LEGAL OPINION NEWSLETTER

JAMES F. FOTENOS, EDITOR

Volume 10 – Number 4

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From the Chair

This is a busy time for the Committee.

- We have another meeting coming up on Sunday, August 7 from 9:30 to 11:00 a.m. at the ABA Annual Meeting in Toronto, with a full agenda. We also are doing a program with the Toronto Opinions Group (“TOROG”) on that Sunday from 2:30 to 4:30 p.m. on Current Legal Opinion Topics From Both Sides of the Border. This will be followed by our traditional reception, to which all are invited, at 5:30 p.m., graciously sponsored by our friends at Blakes.

- This edition of our newsletter continues the tradition of providing useful information on opinion topics on a periodic basis. A great deal of effort goes into putting the newsletter together and I want to thank all who contributed to it. Above all, I want to thank Jim Fotenos, our editor, for all of his work and our past-Chair, John Power, who will not permit us to slack off from the standard he set.

- The analysis of responses to our law firm opinion practices survey is well under way, with an active subcommittee chaired by John Power. I believe it will provide meaningful information that will be helpful to law firms in reviewing their own procedures.

- We continue to make progress on the important and challenging Cross-Border Closing Opinions of U.S. Counsel Report, under the leadership of our Reporter, Ettore Santucci, who is being ably assisted by Don Glazer and other members of the subcommittee. Stay tuned because this will be a significant contribution to the opinion literature.

- Our Committee is participating in the Section’s Global Business Law Forum being held in London on September 21 to 23 by presenting a program on September 22 on cross-border closing opinions, chaired by Ettore Santucci. This will be a good opportunity to exchange views with our European counterparts.

- Our joint project with the Working Group on Legal Opinions (“WGLO”) on identifying common opinion practices is moving along, with an initial draft drawn from the Legal Opinion Principles and the Guidelines having been circulated to the reviewing group for comment and discussion. When the draft is further along, it will be circulated for comment more broadly.

- Our listserv continues to be active and of high quality. I encourage you to use it and to keep the questions, comments and observations coming. If you are reluctant to be identified with a question or response, feel free to send it to me and I will pass it on without attribution.

- I continue to think about the Committee’s organization and would welcome hearing from any of you about specialized areas of opinion practice that would be of interest.

There is one other initiative just getting under way that I want to talk about. Those of us who are experienced legal opinion practitioners have an obligation to convey our knowledge to our less experienced colleagues and to take steps to prepare the next generation of opinion practitioners and leaders. Many of us do that on an individual basis and within our law firms and organizations. Thanks to
the initiative of our membership chair, Anna Mills, we are beginning to develop a program for the Committee to help educate and train less experienced lawyers in opinion practice. The program is in its formative stage and we solicit your thoughts and creativity, as well as your participation, on how best to achieve our objectives. To prompt some thinking: we might prepare a plain English tutorial on opinion basics, we might produce video or audio presentations or compile and make more readily accessible those already done; and we could have a separate newsletter or listserv focused on basics. Please let Anna (amills@vwlawfirm.com) or me know what thoughts you have on what we might do and whether you are interested in participating. We will set aside some time at our annual meeting to discuss this topic. We have no greater obligation to the profession than to pass along our knowledge, experience and wisdom to the generations that follow us. Thanks in advance for supporting this initiative.

I look forward to seeing as many of you as possible in Toronto and to hearing others of you on the call-in (details to come).

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**Future Meetings**

*ABA Section of Business Law Annual Meeting*  
Westin Harbour Castle  
Toronto, Ontario  
August 5-8, 2011

Committee on Legal Opinions

Sunday, August 7, 2011

- Committee Meeting: 9:30 a.m. - 11:00 a.m., Pier 5, Convention Level
- Program: Current Legal Opinion Topics from Both Sides of the Border, 2:30 p.m. – 4:30 p.m., Salon C, Convention Level
- Committee Reception: 5:30 p.m. – 7:00 p.m., Marine Room, Main Lobby

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

Sunday, August 7, 2011

- Subcommittee Meeting: 4:30 p.m. – 5:30 p.m., Dockside 3, Lower Level
Committee Meeting: 1:30 p.m. – 2:30 p.m., Pier 4, Convention Level

Working Group on Legal Opinions
New York, New York
October 25, 2011

October 24, 2011
Related Meetings of the Steering Committee, Association Advisory Board
and Law Firm Advisory Board

ABA Section of Business Law Fall Meeting
Ritz-Carlton Hotel
Washington, D.C.
November 18-19, 2011

ABA Section of Business Law Spring Meeting
Las Vegas, NV
March 22-24, 2012

Spring Meeting of the ABA Section of Business Law

The Section of Business Law held its Spring Meeting in Boston on April 14-16, 2011. Following are reports on meetings of interest to members of the Legal Opinions Committee.

Meeting of the Committee on Legal Opinions

The Committee met on April 15, 2011. Committee Chair Stan Keller welcomed everyone and thanked various members of the Committee for their contributions to the work of the Committee. He expressed special appreciation to Jim Fotenos for his work on the Legal Opinion Newsletter, the latest issue of which was made available prior to the meeting. He also thanked immediate past-Chair John Power for continuing to play a leadership role and assisting with the newsletter.

Survey of Law Firm Practices. John Power reported on the Committee’s survey of law firm opinion practice. About 250 completed surveys have been received compared to about 50 in the Committee’s 2002 survey, with the number, range and depth of questions much greater in this survey than in the 2002 survey. The responses are from law firms that vary greatly in size and number of offices. The survey working group is busy analyzing the responses and preparing information to be shared with members of the Committee.

Cross-Border Project. Ettore Santucci, the reporter for the Committee’s outbound cross-border legal opinions report, described that group’s work to date. The group is near completion of its treatment of opinions on forum selection provisions, which has proven to be a challenging subject. He expressed
his expectation that, with the progress made on the choice-of-law and forum selection sections, the report should move quickly to completion. He invited everyone to attend the program on the report being held later that day.

Diligence Reports. Jim Rosenhauer reported on the Section’s task force on delivery of diligence reports, on which the Legal Opinions Committee is represented. The task force’s report is just about finished and, while there have been changes, the report has not changed substantively from the exposure draft circulated over a year ago. (A copy of the report is posted in the Opinion Resource Center on the Committee’s website and will appear in The Business Lawyer.)

Audit Responses Committee. Jim also reported on the meeting of the Audit Response Committee, which he chairs, at which there was to be a discussion of experiences with audit response letters and auditor requests for information in light of the SEC’s focus on the adequacy of disclosure in compliance with ASC 450-20.

Law & Accounting Committee. Tom White, Chair of the Law & Accounting Committee, reported on his committee’s meeting at which the experience with SEC comments on loss contingencies will be discussed, among other developments. He also referred to his committee’s program.


Joint Project on Common Opinion Practices. Steve Weise reported on the status of the joint project undertaken by the Committee with WGLO, which includes the involvement of state and other bar groups in preparing a description of common opinion practices. He stated that an initial working draft of a statement was near completion and when completed will be circulated to the committee charged with reviewing it, with a meeting scheduled at the WGLO seminar. The initial working draft reflects provisions of the Legal Opinion Principles and the Guidelines for the Preparation of Closing Opinions, both of which are products of this Committee. (See also “Recent Bar Opinion Reports and Statutory and Case Law Developments” in the WGLO Addendum to this newsletter, page A-11.)

Annotated Real Estate Finance Opinion; Transfers of Mortgage Notes. Steve also reported on the ongoing project of several real estate lawyer groups to develop an annotated real estate finance closing opinion. A draft report was recently circulated and is being reviewed. Steve also noted that the Permanent Editorial Board for the UCC, of which he is a member, has circulated a draft report on certain UCC issues relating to the transfer of mortgage notes and welcomes comments. Noel Para and Rick Goldfarb are reviewing the PEB report to see if there are comments the Legal Opinions Committee should make. (Comments were subsequently provided.)

TriBar Projects. Dick Howe and Don Glazer reported on activities at TriBar. They indicated first that the Report on Opinions on LLC Interests, for which Jim Leyden and Don were co-reporters, has been issued. (A summary appears in the Spring 2011 issue of this newsletter and the report itself has been posted in the Legal Opinion Resource Center in anticipation of its publication in the August 2011 issue of The Business Lawyer.) The Report on Opinions on Secondary Sales of Securities, for which Steve Weise is reporter, is just about completed and will appear in the May 2011 issue of The Business Lawyer. (A summary also appears in the Spring 2011 issue of the newsletter and the report is posted in the Opinion Resource Center.) They added that TriBar is revisiting the guidance it provided in its remedies report on choice-of-law opinions and may issue a report amplifying on that guidance, as well as its guidance on opinions on forum selection clauses.
Dick Howe indicated that TriBar has begun to explore the subject of misleading opinions to determine whether there is anything useful it wishes to say on the subject and that it also is considering whether to undertake a project on opinions on arbitration clauses. On that point, it was noted that Massachusetts has a decision (Feeney v. Dell Computer, Inc. 908 N.E. 2d 753 (Mass. 2009)) that struck down an arbitration clause because it denied class arbitration. (The U.S. Supreme Court ruled subsequent to the meeting, in AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (Apr. 27, 2011), that state law permitting class arbitrations is preempted by the Federal Arbitration Act.) (See Steve Weise’s note on “Opinions on Arbitration Clauses” under “Recent Developments” in this issue.)

State Legislation Prohibiting Recognition of Foreign Law. The Chair noted that at least one state (Oklahoma) has enacted a law prohibiting the recognition of foreign country law (designed to prevent the choice of Sharia law but applicable more generally), but that the law has been struck down by a federal court as unconstitutional. Several other states are considering legislation that would prohibit their courts from recognizing any non-U.S. law.

Authorizing At-The-Market Offerings of Delaware Shares. Don Glazer addressed opinion issues prompted by Delaware’s requirements for the issuance of shares when dealing with at-the-market offerings. In these offerings there are frequent issuances of shares, often approved by non-director officers through a general grant of authority by the board of directors. Delaware law requires strict compliance with the statutory formalities for stock issuance, including approval by the board or a board committee with authority of the price, consideration and other terms upon which the shares will be issued. Approval by an officer within broad parameters set by the board or a board committee may not be adequate. If there is a defect in issuance, a question arises whether the action is void or voidable, with the latter susceptible to cure by ratification. This problem therefore requires that attention be given to the procedure followed in these offerings, with the preferred route being to use a committee of the board (which may be a single director, such as the CEO). An alternative route of frequent periodic ratification by the board or a board committee could be inconvenient and raise concerns regarding the effectiveness of the ratification. A list of relevant decisions dealing with stock issuances in Delaware or interpreting Delaware law follows this report. (For further discussion of this topic, see Jim Honaker’s and Tarik Haskins’ note, “Caveat Opinion Givers: Opinions on the Status of Stock,” under “Recent Developments” below, and the WGLO Addendum to this issue under “Recent Bar Opinion Reports and Statutory and Case Law Developments,” page A-11)

Dick Howe noted that this issue also highlighted a problem for the filing of Exhibit 5 opinions with the SEC since an unqualified validity opinion for a shelf takedown is required by the time of settlement of the sale. He indicated that a similar problem existed for frequent debt issuances off-the-shelf, such as medium term notes and registered commercial paper offerings. He reported that this subject will be discussed at the meeting of the Securities Law Opinions Subcommittee of the Committee on Federal Regulation of Securities later that day.

Contractual Provisions Extending Statutes of Limitations. The Chair noted that an issue has been identified regarding agreement provisions that extend applicable statutes of limitation, often unknowingly. An example is an indemnification provision in a private company merger agreement that obligates a party to indemnify the other party for breaches of certain representations and warranties (such as those relating to tax, environmental, intellectual property and title matters) until expiration of the applicable statutes of limitations related to those representations or for fixed or unlimited terms, which may extend beyond the statute of limitation for breaches of contract. An article on this subject by Lou Hering and Melissa DiVincenzo appeared in the Spring 2011 issue of the newsletter.
Anti-Assignment Clauses. The Chair noted the recent decision of the Delaware Chancery Court in *Meso Scale Diagnostics (Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2011 WL 1348438 (Del. Ch. April 8, 2011)) declining to grant a motion to dismiss on a claim that an anti-assignment clause in a license agreement (which prohibited assignments without consent including “by operation of law” but did not include a change-in-control provision) was violated by a reverse triangular merger. This decision, until there is further clarification, adds to the difficulty of dealing with anti-assignment provisions when giving an opinion that no other agreement is being violated. (See also “Recent Bar Opinion Reports and Statutory and Case Law Developments” in the WGLO Addendum at page A-11.)

Application of Dodd-Frank to Swaps. The Chair reported that the ABA Derivatives and Futures Committee has prepared disclaimer language for opinions on swap transactions regarding the application of the Dodd-Frank Act. Our Committee was asked to comment, and an ad-hoc group of our members, at the request of the Chair, has done so.

Membership. There was then a discussion of membership efforts. Anna Mills suggested that the Committee consider ways in which it could educate and train less experienced lawyers about opinion practice. The Chair agreed that this was a good idea and asked members of the Committee to communicate their interest and ideas.

Committee Structure. The Chair concluded by asking members of the Committee to communicate to him areas of opinion practice that they consider worthy of separate focus through a subcommittee. He identified as possible candidates cross-border opinions and opinions on security interests in personal property. He also noted securities law opinions and opinions in M&A transactions as specialized areas with their own substantive committees with which the Committee could have more formal liaison arrangements. Finally, he invited everyone to the Committee reception later that day sponsored by his firm and said that the Committee would meet next at the ABA Annual Meeting in Toronto (August 7), at which it will also sponsor a program on opinion issues from both sides of the border with the Toronto Opinions Group.

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Decisions Relevant to the Issuance of Stock by Delaware Corporations

Delaware Decisions:

Committee on Audit Responses

Stan Keller described the recent increase in the number of comments from the staff of the SEC requiring registrants to expand their disclosures addressing litigation and other contingencies in accordance with Accounting Standards Codification (“ASC”) Subtopic 450-20 (“Contingencies - Loss Contingencies”). (See report on the meeting of the Law & Accounting Committee, below.) He reminded the Committee that, in response to the FASB’s proposals to revise the existing disclosure standards of ASC 450-20, the ABA, in its comment letter of September 20, 2010, argued that the current rules should be adequate to address the disclosure goals of the FASB. The SEC has been pushing for stronger compliance with the existing rules, which some believe have not always been fully followed. Meredith Cross (the SEC’s Director of its Division of Corporation Finance) made clear in her comments of the prior day that the SEC was focusing on compliance with ASC 450-20. The results of this effort have been particularly noticeable in the disclosures of larger international financial institutions.

The approach of the staff has been to seek more disclosure, including quantification when possible, where adverse outcomes are “reasonably possible,” although the staff is sensitive to disrupting the ability of issuers to defend themselves in litigation. The staff has been willing to permit aggregation of loss contingencies, and also to permit an explanation of why estimates are not reasonably possible.

Auditors are looking for more information, but this should not affect audit letter responses contemplated by the ABA/AICPA 1975 Treaty, since the Treaty requires identification of claims but not a prediction of outcomes where outcomes are not either probable or remote. The Treaty further contemplates that attorneys whose engagement includes disclosure advice will confirm to the auditors that the attorneys will fulfill their professional responsibility in providing disclosure advice to the client. This avoids disclosure of privileged information to the auditors while letting the auditors know that the client is receiving relevant advice from counsel. It was noted that, when clients use multiple law firms, not every law firm will have a role which calls for providing this confirmation, but that at least one law firm will confirm its responsibility to provide such advice.

There was a discussion concerning the difficulties lawyers face when asked by clients for predictions of likely outcomes to meet client needs for settlement and other purposes, when all litigation outcomes are inherently unpredictable and subject to unexpected results, as noted in the ABA’s September 20, 2010 comment letter to the FASB. There was also a discussion concerning the impact of concepts of materiality, and of the misleading impact that both quantification and non-quantification can have, depending on the circumstances. Accordingly, greater disclosure of the facts of a matter are a possible alternative if quantification is not appropriate.
Some members of the Committee reported an increase in pressure from auditors for information beyond that contemplated by the Treaty, and that they used centralized processes to uniformly resist such pressure. The approach should be that, having been alerted as to the existence of litigation by the lawyer in the audit letter response, the auditor should then seek additional information from the client (which is receiving advice from its lawyers). Several Committee members indicated that they would not have their litigators talk directly to the auditors after delivery of the audit response letter; others might allow such communication in certain instances if the partners responsible for audit response procedures also participated.

It was noted that inside counsel are likely to face particularly difficult issues in this process.

While auditors understandably want more information given the new SEC disclosure emphasis and PCAOB inspections, most Committee members indicated that their experience so far was that lawyers were not being asked for more information to be given directly to the auditors. It was noted that the FASB’s interpretations (adopted as temporary auditing standards by the PCAOB) recognize that there may be a gap in what the auditors can be told because of the overriding public policy interest in preserving the attorney-client privilege. As noted earlier, this gap is in part filled by the auditors receiving assurance from appropriate counsel regarding the fulfillment of their responsibilities to advise the client concerning appropriate disclosure of loss contingencies.

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Law & Accounting Committee. At a meeting of the Law & Accounting Committee held on April 16, 2011, Mike Scanlon gave his observations on recent staff comment letters regarding disclosure of loss contingencies. He noted that we have not yet begun to see comments on contingency disclosures in recently-filed 10-Ks. Among Mike's observations were:

- Staff comments have focused on issuers’ failure to disclose an estimate of the amount of loss or the range of loss and assert that statements such as "losses may be higher than amounts accrued," "can't estimate with certainty" or "particularity," "can't provide a meaningful estimate" or "outcome of matter may be material to results of operations for a particular period" alone are not viewed as acceptable.

- The staff has indicated that aggregation is acceptable.

- Some comments seem to have borrowed from the FASB’s exposure draft on revising ASC 450-20 and conclude that if the issuer cannot estimate loss or range of loss then it should “consider providing additional disclosure that could allow a reader to evaluate the potential magnitude of a claim.”
Relatively few comments appear to be questioning the timing of disclosures, as opposed to their substance.

The staff often has permitted a prospective application of the issuer’s responses to the staff’s comments.

The comment letters do not appear to have involved extended or contentious debate between the staff and issuers, as most issuers are acceding to the positions taken by the staff.

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

The Subcommittee met on April 15, 2011. The principal topic of discussion was the filing of “unqualified” Exhibit 5 opinions in connection with shelf takedowns. As previously discussed by the Subcommittee, SEC Staff Compliance and Disclosure Interpretation (“C&DI”) 212.05 permits an issuer to file a qualified opinion as to the validity of securities registered at the time a shelf registration statement is filed so long as an unqualified opinion is filed on Form 8-K no later than the closing date of any individual issuance. Although this issue is relevant to any shelf issuer, it has particular impact on financial institutions and other issuers that have active registered medium-term note programs. Such issuers may conduct offerings on a daily basis, sometimes multiple offerings on a single day. Moreover, these issuances may be handled without consultation with outside counsel or with a different outside counsel from the counsel that provided the “qualified” Exhibit 5 opinion at the time of filing of the applicable shelf registration statement. The following three potential alternative approaches were discussed:

1. In alternative (1), the opinion filed at the time of the shelf registration statement filing would be qualified, but it would include annexes setting forth (a) a range of permissible terms for specific securities authorized to be issued and (b) a schedule of named officers specifically authorized to execute and deliver particular securities on behalf of the issuer. The opinion would state that, subject to customary assumptions, such as that the indenture will not be amended, if securities are executed by a named officer and have only terms within the ranges set forth in the annex, the securities will be duly authorized and constitute valid and binding obligations of the issuer and will be entitled to the benefits of the applicable indenture. In connection with any specific issuance, the issuer would state in the prospectus supplement that the terms of the securities comply with the annex and have been executed by a named officer and accordingly, in counsel’s opinion, the securities are duly authorized and constitute valid and binding obligations of the issuer, etc. Under this approach, no further unqualified opinion would have to be filed in connection with each takedown. A number of concerns were raised about this approach, including that counsel delivering the original opinion might not be involved in individual issuances and thus would be bound by its client’s determination that the offering was properly approved and within the permissible terms set forth on the annex to the opinion.

2. In alternative (2), the opinion filed at the time of the shelf registration statement filing would be unqualified, and no further opinion would be filed in connection with individual issuances, but an opinion would appear in the prospectus supplement stating that, in the opinion of the named counsel, the securities offered by the prospectus supplement will be duly authorized and will constitute valid and binding obligations of the issuer, etc., when executed by the issuer, authenticated by the trustee and
delivered against payment. This approach would be consistent with the rules applicable to Exhibit 8 tax opinions under Regulation S-K, Item 601. It would still require counsel to be involved in connection with individual issuances, but it would eliminate the need to file an unqualified opinion on Form 8-K at the time of each issuance. Obviously, the issuer and the named counsel would have to work out among themselves a protocol to be followed at the time of takedowns from the shelf.

3. In alternative (3), a customary qualified opinion would be filed with the registration statement as in a usual shelf registration, but instead of filing an unqualified opinion in connection with each shelf takedown, the issuer would file periodic unqualified opinions that cover a number of prior issuances. For example, each month or quarter the issuer would file an unqualified opinion as to the validity of all securities issued during the preceding month or quarter. This approach would require some agreement in advance with the SEC staff to waive the requirements of C&DI 212.05. The only examples so far appear to be catch-up opinions filed to cover previous issuances where no opinion had been filed, but it was unclear whether the staff will acquiesce in this approach on an ongoing basis. A number of concerns also were raised, including that counsel might conclude – after an individual offering had been completed – that a “clean” validity opinion could not be issued due to a defect of some kind.

No one present at the meeting cited any examples of specific transactions that had followed any of the above approaches, but various participants mentioned that they had had discussions with the SEC staff about these different approaches, and one person said that the SEC staff had indicated that at least one issuer had followed the second alternative in a recent filing.

The next meeting of the Subcommittee will be in Toronto, Ontario on Sunday, August 7, 2011.

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Committee Programs Presented at the Spring Meeting

Ettore Santucci, Don Glazer, Sylvia Chin, and Elizabeth van Schilfgaarde presented a program at the Spring Meeting on the current status of the Committee’s report on cross-border closing opinions of U.S. counsel. The panel discussion included coverage of the role of U.S. customary practice, “as if” opinions, and opinions on arbitration clauses, choice of law provisions, and clauses choosing non-U.S. forums. Program materials are available on the Section of Business Law’s website under “2011 Spring Meeting Wrap-Up” (no. 108 (audio)). The report was addressed at length at the Committee’s meeting held November 19, 2010 in Washington, D.C. For a report of the Committee’s discussions, see the Winter 2010 (vol. 10, no. 2) issue of the newsletter, at pages 6-7.
On May 3, 2011 the Working Group on Legal Opinions ("WGLO") held its semi-annual seminar in New York, 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 October 25, 2011.

The Steering Committee of WGLO and its Association Advisory Board and Law Firm Advisory Board met the prior day, May 2, 2011. Following are reports on the Association and Law Firm Advisory Board meetings.

Law Firm Advisory Board

The Law Firm Advisory Board dinner meeting was held on May 2, 2011. Chair Reade Ryan introduced as the guest speaker Karen Kirchen, Co-General Counsel of Citi Markets and Banking in North America. Ms. Kirchen offered some observations on the extent to which assignees of initial addressees should be able to rely on legal opinions provided in a transaction.

Ms. Kirchen said that her focus was on what makes sense in the syndicated loan market. In securities offerings, the underwriter has a duty to conduct due diligence, receives an opinion which is not assigned to others, and has potential liability to purchasers who acquire securities from the underwriter. There is a huge difference in the role and liability of arrangers of syndicated loans – they disclaim all liability to purchasers. However, the Loan Syndication and Trading Association has established standards for documentation in syndicated loans which require that the opinions received by the arranger be assigned to all subsequent purchasers.

There was a lively discussion of the rationale for requiring the assignability of opinions in this context, including issues concerning the need for an active secondary market, the extent to which purchasers in fact rely on legal opinions, whether subsequent purchasers do in fact understand the customary practice under which the opinions are issued, and the view expressed by many of the Advisory Board members that open-ended assignability involves a potential risk which is unacceptable for opinion givers, unwarranted, and uncompensated. It was suggested that additional dialogues on this subject would be helpful.

There followed reports concerning the status of the lending markets in a number of jurisdictions, by Jim Smith for Boston, Reade Ryan for New York, Mark Adcock for Charlotte, Robert Siegel for Miami, Andrew Kaufman for Chicago, Roderick Goyne for Dallas, and Jerry Grossman for California. The overall consensus was that, while there is still uneveness in most markets, many segments of lending and financing have become more active in the past half-year.

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Association Advisory Board

The Association Advisory Board (“AAB”) held its semi-annual meeting on May 2, 2011 in conjunction with the WGLO programs that were conducted 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 having similar activities or in which such closing opinions have unique focus.

This eighth meeting of the AAB focused primarily on two substantive presentations. The first was made by Martin Fingerhut of Cassels Brock & Blackwell LLP on the topic of Canadian legal opinions. As a preliminary matter, Martin Fingerhut noted various practices in Canada that may deter litigation, including the virtual absence of jury trials in civil claims, the “loser pays” standard in awarding legal costs, and the relative infrequency of punitive damage awards and their relatively modest size when awarded (both as compared to experience in the U.S.). He reported that there is a Canadian forum that is somewhat comparable to the WGLO: the Toronto Opinions Group (“TOROG”), which consists of a group of lawyers, primarily practicing with the Toronto offices of 22 of the largest Canadian law firms, with an interest in transaction opinion practice. The purpose of TOROG is less on expounding customary practice than on improving efficiencies and quality uniformity within the Canadian bar. He noted that while opinion reports and related bar publications from the U.S. were often illustrative, they are not dispositive. Martin Fingerhut’s presentation was part of an initiative by the AAB to attract input from international opinion practitioners, including participation in the AAB by representatives from non-U.S. bar associations. Publications by TOROG are available at http://www.slaw.ca/torogmemos/.

The second presentation was by Steve Weise on the topic of secondary sales of securities. As a backdrop, he noted the challenges that are presented under UCC Article 8 in connection with transfers of a security when the physical and record holder of the stock certificate and the beneficial owner of the security represented by the certificate are different parties. He noted that opinions addressing purchases of securities and acquisitions of security entitlements have not always been in conformity with the substantive provisions of Article 8. For that reason, the recently-completed TriBar Opinion Committee report on opinions in secondary sales of securities (for which Steve Weise served as Reporter) is, in part, a primer both on Article 8 and on current techniques for holding and transferring securities. The report also demonstrates that what might seem a very difficult opinion – that the purchaser of a security acquires it “free of adverse claims” (and comparable language for the acquirer of a security entitlement) – can, with the appropriate assumptions, be stated in a simple way to provide the purchaser or acquirer with the assurance it seeks: that it is not subject to adverse claims.

The meeting also covered regular administrative matters, including reports on the status of opinion reports in progress by the ABA Legal Opinions Committee and by the TriBar Opinion Committee. The AAB will hold its next meeting on October 24, 2011 in conjunction with the Fall program of the WGLO.

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Recent Developments

Caveat Opinion Givers: Opinions on the Status of Stock

Practitioners rendering an opinion on the status of stock of a Delaware corporation should carefully consider whether an opinion can be given if there has been a defect in the creation or issuance of the stock. A relatively recent Delaware Court of Chancery opinion has confirmed the Delaware courts’ policy that a corporation must strictly comply with statutory requirements when it changes its capital structure. See Blades v. Wisehart, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010). In Blades, the corporation purported to effect a forward stock split without obtaining the board and stockholder approvals required by the Delaware General Corporation Law (the “DGCL”). And, in another relatively recent case, the Delaware Court of Chancery held that a “top up” stock option had likely not been validly issued because the terms of the option were not fixed by the board (as required by the DGCL). Olson v. ev3, Inc., 2011 WL 704409 (Del. Ch. Feb. 21, 2011). These cases serve as reminders that the Delaware courts expect strict adherence to the statutory rules for stock issuances and other fundamental changes to a corporation’s capital structure. However, these cases do not expressly address whether these types of defective corporate actions can later be cured through ratification.

Delaware courts have recognized the general principle that ratification is permitted with respect to a corporate action that is voidable, as opposed to an action that is void, which cannot be cured by ratification. The link between void/voidable and ratifiable/non-ratifiable can lead to confusion, because the term “void” is often used by courts in a context where the court is being asked only to decide whether an action is defective, and is not being asked whether the issuance can be cured through ratification. A court might use the term “void” to describe a defect, without intending to make any express holding on whether the action is, in fact, only “voidable” and thus subject to cure by ratification. Similarly, a court might cite to precedent discussing the void versus voidable distinction, but that precedent may only have been cited for the proposition that the corporate action was defective, and the court citing that precedent may not have intended to imply that the act at issue is “void” and not subject to ratification.

There are a handful of cases where the courts have expressly addressed the consequences of a void versus voidable action. The Delaware Supreme Court has identified the distinction between void and voidable acts as follows: voidable acts are “those which may be found to have been performed in the interest of the corporation but beyond the authority of management,” and void acts are those that “are ultra vires, fraudulent or gifts or waste of corporate assets.” See Michelson v. Duncan, 407 A.2d 211 (Del. 1979). The case law applying this distinction to stock that was not issued in compliance with the DGCL is not always clear and therefore a practitioner may have difficulty determining whether a defective stock issuance is void or voidable. For example, in Staar Surgical Co. v. Waggoner, 588 A.2d 1130 (Del. 1991), the Delaware Supreme Court found common stock to be void where it was issued upon the conversion of defective blank check preferred stock. The terms of the blank check preferred stock had not been approved by the board of directors, as required by Section 151(g) of the DGCL and as required by the company’s certificate of incorporation. Accordingly, the corporation’s certificate of incorporation had not been validly amended to authorize the issuance of the preferred stock, and the corporation
therefore lacked the power to issue that stock. It appears that it was this “ultra vires” lack of corporate power that led the Court to conclude that issuance of the stock was void and not merely voidable. Because the Court found the preferred stock (and the common stock that was issued upon conversion of the preferred stock) to be void rather than merely voidable, it refused to entertain equitable arguments to uphold the validity of the stock.

In contrast, in Kalageorgi v. Victor Kamkin, Inc., 750 A.2d 531 (Del. Ch. 1999), the Court of Chancery found stock to be voidable (not void) where the corporation had the power to issue shares of that class of stock, but the issuance had not been approved by the board as required by Sections 152, 153 and 161 of the DGCL. The subsequent ratification by the corporation’s board was sufficient to validate the stock. Kalageorgi suggests that a defective stock issuance is voidable (and the issuance should be ratifiable) if the defect was a lack of board approval of the issuance, as long as the corporation would have been authorized to issue the shares. For example, Kalageorgi would suggest that a stock issuance could be ratified if the issuance could have been approved in the first instance through a board resolution approving the issuance, and if no action other than the adoption of that resolution is required under the DGCL or the corporation’s governing documents. Compare Waggoner (where the defect was not the lack of a resolution authorizing the stock issuance, but the corporation’s lack of authority to issue the series of preferred stock because that series had not been properly created where the certificate of designation establishing that series had not been properly approved by the board).

Although a dividing line between void versus voidable acts can be inferred from the case law, the Delaware courts have never expressly drawn the distinction noted above. Rather, the rules in this area of the law are still uncertain. Accordingly, when wrestling with any ratification issue, the opinion giver will want to assess each issuance on a case-by-case basis, and, even when an opinion can be given on a ratified stock issuance, it may be necessary to qualify the opinion with the reasoning behind the opinion giver’s conclusion.

Given the uncertainty in Delaware law on when ratification will or will not “fix” a defective corporate action, the recent cases are a reminder that, when advising clients on taking corporate action in the first instance, counsel should be mindful of the statutory rules in the DGCL that form the baseline requirements for stock issuances and other fundamental corporate actions.

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[Editor’s Note: For further discussion of this topic, see the listserv dialogue “Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances” in the Spring 2011 (vol. 10, no. 3) issue of the newsletter, at pages 10-12.]
Opinions On Arbitration Clauses

The U.S. Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*, 132 S.Ct. 1740 (2011) has prompted renewed attention to opinions that address the enforceability of an agreement that contains a provision requiring the arbitration of disputes. The scope and meaning of a remedies opinion covering such a provision is now under re-examination.

In *AT&T Mobility* the Court considered an arbitration provision that was part of a broader agreement. The arbitration provision contained a waiver of the right to bring a class action in arbitration. The claimant had a small claim and the lower courts, applying the California Supreme Court’s decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76 (2005), held that the class action waiver was unconscionable and thus unenforceable. The U.S. Supreme Court found that the application of the California rule created an “obstacle” to and “interferes” with the accomplishment of the purposes of the Federal Arbitration Act (“FAA”). Thus, the Court found that the California rule was preempted by the FAA.

It is difficult to predict which terms of an arbitration provision will be considered to violate state law and which ones will be protected by applying the preemptive effect of the FAA. In dicta, the Court suggested that provisions of an arbitration agreement limiting discovery or providing that the Federal Rules of Evidence would not apply in the arbitration would likely be protected by the preemption of any state law or rule that invalidated those clauses.

The 1998 TriBar Report concluded that a remedies opinion on an agreement that contains an arbitration provision addresses the enforceability of the arbitration provision, as it addresses any other undertaking in the agreement. TriBar § 3.6.1. The TriBar Report did not discuss in detail how to deal with the various terms of an arbitration provision, such as limitations on discovery, beyond noting that an opinion giver might want to carve out from the remedies opinion the procedural aspects of the agreement to arbitrate. The California Report on Third-Party Remedies Opinions contains a detailed discussion of California law in this area and points out provisions of an arbitration agreement that might not be enforceable. California Report (2007 Update), App. 10, at pages B-22 -- B-24. The California Report is available in the Legal Opinion Resource Center on the Committee’s website (“State and Other Bar Reports”).

The unsettled nature of the law in this area raises several general questions:

1. Is the agreement to arbitrate as a general matter enforceable, or does it involve the arbitration of a matter that would violate some other policy?

2. If the agreement is generally enforceable, are each of the procedures and other terms specified in the arbitration provision enforceable (this was the subject of *AT&T Mobility*)?

3. If one or more of the procedural and other terms is not enforceable, could that make an otherwise enforceable agreement to arbitrate unenforceable because the unenforceable provisions “permeate” (in the language of the California decisions) the arbitration agreement as a whole and thus are not severable.
Until these questions are resolved in the courts and/or through federal legislation, opinion givers should consider how to address these concerns in an opinion letter that addresses the enforceability of an agreement that contains an arbitration provision, perhaps by taking an exclusion from the remedies opinion for one or more of these concerns.

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Legal Opinion Reports

[Editor’s Note: For a summary of the discussion of pending and published bar reports at the Spring WGLO seminar, see “Recent Bar Opinion Reports and Statutory and Case Law Developments” in the WGLO Addendum to this issue of the newsletter (at page A-11). The Chart of Published and Pending Legal Opinion Reports below, prepared by John Power, was included in the panel materials (as of April 30, 2011), and is updated here to June 30, 2011.]

Chart of Published and Pending Legal Opinion Reports

Recently Published Reports:

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<th>ABA</th>
<th>2007</th>
<th>No Registration Opinions - Subcommittee on Securities Law Opinions</th>
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<tr>
<td></td>
<td>2009</td>
<td>Effect of Fin. 48 - Committee on Audit Responses</td>
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<td>Sample Opinion - Committee on Mergers and Acquisitions</td>
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<td>Arizona</td>
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<td>2007</td>
<td>Remedies Opinion Report Update</td>
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<td>2007</td>
<td>Comprehensive Report Update</td>
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<td>2009</td>
<td>Venture Capital Opinions</td>
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<td>2010</td>
<td>Sample Opinion</td>
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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.
Recently Published Reports (Continued):

Maryland 2007 Comprehensive Report Update
2009 Supplement to Comprehensive Report

Michigan 2009 Statement
2010 Report

New York 2009 Substantive Consolidation - Bar of the City of New York

North Carolina 2009 Supplement to Comprehensive Report

Pennsylvania 2007 Update

Tennessee 2011 Report on Third Party Closing Opinions

Texas 2009 Supplement to Comprehensive Report

TriBar 2008 Preferred Stock
2011 Secondary Sales of Securities
2011 LLC Membership Interests

Multiple Bar Associations 2008 Customary Practice Statement

Pending Reports:

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

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

Florida Comprehensive Report Update

South Carolina Comprehensive Report

Texas Comprehensive Report Update
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.americanbar.org/groups/business_law.html](http://www.americanbar.org/groups/business_law.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 Fall issue of the newsletter to be circulated prior to the Fall Meeting in Washington, D.C. in November of this year. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eaplaw.com) or Jim Fotenos (jfotenos@greeneradovsky.com).
## Addendum

**Working Group on Legal Opinions**

**Spring 2011 Seminar Summaries**

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WORKING GROUP ON LEGAL OPINIONS

SPRING 2011 SEMINAR SUMMARIES

The following summaries have been prepared to provide a general idea of the subjects covered by the panel sessions and breakout groups at the May 3, 2011 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 October 25, 2011.

PANEL SESSIONS I:

1. Liability Exposure on the Perimeter of Legal Opinions
   (Summarized by Jeffrey M. Smith)

   Jeffrey M. Smith, Greenberg Traurig LLP, Atlanta, Chair
   Arthur Norman Field, Field Consulting LLC, New York

   Lawyers who frequently negotiate and prepare closing opinions in business transactions, including securities transactions, regularly balance various risks against the rewards generated by satisfied clients. To avoid liability claims, most opinion givers focus on avoiding substantive errors in closing opinions. The primary loss prevention efforts regularly used by opinion givers include:

   ● Proper training and supervision of opinion preparers;
   ● Thorough evaluation of the necessary scope and depth of the diligence necessary to support an opinion; and
   ● Careful drafting of the opinions.

   Law firms vary in their use of additional loss prevention mechanisms, including:

   ● Opinion committees; and
   ● Opinion review by experienced lawyers who are not primarily responsible for the client engagement or the transaction.

   There are relatively few published decisions addressing substantive errors in legal opinions. One likely explanation is that claims involving legal opinions are frequently resolved short of litigation or after the commencement of litigation but prior to trial.

   The published cases involving claims against lawyers arising from legal opinions can be divided into two groups:

   ● Cases primarily involving alleged substantive errors in the legal opinion; and
   ● Cases where the claim is not directly related to an alleged substantive error in the opinion itself.
The second group was referred to by the panelists as “on the perimeter of” legal opinions.

**Claims “On the Perimeter of” Legal Opinions.** Relatively little attention has been given to these "on the perimeter" claims, which can come in various areas:

- Informal business opinions;
- Conflicts of interest;
- Implied attorney-client relationships;
- Conspiracy and aiding and abetting claims;
- Claims by other professionals; and
- Serving as a witness.

This summary includes only a discussion of the panel’s presentation on “informal business opinions.” For materials on the other “on the perimeter” claims, readers are referred to Arthur Field or Jeffrey Smith, the panelists, for materials presented at the seminar on these other “on the perimeter” claims.

**Informal Business Opinions.** This area is illustrated by the decision in *Gus Consulting GmbH v. Chadbourne & Parke LLP*, 26 Misc. 3d 1212(A), 906 N.Y.S.2d 780, 2010 WL 186387 (N.Y. Sup. 2010) (unreported disposition). This legal malpractice case arose out of tax-related issues connected with structuring an investment vehicle used to purchase securities traded on Russian exchanges. The defendant law firm provided an informal legal opinion that addressed the legality of the structure and specifically a decree issued by President Boris Yeltsin in 1997.

The informal legal opinion was in the form of what the firm called a “risk assessment letter.” The plaintiffs alleged that the law firm opined that the structure did not violate Russian law.

The risk assessment letter itself, however, contained significant cautionary language. The plaintiffs claimed, however, that the cautionary language was deficient in that it failed to provide notice that the conduct could be considered a criminal violation and not merely a civil violation under Russian laws.

The court granted summary judgment to the law firm on lack of causation grounds, concluding that plaintiffs offered no evidence of causation and that plaintiffs’ “claim that the [investment structure] impacted the length and scope of the [government] investigation ‘is purely speculative and cannot support a legal malpractice claim,’” citing *Ambase v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 436 (2007), 2010 WL 186387 at *7.

The informal legal opinion in this case was not the subject of typical loss prevention procedures most law firms apply to formal legal opinions.

Lawyers render informal legal opinions frequently. Claims in this area are likely to increase regardless of what steps law firms take, but law firms have the ability to minimize the risk of claims being asserted. Steps that law firms can take to minimize challenges to informal legal opinions include:
● Encouraging the opening of separate files specifically denominated “informal legal opinions,” rather than including such advice under “general” client files; and

● Considering adoption of some form of peer review of informal legal opinions.

2. **Residential Mortgage Securitization Opinions**
(Summarized by David L. Miller)

*Charles M. Adelman, Cadwalader, Wickersham & Taft, New York*
*Tom Deutsch, American Securitization Forum, New York (Executive Director)*
*Michael S. Gambro, Cadwalader, Wickersham & Taft, New York*
*David L. Miller, Pillsbury Winthrop Shaw Pittman, McLean*

Mike Gambro provided an overview of the structure of a typical residential mortgage backed securities transaction. The securitization pools numerous individual residential loans, with each individual loan evidenced by a promissory note, each note secured by a mortgage, and each mortgage recorded in the public local land records where the mortgaged property is located. ² Often there are intermediate transfers of the interests that had been held by the initial originating lenders. Once a pool of individual residential mortgage loans has been identified for securitization, each loan (i.e. the interest of the then-loan holder in each of the mortgage loans (the seller)) is transferred, from the seller to a party called the “Depositor,” then to the securitization trust (the “Trust”). The trustee issues pass-through certificates, through the Depositor, to individual investors in the Trust. The proceeds paid by those investors for their certificates then go back, through the Depositor, to the seller of the pooled mortgage loans. A principal document in the securitization is the pooling and servicing agreement.

Tom Deutsch described the role of MERS, the Mortgage Electronic Registration System. MERS was set up to facilitate the multiple transfers that occur in connection with mortgage securitizations. In many mortgage loans, MERS is named in the public local land records as the mortgagor of record—sometimes the initial named mortgagee and sometimes the assignee mortgagee—with MERS not as the beneficial owner but as nominee of the originating lender and its assignees. MERS records, in its own electronic registry, ownership and transfers of the beneficial interests in the mortgage loans. In addition, upon request, MERS will provide a formal recordable assignment as evidence for the public local land records of key transfers.

Tom discussed the recent attacks by certain commentators on the MERS structure, and challenges, in courts in various states, of foreclosures of mortgages involving MERS. The issues vary by situation and by state. One of the important principles in the MERS structure—that the mortgage follows the note, is ignored by some critics. The issues are discussed at length in materials on the web site of the American Securitization Forum, including a legal white paper, available here [Control + Click].³

The panel identified two opinions that typically are issued in such a securitization: (i) an enforceability opinion, and (ii) a tax opinion. The opinions are subject to customary assumptions and limitations, including reliance on the warranties of the parties in the transaction documents. The enforceability opinion covers enforceability against the Depositor of the pooling and servicing agreement.

² The customary form of real estate security varies by state, with some using a mortgage and others a deed of trust, deed to secure debt, or other instrument. For simplicity we refer in this summary to mortgages as a shorthand for all such instruments encumbering real estate as security for loans.

Charlie Adelman briefly explained the tax opinion, which opines that each identified interest in the Trust qualifies as a real estate mortgage investment conduit (“REMIC”) within the meaning of Section 860D of the Internal Revenue Code of 1986, as amended. Among other requirements, substantially all of the assets of a REMIC must consist of qualified mortgages or related permitted investments. A REMIC is not itself taxed but the holders of interests are taxed on their income from the REMIC.

Mike observed that the challenges to MERS did not seem to involve the issues that are covered by the typical enforceability opinion or tax opinion given in a residential mortgage loan securitization transaction. Rather, the challenges involve foreclosures after the securitization. The enforceability opinion covers only enforceability against the Depositor of identified securitization documents as of the date of the opinion, not the future foreclosure of the underlying mortgages or enforceability of the underlying mortgage loan documents against individual borrowers.

Issues in securitization and enforcement of residential mortgage loans continue to receive considerable attention in courts, in Congress, and among regulators and legal commentators.

**CONCURRENT BREAKOUT SESSIONS I:**

1. **Internal Opinion Policies and Procedures: Client Disclosure Considerations**
   (Summarized by William A. Yemc)

   *Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair*
   *Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair*
   *William A. Yemc, Richards, Layton & Finger, P.A., Wilmington, Reporter*

   Continuing the theme on opinion practices previously commenced by the co-chairs, this breakout session discussed issues relating to client disclosure considerations. As in the past, the focus of this session was not to develop prescribed or recommended practices, policies or procedures, but to discuss certain issues presented by “client disclosure” situations and to examine the process that firms would use to resolve 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 received the Client’s annual “audit letter” requesting the customary response to its independent auditors. Your Firm is representing Client in connection with a potential contingent liability which, if determined unfavorably to Client, would be material to Client’s financial condition. No third party has yet manifested to Client an intention to assert a claim in regard to the matter or even an awareness of the matter. Nevertheless, the partner in your Firm handling the matter has concluded that assertion of such a claim is “probable” and that an unfavorable outcome is “reasonably possible” as those terms are used in the ABA/AICPA “Treaty,” and that the

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1 At the Fall 2009 and Spring 2010 WGLO sessions, Messrs. Kaufman and Ryan conducted breakout sessions on the opinion practice topic, “Internal Opinion Standards.” At the Fall 2010 WGLO session, Messrs. Kaufman and Ryan conducted a breakout session on the opinion practice topic, “Internal Opinion Policies and Procedures: Multiple Office Practice Considerations.” A summary of the Fall 2010 session is included in the Winter 2010 issue (volume 10, no. 2) of the newsletter, at page A-7.
Client cannot reasonably conclude otherwise. The partner has advised Client that, under the circumstances, Client has a financial statement disclosure obligation with respect to the matter. Client refuses to consent to your Firm’s mentioning the matter in your Firm’s audit letter response. How would your Firm handle this situation?

The participants’ comments relating to their approach to the first illustrative opinion problem are set forth below in a generalized and summary fashion:

**Process Involved in Resolving Issue.** Most participants viewed this problem as involving professional responsibility and legal disclosure issues as well as a business issue. As a result, participants uniformly noted that the dispute should be elevated beyond the level of the partner who is handling the audit letter request. In particular, participants expressed the view that in addition to involving the firm’s opinion or audit response committee, the executive management, risk manager and/or general counsel of the firm would likely be consulted.

Participants also discussed the practices utilized at their firms for handling audit letters generally. Practice varies, but it was noted that in some large firms with multiple offices, the audit letter response process generally begins with a staff of non-lawyers who have been trained to handle the firm’s audit letter requests. The staff is responsible for contacting and obtaining responses from the attorneys who have done any work during the relevant period on any matter for the client that is the subject of the audit inquiry. The staff then compiles all of the information received as a result of such diligence and prepares an initial draft of the audit letter response. The draft letter is then provided for review to the partner who is primarily responsible for the client relationship. If issues like the one raised by the illustrative problem arise, then the relationship partner will consult the opinion or audit response committee, executive committee, risk manager or general counsel. Once all such issues are resolved, the audit response letter is returned to the staff, who then sends the final letter to the auditor.

At smaller firms, participants noted that the responsibility for handling a client’s annual audit letter falls largely on the relationship partner. That partner will solicit attorneys at the firm for information regarding the client that is the subject of the audit, and then will prepare the letter. If the audit letter is “clean,” no other partner or committee of the firm is typically consulted. If, however, that partner is faced with an issue like the disclosure point raised above, the opinion or audit response committee, executive committee, risk manager or general counsel, as applicable, would be consulted to help resolve the issue.

Other Considerations. In resolving the issue, participants noted that several considerations, including rules of professional conduct (e.g., ABA Model Rule 1.13 (“Organization as Client”), Sarbanes-Oxley reporting requirements (e.g., the SEC’s Part 205 Rules), and attorney-client privilege, may factor into the resolution of the matter. Ultimately, participants acknowledged that, given the facts of the illustrative problem, the approach should be to convince the client that disclosure is required.

**ABA/AICPA Treaty.** In addition to analyzing the issue raised by the illustrative problem, the participants engaged in a lively discussion of other issues that arise under the ABA/AICPA 1975 Treaty. Participants discussed whether a duty exists to disclose to the client information that the lawyer intends to

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2 **Editor’s Note:** See American Bar Association, Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (With Commentary), its Appendix A (Excerpts from Statement of Financial Accounting Standards No. 5, “Accounting for Contingencies”) (March 1975) and AICPA, Statement of Auditing Standards No. 12 (1976). The Financial Accounting Standards Board has had a project to consider revisions to FAS 5 (now found in the Accounting Standards Codification Subtopic 450-20). For a report on that project and the ABA’s response, see Jim Rosenhauer’s summary of the Fall 2010 meeting of the Committee on Audit Responses in the Winter 2010 issue of the newsletter, at page 8.]
include in the audit letter response. It was noted that as a matter of client relations, the attorney would likely inform the client of the information that the attorney intends to disclose to the auditor, regardless of whether a duty exists to do so. (Of course, an unasserted claim may not be disclosed by counsel unless counsel is requested to do so by the client.) Participants also discussed whether, under applicable ethics rules, as contemplated by the Treaty, if a client refuses to allow its firm to make a required disclosure, the firm can decline to issue the audit letter response but continue to represent the client. It was noted that it is not clear from the Treaty or applicable ethics rules that a “middle ground” is permitted, and, as a result, the firm would be better off convincing the client to permit the disclosure.

Illustrative Opinion Problem No. 2. Your Firm is representing Client, the seller in a business acquisition transaction. The acquisition agreement, which your Firm helped negotiate, requires that your Firm deliver a knowledge-based “no material pending or threatened litigation” confirmation as a condition to buyer’s obligation to close.

Your Firm has also been advising Client with respect to an asserted breach of contract claim from one of Client’s major customers. The dispute was already “in play” when the acquisition agreement was negotiated. Your Firm has previously advised Client that the claim is “without merit,” and, based on that advice, Client elected not to list the matter on the “Material Litigation” disclosure schedule. Accordingly, listing the breach of contract claim as an exception to the no-litigation confirmation could be inconsistent with Client’s disclosure schedule. Client regards this “problem” as the Firm’s, not its own, and refuses to allow disclosure in the opinion letter. How would your Firm handle this situation?

The participants’ comments relating to their approach to the second illustrative opinion problem are set forth below in a generalized and summary fashion:

Process Involved in Resolving Issue. Participants noted that the main issue raised by the second illustrative problem is the apparent lack of integration between the attorney handling the acquisition transaction and the attorney advising on the breach of contract claim. Participants recognized that attorneys may have different views as to what is a “meritless” claim, and that the context in which the claim is evaluated may also impact that evaluation. If the process had been integrated from the start, with the deal lawyer and the litigator “on the same page,” the issue could have been avoided by disclosing the claim on the disclosure schedule.3

As to the resolution of the issue presented, participants noted that the firm would probably have to convince the client to “retrade” the acquisition transaction on this point. The disclosure schedule would need to be amended, or an additional closing condition would need to be added. This may result in a cost to the client, or the buyer may be willing to close over the issue.

Other Considerations. An ancillary discussion that occurred during the analysis of the second illustrative problem related to the current practices of firms regarding the rendering of “no material pending or threatened litigation” confirmations. Participants noted that their firms would generally give a “no material pending or threatened litigation” confirmation that related solely to the particular transaction that was the subject of the opinion letter. Most participants noted that their firms would resist giving a “no material pending or threatened litigation” confirmation that related to the client generally, even if knowledge-based. Participants also noted that in some local counsel representations, their firms give a limited “no material pending or threatened litigation” confirmation based solely on the results of computer searches of specific court dockets on a particular date.

3 [Editor’s Note: For an illustration of the real world (and adverse) consequences that can occur from a failure to identify “pending or threatened litigation,” see Dean Foods Co. v. Pappathanasi, 2004 WL 3019442 (Mass. Superior Ct. 2004).]
“Your Firm is representing Client, the seller in a business acquisition transaction. The acquisition agreement, which your Firm negotiated, requires that your Firm deliver a knowledge-based “no pending or threatened litigation” opinion as a condition to buyer’s obligation to close.

On the eve of closing, the partner in your Firm handling the transaction receives a phone call from a lawyer representing a third party claiming that Client’s most important products infringe the third party’s patents. Your Firm is not Client’s regular intellectual property counsel and has had no prior awareness of the possible infringement. Your partner immediately discusses the call with Client and with Client’s regular intellectual property counsel, both of whom insist that the third party and its lawyer are notorious “IP trolls” with a reputation in the M&A world for last-minute “IP hold-ups” and that there is “no basis whatsoever” for the infringement claim.

Client refuses to allow disclosure of the threatened claim, either by updating its own disclosure schedules or by permitting your Firm to note the threatened claim in the closing opinion. Moreover, Client tells your partner that if your Firm refuses to issue the opinion and the deal falls through, Client will hold your Firm responsible for its resulting damages.

How would your Firm handle this situation?”]

2. Selected Issues in the Effects of Opinion Giving: Disagreements with Clients, the Side-Switching Lawyer and the “Golden Rule” in Action
(Summarized by William Freivogel)

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

This breakout session touched on three somewhat unrelated issues: (1) the firm-switching lawyer; (2) opinion requests to lawyers for opinions that their firms do not permit; and (3) client requests to lawyers to obtain from the other side opinions that the lawyers themselves would never give.

Firm-Switching Lawyer. Lateral lawyer is asked by lawyers at her new firm, who are in a deal with her old firm, about certain traits and practices of the lawyers at her old firm. The consensus of the group was that the lateral should keep such things to herself. Because she is not being asked about her client, but, rather, her old law firm, the ethics rules do not appear to be implicated. However, the group recognized that as a matter of agency law, and perhaps partnership law, she must not betray the confidences of her old firm.

Requested Opinions Prohibited by the Law Firm. Many in the group had confronted this problem, but there did not seem to be a consensus on how to deal with it. This situation has worsened as new approaches to opinion-giving emerge from ABA committees, WGLO, and various state and local bar
associations. One example from a member of the group was when a firm’s opinion practices had changed, such as where the financing of a private company is at the E round, and the firm has provided opinions in rounds A through D that are no longer considered "market."

**Client Requests to Obtain an Opinion the Lawyer Would Never Give.** There seemed to be a consensus that where the client makes a demand like this, when the firm's policy not to give such opinions is explained to the client, the client frequently backs down. Others believed that where the client persists in the demand, the lawyer may pass on the demand, and if the other side balks, then the lawyer may be able to drop the demand (a common example is an underwriter’s request, often from its in-house counsel, for a title opinion on shares sold in a secondary offering).

3. **So-Called 4 (1-1/2) “No Registration” Opinions – Is There a Customary Practice?**

(Summarized by Timothy G. Hoxie)

*Julie M. Allen, Proskauer Rose LLP, New York, Co-Chair*

*Timothy G. Hoxie, Jones Day, San Francisco, Co-Chair*

*Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Reporter*

This breakout session discussed how firms grapple with requests for “no registration” opinions on resales when a “safe harbor” rule (such as Rule 144, 144A or 701) is not available. In such cases, the securities usually are being sold when one or more of the attributes of the typical safe harbor rule (Rule 144) are not met (generally the holding period requirement but perhaps also the public information requirement) and as a result it is necessary to determine whether the transferor is a statutory underwriter engaged in a distribution triggering a requirement to register the sale. These opinions, while not common, are sought and given, often when transferors wish to transfer shares of companies that have not been held long enough to meet the Rule 144 holding period.

The session reviewed the law relevant to issuing so-called 4(1-1/2) opinions. The exemption – which is not written in the statute or related regulations – is based on the intersection of two registration exemptions found in Sections 4(1) and 4(2) of the Securities Act of 1933. The first of these exempts transactions other than by an “issuer, underwriter or dealer,” while the second exempts transactions “by an issuer not involving a public offering.” The first, by its terms, is not available to an “underwriter,” while the second is not available to anyone other than an issuer. The “4 (1-1/2)” exemption is based on the proposition that a transferor who is not a participant in a public offering should not be viewed as an “underwriter” and therefore should be able to claim the 4(1) exemption notwithstanding that the securities being sold may not have come to rest prior to their resale.

Because the ability to give a 4(1-1/2) opinion depends at least in part on the ability to determine that the proposed resale is not part of a “public offering,” an important part of such a transaction (and therefore of the ability to give a “no registration” opinion) is determining that (a) the transaction in which the securities were originally issued was a valid exempt offering, (b) the resale is itself structured with the same offering restrictions as would have been imposed in the original offering, and (c) nothing else has occurred (such as other resales that must be taken into account and could not be viewed as part of a private offering) that would render the original offering a public offering.

Several examples of 4(1-1/2) opinions were reviewed. The opinions were fact-specific, but were generally based on representations from the transferor (as to the acquisition of the shares, and the absence of activity, such as general solicitation, that would invalidate a private offering) and the transferee (generally the same facts as a purchaser in the original offering would have had to represent, such as status as a “accredited investor” or other basis for qualification to acquire shares in a private offering,
absence of a view to distribution in a public offering requiring registration, and acknowledgement of the restricted nature of the securities acquired. A majority of the examples (though not all) included either an assumption or representation that the original issuance was a valid private placement; those that did not include an express assumption or representation may have been given by counsel familiar with the original offering.

There was some discussion about whether the status of the transferor as an “affiliate” (or not) of the issuer had any bearing on whether or not the opinion could be given. While there was some belief that, so long as an affiliate’s resales were structured in a manner that ensured they were private transactions which, if attributed to the issuer, would qualify for exemption under Section 4(2), an opinion could be given in the same circumstances as for other transferors, that view was not uniformly shared. Some of the sample opinions assumed the transferor was not an affiliate, but others did not, suggesting a similar difference of view as to the importance of this factor.

PANEL SESSIONS II:

1. Opinions and Negative Assurance from Special IP Counsel: What are the Appropriate Boundaries?
   (Summarized by Robert I. Wittie)

Robert I. Wittie, K&L Gates, LLP, Washington, D.C., Chair
Duncan A. Greenhalgh, Goodwin Proctor LLP, Boston
Patrick O’Brien, Ropers & Gray LLP, Boston

This panel considered the appropriate scope of opinions provided by special IP counsel in connection with securities offerings and significant transactions by technology companies whose primary assets consist of intellectual property. The panel’s thesis was that requests commonly being made to special IP counsel are dramatically overbroad, and that a middle ground needs to be found that satisfies the legitimate due diligence needs of opinion recipients while not imposing unreasonable demands or exposure on opinion givers. In the view of the panel, that middle ground is the provision of a narrowly-focused form of traditional Rule 10b-5 negative assurance.

The panel explained that technology companies often use multiple firms as IP counsel, with each firm handling particular families of patents or trademarks and the related applications. One of those firms may act as the company’s regular corporate or securities counsel, or that role may be filled by still another firm. Thus, when such a company is ready to make a public offering of its securities or to engage in another transaction in which the value of IP, and risks posed by IP issues, to its core business is important, there may no single firm that can address both the securities or transactional matters and all of the important IP issues.

Historically, underwriters or transaction counsel conducted much of their due diligence through in-person meetings in which they could ask extensive questions on matters of concern. Today, however, such in-person due diligence with respect to IP matters is often replaced by broad-ranging “opinion” requests to special IP counsel. Such requests can be divided into three categories: (1) a request for an “expertizing” opinion to the effect that the legal matters discussed in the IP sections of the offering circular constitute accurate descriptions or summaries of those legal matters in all material respects; (2) a request for traditional (Rule 10b-5) negative assurance; and (3) requests for non-traditional negative assurance covering matters ranging from the familiar (e.g., no material IP litigation) to what can fairly be called extreme (e.g., no awareness of any basis for a claim challenging the validity of a company’s patents or of any basis for a claim that the company is infringing the IP of any third party).
Customary practice has evolved away from providing non-Rule 10b-5 negative assurance, even with respect to historically normative requests, such as the absence of litigation. As stated in the Glazer and FitzGibbon treatise (§18.8 at 668) (3d ed.):

“The purpose of a closing opinion is ... not to make an opinion giver a certifier of facts. Thus, requests that lawyers confirm their lack of knowledge of particular factual matters are inappropriate, and experienced lawyers resist them even when they are framed narrowly ....” (footnote omitted).

As the panel observed, the types of non-Rule 10b-5 negative assurance requests that have often been directed to IP counsel are anything but narrowly framed. Thus, while the motivation for these requests is understandable, so also is a “no way” reaction by the IP counsel that receives them.

The panel suggested that in some cases the only practicable solution may be for due diligence to be conducted the “old fashioned way” – i.e., through discussions with knowledgeable company officials and the relevant IP counsel. However, an alternative exists when the transaction is a securities offering and when the relevant IP counsel is part of a firm that has sufficient securities expertise. That alternative, and in the panel’s view the solution that best accommodates the needs of both opinion givers and opinion recipients, is a form of traditional, Rule 10b-5 negative assurance that is limited to the IP sections in the disclosure document.

The ABA Committee on Federal Regulation of Securities Securities Law Opinions Subcommittee’s report on “Negative Assurance in Securities Offerings” (2008 Revision), 64 Bus. Law. 395 (2009) specifically contemplates (at note 54) that such assurance may be sought from special IP counsel, but only when that special counsel is experienced in securities law matters and has had sufficient involvement in the preparation of the disclosure document itself to justify the request.

The panel concluded that, in some instances, it may be appropriate to couple such Rule 10b-5 negative assurance not only with an opinion that expertizes the discussion of legal matters in the IP sections of the disclosure but also with some additional, appropriately limited opinions. For example, in lieu of a requested opinion as to the technology company’s ownership or title to its IP, an opinion giver may be willing to advise that, based on a search of the U.S. Patent Office’s records, the company or one of its affiliates is listed as the owner or sole assignee of the relevant patents or applications.

One type of non-traditional negative assurance that was discussed by the panel is to the effect that there has not been, to the knowledge of the opinion giver -

“a failure to comply with the duty of candor and good faith, as required by the [US Patent Office] during prosecution of the [specified patent rights] in the United States.”

The panel noted that this assurance is frequently requested and that IP practitioners tend to regard it as easy to provide because the referenced duty has a technical meaning in patent prosecutions. It refers to an obligation that is imposed under Patent Office rules on all parties, including the lawyer prosecuting the application, to disclose all information that they know to be material to the patentability of the patent being claimed. Because this duty exists, IP attorneys typically make inquiries on the subject to the client and all known (and available) inventors, as well as others whom they know to be substantively involved in the application.

Commenting from the floor, however, Don Glazer observed that opinion givers ordinarily would never give assurance that parties had satisfied their fiduciary duties and that this “duty of candor” assurance is difficult to distinguish from that. Another attendee, commenting away from the actual panel
discussion, indicated that notwithstanding the technical meaning understood by IP lawyers, he considered this “candor and good faith” assurance to be “totally inappropriate” for a variety of reasons, including the inability of counsel to actually know whether others have disclosed all the material information that they know. Thus, while the duty of candor assurance may seem “easy to give” to IP practitioners, it seems no less objectionable from an opinion giver’s perspective than the other broad-based assurance requests referenced above. The panel agreed with this assessment.

**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*

*Louis G. Hering, Morris, Nichols, Arshe & Tunnell LLP, Wilmington*

*Charles L. Menges, McGuire Woods LLP, Richmond*

*Steven O. Weise, Proskauer Rose LLP, Los Angeles*

**Bar Reports.** John Power discussed his April 30, 2011 chart of recent and pending bar opinion reports. See “Legal Opinion Reports” in this issue of the newsletter for the chart as of June 30, 2011. He noted that four reports listed as “pending” in the fall 2010 version of the chart have been “published” and can be viewed on the Committee’s website in the Legal Opinion Resource Center: the Report of the ABA Section of Business Law’s Task Force on Delivery of Document Review Reports to Third Parties; two reports from the TriBar Opinion Committee, the first on opinions on secondary sales of securities, and the second a supplemental LLC opinion report on opinions on LLC membership interests; and a report on selected opinion issues by the Michigan Business Law Section’s Ad Hoc Committee on Legal Opinions. One report has been added to the “pending” category: a report on annotated real estate finance opinions. Only eight reports remain in the “pending” category.

Flash updates on the subject and status of reports were provided as follows: Jim Rosenhauer (ABA — Document Review Reports); Stan Keller (ABA — Legal Opinions in SEC Filings); Charlie Menges (ABA — Real Property, Trust and Estate Law — the Annotated Real Estate Finance Opinion); Steve Weise (TriBar — Secondary Sales of Securities); Don Glazer (TriBar — LLC Membership Interests); Justin Klimko (Michigan report); Phil Schwartz (Florida report); and Pete Ezell (Tennessee report).

**Joint Project Working Group on Description of Commonly Accepted Opinion Practices.** Steve Weise reported that the committee for this joint project, sponsored by the ABA Legal Opinions Committee and WGLO, met earlier in the day. It is in the process of identifying opinion letter practices and procedures that are generally accepted throughout the United States, using as its launching pad this Committee’s Legal Opinion Principles and Guidelines. The objective is to publish a series of reports on practices and procedures that will be sponsored or approved by a large number of bar associations and bar groups across the country. A preliminary draft of a report was discussed at the committee meeting. Committee co-chairs are Kenneth M. Jacobson, Stanley Keller, and Vladimir R. Rossman, and the Reporters for the project are Kenneth P. Ezell, Stephen C. Tarry, and Steven O. Weise.

**Meso Scale Diagnostics, LLC vs Roche Diagnostics GmbH.** Steve Weise reported on this April 2011 Delaware Court of Chancery case (2011 WL 1348438), which involved a reverse triangular merger, an acquisition technique commonly believed to avoid issues with the acquired company’s non-assignable contracts since the acquired company is the surviving entity in the merger. In denying a motion to dismiss (using the standard that “dismissal is proper only where the defendant’s argument is the
only reasonable construction as a matter of law”), Vice Chancellor Parsons found that the plaintiff’s interpretation that a prohibition of an assignment “by operation of law” was violated by a reverse triangular merger was a reasonable one, as was the contrary interpretation by the defendant, and thus the court would not finally resolve the issue on a motion to dismiss. While weak authority, this case is of interest to those giving opinions on no breach or default of contracts in reverse triangular mergers.

**Some Legal Issues That Worry Delaware Lawyers.** Lou Hering summarized the following cases that can raise opinion issues:

- A Delaware corporation should strictly comply with the Delaware General Corporation Law when issuing stock, amending its charter or approving a merger. *See, e.g., Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010) (stock split invalid where charter amendment only increased authorized number of shares but did not include language to effect the split); *Olson v. ev3, Inc.*, 2011 WL 704409 (Del Ch. Feb. 21, 2011) (shares issued on exercise of a “top-up” option likely invalid where board failed to approve the terms of the option or fix the consideration payable for the stock to be issued upon exercise of the option); *Prizm Group, Inc. v. Anderson*, 2010 WL 1850792 (Del. Ch. May 10, 2010) (shares issued for improper consideration were invalid). The Delaware law and whether a defective corporate action is “void” (not capable of ratification) or “voidable” (capable of ratification) is not always clear.

- Board responsibility to set consideration for newly issued shares or shares issued in a merger is non-delegable (except to a board committee). *See, e.g., Jackson v. Turnbull*, 1994 WL 174668 (Del. Ch. Feb. 8, 1994), *aff’d*, 653 A.2d 306 (Del. 1994). This can raise complications in “sale at the market” offerings.


**Legal Opinions to Federal Governmental Agencies.** Charlie Menges described the formation of a new subcommittee of the Committee on Legal Opinions of the ABA’s Section of Real Property, Trust and Estate Law to examine required legal opinions of federal governmental agencies in real estate transactions. Some agencies treat the form of opinion letter required by the agency as non-negotiable, even when the language required is incorrect or inappropriate, and others treat forms as somewhat negotiable. The subcommittee met with representatives of the Department of Housing and Urban Development on its form of opinion letter for multifamily mortgage loan transactions. HUD has revised its form of opinion letter in several important respects, but it remains at odds with current opinion practice in many other respects, including the fact that it is non-negotiable. The subcommittee will next turn its attention to other federal agencies, such as Fannie Mae and Freddie Mac.
**Panel Sessions III:**


   (Summarized by Martin E. Lybecker)

   **Kevin L. Shepherd, Venable LLP, Baltimore, Chair**
   **Martin E. Lybecker, Perkins Coie LLP, Washington, D.C.**
   **Cari N. Stinebower, Wiley Rein LLP, Washington, D.C.**

   **Background.** The “Gatekeeper Initiative” originated in the Moscow Communiqué issued at the 1999 meeting of the G-8 Finance Ministers. It calls upon countries to consider various means to address money laundering through the efforts of professional gatekeepers of the international financial system, including lawyers, accountants, company formation agents, and others. Through the Financial Action Task Force (“FATF”), the leading global organization in the fight against money laundering, governments from countries that comprise the principal financial centers have worked collaboratively to identify money laundering typologies, develop recommendations on best practices to combat money laundering, criminalize money laundering around the world, and encourage cooperation among national law enforcement and regulation agencies.

   **Gatekeeper Task Force.** The Task Force on the Gatekeeper Regulation and the Profession (“Task Force”) was created in February 2002 by ABA President Robert E. Hirshon to address the “Gatekeeper Initiative.” The mission of the Task Force is to respond to initiatives by the U.S. Department of Justice, U.S. Department of the Treasury, the Congress, FATF, and others that will impact on the attorney-client relationship in the context of anti-money laundering (“AML”) enforcement. At the time the Task Force was established, the principal focus of the Task Force was U.S. AML policy and whether the U.S. government would impose a mandatory requirement on lawyers to file suspicious activity reports – i.e., filings with U.S. government regulators or law enforcement personnel of reports on suspicious activity by clients, and would prohibit counsel from informing clients that such a report had been filed (the so-called “no tipping off” rule). This would have made lawyers subject to reporting obligations that are similar to what banks and other financial institutions have with regard to reporting suspicious financial transactions to FinCEN in the U.S. Department of the Treasury.

   **Risk Based Guidance Rather than a Rules-Based Solution.** The Task Force prepared voluntary good practices guidance on client due diligence for the legal profession with the expectation that risk-based guidance would eliminate the need for a federally-mandated rules-based approach, and the ABA has formally approved the guidance as official ABA policy. Using three hypothetical fact patterns designed to identify possible “red flag” situations, Kevin Shepherd of Venable, Cari Stinebower of Wiley Rein, and Martin E. Lybecker of Perkins Coie discussed the steps that practitioners might take to assure themselves that illegal money laundering activities were not taking place in connection with transactions on which they were expressing an opinion. There was a broad consensus among those in attendance that legal opinion practice is ill-equipped to perform AML screening, but that substantial efforts should be undertaken to identify the necessary resources to perform that function and to give publicity to the felt need to support the voluntary good practices guidance as the best available solution.
2. **Opinions Commonly Delivered in International Transactions: Part II**  
(Summarized by James R. Silkenat)

*James R. Silkenat, Sullivan & Worcester LLP, New York, Chair*  
*Carolina T. Joop, Demarest & Almeida Advogados, Sao Paulo and New York*  
*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*

Closing opinions are frequently delivered in transactions in which one or more of the parties is located outside of the United States. This panel discussed several of the issues that are dealt with in these cross-border opinions.

**Arbitration.** Arbitration clauses are frequently included in cross-border transactions as a way to resolve disputes between the parties. But such agreements are of little value if courts will not enforce the arbitration provision or if the arbitration award will not be recognized in the jurisdiction where the losing party has assets (frequently not the jurisdiction where the arbitration takes place). Opinions are frequently requested to the effect that the arbitration clause is enforceable and that any arbitration award will be recognized and enforced in the U.S. without a rehearing on the merits.

The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), addresses arbitrations that arise out of international contractual transactions. “International” in this context typically means that one of the parties is not a U.S. citizen or resident, or where the transaction involves non-U.S. property or is to be performed outside of the U.S.

The panel stated the prerequisites that must apply in rendering any opinion under the New York Convention:

1. that there be a written agreement to arbitrate;
2. that the arbitration take place in the territory of a signatory to the Convention;
3. that the agreement be between a U.S. party and a foreign party, between two foreign parties or, if between two U.S. parties, that the transaction be of an international character;
4. that the transaction be “commercial” under U.S. law; and
5. that the agreement not relate to a subject matter prohibited by the Convention for arbitration.

The latter two of these requirements usually necessitate some exercise of judgment by the opinion giver, but rarely cause a substantive problem, although if the subject matter of the agreement is family law, consumer transactions or labor law, the New York Convention may be inapplicable and the opinion therefore harder to give. Recognition and enforcement of arbitral awards depends on where the arbitration takes place. Most opinion givers will assume that the arbitration will not take place in the U.S.

**U.S. Corporate Formalities.** Non-U.S. parties frequently will request an opinion from U.S. counsel on whether they will be “doing business” in the state whose law is covered by the opinion, at least with regard to the execution of the agreement in question. Giving this opinion is usually not a problem.
Even where non-U.S. law is to govern an agreement, non-U.S. parties frequently ask for an opinion that the U.S. party is duly incorporated and has the power and authority to enter into the agreement and to perform its obligations thereunder. This is not noticeably different than in the normal U.S. context, except that the obligations being undertaken under a non-U.S. agreement may not be entirely clear to the opinion preparers because they are not familiar with the law governing the agreement. However, this generally is not a problem unless the U.S. parties’ obligations under the agreement are unusual. In these instances it is typical for the opinion giver to make assumptions about the meaning and effect of any provisions of the agreement that are unclear.

3. Misleading Opinions? A Panel Discussion
(Summarized by John K. Villa and Gail Merel)

John K. Villa, Williams & Connolly LLP, Washington, D.C., Chair
Hon. Thomas L. Ambro, U.S. Court of Appeals, Third Circuit
Hon. Harold Baer, Jr., U.S. District Court, Southern District of New York

The Panel explored a hypothetical in which an opinion giver is called upon to provide an opinion to a non-client opinion recipient which is literally correct but which the opinion giver knows does not address a risk that could be significant to the opinion recipient. The panelists and the audience considered the tension created by the fact that the client in this hypothetical had negotiated an agreement that did not require disclosure of a potentially major risk so that, if the opinion giver provides an opinion that essentially conforms to the wording of the agreement, the opinion does not disclose the risk which the lawyer knows exists.

Can the opinion giver ethically provide such an opinion knowing that the opinion recipient might later claim that the opinion caused the recipient to misjudge the risks and incur large losses? On the other hand, can the lawyer ethically refuse to provide such an opinion knowing that to do so might have the effect of causing the lawyer’s own client to lose the benefit of a very favorable bargain? If the lawyer refuses to provide the opinion, and the transaction fails to close, would the lawyer be liable to her own client for failure to provide the closing opinion? Would the lawyer approach the situation differently if, for example, she believed that the opposing party agreed to receive less disclosure and paid less (and thus knowingly accepted the risk) as opposed to if, for example, the opposing party agreed to receive less disclosure because of the inexperience of its lawyers? While time did not permit a complete analysis of all of these questions, there was general recognition that the lawyer’s obligations to avoid misleading third parties through opinions or otherwise cannot be analyzed without consideration of the lawyer’s professional obligations and the lawyer’s duties to her own client to secure the benefit of a good bargain.

The panel thus examined the tension between a lawyer’s natural reluctance to participate in a transaction where the opinion recipient fails for whatever reason to ask the questions needed to elicit material information, and the duty of the lawyer to act zealously in the representation of a client within the bounds of the law and professional responsibility. Lawyers are not required to pass judgment on the fairness of the deals that their clients enter into. Yet many lawyers would be uncomfortable in providing an opinion of the nature described above because the opinion recipient’s disappointment may lead to litigation. No one answer was offered that would resolve these competing concerns for all circumstances.

In anticipation of this panel presentation, participants at the seminar had the opportunity, during an earlier set of breakout sessions, to consider and discuss in smaller groups various other hypothetical situations raising many of the same issues. A range of views was expressed on the issues presented, and there was a general appreciation of the difficulty of determining the best course of action in many situations.
PANEL SESSIONS IV:

1. **Differences in Municipal and Corporate Approaches to Securities Disclosure and Opinion Practice**
   (Summarized by Barry Bendes)

   **Stanley Keller, Edwards, Angell, Palmer & Dodge LLP, Boston, Chair**
   **Robert E. Buckholz, Jr., Sullivan & Cromwell LLP, New York**
   **Allen K. Robertson, Robinson, Bradshaw and Hinson, P.A., Charlotte**

   This panel focused on the differences between municipal and corporate securities disclosure and opinion practices and the roles of counsel in each type of transaction. In the corporate securities field opinions are given in the context of detailed disclosure requirements imposed by federal and state securities laws, the SEC’s registration forms, and the disclosure requirements embodied in regulations adopted by the SEC under the Securities Act of 1933 and the Securities Exchange Act of 1934. Public corporate issuers are also subject to robust ongoing reporting requirements.

   In contrast, for municipal securities offerings involving government or agency securities, such as tax exempt facility or special purpose bonds, there is no uniform scheme for what must be disclosed in offering materials, and the offering materials themselves are not seen solely as “compliance” documents but include political, tax and other disclosures. In most cases municipal offerings are exempt from registration under Section 3(a)(2) of the ’33 Act and from periodic reporting under Section 3(a)(12)(A) of the ’34 Act. Municipal issuers generally are not subject to liability under Sections 11 or 12(2) of the ’33 Act but are subject to general antifraud prohibitions. Financial disclosures in municipal offerings are made under the rules of the Governmental Accounting Standards Board or other accounting rules rather than under generally accepted accounting principles and generally require only the inclusion of annual financial statements (usually 6-12 months old by the time the offering comes to market) that are not necessarily accompanied by audit reports, do not include risk factor disclosures, and require very limited continuing disclosure of material events. In such offerings, where there is only modest due diligence conducted by counsel and, in negotiated deals, limited negative assurances given, the scope of work for counsel is quite different from what is traditionally found to exist in corporate offerings.

   Each municipal offering is a separate transaction and is not integrated with prior offerings from the same issuer. The SEC has issued interpretations requiring municipal underwriters to review municipal disclosure documents in order to have a reasonable basis upon which to believe the issuer’s key representations. The general antifraud provisions of the ’33 Act and Rule 10b-5 do apply to municipal offerings and ’34 Act Rule 15c2-12 requires municipal underwriters to review official statements and to obtain certain specified undertakings from municipal issuers to provide continuing disclosures.

   The panel also discussed the more robust disclosure controls and procedures and internal control systems in the corporate arena versus those that exist in the municipal world, which, for corporate counsel, provide a firmer foundation for counsel’s negative assurance letters.

   The materials accompanying the panel’s presentation included references to the literature concerning municipal bond opinions, including to the National Association of Bond Lawyers’ four model bond opinion reports, which address what an “unqualified opinion” means for such purposes, and the SEC’s white paper to Congress of July 26, 2007 addressing disclosure and accounting practices in the municipal securities market.
2. **Unrepresented Opinion Recipients**  
(Summarized by Martin Carmichael)

*Arthur Norman Field, Field Consulting LLC, New York, Co-Chair*  
*Donald W. Glazer, Boston, Co-Chair*  
*Martin Carmichael, Goodwin Proctor, LLP, Boston*

In connection with the formation of private investment funds, fund counsel often gives investors opinions covering federal securities law and state law matters relating to the fund entity and the fund interests. In some cases, counsel also gives tax and ERISA opinions. The opinion letters are typically addressed to all of the investors participating in the particular closing. Fund counsel may have had some interaction with lawyers for some of these investors, but usually has no idea whether an opinion recipient was represented by a lawyer. An unrepresented investor may not understand the meaning, scope and significance of the opinions addressed to it, particularly as affected by customary opinion practice. What are the opinion giver's responsibilities to unrepresented recipients?

The panel discussed this question by considering specific opinions given in these transactions. The panelists agreed that the meaning of most of the typical opinions could be readily understood without reference to customary practice. However, the panel identified a few opinions where this might not be the case. For instance, an opinion that the fund's partnership agreement is an enforceable obligation is subject to limitations that are not stated in the opinion letter but are understood as a matter of customary practice. Moreover, an unrepresented recipient may misunderstand the extent of diligence involved in giving the opinions or be unaware that fund counsel has failed to give an important opinion that should be given in the context of the particular transaction.

The panel discussed whether assumption of risk might be a valid defense to a claim by an unrepresented investor, but concluded it might not be, particularly because an opinion letter could be construed as an inducement to a prospective investor to invest in the fund. The panel also discussed the following alternatives:

- Only provide opinions to investors who specifically request them. (This approach may not appeal to fund sponsors who want to treat all investors as equally as possible.)
- Include a warning / disclaimer in the opinion letter cautioning the recipient that a proper understanding of the opinions requires the assistance of qualified legal counsel, urging the recipient to consult with such counsel, and disclaiming any responsibility to advise the recipient regarding the adequacy of the opinions given or the effect of customary practice on their interpretation.