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From the Chair

This is an exciting and challenging time for opinion practice. It is exciting because we are seeing continuing contributions to opinion learning and the development of customary practice. It is challenging because, paradoxically, the more learning there is the more there is to master and the historic reluctance to sue law firms continues to erode.

As to the reasons for excitement, there are a number of important and useful reports in process. To mention a few, this Committee is nearing completion of a groundbreaking report on outbound cross border opinions. Our task force, with Ettore Santucci as reporter, has been hard at work analyzing difficult issues and reexamining previous conclusions, both those under past learning and some reached earlier by the task force. When published, this report will be a major contribution to opinion learning because it fills in a large gap in the opinion field in a thoughtful and balanced way.

The TriBar Opinion Committee has just completed two useful reports with real practical benefit. One report supplements TriBar’s previous report on LLC opinions by addressing opinions on LLC interests. With the expansion of LLC use, more opinions are being given on LLC interests. The report takes a fresh approach to how these opinions should be formulated, weaving a path through traditional opinions on corporate stock and those on partnership interests, just as LLCs themselves are a hybrid of these two traditional vehicles.

The other TriBar report covers opinions on secondary sales of securities (for example, opinions to underwriters on shares being sold by selling shareholders in a public offering). The report analyzes the limited benefit of this specialized opinion to demonstrate that the “emperor has few, if any, clothes” and then describes the fig leaves that can be used to cover what is left.

A task force of the Section of Business Law, in which members of this Committee are participating, is finalizing its report on the delivery of diligence reports to third parties, a draft of which was circulated to Committee members a year ago. The report provides helpful guidance on how lawyers should deal with a phenomenon that has gradually crept across the “pond” from the EU.

Also, the SEC’s Division of Corporation Finance has reported that it is revising its internal staff guidance on legal opinions required in registration statements, including Exhibit 5 opinions on the “legality” of the securities being offered. Representatives of the Committee, working with the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities, have had an opportunity to provide input to the SEC. Interestingly, tying back to the TriBar LLC report, the SEC guidance will address Exhibit 5 opinions on LLC interests.

Finally, the Committee is participating with the Working Group on Legal Opinions on a joint project exploring the extent of consensus on customary opinion practice. This project will endeavor to put flesh on the bones of the Customary Opinion Practice Statement (63 Bus. Law. 1277 (2008)) endorsed by this Committee and other bar groups and, by doing so, will contribute to the development of national customary opinion practice. This is an important initiative by these two legal opinion groups and it includes the active involvement of interested bar groups and others involved in the world of opinions.

As to challenges, we all face the daunting task of educating our colleagues on opinion practice, for there are many more lawyers dealing with the giving and receiving of opinions than participate in the high art of legal opinion learning. We also face the challenge of establishing policies and procedures
designed to mitigate risks associated with opinion practice. In this regard, the Committee is well along with its law firm opinion survey project, which should prove to be an invaluable resource for identifying practices followed by practitioners. There was a very strong response to the questionnaire that was circulated, and we are in the process, under the leadership of our past chair, John Power, of digesting the responses and preparing an informative report. The combination of an expanded questionnaire and a sharp increase in the number of responses should make this survey even more informative than the one conducted by the Committee several years ago.

While we grapple with education and policies and procedures, we continue to see legal actions against lawyers and law firms, including those based directly on their opinions and those based on participation in allegedly problematic transactions in which opinions were given. These legal actions take the form of private civil suits for damages and governmental civil, criminal and regulatory proceedings. Happily, the limitation on private damage actions for securities law violations to primary violators as opposed to aiders and abettors has successfully been preserved but an expansion of the contours for being considered a primary violator continues to be pressed.

We will continue to monitor these developments for the benefit of our Committee members. I encourage you to contribute to this effort through our meetings, our Committee listserve and otherwise. Let me wish each of you the very best for the new year.

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

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**Future Meetings**

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

**Committee on Legal Opinions**

Friday, April 15, 2011

- Committee Meeting. 8:30 a.m. – 10:30 a.m.
- Program: Ground Rules for Giving Outbound Cross Border Opinions. 3:00 p.m. – 4:30 p.m.
- Reception (sponsored by Edwards Angell Palmer & Dodge LLP). 5:30 p.m. – 7:00 p.m.
Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions

Friday, April 15, 2011

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

Committee on Professional Responsibility

Saturday, April 16, 2011

- Committee Meeting. 9:00 a.m. – 10:30 a.m.

Committee on Audit Responses

Saturday, April 16, 2011

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

Working Group on Legal Opinions
New York, New York
May 3, 2011

ABA Annual Meeting
Westin Harbour Castle
Toronto, Ontario
August 5-8, 2011
The Working Group on Legal Opinions awarded its Fuld Award to Tom Ambro at the WGLO’s fall seminar held October 19, 2010. The award is named after James Fuld, the parent of modern opinion practice. The Fuld Award is presented annually to a person who has made a significant contribution to the field of legal opinions. The award is sponsored by Proskauer Rose LLP, where Jim Fuld was a partner. The two previous recipients were Arthur Field and Don Glazer.

Thomas L. Ambro

Tom Ambro richly deserves this award. He has made enormous contributions to the practice of business law in general and to opinion letter practice in particular. He received both his B.A. (1971) and J.D. (1975) from Georgetown University. After law school, he clerked for Chief Justice Daniel L. Hermann of the Supreme Court of Delaware. He then practiced with Richards, Layton & Finger, P.A., in Wilmington, Delaware, where he was head of its bankruptcy practice. In 2000 President Clinton appointed him to the United States Court of Appeals for the Third Circuit; the U.S. Senate confirmed the nomination by an overwhelming vote of 96 – 2.

Tom was the third person to be chair of the ABA Business Law Section’s Committee on Legal Opinions. As Chair, he oversaw the preparation and issuance of the Legal Opinion Principles (53 Bus. Law. 831 (1998)), which remain one of the key documents in opinion letter practice. Tom was one of the first members of the New York TriBar Opinion Committee from outside of New York. Tom quickly became a leader of TriBar and was a member of the editorial group for TriBar’s highly influential 1998 report “Third-Party ‘Closing’ Opinions” (53 Bus. Law. 591 (1998)). Tom has always brought a practical and sensible approach to opinion letter practice.
Tom has given enormously of his time in his professional life. He was chair of the ABA’s Business Law Section (2001 – 2002) and has served and led many of the Section’s committees and endeavors. He has participated in innumerable CLE programs on opinions, bankruptcy law, and other commercial topics.

As a judge he writes thoughtful and meticulous opinions. His opinion in Owens Corning (In re Owens Corning, 419 F.3d 195 (3d Cir. 2005)) on substantive consolidation in bankruptcy has become the leading precedent in this important area.

Tom has also been a tremendous friend, counselor, and mentor to many in opinion letter and other bar association activities. Somehow in the midst of all of this he spends time with his wife, his children, and their spouses.

On behalf of Tom’s friends and colleagues on the Legal Opinions Committee we extend our congratulations on his receipt of the 2010 Fuld Award.

- Steven O. Weise
Proskauer Rose LLP
sweise@proskauer.com

Fall Meeting of the ABA Section of Business Law

The Section of Business Law held its Fall Meeting in Washington, D.C. November 18-20, 2010. Following are reports on meetings of interest to members of the Committee.

Meeting of the Committee on Legal Opinions

The Committee met on November 19, 2010. Committee Chair Stan Keller had previously circulated the agenda for the meeting by email to the members of the Committee, as well as materials on the cross-border opinions report described below. Following is a summary of the substantive topics taken up by the Committee.

Document Review Reports. Often in connection with the acquisition of a company, counsel for the purchaser is asked to conduct a limited review of specified aspects of the target company as requested by its client and to prepare a written report, frequently referred to as a “diligence report.” In recent years, it has become increasingly common for a third party, such as a lender financing the acquisition, to request that it and its counsel be permitted to review the report in connection with the lender’s due diligence review. Jim Rosenhauer, Chair of the Business Law Section’s Task Force on Delivery of Document Review Reports to Third Parties, reported to the Committee on the status of the Task Force’s report addressing this practice and the issues it raises for counsel preparing diligence reports.

Since distribution of an exposure draft of its report in December 2009 to members of the Committee and the Mergers & Acquisitions Committee, the Task Force has received a number of comments. Jim described the resulting revisions as more textual than substantive. More recently, the Task Force has been considering reported requests for the use of diligence reports by third parties in subsequent transactions involving the sale of the purchaser’s securities, especially when the diligence report was provided in connection with a bridge loan. The contentious nature of this topic was reflected...
in comments by members of the Committee at the meeting on whether the purchaser and counsel preparing the diligence report should share it with counsel for the underwriters in subsequent securities offerings by the purchaser. Opinions ranged from the view that requests to share the reports with the underwriters or their counsel are wholly inappropriate to the view that underwriter’s counsel is entirely justified in seeking to review these reports as part of its investigation to assist in establishing its client’s due diligence defense.

Jim indicated that the next draft of the report should be available for distribution sometime in the first quarter of 2011.

**Cross-Border Closing Opinions.** The bulk of the meeting was taken up with a discussion of the report on Cross-Border Closing Opinions of U.S. Counsel currently being prepared by the Committee’s Subcommittee on Cross-Border Legal Opinions. Ettore Santucci, the reporter for the report, and Subcommittee member Don Glazer led the discussion. Ettore introduced three types of cross-border opinions, two of which are similar in form to domestic opinions but raise more difficult practice issues in the cross-border context. Two similar opinions are (i) enforceability opinions given “as if” the agreement addressed by the opinion were governed by the law covered by the opinion (in this case the law of a U.S. jurisdiction) rather than the law chosen to govern the agreement (the law of a non-U.S. jurisdiction), and (ii) choice-of-law opinions. The third opinion is an opinion on the effectiveness of a choice-of-forum clause.

Ettore indicated that the report will conclude that an “as if” opinion normally should not be given in outbound cross-border opinions because of the extreme difficulty in knowing how a U.S. court would interpret and enforce under domestic law an agreement governed by non-U.S. law.

Don Glazer reviewed the questions that U.S. opinion preparers should address when considering giving an opinion on an “outbound” (i.e., non-U.S.) choice-of-law clause, and why those questions are more difficult to answer in the cross-border context than in the domestic context. He reported that the Subcommittee will recommend that opinion givers in states following the approach taken in Section 187 of the Restatement (Second) of Conflict of Laws expressly exclude from the opinion’s coverage the question whether applying the chosen law (e.g., German law in the case of an agreement selecting German law as the governing law of the agreement) would violate a fundamental policy of the jurisdiction whose law would apply in the absence of an effective governing law clause and that has a materially greater interest in the determination of the issue.

Don also addressed choice-of-forum opinions. He stated that these opinions are rarely given in domestic opinion practice. He then summarized the questions opinion preparers should address in giving such an opinion. He said that under the law in many states forum selection clauses will be given effect unless doing so would be unfair or unreasonable (the “modern view”). However, some states follow the “older view” that courts are free to determine for themselves whether to accept jurisdiction over cases brought before them.

In its report the Subcommittee will recommend that an Omnibus Cross-Border Assumption be stated expressly in U.S. cross-border opinion letters where non-U.S. law is chosen. That assumption has three elements: (i) the agreement opined on has been duly formed under its chosen law, (ii) the governing law clause in the agreement is effective under its chosen law, and (iii) each provision of the agreement is valid, binding and enforceable under the agreement’s chosen law. In addition, in opinions on the effectiveness of a mandatory forum selection clause choosing a non-U.S. court, the report will recommend that the opinion be based on an express assumption that the selected non-U.S. court, in applying the agreement’s chosen law, would give effect to the parties’ choice of forum and that the forum
would accept jurisdiction over the case if a court in the “Covered Law State” (the courts of the jurisdiction whose laws are addressed by the opinion giver) dismisses it.

Survey on Opinion Practice. Rick Frasch reported on the Survey. As of November 15, 2010, some 250 law firms had responded to the Survey (out of 320 that indicated they would respond). The responses are being tabulated by the ABA (the sources of responses are confidential). Once tabulated, a report summarizing the results will be prepared by members of the Survey Subcommittee.

TriBar Reports on LLC Interests and Secondary Sales of Securities. Dick Howe reported that the TriBar report on secondary sales of securities is basically final and will be submitted to The Business Lawyer for publication in May 2011. The report on opinions on LLC membership interests is far along and should be finalized shortly.

- 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 November 19, 2010. Three principal topics were discussed:

1. Larry Hamermesh, Attorney Fellow at the SEC’s Division of Corporation Finance, reported that the Division was continuing its project to provide additional guidance to issuers and counsel with respect to Exhibit 5 opinions in registration statements. Larry suggested that the guidance likely would take the form of a Staff Legal Bulletin or other publicly accessible publication. It should be noted that Larry was attending the meeting in an informal capacity and, accordingly, none of his statements should be regarded as reflecting the views of the SEC or the Staff.

2. There was a discussion of the provision of legal opinions to rating agencies pursuant to Exchange Act Rule 17g-5 (which requires each rating agency to maintain a password-protected web site on which specified information utilized in connection with the assignment of a securities rating is accessible to other rating agencies). Concern was expressed about other agencies relying on legal opinions provided to one agency but subsequently made available to other agencies pursuant to the Rule. The Subcommittee will discuss proposed disclaimer language for opinions expected to be so posted at its next meeting.

3. The Subcommittee discussed a revised chart outlining assumptions and qualifications included in Exhibit 5 opinions in connection with the initial filings of “universal” shelf registration statements and suggestions as to whether such qualifications were necessary or desirable. There was discussion of most of the qualifications, though no consensus was reached. A revised chart will be distributed in advance of the Subcommittee’s next meeting for further discussion at that meeting.
The next meeting of the Subcommittee will be on April 15, 2011 at the Spring Meeting of the Section of Business Law in Boston.

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

Committee on Audit Responses

Stan Keller reported on the Committee’s participation in the ABA response, sent September 20, 2010, to FASB’s Proposed Accounting Standards update entitled “Disclosure of Certain Loss Contingencies,” and in particular on the implications of the proposal on litigation disclosure. (A copy of the ABA’s response can be found on the Audit Responses Committee’s website.) The ABA comments identified a number of concerns, including the significant prejudicial impact that certain proposed disclosures would have on companies and their investors without, in most cases, providing material information to users of financial statements. The ABA comments also identified risks these disclosures would create for the attorney-client privilege and work product protections. Shortly before the meeting, the FASB announced that, in light of issues raised by a number of commenters, it would delay further consideration of its proposals until the second quarter of 2011. Stan noted that it appeared likely that consideration of these issues would slip to the second half of 2011. He also noted that the SEC has commented that reporting companies should provide more disclosure and analysis concerning contingencies, including litigation, based on current accounting standards, while recognizing that some disclosures may not be appropriate because of their detrimental impact on the litigation itself. Stan speculated that, if there is a perception that the quality of disclosures has improved as a result of these SEC positions, there may be less inclination on the part of FASB to change the current accounting standards.

Tom White, Chair of the Law & Accounting Committee, described a similar set of issues resulting from the proposal by the International Accounting Standards Board to amend IAS 37, the international accounting standard concerning disclosure of contingencies. The proposal raises similar issues, particularly with respect to litigation. Tom described the ABA’s comments on this proposal, submitted to the IASB on May 19, 2010. He noted that, shortly before the meeting, the IASB also had announced that it was postponing consideration of the proposed changes until the second half of 2011. Tom noted that, earlier on November 19, officials of the IASB participated in a telephone conference with the ABA Law & Accounting Committee, and he indicated that the ABA would continue its dialogue with the IASB.

Stan and Jim Rosenhauer, Chair of the Committee, agreed that the Treaty under which U.S. lawyers respond to audit letter requests should not require changes even if some of the FASB and IASB proposals are adopted.

Jim Rosenhauer noted that, through the Audit Responses Committee’s listserv and future meetings, the Committee would continue to keep its members informed of developments with respect to the FASB and IASB proposals. He also urged Audit Response Committee members to continue to utilize that listserv to discuss requests from auditors that are outside the scope of the treaty, and other matters related to audit response letters.

- James J. Rosenhauer
  Hogan Lovells US LLP
  jjrosenhauer@hoganlovells.com
On October 19, 2010 in New York the Working Group on Legal Opinions (“WGLO”) held its semi-annual seminar, featuring panel discussions and breakout sessions on current opinion practice issues. Summaries of the panel sessions and breakout groups are included as an addendum to this issue.

The next WGLO seminar is scheduled for May 3, 2011.

The Steering Committee of WGLO and its Association Advisory Board and Law Firm Advisory Board met the prior day. Following are reports on the Association and Law Firm Advisory Board October 18 meetings.

**Association Advisory Board**

The Association Advisory Board (“AAB”) held its seventh semi-annual meeting on October 18, 2010 in conjunction with the WGLO seminars the following day. 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 that focus on closing opinions.

The opening address was provided by the Hon. Thomas L. Ambro of the Third Circuit Court of Appeals and former Chair of the ABA Section of Business Law and its Legal Opinions Committee. Judge Ambro highlighted collaborative efforts underway by the WGLO and the Legal Opinions Committee to identify areas in which state and local bar opinion reports demonstrate the emergence of national standards of practice. He urged members of the AAB to attend the breakout session at the WGLO seminar addressing that project and to enlist participation from bar associations and other groups that focus on identifying customary practice. [See “Report on Customary Practice,” page A-1 of the Addendum.]

The primary substantive presentation was provided by Don Glazer. Don began by describing the holding in a case decided by the U.S. Supreme Court just before the Spring 2010 WGLO meeting: *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). He noted that the case can be read as authority for the proposition that under the Federal Arbitration Act (the “FAA”) an arbitration clause, even in a consumer agreement, that is silent on whether a party can bring a class arbitration, must be interpreted to prohibit class arbitrations. He pointed out that courts in many states have held that contractual prohibitions on class arbitrations in consumer agreements violate a fundamental public policy of the state and hence are invalid. See, e.g., *Feeney v. Dell Computer*, 908 N.E.2d 753 (Mass. 2009) (on which Don reported at the Spring meeting of the AAB). He noted that the U.S. Supreme Court will hear argument in November 2010 in *AT&T Mobility LLC v. Conception*, a case in which the Ninth Circuit reaffirmed its earlier ruling that the FAA “does not expressly or impliedly preempt California law governing the unconscionability of class action waivers in consumer contracts of adhesion.” *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 (9th Cir. 2009). Don recommended, pending further clarification by the Supreme Court in the *AT&T Mobility* case, that opinion givers consider taking an express exception for public policy in an enforceability opinion on an agreement with an arbitration clause which is either silent regarding class arbitrations or purports to eliminate the ability of a party to bring a class arbitration.

The AAB also received reports on two important administrative matters. First, Arthur Field, Chair of the WGLO Steering Committee, reported that a project is underway to lodge materials used in all
WGLO programs on a website available to participants. He noted that WGLO program materials are now so extensive that they do not conveniently fit on a library shelf. Second, Lori Gordon, a member of the Steering Committee, reported that a project is underway to lodge state and local bar reports on the WGLO website. She noted that electronic copies of several reports had already been received. She urged all bar associations represented on the AAB with published opinion reports to use that facility.

The AAB will hold its next meeting in conjunction with the 2011 Spring program of the WGLO. Readers of this newsletter wishing to propose a state or local bar association, or affinity association of opinion recipients, for membership in the AAB should contact the undersigned 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 October 18, 2010, Chair Reade Ryan began by asking the group for reactions to questions that had been raised with him by members of the Board.

The first question was the extent to which members have seen limitations on permissible reliance on legal opinions to 30-day periods (e.g., assignees of participations in a loan agreement may rely upon the closing opinion of counsel to the borrower, subject to the limitations on reliance stated in the opinion, for a 30-day period following the closing). Several members commented that, while they had seen time limits, 30 days was shorter than many. One reason is the desire of a lender to be able to assign reliance on the opinion during a reasonable syndication period. Members reported seeing time limits of 90 to 120 days. It was noted that these time limits were a compromise from the “non-assignability” that is included in many opinions.

The second question was the extent to which the ABA Real Estate/ACREL generic qualification was being used in contexts other than real estate. While some members noted some growing use of this approach, others indicated that there was not widespread acceptance of the generic exception in non-real estate transactions. [Editor’s Note: For a discussion of the generic exception in the context of real estate closing opinions, see “Program Summary: Should Legal Opinion Letters and Real Estate Transactions Differ from Opinions in Other Business Transactions?” in the April 2010 (volume 9, number 3) issue of the newsletter.]

Linda Hayman, one of the original organizers of WGLO, reported that support for WGLO continues to be strong. She indicated that WGLO was undertaking a major expansion of its website, with the goal of making its materials available on line, and providing streaming of some WGLO sessions. Lori Gordon has agreed to be the Webmaster.

Reports on the current state of lending transactions were provided by James Smith of Foley Hoag LLP as to Boston, Reade Ryan of Shearman & Stearling LLP as to New York, Mark Adcock of Moore & Van Allen PLLC as to Charlotte, Robert Siegel of Bilzin Sumberg Baena Price & Axelrod LLP as to Miami, Andy Kaufman of Kirkland & Ellis LLP as to Chicago, Roderick Goyne of Baker Botts L.L.P. as to Dallas, and Jerome Grossman of Luce, Forward, Hamilton & Scripps LLP, as to California. Each reported slow but significant recovery. Although the focus of activity varies somewhat from market to
market, overall levels of activity continue to lag far behind the period 2005-2007. Several reported reduced restructurings, and increased M&A and (in some cases) project financing transactions.

Arthur Field reported on the effort by the ABA Legal Opinions Committee and WGLO to sponsor a customary practice project and report, which will start with an analysis of the ABA Principles and ABA Guidelines to see whether there is widespread agreement on their content, which could then be reflected in a report adopted by bar groups across the country. [See “Report on Customary Practice,” page A-1 of the Addendum.] The goal would be to have something that would be useful both as an educational tool on opinion practice and in litigation contexts.

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

Notes From the Listserve (Index of Dialogues, October 2008-Fall 2010)

[Editor’s Note: Dialogues on the Committee’s listserve are not intended to be authoritative pronouncements of customary opinion practice, but rather 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 “listerves” 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 index. You must be a member of the Committee to subscribe.]

We inaugurated “Notes From the Listserve” (formerly called “Lessons From the Listserv”) with the October 2008 issue of the newsletter (volume 7, number 4). In this issue we provide a topical index of all dialogues covered in this feature from the October 2008 issue through our Fall 2010 issue (volume 10, number 1).

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**Recent Developments**

Opinions on the enforceability of choice-of-law clauses are receiving increased scrutiny, as evidenced by the breakout session in the Fall WGLO seminar on choice-of-law opinions, summarized by Lawrence Goldberg in the addendum to this issue (page A-5). A significant focus of the Subcommittee on Cross-Border Legal Opinions is on choice-of-law opinions, and the TriBar Opinion Committee is considering undertaking a project in this area. An example of the challenges confronting opinion givers who are asked to render such opinions is the 2010 opinion of the Ninth Circuit in *Pokarny v. Quixtar, Inc.*, 601 F.3d 987. Before the Ninth Circuit was an appeal by Amway (now called Quixtar) challenging the district court’s decision that Amway’s mediation/arbitration scheme for its so-called “independent business owners” (“IBOs”) is unconscionable by reason of its procedural and substantive unconscionability. Notwithstanding the IBOs’ agreement to dispute resolution procedures stipulating Michigan law as controlling their enforcement and interpretation, the district court, affirmed by the Ninth Circuit, applied California law to determine their unconscionability (plaintiffs are California residents).

In the course of its opinion, the Ninth Circuit also concurred with the district court in concluding that the fee-shifting clause of the procedures, whereby the prevailing party is entitled to reimbursement of its legal fees and expenses from the non-prevailing party, is also unconscionable:

“We agree that because the fee-shifting clause puts IBOs who demand arbitration at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court, the district court properly held that the clause is substantively unconscionable.”

601 F.3d at 1004.

The Ninth Circuit does not limit its ruling to agreements with consumers or individuals. If not understood in that context, the holding, and the Ninth Circuit’s reasoning, could call into question many standard fee-shifting agreements. Understood in context, the ruling should not apply to fee-shifting agreements between commercial parties.

- The Editor

**Legal Opinion Reports**

[Editor’s Note: For a summary of the Fall WGLO panel on pending legal opinion reports, see “Recent Bar Opinion Reports and Statutory and Case Law Developments” in the WGLO addendum to this issue of the Newsletter (at page A-9). The following note by Justin Klimko summarizes his remarks on that panel on Michigan’s legal opinions report (published September 2010). The Chart of Published and Pending Legal Opinion Reports below, prepared by John Power, was included in the panel materials (as of September 30), and is updated here to November 30, 2010.]

**Michigan Report**

The Report of the Michigan Ad Hoc Committee on Legal Opinions was published in September 2010. It can be found here [CTRL + Click]. The Michigan Report is not a comprehensive restatement or review of opinion practice. Rather, it (i) identifies and briefly reviews existing literature on opinion practice from the ABA Legal Opinions Committee, the TriBar Committee and other national, state and local committees and organizations, and recommends those materials to Michigan practitioners as consistent in most respects with customary practice in Michigan and useful guidance in the preparation...
and delivery of transaction opinions, (ii) identifies portions of Michigan’s 1991 Report that may have been rendered obsolete or inaccurate because of subsequent developments, (iii) adds references to statutes and case law from the intervening years that affect specific areas of Michigan law discussed in the 1991 Report, and (iii) discusses some specific issues that Michigan lawyers may encounter in rendering transaction opinions, including Michigan statutes and decisions that influence the evaluation of those issues.

- Justin G. Klimko  
  Butzel Long, P.C.  
klimkojg@butzel.com

**Chart of Published and Pending Legal Opinion Reports**

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<thead>
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1 Available (or soon to be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee
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(A. Sidney Holderness & Brooke Wunnicke)

(Aspen Publishers)

When asked to review the Third Edition of the *Legal Opinion Letters Formbook*, I was both delighted and dismayed. Delighted, because I had the privilege and pleasure of working with my recently departed friend, Sid Holderness, on opinion (and other) matters for over 30 years. Dismayed, because, to my embarrassment, I had not read the first two editions.

Having now confessed my shortcomings and with apologies to those of you who have read the previous editions, I am writing this review. I approach it from two perhaps unusual perspectives: first, unburdened by knowledge of the first two editions and second, as a reflection of Sid’s life as a lawyer and colleague. I do this with apologies to co-author Brooke Wunnicke, who I have not met, but I am confident will understand.

The first two chapters of the book deal with the art of writing and in particular the art of writing third-party legal opinions. These chapters should be read by every young lawyer, whether or not they ever have to draft a legal opinion. They also should be read by any lawyer who drafts or reviews legal opinions.

The balance of the book contains annotated legal opinions on virtually every common form of corporate and financing transaction. The forms are redacted opinions rendered by various counsel in real
transactions. For those not expert in a particular area, the forms are an invaluable resource. They provide a checklist of matters to be covered in a particular transaction and an example of how an opinion should be written. They also identify, thanks to the authors’ excellent footnotes and comments, legal issues to be considered and pitfalls to be avoided in rendering particular opinions. I for one will never review another opinion without the Formbook by my side. The authors have compiled a “basic training” manual for the opinion preparer and recipient. However, the book is far from basic; the reader will garner much substantive knowledge, and as to any particular opinion, this book contains just about everything the opinion preparer needs to know to render the opinion.

Having said that, I have a few suggestions for the Fourth Edition. While there is no question that various bar association reports are important reading for opinion gurus, they do not add much but bulk to this book for the everyday practitioner and could safely be eliminated. Those who are interested can easily find them on the ABA Legal Opinions Committee’s website, or otherwise. The same might be said of the various TriBar reports, which are available in handy form from the ABA online and in booklet form. Eliminating these reports would make the size of the Formbook more user friendly.

While the opinions are uniformly excellent, they are a bit heavy on Texas issues and forms. I should think the target audience is more likely concerned with Delaware and New York laws, and perhaps a few more examples from these states would be useful.

Finally, not surprisingly, the authors of the sample opinions have widely divergent views on appropriately-stated opinion exceptions. Even opinions on similar topics (see, for example, the opinions in Sections 8.02 (on registered/rule 144A offerings of debt securities) and 8.03 (on registered primary offerings of common stock)) do not treat opinion exceptions consistently. This presents the user with a conundrum — what are the “standard” exceptions one should expressly include in a legal opinion?

As opinion committees around the country are trying to seek common ground for opinions rendered, so should they seek consensus on appropriate exceptions. The list of exceptions in common use seems to be growing; this will inevitably lead practitioners to a “kitchen sink” approach for fear that if an expert later testifies at a trial that “exception X” is customary, the opinion may be found to have covered unintended areas of the law.

Now let me turn to the fun side of the book (yes, Sid did find opinion work fun). The book opens with a French phrase. From there, to make its points it draws on Confucius, Oliver Wendell Holmes, Little Johnny Possum, James Madison, Lord Chesterfield, Blackstone, Sir Francis Bacon, Quintus Horatius Flaccus and Justice Cardozo, most of them in the first twenty pages! I began to read this book on an airplane. By page 26 I was chuckling to myself (well, not quite to myself); to see why open the book to pages 26 and 27 dealing with Words and Phrases to Avoid. The man next to me asked what I found so funny in this rather hefty tome. When he saw it was a book on legal opinions I was laughing about, he edged a bit further away in his seat. But the grace of this book is that the authors have approached a subject often written about in rather pedantic tones, in a light-hearted manner.

The section on writing so reminded me of Sid! Always an advocate of elegance, always understated (except in his choice of ties and suspenders, which I always envied) and always to the point. This book contributes much to the ability of the lawyer who is not an opinion guru to write legal opinions without fear. This is a singular accomplishment. I read the section on legal ethics, the authors quote Sir Francis Bacon on the obligations of a professional to that person’s profession. Sir Francis counts a professional to have led a satisfactory life “if a person be able to visit and strengthen the roots and foundation of the science itself, thereby not only graceing it in reputation and dignity, but also amplifying it in perfection and substance.” Sid certainly graced the legal profession “in reputation and dignity,” and
this excellent Formbook amplifies it in “perfection and substance.” It represents a fitting “finis” to the life of our friend and colleague, Sid Holderness.

- J. Truman Bidwell, Jr.
Sullivan & Worcester LLP
jtbidwell@sandw.com

Membership

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her to the ABA Section of Business Law website: http://www.abanet.org/buslaw/home.html, click “Committees,” and scroll to Legal Opinions. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

Next Newsletter

We expect the next newsletter to be circulated in mid-April 2011. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eapdlaw.com) or Jim Fotenos (jfotenos@greeneradovsky.com).
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WORKING GROUP ON LEGAL OPINIONS

FALL 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 October 19, 2010 WGLO meeting in New York. The summaries were prepared by panelists, leaders of breakout groups, or by members of the audience. Breakout group leaders are preparing separate summaries for the concurrent breakout sessions that will be available in the materials at the next WGLO meeting, which is scheduled for May 3, 2011.

PANEL SESSIONS I:

1. Report on Customary Practice
   (Summarized by Stanley Keller)

   Kenneth M. Jacobson, Katten Muchin Rosenman LLP, Chicago
   Stanley Keller, Edwards Angell Palmer & Dodge LLP, Boston
   Vladimir R. Rossman, McDermott Will & Emery LLP, New York
   Kenneth P. Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Nashville
   Stephen C. Tarry, Vinson & Elkins LLP, Houston
   Steven O. Weise, Proskauer Rose LLP, Los Angeles

   This panel described the joint project sponsored by the ABA Section of Business Law’s Legal Opinions Committee and WGLO to identify selected legal opinion practices upon which there is widespread consensus and to issue reports from time to time identifying that consensus. Stan Keller began with an overview of the project, which he described as an important one that will be successful only if there is broad participation. Ken Jacobson and Vladimir Rossman then provided some history and discussed how topics to be addressed would be selected. They indicated that the plan was to begin with the Legal Opinion Principles (53 Bus. Law. 831 (1998)), which have been widely accepted, and with the possibility of considering then or subsequently selected provisions of the Guidelines for the Preparation of Closing Opinions (57 Bus. Law. 875 (2002)).

   Steve Weise, as the Reporter, then gave a description of how the project would operate and how work product would be developed and approved. He indicated that it would be an open and transparent process with broad participation, especially by state bar groups. Pete Ezell, a Co-Reporter, noted that the project would include coordination with various legal practice groups, covering such areas as real estate, tax and international, to identify where customary practice is alike and where it diverges and why differences exist. Steve Tarry, also a Co-Reporter, re-emphasized the important role of state and local bar groups in the effort.

   A general discussion of certain of the Legal Opinion Principles then followed to illustrate how the project might proceed. Ken Jacobson wrapped up the panel by referencing the project’s importance and the need for broad, inclusive participation.
2. **Illustrative Opinions in ABA Mergers and Acquisitions Committee’s Model Stock Purchase Agreement, Second Edition**
(Summarized by Thomas M. Thompson)

Joel I. Greenberg, Kaye Scholer LLP, New York
Thomas M. Thompson, Buchanan Ingersoll & Rooney, PC, Pittsburgh

This panel reported on two recently published illustrative legal opinions designed for an M&A transaction, which were included as exhibits to the revised Model Stock Purchase Agreement, Second Edition with Commentary (“MSPA”) published by the Section of the ABA Mergers and Acquisitions Committee. The MSPA updates the 1995 Model Agreement and expands the commentary to address in greater depth the possible responses of counsel for the seller. The illustrative opinion letters (one from seller's counsel and one from buyer's counsel) and commentary are intended to serve as a guide for M&A lawyers on basic considerations of opinion practice in the context of acquisitions. The opinion letters were developed by a task force of M&A Editorial Committee members who are also active in the ABA Legal Opinions Committee and WGLO, with considerable help and guidance from a special task force of the ABA Legal Opinions Committee. Copies of the letters and related commentary are posted on the ABA Legal Opinions Committee’s Legal Opinion Resource Center.

Joel Greenberg began by noting that that the commentary to the illustrative opinions acknowledges that legal opinions are rarely delivered in M&A transactions in which the target is a public company, and have become less common in M&A transactions involving private targets. The commentary notes the need for a careful consideration of the cost / benefit balance in determining whether to require delivery of an opinion letter, addresses the purposes served by particular opinions, and discusses alternatives to reliance on some opinions traditionally requested. The illustrative legal opinion letters are drafted to be reasonable first drafts in an acquisition of all the stock of a privately held target company and illustrate opinion letters that a reasonable recipient would be willing to receive and a willing opinion giver would be prepared to deliver.

The illustrative opinion letters in the revised MSPA have changed significantly from the original opinion letters in the 1995 MSPA (which were based on the 1991 ABA Accord) and the 2001 Model Asset Purchase Agreement and Commentary (which included both Accord and non-Accord opinions). The commentary in the revised MSPA references various bar association opinion reports published since 1995. The new MSPA illustrative opinion letters and commentary largely track the suggested language of those reports and draw heavily upon the 1998 TriBar Report (Third-Party “Closing Opinions,” 53 Bus. Law. 591), as well as the Boston Bar’s short form opinion (A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles, 61 Bus. Law. 389 (Nov. 2005), and several state bar association opinion reports in the context of M&A transactions.

The illustrative seller’s counsel opinion letter in the revised MSPA contains suggested opinion language and commentary on:

- corporate status and power;
- authorization, execution, delivery and enforceability of the transaction documents;
- “no breach or default” of organizational documents or agreements to which the client is a party and “no violation” of applicable law;
- governmental consents or filings;
capitalization of the target company and characteristics of its issued and outstanding stock; and

- the effect of the receipt of the target stock by the buyer (but not as to title to that stock) —
  (this opinion draws on the recent UCC Article 8 revisions).

In addition, the illustrative seller’s counsel opinion letter contains suggested language and commentary addressing no litigation confirmations, involvement of local or specialty counsel, and other language commonly used in M&A opinions. The Commentary cautions against overly broad kitchen sink qualifications and contains language dealing with assignment and limitations on reliance.

CONCURRENT BREAKOUT SESSIONS I:

1. **Ethical Considerations Arising in the Context of Opinion Negotiations**
   (Summarized by James A. Smith)

*William Freivogel, Chicago, Chair*

*James A. Smith, Foley Hoag LLP, Boston, Reporter*

This breakout session focused on the inherent conflict built into the negotiation and delivery of third-party legal opinions: while zealously representing its client, the opinion giver nevertheless owes a limited duty to the opinion recipient. See Section 95, Restatement (Third) of the Law Governing Lawyers. The group considered three specific topics, described in more detail below. It concluded that all three topics involved issues that are highly fact dependent and, at best, one could only hope to highlight these issues for opinion preparers to consider when preparing opinions.

**Standard Opinions.** In this scenario the opinion recipient does not provide a form of opinion, but instead asks the opinion preparers to provide the firm’s “standard opinion” for this type of transaction. The opinion giver typically has many forms of opinion, some more difficult to render than others — which form should be offered up?

Participants in the breakout session experienced in providing opinions as local counsel or in such situations as the formation of a private equity fund reported that this issue arises frequently. No one could identify any ethical rule that prevented counsel from offering a draft that was more favorable to the opinion giver than the opinion that the opinion giver would actually be willing to provide if pressed. Several people noted that the “market” often dictates the response in these situations. If the opinion preparers know that counsel for the recipient is knowledgeable about the kinds of opinions that are typically given in a particular setting, the opinion preparers are not likely to waste time by offering too little. Similarly for local counsel, there is an understanding that the opinion will, over time, be compared to those given by other counsel in the jurisdiction, and this understanding often leads to a more robust response to the request for a “standard” opinion.

**No Conflicts Opinions.** The opinion giver is asked to provide a “no conflicts” opinion based on a specified list of documents that has been provided by the opinion giver’s client. The opinion preparers know that there are agreements not on the list that may be in conflict with the agreement on which the opinion is being given. What is the responsibility of the opinion giver with respect to these other agreements?

Partially in response to decisions like the one in *Dean Foods (Dean Foods v. Pappathanasi*, 2004 WL 3019442 (Mass. Superior Ct. 2004)), the standard practice in many jurisdictions is for opinion givers...
to provide a “no conflicts” opinion only as to agreements on a specified list of documents, rather than as
to any “material agreement of which we have knowledge.” This formulation is intended to limit claims
based on what the opinion giver knew or should have known. But it also raises the question whether the
opinion giver has a duty of disclosure to the opinion recipient when the opinion giver knows that the list
of agreements is not complete and that some of the agreements not on the list might conflict with the
agreement that is the subject of the opinion. The issue is raised to another level if the opinion giver’s
client has refused to add an agreement to the list, either because the client does not believe the agreement
is material or because adding the agreement could “blow the deal.”

Several ethical and other rules come into play in this deliberation including ABA Model Rule 1.6
(the confidentiality rule) that restricts the opinion giver from disclosing the existence of the agreement in
question if its client refuses to permit the disclosure; Model Rule 4.1(a) that prohibits counsel from
making a false statement of material fact or law to a third party; Model Rule 8.4(c) that prohibits conduct
involving fraud or deceit; and the ABA Legal Opinion Guidelines that prohibit the giving of a misleading
opinion.

Recognizing that this is an area governed by the facts and circumstances of each particular case,
several useful comments nevertheless emerged from the discussion:

(i) When relying on a list of agreements that are certified by the client, many attorneys are
careful to characterize these as agreements that the client has determined to be material
— an attempt to avoid allocation of this responsibility to the opinion giver.

(ii) A distinction needs to be made between the situation in which the opinion giver is
intimately involved in drafting disclosure schedules for the client’s representations or for
a client’s certificate, and one in which the client’s inside counsel has that responsibility.
In the latter case, the opinion giver may be absolved from looking behind the list of
agreements unless faced with red flags that raise a question about the veracity of the list
of agreements.

(iii) In general, most agreed that if an opinion giver has engaged in a dispute with the client
over disclosing a conflicting agreement in a representation or certified list of agreements,
the opinion giver may not be wholly protected from a claim if it focuses its no conflicts
opinion solely on a list of agreements.

**Written Waivers.** The opinion giver is representing a borrower with respect to a loan from a
bank that is also a client of the opinion giver’s firm (in unrelated transactions). In states that require
written waivers of conflicts, to what extent are these waivers being obtained in practice?

New York has recently changed its ethics rules to require written waivers of conflicts. Other
states following the Model Rules (see ABA Model Rules 1.7, 1.9) have had a written waiver requirement
for some time. There was not a general consensus as to the proper documentation required for a written
waiver, recognizing that this is once again a matter of facts and circumstances. Many relied on email
correspondence with the affected clients. Others reported that some institutions have inside counsel
generate a form waiver of conflicts when certain factual circumstances are present. Finally, in cases
where one of the clients in question might not be sophisticated about conflicts issues, most require much
more formal waiver procedures.

In the context of a closing opinion, the issue is particularly complex because of the general duty
owed by the opinion giver to its client in the current transaction, the limited duty owed to a recipient in
the opinion process, and other duties that may be owed to the recipient because it is a client of the opinion giver in other contexts. The breakout session ended before the group could more fully develop this point.

2. **Choice-of-Law Opinions**  
   (Summarized by Lawrence S. Goldberg)

   *Timothy G. Hoxie, Jones Day LLP, San Francisco, Co-Chair*  
   *Lawrence S. Goldberg, Schulte Roth & Zabel LLP, New York, Co-Chair*  
   *David R. Keyes, Kelly Hart & Hallman LLP, Houston, Reporter*

   Recently some courts have refused to enforce choice-of-law clauses. These decisions raise questions about choice-of-law opinions, whether giving such opinions is a wise practice and what qualifications or exceptions should be taken. The session focused on what practice has been and whether this should change. Every enforceability opinion covers the enforceability of a choice-of-law clause in the agreement opined on, unless that clause is expressly excluded from the opinion.

   **Classification.** An “Inbound Opinion” addresses the enforceability of a choice-of-law clause (expressly or by implication in a general enforceability opinion) where the opinion giver’s own jurisdiction covered by the opinion letter (“Covered State”) is the jurisdiction whose law is chosen to govern the transaction (“Chosen State”). In other words, the Chosen State and the Covered State are the same state. An Inbound Opinion may be given either in reliance on a specific statute if one exists in that state or on Section 187 of the Restatement (Second) of the Law of Conflict of Laws (1971) (the “Restatement”).

   In an “Outbound Opinion,” the Chosen State (e.g., the credit agreement provides that North Carolina law will govern) and Covered State (e.g., a New York law firm provides the legal opinion under New York law) are different jurisdictions. The opinion letter addresses whether the courts of the Covered State (New York) will give effect to the choice-of-law clause selecting the law of the Chosen State (North Carolina). Outbound Opinions may be requested in both a domestic context (where the law of another State governs the applicable agreement) and an international context (where the law of another country governs the applicable agreement).

   **Inbound Choice Statutes.** Firms typically provide Inbound Opinions. Participants generally agreed that if the Covered State has an “inbound choice” statute (e.g., New York and California), then giving an Inbound Opinion is fairly simple. Issues may exist regarding the size of a transaction for purposes of the inbound choice statute, including whether smaller claims can be aggregated to meet a minimum size test. Practice seems to vary as to whether firms expressly limit their opinion by assuming (without opining) that the statute applies.

   In addition, practice varies on whether firms include a qualification with respect to constitutional law issues. Some courts have raised the issue of whether federal constitutional due process or full faith and credit requirements may limit the enforceability of an inbound statute if no contacts exist with the Chosen State. See *Lehman Bros. Commercial v. Minmetals Intl. Non-Ferrous Metal Trading Co.*, 179 F. Supp. 2d 118 (S.D.N.Y. 2000). Some observed that this may have become a “dead issue” because *Minmetals* is a ten-year-old case and raised the issue in *dicta*, no court has actually refused to enforce New York’s Section 5-1401 on constitutional grounds, and the facts in cases discussing the issue may have been unique. One participant mentioned that the U.S. Supreme Court has expressly indicated that the application of a choice-of-law clause may be unconstitutional where insufficient contacts exist with the selected state.
**Inbound Opinions: The Restatement.** Under the Restatement, a court should apply the chosen law if it has a reasonable relation to the transaction or the parties, and if the application of that law would not be contrary to a fundamental policy of another state (including the forum state) having a materially greater interest in the issue and whose law would govern in the absence of an express choice of law.

**Outbound Opinions:** A minority of the attendees indicated that their law firms generally refuse to issue Outbound Opinions. However, a majority of the attendees confirmed that their law firms generally will issue Outbound Opinions, all or almost all of them in states that follow the Restatement. An Outbound Opinion typically includes more assumptions and qualifications than are generally included in an Inbound Opinion. In addition to the assumptions and analysis required by the Restatement about the nature and extent of the contacts with the Chosen State, an Outbound Opinion often (though not always) includes, among other things, assumptions and qualifications about fundamental policy (an important element of the Restatement test) and constitutional law issues. The difficulty in predicting what a court might find to be “fundamental policy,” or even how a court might determine the identity of the state or jurisdiction with a materially greater interest in the transaction or dispute is highlighted by recent cases, and has suggested to some a need to qualify any opinion that expressly or implicitly addresses a choice-of-law clause so as not to pass on either of these elements of the Restatement test.

The Brack and Feeney cases highlight the basic issue. **Brack v. Omni Loan Co., Ltd.**, 164 Cal. App. 4th 1312, 80 Cal. Rptr. 3d 275 (4th Dist. 2008); Feeney v Dell, Inc., 908 N.E.2d 753 (Mass. 2009). How does a firm determine whether the application of the laws of a Chosen State violates a fundamental policy of the Covered State?

Both cases involved consumer class actions and fundamental public policies. In **Brack** a lender failed to obtain a lending license and to display a sign stating the finance charges. The California Court of Appeal held that California’s Finance Lenders Law “is fundamental”, contracts made in violation of the Finance Lenders Law are void and found the Nevada choice-of-law provision to be unenforceable. In **Feeney**, purchase agreements for Dell computers provided that Texas law shall govern, and included an arbitration clause that prohibited class actions. The Massachusetts court held that the interests of Texas (minimizing legal expenses of its companies) were outweighed by the materially greater interest of Massachusetts (affording its consumer a judicial remedy through class actions and deterring corporate wrongdoing). Thus, the court did not give effect to the choice-of-law clause, applied Massachusetts law, and, as so applied, struck down the arbitration clause.

Two Massachusetts attendees in the session stated that before **Feeney** they would not have guessed that permitting class actions for small value claims was a fundamental policy in Massachusetts and might not have taken a fundamental policy (of the Covered State) exception in a choice-of-law opinion. **Feeney** and **Brack** illustrate that attorneys may not know what might be regarded as a fundamental policy in their own states. Thus, attorneys may need to re-think the treatment of fundamental policies in legal opinions.

One tentative solution discussed is the “as if” opinion. Such an opinion states that a contract would be enforced by the courts of the Covered State if the laws of the Covered State were to apply to the contract notwithstanding the selection of the law of the Chosen State, and would exclude any choice-of-law opinion. An “as if” opinion reduces the importance of the choice-of-law opinion, because the recipient has comfort that if the choice-of-law clause is ineffective and the law of the Covered State applies, the contract would nonetheless be effective under the law of the Covered State.

Even in an “as if” opinion, however, the opinion giver must consider what is a fundamental policy. For example, a Massachusetts opinion giver before **Feeney** might not have known before **Feeney** that the prohibition against class actions violated a fundamental policy of Massachusetts, rendering the
arbitration clause unenforceable. Thus, an “as if” approach does not guarantee that the transaction documents do not contain a provision contrary to the fundamental policy of the Covered State.

The Brack and Feeney cases create uncertainty. Several attendees observed that if fundamental policy might affect the enforceability of a contract under the laws of the Covered State, then the use of a fundamental policy qualification should apply to enforceability opinions generally. Although thus far such a qualification is not customary, there appears to be a need for further consideration of the role of fundamental policy in light of these decisions.

3. Internal Opinion Policies and Procedures: Multiple Office Practice Considerations
(Summarized by Frank T. García)

Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair
Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair
Frank T. García, Fulbright & Jaworski L.L.P., Houston, Reporter

Continuing the theme on opinion practices previously commenced by the co-chairs, this breakout session discussed issues related to multiple office practice considerations.† The focus of this session was not to develop prescribed or recommended practices, policies or procedures, but to discuss issues presented by multiple offices (whether intra-state, interstate or global) regarding a firm’s opinion practices and to suggest approaches to those issues. Andy Kaufman and Reade Ryan posed three illustrative opinion practice problems and invited participants to discuss how their firms would address them; time and active participation precluded discussion of the third problem.

Illustrative Opinion Problem No. 1 Your Firm has offices in Atlanta, Chicago, Dallas, Miami, New York (the “New York Office”), and San Francisco. On behalf of its Client, BigCo, the Atlanta office is negotiating, documenting and closing a syndicated loan facility to be agented by a New York based money-center bank represented by the New York City office of a national law firm with offices in New York City, Chicago, and Los Angeles. BigCo and all its subsidiaries are Delaware corporations, and their respective operations and assets are located in Georgia, Florida, Texas and California. BigCo will be the borrower and all subsidiaries will be guarantors, and the borrower and all guarantors will grant personal property security interests and real property liens over substantially all their assets to secure their obligations under the facility. The facility will be governed by New York law except to the extent that the laws of Delaware, Georgia, Florida, Texas and California will necessarily apply (e.g., with respect to the perfection of security interests, real estate liens and choice of law).

Your Firm will deliver the customary closing opinions including existence, power and authority, due authorization, execution and delivery, enforceability of loan documents, no conflicts with law, organizational statutes and documents or major contracts, no required governmental or material third party consents, attachment and perfection of security interests and real estate liens, and no 40 Act or margin regulation issues. Accordingly, the opinion will address laws and issues arising under Federal law and the laws of New York, California, Delaware, Florida, Georgia and Texas. Because your Firm has offices in each of the relevant states (other than Delaware, but with respect to Delaware your Firm is comfortable delivering “basic” Delaware General Corporate Law opinions), your Firm is proposing to deliver all the required opinions in a single opinion letter, drafted and negotiated by the lawyers in your Atlanta office (the “Originating Office”, and each other office, except the New York Office (a “Local Office”) handling the transaction.

† At the Fall 2009 and Spring 2010 WGLO sessions, Messrs. Kaufman and Ryan conducted breakout sessions on the opinion practice topic, “Internal Opinion Standards”. A summary of the Spring 2010 session was presented in the July 2010 (volume 9, no. 4) issue of this newsletter, at page A-3.
The participants’ comments relating to their approach to the first illustrative opinion problem are set forth below, in each instance in a generalized and summary fashion:

**Opining Counsel Division of Responsibility on Review of Loan Documents.** Most participants supported the following approach. The Originating Office counsels with the Client, and performs a thorough review and analysis of, and conducts the negotiations on, the loan documents. Each Local Office reviews only the pertinent loan document provisions relating to the scope of its opinion; e.g., lien creation under mortgages on property located in its state. The New York Office performs an overview substantive review of all New York-governed documents in relation to the enforceability and creation of personal property security interests opinion. The Originating Counsel provides transactional, Client and documentation detail and support information to the Local Offices and New York Office and otherwise coordinates their activities on the transaction.

**Opinion Letter Preparation Considerations.** The Originating Office drafts and negotiates the opinion letter and drafts and obtains the factual support certificates from the Client (but seeks input from each Local Office and the New York Office). The New York Office reviews the opinion letter in relation to the enforceability of the documents whose chosen law is New York, the security creation opinions, and related exceptions and qualifications. Each Local Office drafts the opinion paragraphs, and related exceptions and qualifications, that are particular to its opinion(s). Some firms indicated that they deliver a single umbrella opinion letter relating to all jurisdictions covered by the transaction. Other firms indicated that opinions of each Local Office are omitted from their overall opinion letter, and these omitted opinions are given in separate opinion letters from, and on the letterhead of, the respective Local Offices.

**Opinion Letter Review.** Where the firm has a policy of opinion committee review or uses a second partner review (the term “opinion committee” is used to cover both situations), a consensus of the participants’ supported the involvement of a New York-licensed and residing member of the firm for the “second partner review” as well as for a substantive review of the transaction documents whose chosen law is New York. On the other hand, involvement of an opinion committee member from each or any Local Office for Local Office aspects of the documents or by a Delaware-licensed attorney on general Delaware corporate law is not considered of paramount importance. The role and function of the opinion committee would depend on the firm’s policies. The firm might have a centralized opinion committee that passes on adherence to firm form and policy, with the differences requiring committee consent. Or the firm might have a less centralized opinion committee process where, for example, the Originating Office is responsible for overseeing compliance with the review process, and the involvement of the opinion committee is on an “as requested” basis. It was noted that some firms have opinion committees for each foreign office, possibly with overlap in committee membership.

**Cost Considerations.** With the number of attorneys involved in the multiple office transaction, the following observations were noted in regard to cost efficiencies: (i) the second partner review does not usually call for a substantive review; (ii) even if it does involve a substantive review, the reviewer generally is experienced in the type of transaction involved and limits the review of documentation to specific issues related to the opinion, and not for other purposes, for example, to assist in negotiations; (iii) where firm policy calls for a Local Office review, it will be focused on the specific topics for which the Local Office is responsible; (iv) only the Originating Office is responsible for knowledge of all transaction terms and the substance of all transaction documents, and accordingly it provides that information and detail to others involved in the opinion process; and (v) communications among the Originating Office, the Local Offices, the New York Office and the opinion committee are conducted substantially verbally.
Illustrative Opinion Problem No. 2. Your Firm has offices in New York, Miami, Chicago, Houston and Los Angeles, with over 100 lawyers in each city. The Firm’s opinion committee has proposed, and the Firm’s policy committee has approved, a written detailed and comprehensive opinion policy applicable to all lawyers in all offices, and copies of that opinion policy have been distributed to all partners of the Firm. You are the chair of the opinion committee, and the senior partner comes to you and asks, “Going forward, how can we be sure that our partners are complying with our new opinion policy?”

The participants’ comments suggested that a greater likelihood of compliance with opinion policies will occur if all firm attorneys (i) are familiar with the substance and scope of the policies, (ii) understand that those policies serve as an important risk management tool, and that differences therewith should require clearance by someone designated for that purpose, and (iii) further understand that the role and focus of the opinion committee or the equivalent is to assist in resolving issues encountered with the opinion policies. Opinion policies also serve the important role of providing guidance to attorneys who do not practice in the corporate and finance disciplines. Otherwise, they may inadvertently ignore policies or lack an understanding of fundamental opinion-giving considerations, for example, the role of customary practice. It was suggested that attorneys should attend relevant training seminars, and as part of the new/lateral partner orientation, attorneys should be further instructed in the importance and function of opinion policies.

To assist in obtaining adherence to opinion policies, many firms request that a final copy of each delivered opinion be submitted to a central, firm-wide retrievable database. Even where no one is responsible for reviewing or cataloging opinion letters, a stricter adherence to policies may occur if an opinion preparer realizes that his or her product will be available for firm-wide viewing. Firms using this approach recommended reminding firm attorneys of the responsibility to adhere to this practice at least monthly. More formal procedures, such as requiring strict adherence to prescribed forms, maintaining detailed records of deviations from policies, and involving a greater “hands-on” participation by the opinion committee, were discussed. Some felt that the benefits of these procedures may often be offset by related costs and problems, including the administrative burden, inconsistencies in record keeping, blind adherence to a form that prevents the user from developing an understanding of its meaning or appreciation of a requested modification, and interference with the process of negotiating the opinion letter.

NOON PANEL:

Recent Bar Opinion Reports and Statutory and Case Law Developments
(Summarized by John B. Power)

John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator
Kenneth P. Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Nashville
James Gadsden, Carter Ledyard & Milburn LLP, New York
Richard R. Howe, Sullivan & Cromwell LLP, New York
Justin G. Klimko, Butzel Long, P.C., Detroit
David L. Miller, Pillsbury Winthrop, McLean, Virginia
**Recent Bar Reports**

A panel comprised of Messrs Ezell, Klimko and Miller discussed proposed or issued reports of the national real estate bar and the Michigan and Tennessee bar associations.‡

1. **Real Estate Report**

David Miller indicated that a draft of a proposed real estate report by the ABA Section of Real Property, Trust and Estate Law, ACREL, and the American College of Mortgage Attorneys is currently being reviewed by members of the author committees, and when published will replace and expand on a comprehensive 1998 report by two of those committees. It will reflect the view that the remedies opinion on documents in a loan secured by real estate may be limited by a generic exception that provides assurance as to the acceleration of principal on account of a material default. It will recognize the role of customary practice as exemplified by the Customary Practice Statement, 63 Bus. Law. 277 (2008). See “Legal Opinion Reports” in the Fall 2010 issue (volume 10, number 1) of this newsletter.

2. **Michigan Report**

[Editor’s Note: For a summary of Justin Klimko’s comments on the panel, see “Legal Opinion Reports” in the main body of this issue of the newsletter.]

3. **Tennessee Report**

Pete Ezell reported that the proposed Tennessee report is designed to replace Tennessee’s 1995 report; at the time of the panel it was posted on the Internet for comment. The report will provide guidance on issues that commonly arise in connection with Tennessee opinions. It will generally recognize the existence of customary practice, but will not purport to be a comprehensive statement of customary practice in Tennessee. The report will recognize the use of a generic exception in many real estate loan transactions and less frequently in general business transactions, will discuss the formulations of the exception (including the “practical realization assurance”), and will discuss the use of “laundry lists” of exceptions either separately or in combination with a generic exception. See “Bar Reports” in the July 2010 issue (volume 9, number 4) of this newsletter.

**Recent Legal Developments**

1. **New York Statute on Powers of Attorney**

Dick Howe reported on the enactment in New York, effective September 12, 2010, of a statute solving most of the problems created by a 2009 statute which required for validity that every power of attorney be acknowledged before a notary public and contain the exact wording of a prescribed cautionary statement. See “Recent Developments” in the Fall 2010 issue of this newsletter.

2. **Seventh Circuit Addresses Issues Relevant to “True Sale” Opinions**

Jim Gadsden reported on *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688, 695-696 (7th Cir. 2010), which strikes a cautionary note for lawyers giving opinions on “true sales” of assets to a special purpose entity. The 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. See “Recent Developments” in the Fall 2010 issue of this newsletter.

3. **Chart of Bar Reports**

John Power presented a September 30, 2010 chart of recent and pending bar reports. See “Legal Opinion Reports” in this issue of the newsletter for the same chart as of November 30, 2010.

**PANEL SESSIONS II:**

1. **Opinions on LLC Interests and Related Opinions**
   (Summarized by Susan Cooper Philpot, Cooley LLP, San Francisco)

   Donald W. Glazer, Boston, Chair
   Louis G. Hering, Morris, Nichols, Arstt & Tunnell LLP, Wilmington
   James G. Leyden, Jr., Richards, Layton & Finger LLP, Wilmington

   The use of Delaware LLCs has become so common that today Delaware has more LLCs than corporations. For the past 2½ years the TriBar Opinion Committee has been working on a follow-on to its 2006 LLC Opinion Report. The new report covers opinions on the issuance of LLC interests and a few related matters. Several issues considered in the course of drafting the new report proved to be contentious, but the report is close to final. The panel shared the following specific recommendations for opinions regarding LLC interests:

   • **TriBar suggests: “The LLC Interests have been validly issued.”**

   This opinion means that the LLC Interests have been issued in compliance with the applicable LLC statute, the LLC’s operating agreement and its certificate of formation, and that the terms of the LLC Interests do not violate any requirements or provisions of any of the foregoing. This opinion does not mean that the rights the LLC Interests purport to grant to the holders are enforceable obligations of the LLC. “Duly authorized” or “duly authorized and validly issued” is more appropriate in the corporate context, and the Committee discourages its use.

   • **TriBar suggests: “Purchasers have been duly admitted as members.”**

   This opinion means that the purchasers of the LLC Interests have been admitted as members of the LLC in compliance with the LLC statute, the LLC’s operating agreement and its certificate of formation, and fall within the definition of “member” under the LLC statute. It does not mean that the obligations under the operating agreement are enforceable or that the purchaser has the power to be a member under applicable law or that the terms of any subscription agreement under which the Purchasers have acquired the LLC Interests have been satisfied.
• TriBar may suggest a form of: “Purchasers have no obligation under the [LLC Act] to make further payments for the purchase of their LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests, except . . .”

Exceptions for the above opinion might include a deferred purchase price under any applicable subscription agreements, further contributions under the operating agreement and statutory obligations to return wrongful distributions. If the opinion is not limited to the LLC Act, then the opinion giver needs to consider other laws. This formulation of the opinion is preferred over the corporate form of opinion of “fully paid and nonassessable.”

• TriBar may suggest a form of: “Purchasers have no personal liability under the [LLC Act] for the debts, obligations and liabilities of LLC, whether arising in contract, tort or otherwise, solely by reason of being member of LLC, except . . .”

Exceptions similar to those described in the prior bullet point also should be considered for this opinion. In fact, these last two opinions are often combined. By tying this opinion to the LLC Act and a Purchaser’s capacity as a member, the opinion does not address liability resulting from a Purchaser’s status as a controlling person under the securities laws, environmental laws, etc., a Purchaser’s service in a capacity other than as a member, a Purchaser’s own tortious or wrongful conduct, or application of a piercing-the-veil or similar doctrine. Opinion givers may include language that clarifies this point.

2. FASB Proposals for Disclosure of Loss Contingencies
(Summarized by Stan Keller and Jim Rosenhauer)

Stanley Keller, Edwards Angell Palmer & Dodge LLP, Boston
David Elsbree, Jr., KPMG LLP, New York
James J. Rosenhauer, Hogan Lovells US LLP, Washington, D.C.

Stan Keller introduced the panel as dealing with lawyer responses to audit letter requests, an area of professional responsibility closely related to, but different than, third-party legal opinions. This is a subject of current interest because of the Financial Accounting Standards Board’s (“FASB”) proposal to change the standards for accounting for loss contingencies in ASC 450-20-55 et seq., both with respect to accrual and disclosure requirements. Lawyer audit response letters are part of the process for auditing the accounting for loss contingencies (e.g., litigation reserves), and a key question is what effect, if any, a change in accounting will have on audit response letters and the ABA Statement governing those responses.

David Elsbree, who was the project manager at FASB when this project was initiated, described the latest FASB revision proposal and the reasons for it. He noted that the FASB heard concerns from financial statement users that there is not sufficient information being provided about loss contingencies and that there are too many surprises. As a result, the FASB initiated this project to address these issues while recognizing the concerns of companies. The FASB proposal would expand the qualitative information required in disclosures, focusing on factual rather than predictive information. Stan commented that the revised FASB proposal was an improvement over its original proposal but that there were still significant problems, especially with respect to an expansion of the quantitative information called for and the need to disclose certain remote contingencies.

Jim Rosenhauer, who chairs the ABA Section of Business Law’s Audit Response Committee, then discussed the effect of the FASB proposal on audit response letters. He expressed his view that no change in the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information or in audit response letters provided under it would be necessary. However, lawyers would
need to be aware of the additional information their client companies would have to disclose and should take any changes in accounting requirements into account when advising their clients, when appropriate in connection with their engagement, on the client’s disclosure obligations.

**Note:** Subsequent to the panel presentation, the FASB announced that it would not be addressing this subject until well into 2011 and would take into account the experience with disclosures in financial reporting for 2010. As a corollary to this, the SEC has indicated that it is looking more closely at accounting by companies for loss contingencies, including timeliness and sufficiency of disclosures, for compliance with existing accounting standards. (See the summary of the Audit Response Committee’s meeting of November 19, 2010 included in the main body of this newsletter.)

**CONCURRENT BREAKOUT SESSIONS II:**

**1. Addressing New Case Law and Statutory Developments in the Opinion Letter**

(Summarized by Willis R. Buck, Jr.)

*Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Co-Chair*

*Scott A. Stengel, Orrick, Herrington & Sutcliffe LLP, Washington, D.C., Co-Chair*

*Lori S. Gordon, Chicago*

This breakout session was devoted to an open-ended discussion of how new legal developments should be addressed in legal opinions. Using recent case law developments (*In re TOUSA, Inc.* 422 B.R. 783 (Bankr. S.D. Fla. 2009) and *In re General Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009)) and statutory developments (the Dodd-Frank Wall Street Reform and Consumer Protection Act) as examples, the discussion explored some of the considerations that bear on the handling of new or unexpected legal developments. The opinion literature generally extols the virtue of brevity and reliance on customary practice to “read in” certain assumptions, limitations and standards of diligence that are understood between counsel, thereby facilitating the documentation and closing of transactions. See, e.g., *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008). The inclusion in an opinion of multiple qualifications covering recent and potentially unresolved legal developments may address contingencies as to which an opinion recipient should not reasonably expect comfort in a third-party legal opinion, while at the same time burdening completion of the underlying transaction. The primary competing concern is that failure to reference a recent development could expose the opinion giver to liability for its failure to highlight the development, especially in a litigation context where the tenets of customary practice may not receive the deference accorded to them by transaction lawyers.

Other questions raised included the following: What bearing does the precedential weight of new case law (e.g., trial court decisions versus appellate decisions, bankruptcy court decisions without precedential value elsewhere, etc.) have on whether or not a specific reference or qualification is appropriate in a legal opinion? Should there be a presumption against including an additional qualification or exception in opinions to address specific case law developments? Under what circumstances is it appropriate to exclude from the coverage of an opinion a new and complicated statutory regime that even specialist practitioners may not have had an opportunity to digest? How do firm opinion committees decide how to address new legal developments in opinions rendered by the firm?

Ultimately, the approach taken by an opinion giver with respect to new legal developments is a question of professional judgment to be exercised in the context of a particular transaction. It was clear from the discussion that on any given issue (e.g., whether a specific *TOUSA*-based qualification should be
included) different practitioners come to different conclusions. There was, however, some consensus as to the considerations relevant to the exercise of that judgment, including those outlined above.

2. **Non-Negotiable Opinions**  
   (summarized by Jerome A. Grossman)

   **George M. Williams, Jr., Dewey & LeBoeuf LLP, New York, Chair**  
   **Jerome A. Grossman, Luce, Forward, Hamilton & Scripps LLP, San Diego**

   The subject, non-negotiable opinions, refers to forms of opinions mandated by recipients without change—typically, government agencies, investment banks, or accounting firms. Some government agencies, for example, demand form opinions that must be signed as-is, on a take-it or leave-it basis, despite the fact that the requested form of opinion does not conform to published norms, as described in bar association reports and other resources. Investment banks sometimes demand opinions that they declare to be “market”—*i.e.*, generally required and given—even though giving the opinion requested is not supported by opinion literature. Accounting firms may require a specific legal opinion as a condition to delivering a requested audit opinion or to confirm the accounting for a specified transaction.

   The participants noted that demands for “market” opinions, outside of the municipal bond context (where the expectation of an unqualified opinion regarding the exemption of interest from income tax is explained by the historical practice in which the opinion was included as part of the bond itself and was easy to give), arise most often in Europe, where the constraints against demanding an opinion simply because it is “market” are tempered by the more limited exposure of opinion givers to claims, in some cases by caps on liability of the opinion giver, and by a shorter tradition of giving third-party opinions.

   With respect to opinions demanded by government agencies—such as the opinions demanded in connection with transactions under TARP—the options seem to be (if no exceptions to the form will be accepted): (1) deliver the opinion in the required form, with a cover letter explaining what the opinion should be understood to mean, despite the words actually used in the opinion itself (if the recipient will accept the opinion under cover of that letter); (2) deliver the opinion in the required form and hope for the best (i.e., trust that, if the opinion ever became the subject of a claim, the opinion would be interpreted as if it had been given in a form consistent with accepted practice notwithstanding the words actually used); or (3) decline to give the opinion, possibly attempting to engage a firm that has given the opinion in the required form for the sole purpose of doing so.

   The participants agreed that simply giving the opinion in the required form and hoping for the best is wishful thinking. Suggestions focused on controlling either the demand side (*i.e.*, educate those with authority to change the required forms) or the supply side (*i.e.*, try to discourage attorneys from delivering opinions in the required forms).

   On the “demand” side: participants reported that those in government agencies responsible for closing transactions for which opinion forms are mandated seem not to appreciate the difference between the loan documents themselves and the legal opinion that is delivered by counsel to the borrower thereunder. Even though those government officials may be acting in good faith, they often see opinions as a way of getting facts and possibly to allocate to counsel liability for the failure of those facts to be true. Several participants spoke in favor of organizing a group to meet with agency officials to explain the purpose of legal opinions and why their institutionalized requests are not reasonable. Efforts to do so are already in progress; the ABA’s Real Property, Trust and Estate Law Section, for example, has attended meetings with HUD, in which its general counsel participated, and has plans to continue those meetings. George Williams reported that his colleagues who represent government agencies relate that
there are government officials with authority who are open to discussing the issues raised by opinion givers.

On the “supply” side: participants noted that smaller firms with developer clients may have little choice but to give the opinions as demanded. It was suggested that publication of alerts or articles addressing the issues that giving many “non-negotiable” opinions raise for opinion givers would be instructive for all firms involved.

3. **Reliance on a Client’s Representations in an Acquisition Agreement as Factual Support in Giving a Legal Opinion**

(Summarized by Thomas M. Thompson)

*Joel I. Greenberg, Kaye Scholer LLP, New York, Co-Chair*

*Thomas M. Thompson, Buchanan Ingersoll & Rooney, PC, Pittsburgh, Co-Chair*

This breakout session addressed the approach taken by M&A lawyers in relying on client representations in acquisition agreements as factual support for legal opinions. The topic arose out of the recognition that at least some representations in some M&A transactions are intended primarily as a means of risk allocation between the parties rather than strictly as statements of factual accuracy.

The illustrative opinion in the recently published Model Stock Purchase Agreement (Second Edition) (“MSPA”) of the ABA Mergers and Acquisitions Committee, includes the following language in the preliminary paragraphs of the opinion: "As to certain matters of fact relevant to the opinions in this opinion letter, we have relied on certificates of officers of the Company and on factual representations made by the Sellers in the Stock Purchase Agreement." MSPA, Vol. II at 46. The related commentary contains the following caveats on this point: "An opinion giver cannot rely on factual certificates or representations if either (1) ‘reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion givers to be false’ (TriBar ’98 §2.1.4; see also §2.2.1(c)) or (2) ‘the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.’" (ABA Legal Opinion Principles §III.A).” MSPA, Vol. II at 46.

Participants in the breakout session recognized that risk allocation is among the purposes often served by a representation in an M&A agreement, and noted that literature both on opinions and on M&A practice has recognized this purpose. Whether risk allocation is the primary purpose varies with the nature of the particular representation, the type of client making the representations (e.g., strategic seller, financial seller, passive shareholder) and other circumstances peculiar to the deal. From most participants’ experiences, the types of representations which serve as a vehicle for risk allocation tend to be more open-ended and unqualified than those usually used as support for opinions. The following example is stated in the commentary to the MSPA:

"... [T]here may be areas covered by representations in which Sellers' knowledge and examination will not provide certainty. For example, Sellers represent in Section 3.22(c)(iv) that the Company's products do not infringe any third-party patents. Sellers might view this as an impossible statement to make. In these instances, the representation serves to allocate the risk of the unknown, with Buyer taking the position

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‡ The increased recognition of the risk allocation role of representations and warranties may result from the disclaimers found in SEC reports of publicly-filed acquisition agreements made in response to the SEC’s Section 21(a) Report concerning The Titan Corporation (Exchange Act Release No. 51283, March 1, 2005).
that the Sellers, based upon their experience with the Company, are in a better position to bear that risk."

MSPA, Vol. I at 78. Participants in the breakout felt that these more open-ended, unqualified representations are not the sort relied upon by participants for opinion support; those most often relied upon for opinion support are more cut and dried representations such as corporate status, authority and corporate action to the extent they include factual, as opposed to legal, confirmations.

Breakout participants had observed few instances where a client proposed to make a representation that it knew categorically to be wrong without disclosure of such to the buyer. There are very significant reasons to advise against making such an intentional misrepresentation well beyond opinion practice, including case law holding that negotiated limitations on remedies are inapplicable to intentional misrepresentations. The approach commonly preferred by many M&A lawyers to allocate a particular risk is to recommend the use of an accurate representation, but to address the allocation of risk between buyer and seller through tailored indemnities, walk rights and conditions to closing focused on the specific risk.

Participants were asked whether they relied exclusively on client representations as support for opinions in M&A transactions. Nearly all who relied on representations also usually obtain fact certificates from officers or other client representatives focused directly on the specific facts relied upon for the opinion. Several participants noted that in transactions where counsel has known the client well (and perhaps even formed the company), and participated in the acquisition negotiation and documentation, they will rely on specific representations without obtaining additional officer certifications. Additionally, one participant whose firm principally gives local counsel opinions relies on specific representations in giving opinions and does not seek fact certificates; however, the representations relied upon are the status, authorization, corporate action and other straightforward representations that would not normally serve a risk allocation purpose.

There was a difference of view among the participants as to whether a client’s representation in an M&A agreement is more reliable support for an opinion than a client fact certificate. Some thought that there is a stronger financial incentive to be accurate in representations than in officer certificates, which often carry no personal liability for the officer. As noted above, many practitioners obtain both.

A number of participants observed that from their experience clients in M&A transactions are no more likely to adopt a risk allocation approach to their representations and warranties than they would be in financing transactions.

Participants’ views were strongly to the effect that if an opinion giver is aware that its client is making a false representation in the agreement for risk allocation or other reasons, at the very least the law firm should not rely on that representation as support for an opinion, if indeed it should be delivering an opinion at all. Participants also concurred that if an opinion giver is aware that a client’s representation is being given principally as a risk allocation device, even if only because of uncertainty over the unknown, the opinion giver should not rely on that representation as factual support for the opinion. The analysis for the opinion giver is essentially as spelled out in the Model Stock Purchase Agreement, and opinion preparers do and should consider the primary purpose of the particular representation, the nature of the representation and the surrounding circumstances to test the reliability of that representation as factual support for the opinion.
1. **Secondary Stock Sales**  
(Summarized by Julie M. Allen)

*Julie M. Allen, Proskauer Rose LLP, New York, Chair*  
*Sandra M. Rocks, Cleary Gottlieb Steen & Hamilton, LLP, New York*  
*Lawrence E. Wieman, Davis Polk & Wardwell LLP, New York*

The TriBar Opinion Committee is in the final stages of preparing a special report on opinion letters in secondary sales of securities, which is currently scheduled for publication in the May 2011 edition of *The Business Lawyer*.

Each of the panelists serves on the drafting subcommittee of the TriBar Opinion Committee for the special report. The panel discussed the report and common issues encountered by opinion givers and opinion recipients in transactions involving secondary sales of securities. The panel discussion focused on Article 8 of the UCC (as uniformly adopted with only minor exceptions in all 50 states), which governs these opinions, given most commonly to underwriters of registered secondary sales of securities and securities entitlements. The proper form of a secondary sale opinion depends on whether the acquired securities are held in the direct (i.e., the securities are owned of record by the security holder) or indirect holding system (i.e., the securities are held in street name for the benefit of the security holder).

Observing that while many forms of underwriting agreements still call for a title opinion (either that the seller has good title or will transfer good title), the panel noted that title opinions should neither be given nor requested, because such an opinion involves a factual confirmation that is extraordinarily hard or impossible to confirm, and is beyond the competence of a lawyer. Rather, the proper form of opinion in the case of a direct holding is that the buyer has acquired the securities free of adverse claims and, in the case of an indirect holding, that the buyer has acquired a security entitlement and no action can be asserted against the buyer based on an adverse claim of which the buyer does not have notice.

Because of Article 8, a secondary sale opinion utilizes the Article 8 definitions of the relevant terms and is given based upon a particular set of factual assumptions. Customary practice permits the assumption of the required factual predicates. As such, the opinion does not require any particular analysis. The panel concluded by discussing whether, once properly understood, a secondary sale opinion adds any value to a transaction. The panelists’ conclusion was that it generally does not.

2. **Opinions Commonly Delivered in International Transactions**

*James R. Silkenat, Sullivan & Worcester LLP, New York, Chair*  
*Cynthia Kalathas, Arendt & Medernach, LLC, Luxembourg and New York*  
*Ettore Santucci, Goodwin Proctor LLP, Boston*  
*Xiaolin Zhou, Jun He Law Firm, Beijing and New York*

[Editor’s Note: This panel discussed special issues in cross-border opinion practice. A portion of the discussion focused on opinions given by U.S. counsel to non-U.S. recipients, including “as if” opinions, opinions on choice-of-law clauses, and opinions on choice-of-forum clauses. See the discussion of cross-border closing opinions under “Fall Meeting of the ABA Section of Business Law — Meeting of the Committee on Legal Opinions” in the main body of this issue of the newsletter.]