest of most clients as distinguished from their lawyers in third-party opinions, and the decreasing use of third-party opinions in many circumstances.

Jim Rosenhauer led a discussion on certain qualifications, exceptions and limitations typically found in opinion letters. He focused on the difficulty of determining when such qualifications, exceptions and limitations are deemed to be implied in an opinion letter without being expressly stated and when such qualifications, exceptions and limitations need to be expressly stated in the opinion. As an example, he discussed the often “implied” list of laws excluded from coverage under an opinion stating that it covers “all laws” and noted that some commentators have questioned whether a judge in a court action against a law firm that gives such an opinion letter would recognize that such laws were not in fact covered under the opinion. Jim then noted that several opinions are being re-examined by bar committees as their meaning in various contexts is more deeply analyzed. One example is the use of “as if” remedies opinions. Jerry Hyman noted that a similar re-examination is occurring with respect to the meaning of, and current bar report guidance with respect to, “conflict of laws” opinions.

Sylvia Chin concluded the program with a discussion of whether opinion givers should begin to limit their liability to recipients and other third parties who rely upon an opinion letter through the use of express limitations (“caps”) in the opinion letter on the liability of the opinion giver. Sylvia referred the audience to an article on the topic by Don Glazer and Jonathan Lipson, “Courting the Suicide King: Closing Opinions and Lawyer Liability,” 17 Bus. Law Today No. 4 (March/April 2008). Although the panelists were not aware of any United States law firm attempting to state such “caps” in an opinion letter, one panelist noted that some U.K. firms often include such “caps” in their opinion letters.

- Richard N. Frasch
   rnfrasch@aol.com

Program Summary: “Opinions to Federal Agencies: Does Customary Practice Matter?”

The Legal Opinions Committees of the Business Law Section and the Real Property, Trust and Estates Section presented this joint program. Charles Menges, of McGuireWoods LLP (Richmond, Virginia), representing the RPTE Section, chaired the program, and other panelists presenting on-site included Gary Barnum, of Stoel Rives LLP (Portland, Oregon), and Andrew Kaufman, of Kirkland & Ellis LLP (Chicago, Illinois) (both representing the Business Law Section). John Daly, associate general counsel with HUD, participated live from Washington, D.C., via Skype video call.
The panelists discussed the unique challenges of drafting and negotiating closing opinions delivered to federal agencies, and in particular how receptive the agencies may be to emerging principles of customary practice and to variations in presentation and conclusions dictated by differences in state law and by the preferences and predilections of the opinion givers and their firms. At least anecdotally, opinion givers historically report far less flexibility in negotiating opinions with federal agencies than in negotiating opinions with private opinion recipients, and examples are legion of law firms being required to render “standard form” opinions dictated by the recipient agencies with no ability to make even the most modest changes or to include even the most “standard” qualifications and limitations.

Generally speaking, given the long history of government financing programs in the real estate, housing and mortgage context (including HUD, Fannie Mae and Freddie Mac), the real estate bar has had more experience delivering opinions to federal agencies than the business law bar, and their efforts to engage the agencies in constructive dialogue have been more organized and successful than on the business law side.

For example, Mr. Daly reported that as a result of comments received from various real estate groups, HUD is in the process of revising its required form of opinion to take into account many of the concerns of the bar. Real estate lawyers think that the proposed form of opinion as published by HUD is an improvement in many respects over the existing form, although it still does not necessarily reflect current opinion practice of many law firms. Mr. Daly also made clear that, due to the large number of transactions and the limited number of HUD personnel available to monitor and process those transactions, HUD will continue its current position that its form of opinion is not negotiable.

Many in the Business Law Section first encountered the challenges of negotiating opinions with federal agencies in connection with the recent TARP program, where firms representing recipients of TARP funds were required to deliver broad closing opinions without being permitted to take customary qualifications and exceptions. The Business Law Section’s Legal Opinions Committee has organized a Task Force (chaired by Messrs. Kaufman and Jerry Grossman) to address these issues. While the urgency of the TARP experience has passed with the conclusion of that program, the panelists noted that various other pending federal financing programs, particularly in the energy arena, may well raise issues similar to those experienced in the TARP context. They suggested that the positive results that the real estate lawyers have recently begun to realize in their collective negotiations with the agencies with whom they practice may portend opportunities for similar results in the business law context.

Committee members interested in participating in the work of the Task Force should contact Mr. Kaufman or Mr. Grossman.

Andrew M. Kaufman
Andrew M. Kaufman, P.C.
Kirkland & Ellis LLP
andrew.kaufman@kirkland.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 to the text box (“Join the Committee’s Listserve”) at the end of this summary of the listserve dialogues. You must be a member of the Committee to subscribe.]

Since the publication of our July 2010 issue, two opinion issues have been raised that we summarize here. Jerry Grossman of Luce, Forward, Hamilton & Scripps LLP, San Diego, also raised a question on the giving of “true sale” opinions in the context of a transfer of accounts to a second-tier wholly-owned subsidiary. The dialogue on Jerry’s question can be reviewed in the archives link under listserves on the Committee’s website.

1. Legal Opinions v. Factual Confirmations in the Context of a Computer Hosting Agreement

In his inquiry of August 30, 2010, J. Phillip Glasscock, Scottsdale, Arizona, requested the listserve’s reaction to numerous opinions requested of his firm in connection with a computer hosting agreement. The opinions requested included whether his client was a duly formed entity that is “active,” “valid,” or “current” under the laws of its place of organization; whether the company conducted business under an assumed name or “DBA” and had properly registered the name with the appropriate government agency; whether the company “has a physical presence and its place of business” at a specified location; whether the company had an active demand deposit account with a regulated financial institution; and whether the company had the exclusive use of its domain name in identifying itself on the Internet.

Thomas J. Hawley of Burke & Parsons, New York, recognized the request as possibly part of the “ID checking” that is required for “extended validation certificates,” i.e., certificates designed to identify the legal entity that controls a web or service site, and which enable encrypted communications with that site. He referred readers to the “Guidelines for the Issuance and Management of Extended Validation Certificates,” published by the CA/Browser Forum, found here [CTRL + Click].

The response of the listserve to these requests was uniform. As Steve Chameides of Foley & Lardner LLP, Washington, D.C., commented, “much of this is not proper opinion material but factual issues that are more properly the subject of reps and warranties from the contracting property.” Margaret Bancroft of Dechert LLP, New York, was emphatic that “[l]aw firms should never be issuing fact opinions.” The recipient, noted Margaret, “should get fact certifications from the entity senior executives.” Certifications such as those requested by the counterparty in the inquirer’s situation “operate as a risk allocation mechanism,” which is inappropriate in a request for a legal opinion.

Wena Poon of Virtual Law Partners LLP, San Francisco (and Business Law Ambassador to the Committee) reported that she had seen these types of opinion requests from non-U.S. lawyers in China, Hong Kong, and some European countries. She noted that her standard reply is to refuse to give the requested factual certifications and, instead, give an opinion on the issues U.S. lawyers normally opine on.

* The URL is http://www.cabforum.org/Guidelines_v1_2.pdf.
2. Perfection and Priority Opinions With Respect to Securities

Matthias M. Edrich of Peck, Shaffer & Williams LLP, Denver, set off an explosion of responses to his perfection opinion request of September 14, 2010. Matthias asked a relatively innocuous question on whether it was common to receive a perfection opinion from borrower’s counsel regarding investment property held under a control agreement in a bank trust department. The response was uniformly yes, with Reade Ryan of Shearman & Sterling LLP, New York, even helpfully providing a form of the opinion:

1. The Security Agreement is effective to create in favor of the [Bank] [Secured Party], as security for the payment of the Secured Obligations, as defined therein, a security interest (the “Security Interest”) in the Collateral described therein.

2. The Security Interest in that portion of the Collateral consisting of the Securities Account and the Collateral consisting of security entitlements resulting from the [Securities] being credited by book entry thereto will be perfected upon the execution and delivery by the Securities Intermediary [as defined], the Grantor [as defined] and the [Bank] [Secured Party] of the Account Control Agreement.”

What quickened the pulse of the listserv was Paul Schoff’s (Schoff McCabe, P.C., Philadelphia) observation that it would also be appropriate for borrower’s counsel to render an opinion concerning priority, noting that “it would be entirely appropriate [for the recipient] to seek an opinion regarding priority of the secured interest.” Richard Newman, counsel (retired) of Mayer Brown LLP, Chicago, assuming that the securities serving as collateral for the loan were security entitlements credited to a securities account maintained by the bank for the borrower, noted that he would be willing to give a “priority opinion that a security interest perfected by control has priority over another security interest that is perfected by a method other than control.”

Richard Goldfarb of Stoel Rives LLP, Seattle, questioned the value of the type of opinion Richard indicated he would be willing to give, since it would be “duplicative of the opinion that the secured party has perfection by control in the first instance.” Richard’s position is that “an opinion that perfection has been effected by control gives you the attributes of control, which happen to include a bunch of things that aren’t stated in the opinion, one of which is priority over secured parties perfected by other means.”

Joseph Heyison, Senior Vice President and Associate General Counsel of Daiwa Capital Markets America Inc., New York, listed eight examples of liens or claims that can trump a security interest perfected by control, including interests under forfeiture statutes, RICO judgment liens, OFAC blocking orders, and tax liens.

Michael M. Sherman of Cozen O’Connor, Philadelphia, noted that in his experience priority opinions have not been “market” for many years, even in the context of large loans. Noted Michael: “I’ve rarely even been requested by lender’s counsel for a priority opinion over the last 15 years, and when I am asked, I resist.”

On the other hand, Lorraine Massaro, of K&L Gates LLP, New York, observed that in recent years she has seen “more and more priority opinions given in the context of collateral held in a securities account subject to a control agreement,” but with all the “applicable” assumptions set forth in the UCC stated in the opinions.

Steve Weise of Proskauer, Los Angeles, had the last word, noting that any priority opinion given with respect to control is limited to persons that perfect an Article 9 security interest by other means and
assume control by the depositary bank or the securities intermediary. Such opinions, noted Steve, “don’t address at all non-UCC liens,” such as those mentioned by Joseph Heyison.

[Editor’s Note: For background on UCC perfection and priority opinions, see the Special Report of the TriBar Opinion Committee, “UCC Security Interest Opinions – Revised Article 9, 58 Bus. Law. 1449 (2003)) reprinted in the Collected ABA and TriBar Opinion Reports 2009 (Committee on Legal Opinions and the TriBar Opinion Committee), and Chapter 12 (“Opinions on Security Interests in Personal Property”) in D. Glazer, S. FitzGibbon, and S. Weise, Glazer and FitzGibbon on Legal Opinions (3d ed. 2008).]

- James F. Fotenos
  Greene Radovsky Maloney Share & Hennigh LLP
  jfotenos@greeneradovsky.com

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* The URL is http://www.abanet.org/dch/committee.cfm?com=CL510000
Recent Developments

Seventh Circuit Addresses “True Sales” to Bankruptcy Remote Vehicles

The Seventh Circuit’s recent decision in Paloian v. LaSalle Bank, N.A., 2010 WL 3363596 (7th Cir. Aug. 27, 2010), strikes a cautionary note for parties considering securitized financings involving a “true sale” of assets to a special purpose entity, and for lawyers providing “true sale” opinions. Doctors Hospital of Hyde Park, Inc. (“Doctors Hospital”) obtained a revolving credit facility from Daiwa Healthco-2 LLC (“Daiwa”), pursuant to which (i) Doctors Hospital contributed all of its healthcare receivables on an ongoing basis to MMA Funding, L.L.C. (“MMA”), a special purpose entity organized by the owner of Doctors Hospital, (ii) MMA granted a security interest in those healthcare receivables to Daiwa, (iii) Daiwa loaned funds to MMA, and (iv) MMA disbursed those funds either to Doctors Hospital or directly to Doctors Hospital’s creditors as the purchase price for the receivables. Doctors Hospital filed for chapter 11 and a chapter 11 trustee was appointed. In subsequent litigation, the trustee asserted that Doctors Hospital’s purported transfers of its healthcare receivables to MMA were not “true sales” and therefore that MMA’s direct payments to Doctors Hospital’s other creditors were transfers of property of the debtor that could be recovered as fraudulent transfers.*

In considering the trustee’s claim, the bankruptcy court (In re Doctors Hospital of Hyde Park, Inc., 360 B.R. 787, 847–53 (Bankr. N.D. Ill. 2007)), and the district court on appeal (LaSalle National Bank Association v. Paloian, 406 B.R. 299, 336–44 (N.D. Ill. 2009)) each applied a multi-factor balancing test aimed at assessing the extent to which Doctors Hospital transferred the benefits and burdens of ownership of the healthcare receivables to MMA. Each court based its decision principally on the contribution agreement under which Doctors Hospital transferred the receivables to MMA, which provided that Doctors Hospital “relinquished ‘all right, title, and interest in and to [the receivables]’” (Id. at 339 (quoting In re Doctors Hospital of Hyde Park, Inc., 360 B.R. at 800)) and expressly stated the parties’ intent that the transfer of receivables be a true sale. Relying on a law review article by Thomas Plank, a professor at the University of Tennessee College of Law and formerly of counsel to McKee Nelson (later Bingham McCutcheon), The Security of Securitization and the Future of Security, 25 Cardozo L. Rev. 1655-1741 (2004), the lower courts analyzed the question as whether the MMA was effectively organized as a special purpose entity and whether MMA should be considered an alter ego of Doctors Hospital. In affirming the bankruptcy court’s decision, the district court also emphasized Daiwa’s reliance on MMA’s separateness, and the officer's certificate and legal opinion delivered in connection with the MMA financing.

On further appeal, the Seventh Circuit, in an opinion by Chief Judge Easterbrook, focused primarily on the parties’ actual conduct, as opposed to their intent as expressed in their agreement, and reversed (See Paloian, 290 WL 3363596, at *7-*9). Judge Easterbrook noted that in a typical true sale the purchaser makes an upfront payment to purchase assets from the seller, assumes management of the assets, and makes a profit or loss, as the case may be, depending on how much value it can extract from the assets. According to the Court, MMA operated as if it were a department of Doctors Hospital. It did not have an office, a phone number, a checking account, or stationery; all of its letters were written on the Hospital's stationery. It did not prepare separate financial statements or file tax returns. The record did not indicate that MMA ever actually purchased Doctors Hospital’s receivables for any particular price. Instead, MMA merely received a small portion of the proceeds of the receivables to cover its operating expenses. Moreover, Doctors Hospital continued to carry the receivables on its books and informed its

* Another point of interest to participants in a structured finance transaction is the court's determination that the trustee of a securitization trust is a proper defendant in an avoidance action: the bankruptcy trustee need not pursue each of the investors that received distributions from the trust in order to recover the funds. See Paloian, 2010 WL 3363596, at *3.
other creditors that Daiwa had a security interest in the receivables, even though MMA was owned by the principal of Doctors Hospital and not by Doctors Hospital itself. The Court held that this record was insufficient to support a finding of a true sale of receivables from Doctors Hospital to MMA under its conduct-based analysis and vacated and remanded the district court’s decision with instructions to remand the case to the bankruptcy court to determine whether there was a *bona fide* sale of accounts and whether "MMA Funding was more than a name without a business entity to go with it" (2010 WL 3363596, at *8).

This decision reinforces the importance of the parties to a structured financing transaction actually complying with the separateness covenants and other terms of the transaction documents.

- James Gadsden
  Bryan J. Hall
  Carter Ledyard & Milburn LLP
  gadsden@clm.com
  hall@clm.com

**Update on New York’s Power of Attorney Law**

Legislation has become effective in New York that addresses the most serious concerns for opinion practice that were created by New York’s 2009 statute governing powers of attorney, which became effective September 9, 2009. The 2009 statute imposed formal requirements for the validity of powers of attorney given by individuals that might apply to many types of transaction in which they would be extremely burdensome or impractical. New York’s Power of Attorney statute (N.Y. General Obligation Law (“GOL”) §§ 5-1501 - 5-1514) was revised by Chapter 340 of the Laws of New York, 2010, to carve out from the operative provisions of the statute found in section 5-1501B most of the usual and ordinary commercial and business transactions that are the traditional subjects of third-party legal opinions, as well as to provide a list of the types of powers that are exempt and not subject to the notice, execution, termination and other provisions of the revised law. Chapter 340, which went into effect on September 12, 2010, is retroactive to September 1, 2009. It further revokes the presumption that was in the law that a later-dated power of attorney automatically terminates all prior powers. It also allows for "powers coupled with an interest" to survive death in appropriate situations.

Whenever a power of attorney is signed in New York, in order to determine whether the operative provisions of the statute apply to the power of attorney, the exemptions listed in N.Y. GOL § 5-1501C should be reviewed. This is true whether the power of attorney is a stand alone document or embedded in another agreement or instrument.

Powers of attorney executed in New York prior to September 12, 2010 pursuant to the law in effect when the powers were first executed generally remain valid if they were valid on September 11, 2010. The 2010 revision also contains provisions dealing with powers of attorney that may have been inadvertently terminated following September 1, 2009 simply by the execution of later-dated powers. The transition rule provides which of these potentially terminated powers survive and which do not, depending upon whether the agent was notified of the termination or whether the original or later power of attorney was recorded in the land records.

Chapter 340 clarifies that powers of attorney executed in another jurisdiction that comply with the laws of that jurisdiction or the laws of the State of New York on the date of execution are valid in New York. Similarly, the Chapter provides rules for the validity of a power of attorney executed in New York by an individual domiciled in another state.
Powers of attorney laws have been introduced recently in the legislatures of a number of states, at the request of state law revision commissions, and have been adopted in a few states. Many of these differ from the revised New York statute and, like the uniform law proposed by the National Conference of Commissioners on Uniform State Laws, can present issues concerning the enforceability of powers of attorney commonly used in business transactions. These laws should therefore be reviewed when powers of attorney to which they may relate are being used.

- Barry J. Bendes
   Edwards Angell Palmer & Dodge LLP
   bbendes@eapdlaw.com

[Editor’s Note: For prior reports on New York’s power of attorney statute, see the January 2010 and October 2009 issues of this newsletter, under “Recent Developments.”]

Legal Opinion Reports

Annotated Real Estate Finance Opinion Report

The Annotated Real Estate Finance Opinion Report (the “Report”) is a collaborative project being undertaken by members of The American Bar Association, Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions (the “RPTE Committee”), The American College of Real Estate Lawyers Attorneys’ Opinions Committee (the “ACREL Committee”) and The American College of Mortgage Attorneys Opinions Committee. At present, a draft of the Report is being reviewed and commented on by members of these committees. It then will be circulated more widely. The Report will update and expand the Inclusive Real Estate Secured Transaction Opinion, including its accompanying report (collectively, the “Inclusive Opinion”).

The Inclusive Opinion was issued in 1998 jointly by the RPTE Committee and the ACREL Committee. The Inclusive Opinion can be found here [CTRL + Click].† The Inclusive Opinion drew on only two reports (collectively, the “Accord Opinion Reports”): (i) the ABA Third-Party Legal Opinion Report, including the Legal Opinion Accord, published in 1991, and (ii) the report published in 1994 jointly by the RPTE Committee and the ACREL Committee, which adapted the Accord for loans secured by real property. Opinion letters issued pursuant to the Accord Opinion Reports would incorporate the Accord Opinion Reports by reference; all of the terms, provisions, and definitions of the Accord Opinion Reports were deemed to be part of opinion letters that referred to them. Therefore, the parties would have to understand the Accord Opinion Reports in order to understand such an opinion letter. In contrast, the Inclusive Opinion provided a form of an opinion letter that included within its four corners all of the concepts that were adopted when an opinion letter incorporated by reference the Accord Opinion Reports.

The Inclusive Opinion also was intended to be an educational tool, providing, through what it called “one stop shopping,” a more accessible way to understand the two Accord Opinion Reports. It was “inclusive” in the sense of including the principal concepts of those Reports in the Inclusion Opinion. By design, the “inclusiveness” of the Inclusive Opinion was limited; it did not go beyond the two Accord Opinion Reports. It was never intended to be inclusive in the sense of reflecting other reports or approaches to opinion letter practice.

† The URL is http://meetings.abanet.org/webupload/commupload/RP213000/newsletterpubs/opinion.pdf.
The Report represents an effort to go beyond the Inclusive Opinion to reflect developments in opinion letter practice since issuance of the Inclusive Opinion, including recognition of the role of customary practice, as exemplified by the Customary Practice Statement, 63 Bus. Law. 1277 (2008). Like the Inclusive Opinion, the Report will be an educational tool as well as a framework for consideration of opinion letter issues.

The Report will not establish minimum normative standards, but will provide suggestions that might help streamline the process of giving and reviewing opinion letters in real estate secured loan transactions.

- Kenneth P. Ezell, Jr.
  Baker, Donelson, Bearman, Caldwell & Berkowitz P.C.
  pezell@bakerdonelson.com

Chart of Bar Reports

Courtesy of John Power, the following chart lists published and pending reports on legal opinions and legal opinion practice.

Recent and Pending Bar Reports on Legal Opinions
As of September 30, 2010

Recently Published Reports

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<td>Negative Assurance - Subcommittee on Securities Law Opinions</td>
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1 Available (or soon to be available) in the Legal Opinion Resource Center on the web site of the Committee.
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**Pending Reports**

ABA Business Law Section
- Outbound Cross-Border Opinions - Committee on Legal Opinions
- Survey of Office Practices Update - Committee on Legal Opinions
- Diligence Memoranda – Task Force on Diligence Memoranda
- Legal Opinions in SEC Filings (Update) – Subcommittee on Securities Law Opinions

ABA Real Property Section (among others)
- Annotated Real Estate Finance Opinion

Florida
- Comprehensive Report Update

Michigan
- Report

South Carolina
- Comprehensive Report

Tennessee
- Report

Texas
- Comprehensive Report Update

TriBar
- Transfers of Securities
  - LLC Membership Interests

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Next Newsletter

We expect the next newsletter to be circulated in January 2011. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eapdlaw.com) or Jim Fotenos (jfoenos@greeneradovsky.com).