IN OUR OPINION
THE NEWSLETTER OF
THE LEGAL OPINIONS COMMITTEE
ABA BUSINESS LAW SECTION
Volume 12 — Number 4 Summer 2013

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ADDENDUM, WGLO SPRING 2013 “FULD@40” SEMINAR
FROM THE CHAIR

This is my last “From the Chair” message. It has been a privilege to lead this Committee the past three years. The time has come to turn the leadership reins over to Tim Hoxie, and I am confident he will do an outstanding job leading the Committee. I also want to thank my immediate predecessor, John Power, who was always there and actively involved, contributing his wisdom, energy and continued interest. He set a model I hope to emulate as past chair.

I take this opportunity to review the activities of the Committee over the past three years and to discuss an agenda for it for the future. I then offer a few thoughts on issues facing legal opinion practice going forward.

Committee Retrospective

• I begin with the Report on the 2010 Survey of Law Firm Opinion Practices that I inherited from John Power. Thanks to John’s perseverance (with some help from his friends, including Don Glazer), the report has been completed and is now published in the May Business Lawyer, which can be accessed online and will soon be in your mailbox. The results of the survey, and the analysis of those results in the report, provide invaluable information for law firms in understanding opinion practices being followed by other comparable firms and in evaluating their own practices.

• Next, our Report on Cross-Border Closing Opinions of U.S. Counsel is well along toward completion, thanks to the herculean efforts of Ettore Santucci and his committee. Various drafts have been widely circulated and I am hopeful this groundbreaking report will be completed and published in the not-too-distant future. Nothing like it, analyzing in depth U.S. cross-border opinion practice, has ever been done before. This report will contribute greatly to a better understanding of these opinions and establish the basis for a meaningful dialogue with our counterparts in other key countries. More on this below.

• We have launched the joint project with the Working Group on Legal Opinions (WGLO) to identify commonly accepted third-party legal opinion practices. An objective of this project is to advance national opinion practice by establishing a baseline of understanding among lawyers in different locales and different areas of legal practice. We are nearing completion of an exposure draft of the project’s initial phase that will be submitted soon for consideration by this Committee.

• Regarding WGLO, we have worked with the leadership of the ABA Business Law Section and of WGLO to establish a solid foundation for WGLO to continue as a separate entity from the ABA so that it can carry on its mission, working with the ABA and other bar and opinion groups, to improve opinion practices and enhance understanding among the various constituencies involved in opinions.

• The Committee continues to be the centerpoint for coordinating opinion practice issues and interfacing with other groups on opinion matters. Thus, we have worked with other ABA committees, such as the Mergers and Acquisitions Committee and the Fed/Reg Securities Law Opinions Subcommittee on opinion matters. We are the group, working with the Securitization and Structured Finance Committee, that is interacting with the AICPA on its proposal regarding true sale and legal isolation opinions. The AICPA proposal raises difficult opinion issues that require good faith efforts by both professions to reach a workable
common ground in the interest of our joint clients.

- Education of the bar on legal opinion matters has been in the forefront of our Committee’s efforts. This has been accomplished through our programs and committee meetings, promotion of active listserv exchanges and, thanks to the amazing efforts of our Editor, Jim Fotenos, the publication of the Committee’s newsletter “In Our Opinion.” As this issue of the newsletter demonstrates, it is the most comprehensive and informative source of current opinion learning.

Agenda for the Future

- Completion of the Cross Border Opinions Report should provide the opportunity for the Committee to engage with opinion practitioners in key foreign jurisdictions, both to develop an understanding of what kind of opinions foreign recipients should reasonably expect from U.S. lawyers and to make progress on identifying common opinion concepts among jurisdictions that will facilitate cross-border opinion practice. The ABA, as the recognized institution for U.S. lawyers, and our Committee in particular, are in a unique position to promote this dialogue and advance this initiative. We have already reached out to our counterparts in other jurisdictions and can expect this initiative to move forward.

- On the domestic front, there is much that can be done to advance a common understanding of views regarding opinions among various geographic and practice constituencies through the joint project with WGLO on identifying commonly accepted opinion practices. By identifying widely accepted opinion practices, we will make it easier for opinion givers to rely upon customary practice as the basis for giving opinions and will make the opinion process more efficient. The ABA Legal Opinion Principles and the ABA Guidelines for the Preparation of Closing Opinions have served a valuable role in advancing opinion practice, and there is an opportunity to update and expand them in a comprehensive statement that can be broadly endorsed. Our Committee must continue to play a leadership role in this effort if the project is to succeed.

- The Shakers created a wonderful community with a fine quality of life, but with a fundamental flaw — they neglected to recognize the consequences of failing to replicate. I fear opinion practitioners are in a similar position — we are a wonderful guild of aging practitioners who advance the quality of opinion practice, but like the Shakers, we fail to replicate. Our Committee must do a better job educating younger lawyers on opinion practice and bringing along new generations of opinion leaders if we are to avoid the inevitable consequences that confronted the Shakers. This is an initiative our Committee has begun but it needs a lot more attention and effort if it is to succeed.

Issues Facing Legal Opinion Practice

I have written before that legal opinion practice is at a crossroads. This theme was explored at the WGLO Fuld@40 Seminar, summaries of which are included in the Addendum to this newsletter.

The core question, in my view, is the extent to which third-party opinion practice will continue to be based upon customary practice as we know it, which is premised upon professionalism, practicality and good sense, or whether it will migrate towards another model. We have seen calls for a more “contract-based” and a literalist’s approach to opinions. This approach can take the form of an Accord-like
“normative” basis for opinion giving or an expansion of efforts to state things expressly even though they may be understood, with inclusion of expanded lists of assumptions and qualifications. We also see suggestions for adding contract-like protective provisions in third-party opinion letters, as well as for narrowing the opinions given by lawyers, even when those opinions serve a legitimate purpose and are capable of being given responsibly. These approaches to opinion practice have been driven, in part, by risk management and mitigation concerns and a focus on motion outcomes in litigation.

Decisions will have to be made about the future course of opinion practice. Some of these decisions inevitably will be made by market demands, with that market, which has become increasingly national, now becoming ever more international. However, many of the decisions regarding the future of opinion practice will be in the hands of opinion thought leaders, like the members of this Committee.

For reasons I explain in my Fuld@40 paper, I continue to believe that third-party opinion practice must be grounded in reliance on customary practice, albeit a customary practice that continues to evolve to address emerging issues and practice developments and that includes a sharpening of the opinions we give so their coverage is more precise and they communicate better. However, before we rush to embrace the seemingly easy risk mitigation solutions, we should consider the purpose of opinions and their value. Ultimately, the opinions we give must assist our clients achieve their transactional objectives, consistent with our meeting our professional responsibilities. I look forward to the ongoing analysis and debate over these issues.

- Stanley Keller
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ABA Business Law Section
Annual Meeting
Fairmont Hotel
San Francisco, California
August 9-11, 2013

Professional Responsibility Committee
Saturday, August 10, 2013
Committee Meeting:
2:30 p.m. – 3:30 p.m.

Legal Opinions Committee
Sunday, August 11, 2013
Committee Meeting:
9:30 a.m. – 11:00 a.m.
2:30 p.m. – 4:30 p.m.
Reception: 5:30 p.m. – 7:00 p.m.
Sponsored by Jones Day LLP

Law & Accounting Committee
Sunday, August 11, 2013
Committee Meeting:
8:00 a.m. – 9:30 a.m.

Audit Responses Committee
Sunday, August 11, 2013
Committee Meeting:
1:30 p.m. – 2:30 p.m.

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee
Sunday, August 11, 2013
Subcommittee Meeting:
4:30 p.m. – 5:30 p.m.

Working Group on Legal Opinions
New York, New York
October 28 & 29, 2013

ABA Business Law Section
Fall Meeting
Washington, D.C.
November 22-23, 2013
The May 2013 meeting of WGLO was entitled “Fuld @ 40” in honor of James J. Fuld, who, forty years ago, wrote the seminal article on opinions, “Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Chaos,” 28 Bus. Law. 915 (1973). It is due to Jim Fuld that groups of lawyers, such as those at WGLO, devote themselves to the task of attempting to make the giving and receiving of third-party legal opinions both fair and efficient. At the May 2013 WGLO meeting, it was only fitting that the Fuld Award was given posthumously to James J. Fuld. Present to accept the Award were his three children Nancy (Fuld Neff), Joan (Fuld Shauss), and Jim, Jr.

Jim Fuld’s seminal article was inspired by his being asked late on a Friday in the course of final negotiations on a transaction to give an opinion that he knew the opposing law firm would not give; his response to the request was that he would think about it over the weekend. His ruminations that weekend resulted in his now famous 1973 article.

To set the stage for the reader of his article, Jim Fuld noted that he could find “hardly any cases considering the substance and form of legal opinions; there is virtually no printed word on the subject … and, unlike accountants, the lawyers do not have any generally accepted principles covering opinions.” 28 Bus. Law. at 915.

As to the opinion request which inspired Jim Fuld to pick up his pen, he noted that it was the practice of most law firms to have two opinion files — those they would give and those they would accept. He noted that the practice was defended “on the ground that each lawyer is entitled to try to obtain the best possible deal for his client” — but, Mr. Fuld responded: “I disagree” — hence, the birth of the Golden Rule.

Jim Fuld’s concluding suggestion “is for the organized bar to establish general principles regarding legal opinions” (28 Bus. Law. at 919) — hence, the birth of “customary practice.”

In comments about Jim Fuld at the WGLO meeting, Judge Thomas Ambro noted Jim Fuld’s many accomplishments outside of the legal profession. He was a brilliant music historian and collector of musical scores. His collection was acquired by the Morgan Library. It spans four centuries and includes first printings of popular folk songs, show tunes and classical works, including a 1609 edition of “Three Blind Mice.” Jim Fuld represented many clients in the music field, including the New York Philharmonic and Leonard Bernstein. He also wrote a book (The Book of World-Famous Libretti: The Musical Theater From 1598 to Today (1994)), which became a standard reference work. As Jim Fuld said: “This book attempts for the first time to assemble information about the original libretti of 168 of the world’s best known and important operas and other works for the musical theatre. It is an attempt to bring order out of some chaos.”
Thus, what Jim Fuld did for music he also did for legal opinions.

Jim Fuld’s children confirmed that he was a man of punctuality, lived an orderly life and had an orderly mind. The legal profession is indeed fortunate that Jim Fuld had a passion to bring order out of chaos, which has resulted in continued attempts to bring order to third-party legal opinion practice.

This year’s Fuld Award could not have gone to a more worthy recipient.

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**RECENT DEVELOPMENTS**

**Update on Swap Guarantee Opinions**

The joint final rules of the CFTC and SEC on the definition of “swap” became effective October 12, 2012. SEC Release No. 33-9339 (July 18, 2012). The joint adopting release states that the term “swap” includes a guarantee of a swap. *Id.* at 67-70.

The Commodity Exchange Act (7 U.S.C. § 1 et seq.) (“CEA”) prohibits any entity that is not an “eligible contract participant,” or “ECP,” from entering into a non-exchange traded swap. 7 U.S.C. § 2(e). Generally, an ECP is an entity that has (1) total assets exceeding $10,000,000, (2) a net worth exceeding $1,000,000 and enters into a swap in conducting or managing risk in its business, or (3) its swap obligations guaranteed by an ECP meeting certain criteria. 7 U.S.C. § 1a(12).

The CFTC staff issued a no-action and interpretative letter on October 12, 2012 that stated that a guarantor of a swap must be an ECP. Release No. PR 6385-12 (Office of General Counsel).

Thus, if a corporate borrower enters into a non-exchange traded swap to hedge its interest rate risk arising under its credit agreement and, as is typical in many financings, its subsidiaries provide an upstream guarantee of the credit agreement that includes any related swap obligations, then each subsidiary guarantor must be an ECP. In other words, an upstream guarantee of a typical swap by a non-ECP subsidiary is not enforceable.

In the absence of stand-alone subsidiary financials, it may not be feasible to determine whether every subsidiary guarantor is an ECP with sufficient total assets or net worth. In addition, the ECP requirement must be met each...
time that a swap is entered into. In many financings, the subsidiary guarantee is commonly entered into at closing and will likely remain in place for years. Swaps are likely to be renewed or replaced from time to time, and it is possible that a subsidiary swap guarantee would meet the test at one point in time and fail it at another.

One solution is to add a savings clause exclusion from the guarantee and security arrangements to the extent the guarantee or grant of security is or becomes illegal under the CEA or any related rule or interpretation. The Loan Syndications and Trading Association ("LSTA") and more recently the International Swaps and Derivatives Association ("ISDA") have circulated model language for such an exclusion, albeit specifically tied to the current statutory wording. Some practitioners prefer simpler wording for financing documentation that will continue to apply in the event of future changes in the law. For example:

"... other than any obligation of any Guarantor to pay or perform under any agreement, contract, or transaction that constitutes a "swap" within the meaning of Section 1a(47) of the Commodity Exchange Act (a "Swap"), if, and to the extent that, all or a portion of the guarantee by such Guarantor of, or the grant by such Loan Party of a security interest (directly or indirectly) to secure, such Swap (or any guarantee thereof) is or becomes illegal under the Commodity Exchange Act or any rule, regulation, or order of the Commodity Futures Trading Commission (or the application or official interpretation of any thereof) . . . ."

Proceeds waterfall and collateral sharing provisions in the financing documents may be adjusted to reflect the exclusion. Some question remains about whether a grant of a security interest directly to secure a swap, rather than a guarantee of a swap, runs afoul of these rules.

The savings clause language set out above covers both to address that uncertainty.

In the absence of such a savings clause, opinion givers may wish to consider the advisability of including an appropriate qualification in any opinion addressing the enforceability of guarantees of swap obligations.

The LSTA also suggests as an option, and ISDA also envisions, the possibility of a keep-well arrangement under which all members of the loan party group guarantee each other’s swap and swap guarantee obligations, on the premise that if at least one member is an eligible ECP, all others will pass muster as ECPs. In multi-lender financings, it may be preferable to include any keep-well arrangement in the specific swap transaction, rather than in the financing documentation, so that if the arrangement later needs to be modified, the modification can be effected by agreement between the swap parties without involving the broader lender group.

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NOTES FROM THE LISTSERVE

[Editor’s Note: Dialogues on the Committee’s listserv are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Members of the Committee may review the comments referred to below by clicking on the “Archives” link under “Listerves” on the Committee’s website.]
Including Dodd-Frank as One of the Laws Not Covered by a Closing Opinion

By his inquiry to the listserv of June 12, 2013, Robert K. Morris of Reed Smith LLP asked if opinion givers are routinely excluding the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) from coverage of a standard closing opinion given by counsel to a borrower to the lender in an ordinary bank financing. By excluding Dodd-Frank from the laws covered by the opinion the statute would, noted Robert, be “treated in a fashion similar to federal securities laws and antitrust laws.” Robert noted that the exclusion may be based on the notion that Dodd-Frank “is so complicated, confusing and ill-drafted, and recent,” that counsel declines to include it in the laws covered by the opinion.

Stephen C. Tarry of Vinson & Elkins LLP responded that, in secured financing transactions, his firm “would typically include an express exclusion for Dodd-Frank only if the opinion covers swap documents.” Steve also noted that if the borrower could be deemed “systemically” important (as determined by the Financial Stability Oversight Council) then his firm would probably also include an express exclusion, but he had yet to face the issue. Except for “non-ECP” (eligible contract participant) guarantors, Steve was not aware of any provision of Dodd-Frank “that would impact the legality or enforceability of a garden variety secured loan transaction as against a non-systematically important borrower.” Steve’s firm does take an express exception for non-ECP guarantors if any guaranty of the loan agreement covers swaps.1

Richard L. Goldfarb of Stoel Rives LLP noted that if the loan agreement permits the pass through of additional costs to the borrower imposed by or relating to compliance with Dodd-Frank, then he would be “extremely loath to opine that that is enforceable.”

Gail Merel of Andrews Kurth LLP, on the other hand, stated that she “regularly” sees an exclusion of Dodd-Frank from the laws covered by an opinion letter and takes the exclusion herself in ordinary bank financings. She also noted that where the loan documentation provides for derivatives and guarantees of derivatives, she has seen the exclusion of Dodd-Frank clarified further to address those specific provisions.

Providing Negative Assurance on Issuer’s Intellectual Property

By his inquiry to the listserv of July 9, 2013, Steven Lauff of Denko Coburn & Lauff LLP, West Lake Hills, Texas, raised an inquiry that has received considerable attention in this newsletter, namely, the appropriate scope of negative assurance on an issuer’s intellectual property rights given to the underwriters by issuer’s counsel in a securities offering. Steve noted that he had done some homework and that the matter has been addressed at least three times in prior issues of the newsletter: a WGLO panel addressed the topic in 2011 (“Opinions and Negative Assurance from Special IP Counsel: What are the Appropriate Boundaries?”), summarized in the WGLO Addendum to the Summer 2011 issue (vol. 10, no. 4) (at A-9 -- A-11), and in 2010 at the WGLO Spring 2010 session (“IP Opinions in Corporate Transactions and Negative Assurances on IP Disclosures”) July 2010 issue (vol. 9, no. 4) (at A-5 – A-6); and the topic was addressed in a listserv dialogue (“Patent Opinions to Underwriters in the IPO Context”) in the April 2010 issue (vol. 9, no. 3), at page 12. Steve asked whether the following opinion request made to him by underwriter’s counsel was appropriate:

“There is no basis that is reasonably likely to result in a finding that the Company does not have clear title [to its IP], and there is no basis that is reasonably likely to result in a finding of unenforceability or invalidity of any of the Company’s [patents].”

1 [Editor’s Note: For a discussion of swap guaranty opinions, see “Recent Developments — Update on Swap Guarantee Opinions” in this issue of the newsletter.]
Underwriter’s counsel claimed that the form of assurance it was requesting was “market” in IP opinions underwriters expect to receive in IPOs. Underwriter’s counsel further requested that Steve modify his firm’s definition of “knowledge” to eliminate the statement that Steve’s firm had not conducted any independent investigation or inquiry.

The response to Steve’s inquiry was swift. Ettore Santucci of Goodwin Procter LLP stated that the requested language “strikes me as unreasonable in many respects and certainly inappropriate for a negative assurance letter in all respects.” Noted Ettore, underwriter’s counsel appeared to be requesting a “title” opinion on IP and that in his view was not “market” or accepted opinion practice among IP lawyers. Robert A. Wittie of K&L Gates LLP agreed with Ettore, noting that at the Spring 2011 WGLO panel that he moderated (and on which Ettore sat) summarized in the Summer 2011 issue of the newsletter cited above, “the clear consensus was that they [de facto IP title opinions] are inappropriate.” Concluded Bob: “[a] limited 10b-5 assurance – limited in the sense that it only addresses the discussion in the offering materials of the particular items of IP as to which the IP lawyer has acted as counsel – should be sufficient to satisfy the underwriters’ due diligence needs.”

Stan Keller also agreed with Ettore, noting that IP opinions and negative assurance in IPOs are among the most troublesome current areas in IPO opinion practice. Agreeing with Bob Wittie, Stan observed that the negative assurance confirmation itself, to the extent that it covers IP matters, addresses the underwriters’ request in a more appropriate context. Underwriters should also take comfort in receiving confirmations on the fairness of the descriptions of documents and legal matters in the disclosure document that relate to IP matters. No-litigation confirmations can address the absence of knowledge of pending proceedings challenging the validity of patent claims or litigation alleging infringement. Stan did express some sympathy with the underwriter’s concern over broad disclaimers of conducting “any independent investigation or inquiry” and noted that such limitations can be more tailored.

Jim Rosenhauer, Don Glazer and Ettore Santucci jointly added that commentators and bar groups have been consistently urging the elimination, or at least reduction, of factual statements in what are supposed to be legal opinions, including limiting statements about litigation (as an alternative to the approach of making no statement) to at most a statement as to pending litigation handled by the firm which challenges the agreement with respect to which the opinion is being given (and certainly avoiding any statement “to our knowledge” about litigation generally). They noted that, consistent with that approach, any statement by patent counsel about litigation should be limited to patent litigation as to which that counsel is representing the client.

**Due Organization Opinions on Converted Entities**

By his inquiry to the listserv of July 11, 2013, Stan Keller, passing along a Committee member’s inquiry, asked for the listserv’s reaction to an opinion request for a “due organization” opinion on a corporation that had incorporated as a non-Delaware corporation but subsequently converted into a Delaware corporation: Is it necessary for the opinion giver “to perform the same review of the incorporation and organization of the original non-Delaware corporation as would be done if there had been no subsequent conversion to Delaware, or is the conversion thought to provide some sort of ‘fresh start’ that does not need to be looked behind?”

Stan also asked the listserv to consider the situation in which, in lieu of a conversion, the reincorporation of the corporation to Delaware had been as the result of a merger rather than through a conversion.

Richard R. Gerken, a former in-house corporate counsel and now a professor of business law at Plymouth State University, Plymouth, New Hampshire, observed that the
reincorporation by conversion appeared to be a “fresh start” going forward, and that an inquiry into the former state’s laws would have no real relevance other than to ensure that the company continued to be licensed as a foreign corporation doing business in that state. As for a merger, Richard noted that the merged corporation ceases to exist, and that the amount of time elapsed since the Delaware incorporation or merger would be relevant in lessening any anticipated problems.

Richard R. Howe of Sullivan & Cromwell LLP noted that his firm confronted this question in the case of a reincorporation in Delaware by a non-United States entity under Delaware’s GCL § 388 (Domestication of Non-United States Entities). Dick’s client had received an opinion of Delaware counsel in connection with the reincorporation, and foreign counsel had given a due incorporation opinion for the redomesticating entity. Dick's firm, which gave subsequent opinions on the due incorporation in Delaware for the client, gave them without reference to the original foreign entity. Dick did note that the question is easier where the reincorporation is done as a merger, since a new entity is clearly formed. Nevertheless, he agreed that even a converted entity should be viewed as a “fresh start” even though the statute (GCL §§ 265(f) (domestic conversions), 388(i) (foreign domestincations)) states that the converted entity, “for all purposes of the laws of the State of Delaware,” is deemed “to be the same entity as the converting other entity.”

Shawn Pearson of Woodburn and Wedge, Reno, Nevada, issued a note of caution on the question of whether the former jurisdiction’s laws permit an entity to convert in the first place. Shawn has had experience in which an entity converted into a Nevada entity, but the other jurisdiction’s laws were silent on the power to convert. No filing was made in the other jurisdiction, and so the converted entity continued to exist in that jurisdiction, according to its Secretary of State. In those circumstances, Shawn’s firm declined to opine on the converted Nevada entity’s due organization.

Noël J. Para of Alston & Bird LLP also cautioned that, in the absence of any opinion report guidance or statutory support for the “fresh start” theory, he would conduct the necessary diligence (or retain local counsel to do so) to establish “due incorporation” or “due organization” under the other jurisdiction’s laws, as well as the necessary diligence to establish the conversion or merger under Delaware law.

Marla H. Norton of Bayard P.A., Wilmington, expressed the view that any opinion on due organization under Delaware law would not extend to any organizational deficiency under the prior non-Delaware law, at least to the extent the opinion is limited to Delaware law. Her firm follows the practice of treating the converted entity as a new corporation and having it appoint the existing board, adopt Delaware bylaws, and ratifying, as appropriate, the converting entity’s prior acts. Such an opinion, noted Marla, would not address the effect on a domesticated Delaware corporation of any serious organizational flaw with respect to the corporation’s pre-domestication period. Marla asked whether the opinion giver might not, therefore, as a matter of belt and suspenders, expressly assume that the non-Delaware corporation had been duly organized prior to its domestication in Delaware.

Stan Keller closed the discussion by agreeing with Dick Howe’s analysis and noted that, depending on the law of the new jurisdiction, an opinion might be given even if the original jurisdiction does not provide for conversion — observing that this issue can be dealt with, if there is uncertainty, by dissolution of the converting entity under the original jurisdiction’s law. Agreeing with Marla, Stan noted that any opinion “would be limited to the new jurisdiction and a recipient could not expect you to cover the original jurisdiction’s law.”

Other Listserve Dialogues

We do not summarize all listserv dialogues that have occurred since our last Notes from the listserv (in the Winter 2012 issue of the newsletter), which include dialogues on true sale
opinions requested by auditors; Export-Import guaranteed notes as exempt securities under the Securities Act; reliance by lender’s counsel on borrower’s counsel’s opinions in Fannie Mae loan transactions; and enforceability opinions on “Program Obligations” in HUD closing opinions. You may access these dialogues by going to the listserves/archives section on the Committee’s website.

As always, members are encouraged to raise legal opinion issues on the listserv and to participate in the exchanges. Members also are encouraged to bring new developments (such as recent case law or newly identified issues) to the attention of Committee members through the listserv.

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LEGAL OPINION REPORTS

2010 Survey of Law Firm Opinion Practices

The report on the 2010 survey of law firm opinion practices by the Legal Opinions Committee is published in the May 2013 issue of The Business Lawyer. It summarizes the answers provided by 252 law firms that responded to the survey, and tabulates responses to survey questions in an appendix.

In general, large firm opinion practices differ from those of smaller firms. Based on survey responses, not surprisingly, large firms tended to have more structure in their opinion practice. For example, the larger the firm, the greater the likelihood that it had one or more opinion committees. Large firms were more likely to require consultation with another lawyer before delivering an opinion letter than smaller firms, and were more likely to use model opinion letters and model opinions. Moreover, big firms were more likely to give straightforward opinions on Delaware entities and on Article 9 of the UCC of other states.

Survey responses indicated that firms of comparable sizes tended to follow similar practices. However, on a closer look, details of firm practices varied substantially even among firms of similar size. For example, firms handled responsibilities of opinion committees, circumstances requiring consultation, and who served as consulting lawyers in different ways.

Firm practices change over time. For example, although most firms gave no-litigation confirmations, the 2010 survey responses suggested a trend toward limiting the coverage of those confirmations. The report identifies a few other significant differences in practice from those found in an analogous but more limited survey by the Committee in 2002.

Publication of the 2010 report is the culmination of more than five years’ effort to find out what law firms actually do in their opinion practice. The members of the drafting subcommittee diligently drafted and distributed the survey, collated the responses and wrote the report. It makes interesting reading and provides useful ideas to those in opinion practice.

- John B. Power
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# Chart of Published and Pending Reports

[Editor’s Note: The chart of published and pending legal opinion reports below has been prepared by John Power, O’Melveny & Myers LLP, Los Angeles, and is current through June 30, 2013.]

## A. Recently Published Reports

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<th>Section</th>
<th>Year</th>
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<td>ABA Business Law Section</td>
<td>2007</td>
<td>No Registration Opinions – Subcommittee on Securities Law Opinions</td>
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<td>2009</td>
<td>Effect of FIN 48 – Committee on Audit Responses</td>
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<td>2009</td>
<td>Negative Assurance – Subcommittee on Securities Law Opinions</td>
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<td>2010</td>
<td>Sample Opinion – Committee on Mergers and Acquisitions</td>
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<td>2011</td>
<td>Diligence Memoranda – Task Force on Diligence Memoranda</td>
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<td>2013</td>
<td>Survey of Office Practices – Committee on Legal Opinions</td>
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<td>Legal Opinions in SEC Filings (Update) – Subcommittee on Securities Law Opinions</td>
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<td>ABA Real Property Section (among others)</td>
<td>2012</td>
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3 These reports are available (or soon will be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, http://apps.americanbar.org/buslaw/tribar/.
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**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 here.\(^4\) If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

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**NEXT NEWSLETTER**

We expect the next newsletter to be circulated in October of this year. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com) or Jim Fotenos (jfotenos@greeneradovsly.com)

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Addendum

Working Group on Legal Opinions

Spring 2013 “Fuld@40” Seminar Summaries
Addendum

Working Group on Legal Opinions

Spring 2013 “Fuld@40” Seminar Summaries

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WORKING GROUP ON LEGAL OPINIONS

SPRING 2013 “Fuld@40” SEMINAR SUMMARIES

The following summaries have been prepared to provide an overview of the subjects covered at the panel sessions, and at concurrent breakout groups and dinner meetings, all held in New York on May 13 and 14, 2013. The summaries were prepared by panelists, leaders of the concurrent sessions, or by members of the audience. The next WGLO seminar is scheduled to be held on October 28-29, 2013 in New York.

We extend a special thanks for assisting in editing the summaries to Gail Merel of Andrews Kurth LLP (gailmerel@andrewskurth.com), who is the editor of the WGLO seminar handbooks.

PANEL SESSIONS I:

The Recipient Speaks
(Summarized by Susan Cooper Philpot)

Robert Evans III, Shearman & Sterling LLP, New York, Moderator
Dina J. Moskowitz, Standard & Poor’s Ratings Services, New York

This panel presented the views of inside counsel from several financial institutions that are frequent recipients of opinions. Generally, the panelists believe that an opinion from the borrower’s or counterparty’s counsel is critical for (a) providing the receiving institution with assurance that the opining firm has been actively involved in the process, presumably finding and fixing problems, thereby “eliminating” legal risk in the transaction, (b) assisting the receiving institution in establishing that an appropriate diligence process has been followed prior to its commitment of funds, and (c) providing the receiving institution overall comfort that there are “no flaws, no problems” in the transaction with respect to which the opinion is given.

The panel discussion, particularly in its response to questions from an audience consisting of many counsel whose firms regularly represent opinion givers, highlighted the often different perspectives of opinion recipients and opinion givers on some of the current hot button issues in opinion practice, including:

Reference to bar literature in opinions: Contrary to the increasing reliance on “customary practice” by the practicing bar, the panelists greatly disfavor opinions that reference or incorporate bar opinion reports. The stated rationales for the panelists’ reluctance include the large volume of opinions received, the number of different bar groups whose literature might be relevant to the opinions received and a general discomfort with looking beyond the four corners of the opinion to determine its meaning.

Perceived need to conform to “market practice”: While the panelists indicated they are willing to discuss opinion issues in any particular instance if raised on a timely basis, generally any exception, exclusion, limitation or narrowing of the requested opinions, regardless of its factual or legal basis, is a non-starter for them if the resulting opinion deviates from what they perceive to be “market practice.” The panelists view their primary charge from the financial institutions they represent to be to obtain an opinion that is “market.”
Permitted reliance by transferees: Despite the reluctance by opinion givers to allow reliance on opinions by other than the original addressee(s), the panelists believe that any limitation on reliance on the opinion by later third-party transferees negatively impacts the market value and liquidity of the instrument opined on. If the original opinion recipient has the protections of the opinion and a right to assert a claim against the opinion giver, the panelists generally consider this right to be something valuable that the original purchaser ought to be able to include in pricing any subsequent sale of the instrument.

Narrow definition of “knowledge”: The panelists indicated they are particularly concerned about opinions that define “knowledge” as limited to the awareness of the attorneys working on the transaction. They have no way of knowing whether the group of attorneys working on the transaction at the opining firm is broad enough to reasonably insure that all relevant knowledge is covered by the opinion. A panelist even raised the possibility that such a definition of knowledge might be manipulated by an opinion giver firm in deciding how to staff a transaction in order deliberately to exclude important knowledge from the scope of the opinion.

Proposal for including a limitation of liability in the opinion: An audience member raised the question whether the process of negotiating opinions might be improved if the opinion giver firm’s liability on the opinion were limited so that opinions in large dollar transactions would not have the potential to threaten the very existence of the opining firm. The panelists emphatically rejected the suggestion that opinions might contain a provision limiting the opinion giver firm’s liability for the opinion to a specified dollar amount because such a negotiated limited amount reduces personal accountability and raises issues of moral hazard. A panelist also expressed the view that having recourse to all of the opinion giver firm’s assets was an essential part of the deal in requiring and accepting the opinion from a reputable firm in the first place.

Enforceability opinions on opinion recipient form documents: An audience member raised the issue whether it is really appropriate for the opinion recipient to require an opinion on the enforceability of its own form documents from the opposing counsel. Not all of the panelists deal in transactions that raise this issue, but those panelists that do stated that the enforceability opinion is at the very heart of the opinion being received and its exclusion was beyond discussion.

The one issue that drew a consistent refrain from both opinion givers and opinion recipients was that opinions are often dealt with regretfully late in the transaction process, resulting in severe timing pressures and few opportunities to consider acceptable alternatives.

CONCURRENT BREAKOUT SESSIONS I
(ETHICS AND THE FAIR AND OBJECTIVE OPINION):

1. **Does (Will) the Avoidance of Conflicts Impose a Duty to Know the Client?**
   (Summarized by the Panelists)

   Lori S. Gordon, Chicago, Co-Chair
   James A. Smith, Foley Hoag LLP, Boston, Co-Chair
   Robert A. Wittie, K&L Gates LLP, Washington, D. C., Reporter

   This breakout focused on the question of conflicts of interest that may arise when parties are added to a transaction during the period between the conclusion of contract negotiations and the closing of a syndicated loan or a private equity fund. The multiple “late entrants” in these transactions often have no direct involvement in the negotiation of the contracts evidencing the terms of the business
arrangement. Indeed, primary counsel for the borrower or the fund promoter will be interacting with the vast majority of these participants (i.e., all parties other than the agent bank or lead investors for a fund) primarily through the non-adversarial activities of preparing closing documentation and, importantly, through the rendering of a closing opinion to all such parties. To the extent required, local counsel also may be contacted during this time to deliver additional closing opinions.

Concurrently with this routine closing activity, the group of potential opinion recipients may be changing or growing as banks are added to the syndicate or additional investors commit to the fund. In the case of the fund, there may even be (and often are) multiple closings. As a result of these changes/additions, the opinion giver may, for the first time in the transaction, be interacting with parties who could not have been identified to such counsel even twenty-four hours before the closing. However, under Section 51 of the Restatement Third, The Law Governing Lawyers, each of these parties, as opinion recipients, may be owed “a duty of care” with respect to the opinion (but not with respect to the transaction itself) by virtue of the opinion giver’s inviting “the non-client to rely on the lawyer’s opinion … and the non-client so relies.”

The primary focus of the breakout was not on the existence or nature of any duty to the recipients, but rather on what responsibility the opinion giver might have to determine whether the law firm has a potential conflict of interest with one or more of these “late entrants.” As ultimately expressed by many of the participants, the answer to this question turns on whether these recipients are “directly adverse” to the opinion giver for purposes of Model Rule 1.7(a), thereby creating a potential conflict of interest if any of these opinion recipients happens to be a client of the opinion giver in other, unrelated matters. If such parties are “directly adverse,” the opinion giver can be placed in a difficult situation, as there is often insufficient time under these circumstances to run a typical or even an abbreviated conflicts check prior to the time that an opinion is to be rendered; indeed, the final identity of some members of a bank syndicate may not be known until after the opinion is delivered.

Firms that regularly represent major banks and other commercial lenders often are able to negotiate advance conflicts waivers with their clients; such waivers provide that these clients consent to the law firm representing a borrower in a situation in which those institutions are solely acting as syndicate members. However, such advance waivers are not always in place, which leaves the opinion givers with the practical problems of lack of time and the expectations of all parties to avoid any delay, whether as a result of a potential conflicts issue or otherwise.

A lively discussion produced no definitive answers to the various issues posed by this situation. Key observations included the following:

- No one was aware of any case or ruling on point, but the sense of the group was that the mere rendering of an opinion to a syndicate of lenders or a group of fund investors with which the opinion giver had not engaged in any direct negotiation should not be considered “directly adverse” within the meaning of Model Rule 1.7(a), particularly in light of the fact that, far from being adverse, any duty owed by the opinion giver to the opinion recipient under the Restatement is limited. The group concluded that informal guidance on the issue might be sought from the Standing Committee on Ethics and Professional Responsibility of the ABA Center for Professional Responsibility, although more research and discussion would be required before a decision could be made on whether guidance should be requested.

- The situation becomes even more complicated when some negotiations between opinion giver and opinion recipient do occur; for example, if a fund investor seeks a side letter, or if one or more recipients seek modifications to the opinion itself. In such cases, it may be prudent to run at least an abbreviated conflict check (checking the firm’s client list for
example) even if time does not allow a full check to be made. In other cases, not even such an abbreviated check is possible. In such situations, there was a clear sense of the group that the ultimate decision is generally best not left for the attorney involved in the transaction to make on his or her own. There was, in fact, a strong consensus that opinion preparers should consider involving the opinion committee or the firm’s general counsel where the late entry is not only receiving an opinion, but is also involved in some form of direct negotiation with the opinion giver.

- While the particular situation focused upon by the breakout is narrow in scope, it is quite common. The concept of “direct adversity” when applied to “late entrants” in syndicated loan and fund transactions is an important illustration of the difficulty in applying certain of the Model Rules in the transactional context.

2. Ethical Considerations in Third-Party Opinion Practice
(Summarized by Sarah M. Ward)

Philip H. Schaeffer, White & Case LLP, New York, Co-Chair
Bruce C. Young, Warner Norcross & Judd LLP, Grand Rapids, Co-Chair
Sarah M. Ward, Skadden, Arps, Slate, Meagher & Flom LLP, New York, Reporter

This session focused on whether a lawyer, after accepting an engagement, is permitted to withdraw or is required to make a "noisy" withdrawal" because of the inaccuracy or incompleteness of the client's representations or the client's proposed improper use of a third party opinion. The group initially focused on Model Rules of Professional Conduct ("Model Rules") 1.16(a), 8.4, 1.2(d) and 4.1, and came to the conclusion that the Rules, which were not drafted by transaction lawyers, are ambiguous and confusing. The group worked through several examples, including the following: (i) an opinion giver renders an opinion and subsequently discovers that the opinion is inaccurate, and (ii) an opinion giver renders an accurate opinion based on its client’s representations, but subsequently learns that the representations were wrong.

The consensus was that, absent blatant fraud, the Model Rules relating to withdrawal do not provide clear guidance as to the actions required of the opinion giver. Various participants pointed out that a firm might face liability to a client injured by the firm’s withdrawal if the withdrawal turns out not to have been justified.

On the other hand, if an opinion giver, after learning that the opinion was inaccurate due to the client’s representations being inaccurate, fails to take appropriate remedial action, which might include withdrawal from representation of the client and withdrawal of the opinion, it may face the possibility of claims from the opinion recipient. The group concluded that the best protection for a firm is to know the client.

3. The Theory of Opinion Disclosures
(Summarized by Willis R. Buck, Jr.)

George M. Williams Jr., Kaye Scholer LLP, New York, Chair
Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Reporter

Opinion letters not infrequently include phrases like “we draw to your attention that . . . ” or “we note that . . .” followed by reference to a law, rule or regulation, a case, a fact or some other circumstance that the opinion giver decided should be specifically brought to the attention of the recipient. This
breakout session explored some of the possible reasons why opinion givers choose to make such special or non-standard disclosures in opinions.

What triggers such disclosures? In broad terms, they seem often to be motivated by risk aversion. The opinion preparers, for example, learn of a legal or factual contingency that is not directly raised by the specific opinions given, but that could, in certain circumstances, lead to an outcome different from that contemplated by the opinion. In order to avoid any risk of a future claim that the opinion was misleading or otherwise deficient, the opinion preparers may elect to disclose the contingency even though strictly speaking disclosure is not required given the scope of the opinion.

But should such disclosure effectively be required? Does it constitute misrepresentation of some kind not to make it? Does the Golden Rule, though not directly on point, inform the question by analogy in that, were the tables turned, the opinion giver would want its client to be told of the contingencies? Does the inclusion of such disclosures open the door to increasingly marginal disclosures that risk cluttering opinions and burdening the opinion process? Questions like these were raised, directly or indirectly, by the discussion, which at this stage was directed more to identifying the issues than to achieving consensus.

Much of the discussion focused on the example of Section 1131(1) of the New York Tax Law, which imposes liability on the members of a limited liability company for New York sales taxes that are not remitted to state tax authorities by the limited liability company. A footnote in the Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests (2011) observes, in the context of discussing an opinion to the effect that LLC members have no personal liability under the applicable LLC statute, as follows: “Although technically not required to do so, some opinion preparers, if aware [of a provision like the New York sales tax statute], may choose, depending on the circumstances (for example when the opinion letter generally covers the law of the state with that provision), to refer to the provision in the opinion letter or otherwise bring it to the attention of the recipient or its counsel.” 66 Bus. Law. 1065, 1075 n. 55 (2011).

Several participants were firmly of the view that disclosure of the possible sales tax liability was not necessary in the context of an opinion expressly focused on the personal liability of LLC members under the applicable LLC statute. So long as the scope of the opinion is clear, there should be no responsibility, especially in the third-party opinion context, to educate presumptively qualified counsel for the recipient about contingencies beyond the scope of the opinion. Counsel for the recipient bears the responsibility of advising its client of the potential liability under tax law. Other participants were of the view that where the outcome of a known contingency is directly at odds with the opinion, though arising from a different legal basis, disclosure would be prudent from a risk management perspective.

Among the other points touched upon were: the possibility that in some cases the nature or existence of an applicable opinion practice might be unclear, and the possibility that focusing on the tort of misrepresentation sometimes may lead the parties to believe that only two possibilities exist (misrepresentation or something completely harmless), even though a third possibility may also exist (a simple miscommunication based on differences of expectation and experience). This third possibility may exist most often in cases where customary opinion practice either does not exist or is unclear. For example, failure to disclose the sales tax liability discussed above might be viewed as such a miscommunication rather than as rising to the level of a misrepresentation.

It seems clear that developing a comprehensive and coherent theory of disclosure in legal opinions is a long-term project. In the meantime, this breakout session and the associated materials raised some of the key questions for practitioners to consider as they grapple with particular situations.
CONCURRENT DISCUSSION MEETINGS:

1. Alternative Entity Opinions
   (Summarized by Barry J. Bendes)

Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, Wilmington, Co-Chair
Kenneth Chin, Kramer Levin Naftalis & Frankel LLP, New York, Co-Chair
Barry J. Bendes, Edwards Wildman Palmer LLP, New York, Reporter

This breakout session considered issues that differentiate legal opinions given with respect to alternative entities (LLCs, LPs, partnerships, business and statutory trusts, etc.) from those traditionally given with respect to corporate entities. LLCs and other alternative entities are creatures governed by contract as well as state enabling law. While the literature dealing with third-party legal opinions continues to grow, the participants recognized that there is variation in how firms address matters affecting alternative entities.

State enabling laws (the statutory laws governing the formation and governance of alternative entities) frequently have provisions specifically providing that the governing documents of the alternative entity (the limited liability company operating agreement, limited partnership agreement or other governing document) may override many provisions in the enabling law. Each such agreement is thus subject to state contract law concepts as well as statutory enabling law and cases interpreting the enabling law.

The participants recognized that as creatures forged through the integration of contract and organic law (the common law and statutory enabling laws of the applicable state), alternative entities, by their nature, are flexible and have great variance in such matters as their structures, powers, management, ownership, duration, dissolution, restrictions on transfer of interests, and admission of new members and assignees. Some opinions relating to LLCs, for example, are relatively easily given by anyone familiar with the governing statute and with the operating agreement even if they do not generally practice in the relevant state. Others require knowledge of applicable contract law, and, at times, other local law matters. Yet a third type of opinion, while perhaps clear in the corporate context, is inapplicable (or, at least, unclear) when applied in the context of LLCs and other alternative entities, where the enabling law does not, and the operating agreement (or governing instrument) often does not, contain guidance to provide clear meaning to the traditional nomenclature of such opinions.

The group considered eight typical LLC opinions:

1. status (the LLC’s status as a limited liability company duly formed, validly existing and in “good standing”),
2. power (the LLC’s power to enter into and perform its obligations under specified documents),
3. action (the LLC’s authorization, execution, and delivery of specified documents),
4. enforceability of LLC agreements,
5. valid issuance of LLC interests,
6. admission of purchasers of LLC interests as members of the LLC,
7. obligations of purchasers of LLC interests to make payments and contributions to the LLC, and
8. personal liability of purchasers of LLC interests to third parties.
The consensus of the participants was that status, power, and action opinions on LLCs cover not only the applicable LLC Act but also applicable local law contract concepts. Some participants indicated they expressly limit such opinions to the statutory text of the applicable LLC Act, while others expressed concern about this approach because the statute has meaning only as it is interpreted by the courts. They voiced a belief that the concept of “freedom of contract” inherent in the LLC Acts of the various states affects status, power, and action opinions and that an understanding of how a court having jurisdiction over the matter might interpret and apply the law to the contractual provisions would, in their view, be essential for an enforceability opinion. Generally, the participants were in accord with the TriBar LLC Opinion Reports issued in 2006 and 2011 dealing with alternative entity opinions.1

In discussing enforceability opinions the consensus of the participants was that such opinions should be given only by those with the requisite familiarity with the applicable contract law. Further, the participants noted that it is necessary to address and focus on whether there is a valid and enforceable operating agreement as a prerequisite to whether the transaction documents are enforceable. It was noted that this is especially important when dealing with special purpose entities or vehicles (SPVs).

The group next considered valid issuance and admission opinions. It was acknowledged that a review of the LLC Act, the LLC’s certificate of formation (articles) and limited liability company operating agreement were necessary to determine the statutory or contractual requirements and conditions for creating and issuing the interests and for admitting a “new member” or transferee or assignee of a membership interest. Requests for “validly issued” and “non-assessable” opinions for LLCs and other alternative entities are generally inappropriate because those terms do not have a clear meaning when applied to alternative entities.

It was noted that under most LLC Acts, there is no obligation to make any contributions to the LLC, but that such matters are ordinarily covered in the LLC’s operating agreement, which, in some instances, may require additional contributions or payments. There are also obligations under certain state statutes to return distributions that were made unlawfully or in contravention of the LLC operating agreement. Under some circumstances the IRS and certain state taxing authorities have taken the position that obligations for payroll taxes, withholding taxes and other taxes (e.g., sales and use taxes) may flow through to some or all of the members, but these matters are usually not covered by opinions.

The participants also discussed issues raised by series LLCs in giving a number of traditional opinions, as well as other issues relating to series LLCs, including state variations for determining whether each series is a separate entity, UCC Article 9 security interest issues (including, for example, issues relating to perfection of security interests in the assets of one or more series), bankruptcy of a series, FIN 46 issues, tax separateness, and SEC filing fee calculations.

Throughout the discussion, the participants provided insights into how various substantive practice areas and different firms approach the need for local counsel when dealing with the application of state contract law to LLC operating agreements and other formation and governance documents. The participants recognized and focused on the need for the requisite competence and familiarity with applicable statutory and case law of the state of formation covered by the legal opinions being given for entities formed under the law of a state where the opinion giver does not regularly practice.

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2. **International Opinion Issues**  
(Summarized by J. Truman Bidwell, Jr.)

*J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York, Co-Chair  
James R. Silkenat, Sullivan & Worcester LLP, New York, Co-Chair*

This breakout session discussed what sections of the ABA are involved in considering the issues surrounding the giving and receiving of legal opinions in cross-border transactions. The consensus was that very little is being done other than by the Committee on Legal Opinions. It was noted that the International Insolvency Institute puts on programs dealing with international insolvencies and issues reports on cases in the area, but it does not appear to consider opinion matters. There was also a consensus that it is extremely important that the ABA take a leading role in the area because (a) the field of international transactions is a relatively new but a rapidly developing one, (b) an ever increasing number of firms is becoming involved in such transactions although some firms may not have a great deal of experience with them, and (c) in the absence of a common understanding between opinion givers and recipients in cross-border transactions, the risk of a misunderstanding of such opinions increases.

It was noted that the Restatement (Third) of the Law Governing Lawyers § 51 comment (e) (2000) indicates that different standards may apply when the recipient of an opinion is not represented by counsel or is unfamiliar with customary opinion practice. If such a principle were to apply in cross-border transactions, there could be a concern that the statement in some opinions by U.S. lawyers that the opinions are rendered in accordance with U.S. customary practice may not be effective if the recipient is a foreign person represented by counsel who is unfamiliar with U.S. customary opinion practice. The role of the Golden Rule in international practice was also discussed.

It was agreed that it would be a worthwhile project for the ABA to take a leading role in meeting with foreign bar groups where opinion practice in international transactions is developing for the purpose of considering whether a common understanding of standards by which legal opinions in international transactions should be understood might be reached. It was also agreed that, while it may be difficult to arrive at an international “customary practice” statement, it might be possible to establish a common vocabulary. The French and London bar associations were noted as logical starting points.

3. **The Limited Knowledge and Role of Local Counsel**  
(Summarized by Philip B. Schwartz)

*Frank T. Garcia, Fulbright & Jaworski L.L.P., Houston, Co-Chair  
William A. Yemc, Richards Layton & Finger, P.A., Wilmington, Co-Chair  
Philip B. Schwartz, Akerman Senterfitt LLP, Miami, Reporter*

This discussion meeting focused on the unique issues faced when serving as local counsel in a multi-state transaction, including (i) an opinion recipient’s expectations with respect to a local counsel opinion, as well as the scope and substance of local counsel opinions compared to opinions rendered by the primary transaction counsel; (ii) whether local counsel intake procedures, coupled with opinion limitations concerning lack of client contact and reliance on specified documents, are adequate in the current environment; and (iii) the appropriate scope of local counsel opinions and permitted reliance, including SEC Exhibit 5 opinion practice.

The first issue discussed related to intake procedures followed when acting as local counsel. There was a recognition that because an attorney acting as local counsel is still acting as "counsel" under the Rules of Professional Conduct, the general rules associated with client intake apply to local counsel.
At the same time, there was a recognition by those participating that local counsel are often engaged at the last minute in the transaction and have little or no contact with the clients (generally receiving all documents required to render their opinion letters through the primary transaction counsel). While there was a recognition that appropriate background searches on the potential clients should be completed in the same manner as are completed for clients generally, because of the nature of local counsel practice, in accepting local counsel opinion assignments there was also a consensus that a significant amount of reliance is often placed on the reputation of the law firm referring the matter to the local counsel. Some of the practices discussed by participants included doing Google searches on the potential clients and obtaining engagement letters in order to comply with the applicable rules of professional conduct and to meet any applicable "know your client" requirements.

In that regard, one of the issues discussed was that in theory, local counsel, who are typically hired in the U.S. to represent borrowers, play a limited role in reviewing the transaction documents and generally only offer suggestions in order to render the requested opinions that the documents are in compliance with local law. In many cases, such suggestions may require modifications to the documents that benefit the lender and are adverse to the interests of the borrower, local counsel’s client. There was a view that issues of this nature could be resolved by having lenders retain local counsel (paid for by the borrower) as a more appropriate structure for obtaining assurance of the transaction documents’ compliance with local law.

The next issue discussed was obtaining client consent to the delivery of the opinion letter. It was noted that under the Rules of Professional Conduct counsel must obtain client consent to render an opinion to a third-party. There was an acknowledgement that, in many cases, since local counsel does not interface directly with the client, it typically obtains the necessary consent for delivery of the opinion from the principal transaction counsel for the client. There was a general consensus that while it may be a good idea to confirm client consent to the delivery of the opinion, it is customary in local counsel opinion practice to assume such consent from the request of the principal transaction counsel to deliver the opinion letter on the client's behalf. There was also a consensus that efforts should be considered to obtain an advisory ethics opinion regarding this issue, since the rules do not expressly state that local counsel is allowed to obtain client consent from the client’s principal transaction counsel in these circumstances.

The discussion then moved on to what limitations should be acceptable to an opinion recipient of a local counsel opinion. There was a general consensus that local counsel should be permitted to limit the documents reviewed and the scope of the diligence it performs to a defined and limited set of documents and procedures. There was also a general consensus that local counsel should be entitled to assume the substance of all of the predicate opinions that are necessary to provide its opinions (for example, all of the entity-related “building block” opinions with respect to an out-of-state entity that are predicates to a remedies opinion being rendered by such local counsel with respect to transaction documents that are governed by the law of the state in which such local counsel practices). There was also a general consensus that local counsel should be entitled to address in the opinion letter only the law of the jurisdiction in which it practices (and not federal law). However, it was noted that the question of whether federal law is covered by the opinion letter often comes up in the context of a cross-border transaction. Finally, there was a general consensus that because local counsel typically has little or no contact with the client, it should generally not be asked to provide opinions on matters that might otherwise be requested of local counsel if it were acting as the principal transaction counsel (such as a “no breach of or default under agreements” opinion, a “no violation of judgments, decrees or orders” opinion and a “no litigation” confirmation).

There was also a discussion concerning whether to allow reliance on the local counsel opinion by other counsel participating in the transaction. There was a general consensus that such reliance should
only be permitted when such other counsel will be relying on the opinion letter in connection with rendering its own opinion letter.

Finally, there was a discussion about whether to make clear in the opinion letter the limited role that the local counsel is performing. There was a general consensus that such limitations should be acceptable to an opinion recipient when included in the opinion letter (e.g., a statement that counsel has been hired solely to render a legal opinion with respect to the law of a particular state).

The issues relating to SEC Exhibit 5 local counsel opinions were noted, but were deferred due to time constraints.

There was a consensus among the group participating in the discussion that further WGLO sessions should focus on the unique issues confronting attorneys rendering legal opinions as local counsel.

4. Private Financing Opinion Issues
(Summarized by A. Mark Adcock)

Roderick A. Goyne, Baker Botts L.L.P., Dallas, Co-Chair
Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair
A. Mark Adcock, Moore & Van Allen PLLC, Charlotte, Reporter

Participants at this session discussed two topics: (1) a hypothetical involving a loan agreement for a loan denominated in Euros in the face of uncertainty about the future of the Euro, and (2) the exposure draft of the WGLO paper on common qualifications to a remedies opinion in U.S. commercial loan transactions.

1. With respect to the first topic, the following hypothetical was posed:

A. **Hypothetical**: You are representing the lender in preparing a loan agreement that provides for the lender to make loans denominated in Euros to a U.S. borrower. You will deliver to the lender an enforceability opinion on the loan agreement. Given the current uncertainty regarding the future of the Euro, you raise with the lender your concerns about proceeding with a Euro-denominated loan. The lender tells you not to worry and to prepare for the closing.

   (i) What do you include in the loan documentation, if anything, regarding conversion of Euro-denominated loans to another currency or to otherwise protect the lender in the loan agreement?

   (ii) What do you state, if anything, in your remedies opinion regarding Euro-denominated loans in light of your concerns?

B. Would your approach change if, a week before the closing, the European Economic and Monetary Union announced that the Euro as a currency may be discontinued?
In response to the first question, participants had several suggestions:

- One participant suggested that, if the attorney believes there is a significant risk of collapse of the Euro, then the risk should be raised with a senior officer of the lender.

- There was general consensus that, even if the loan is denominated in Euros, the lender should insist that the loan agreement be governed by New York law and provide for exclusive jurisdiction to resolve any disputes in New York courts. This mechanism would lessen the risk that a foreign court would try the case, or that a court would apply a foreign law converting Euro-denominated obligations of the enacting jurisdiction’s nationals into a local, and devalued, currency.

- One participant pointed out that under the Uniform Enforcement of Foreign Money Judgments Act, under New York law a Euro-denominated judgment would be converted into a U.S. Dollar-denominated judgment (although this statute does not expressly address the disappearance of a currency).

In response to the second question with respect to what to say regarding Euro-denominated loans in the remedies opinion, there was general consensus that any subsequent legislation to discontinue the Euro would be a change in law not addressed by the remedies opinion.

2. The participants then discussed the draft paper on common qualifications to a remedies opinion in U.S. commercial loan transactions.

Gail Merel, chair of the committee that is preparing the draft paper, observed that it was the goal of the committee to review the qualifications commonly offered, and commonly accepted, in a number of jurisdictions in the United States, and to determine whether there is a consensus with respect to the exceptions taken, the expression of the exceptions, and the rationale for taking the exceptions. Gail reported that the committee had found remarkable consensus among the seven states represented on the committee with respect to each of the questions addressed, with the consensus generally pointing towards very general carve outs and exceptions as to the matters covered in the paper.

One of the commonly taken, and commonly accepted, exceptions identified by the committee is an exception regarding the enforceability of an arbitration provision. Some participants observed that their firms generally take an exception with respect to the enforceability of arbitration provisions, and that opinion recipients seldom object to this exception.

5. Public Financing Opinion Issues
(Summarized by Stanley Keller)

Julie M. Allen, Proskauer Rose LLP, New York, Co-Chair
Stanley Keller, Edwards Wildman Palmer LLP, Boston, Co-Chair
Edward H. Fleischman, Linklaters LLP, New York, Reporter

This discussion focused on current practice in opinions and negative assurance given to underwriters and others in connection with registered and Rule 144A offerings and issues for opinion practice arising from the JOBS Act.
The discussion began with a question whether it is customary for issuer’s counsel to provide negative assurance when counsel for the underwriter or placement agent is not doing so. The general sense was that, although it is preferable to have both sets of counsel provide the comfort, issuer’s counsel’s providing comfort is not necessarily dependent upon similar comfort being provided by the intermediary’s counsel. It was noted that it tends to be routine in municipal bond practice for underwriters’ counsel to provide negative assurance, even though it varies in that practice as to whether issuer’s counsel also provides such assurance.

This led to a discussion of the difficulties that can be involved in providing negative assurance, for example when there are rapid takedowns and significant offshore matters to be addressed, and whether it is ever appropriate to limit the scope of diligence that otherwise would typically be done and to state that limitation expressly. It was noted that the scope of work expected is dependent upon the context and that, while there can be exceptions, the value of negative assurance, which has become an expected element of underwriters’ diligence for purposes of establishing a defense in registered public (and certain other) offerings, can be impaired by such qualifications. There was discussion of the challenges of becoming familiar with a company’s operations in foreign jurisdictions, especially when there are language barriers, and of reviewing contracts in foreign languages and governed by foreign law. The importance of working with foreign counsel familiar with U.S. requirements was noted. It was observed that negative assurance practice is about risk management and the challenges of cross-border practice make this more difficult. For example, it is the U.S. securities lawyers who should make the judgments about materiality, with such assistance from foreign counsel as the U.S. securities lawyer finds necessary to make those judgments.

The increase in registered direct offerings without intermediaries was noted, which presents the question of what opinions and confirmations are appropriate. It was agreed that negative assurance is provided as support in connection with a diligence defense and therefore should not be provided to purchasers. However, in some cases purchasers may be or may become underwriters, in which case an approach sometimes used is to provide the negative assurance to them only if that should be the case.

There was a brief follow up on a previous session’s discussion of opinion issues raised by the JOBS Act changes. It was noted that, because of the delay in the SEC’s implementation of the exempt offering provisions of the JOBS Act, there have not been significant developments. However, there seems to have been an accelerating trend towards greater use of general solicitation, even in the absence of SEC rulemaking, as evidenced by so-called “accredited investor crowdfunding” taking place, only some of which is compliant with existing rules. It was noted that the JOBS Act provisions facilitating public offerings by “emerging growth companies,” such as the ability to test the waters, have not affected opinion practices but rather are being covered by representations in the underwriting agreement.

CONCURRENT BREAKOUT SESSIONS II
(THE ROLE OF THE OPINION COMMITTEE):

1. Evaluating Your Opinion Committee
   (Summarized by Timothy G. Hoxie)

   Ronald S. Gross, Jones Day LLP, New York, Co-Chair
   Timothy G. Hoxie, Jones Day LLP, San Francisco, Co-Chair

   Assessing the effectiveness of an opinion committee starts with the question: what are we measuring? Prior discussions at WGLO have confirmed that most law firms of significant size follow a
process of opinion review and have an opinion committee that facilitates and sets policies for that process. These discussions have also confirmed that the mechanics of opinion review and the structure, function and responsibilities of opinion committees are not uniform across firms.

Given this variety of function and structure, it is impossible to assess performance of a committee if there are no standards against which performance can be measured. Put another way, before opinion committee performance can be assessed, the role and responsibility of the opinion committee must be articulated. While many firms refer to committees in their policies, and provide that they perform certain functions, few firms appear to have thought comprehensively about committee functions within the law firm, or to have articulated these functions and responsibilities in writing.

The group considered whether some form of opinion committee charter (like what is done for a board committee) might be useful to promote thinking concretely about the committee’s role within the law firm. Such a charter might address issues such as the composition of the committee, the scope of its responsibilities (for example, does it confine itself to setting opinion review procedures and opinion policies, or does it also conduct risk assessments and educate lawyers about its policies), and how the committee should interact with other decision makers within the firm, whether within the risk management area, with practice groups, or with local offices. The charter might also consider the degree to which the committee periodically sets its own goals and priorities. Of course, there is little in a name: one might not have a “charter” but yet the role and responsibility of the committee might be articulated by written firm policy statements, opinion procedures, and the like.

Once an opinion committee’s role within a firm is articulated, its effectiveness can be assessed. This assessment could focus on at least two areas: the degree to which the committee meets its stated objectives and the degree to which committee members contribute to committee activities and work effectively together. Again, using board committee assessments as a model, the group discussed different ways of conducting an assessment, including use of surveys and interviews (of committee members and perhaps also of other constituencies that interact with the committee). Like board committee assessments, there is no single template for assessing committee effectiveness, and a mixture of approaches might be taken over different periods.

The discussion suggested that firms do not appear to take a systematic approach to articulating and then assessing the role of an opinion committee with the same degree of rigor and formality that a corporate board would follow in conducting a self-assessment or in evaluating its committees. That may reflect the historically horizontal organization of law firms rather than a considered decision that such an approach is not appropriate. As a result, more discussion of this topic is probably merited.

2. **Opinion Education – Are We Failing to Educate the Opinion Committee?**
   (Summarized by Robert D. Pannell and David A. Murdoch)

   Robert Evans III, Shearman & Sterling LLP, New York, Co-Chair
   Robert D. Pannell, Retired, Nelson Mullins Riley & Scarborough LLP, Atlanta, Co-Chair
   David A. Murdoch, K&L Gates LLP, Pittsburgh, Reporter

   This session focused on the historical and potential future role of opinion committees in relation to three aspects of opinion education: (1) risk management involving questionable transactions and clients; (2) customary practice; and (3) opinion craftsmanship. Particular emphasis was given to risk management.
Risk Management Involving Questionable Transactions and Clients. The discussion started with the proposition that firm-wide risk management is usually a core function of the management committee and of the general counsel of a law firm but not typically of the opinion committee. While risk management is important to what opinion committees do, the session addressed whether opinion risk has a unique profile and what the opinion committee’s relationship with the management committee or the general counsel should be. In other words, as the co-chairs formulated the issues, two questions drove the discussion: “How does an opinion committee influence those with authority to make risk decisions? Should opinion committees be educated to enhance or add new skills and to accept significant new responsibility for the opinion letter component of law firm risk management?” Ancillary to these primary questions, the discussion focused on whether there are enough materials about opinion practice, whether those materials are being kept current, and how practitioners should consider state reports in conjunction with materials published by TriBar and the ABA.

The session attendees considered the possibility of a “boot camp” for new opinion committee partners and for associates who assist with legal opinions in business transactions. Given the pressure of billings, billable hour requirements, and differing experiences of lateral partners, law firms may need to consider how to “teach judgment” and assess risk in accordance with their firms’ standards. Hence the question of who is responsible for training assumes greater significance. Law firms may want to consider how “to take junior partners and move them up the learning curve” in legal opinion practice in the face of legal training that includes how to find the relevant law but provides less emphasis on knowing the substantive law.

The session participants considered whether law firm opinion policies should be circulated, and whether forms and model opinions should be more highly developed, within firms. Notwithstanding these important issues, the opinion committee, the management committee and general counsel need to determine the extent to which they want to control what opinions will, or will not, be issued by the firm. In this sense, while risk management may be the primary responsibility of the management committee or another committee and general counsel of the firm, the opinion committee typically will weigh in on whether and to what extent opinions should be given, restricted or withheld.

Various procedures involving the “intake” of clients and new matters are generally the primary responsibility of the management committee and general counsel but they also may give rise to the involvement of the opinion committee or one of its members. Another risk management approach is to make further efforts to reduce the risk of firm liability through the narrowing of opinions and the improvement of opinion quality. Risk-reduction enhancements are also driven by the analysis of the cost-benefit ratio of the opinion as viewed by the giver and the recipient of an opinion. While firms also may give attention, as part of the intake process, to whether the firm has the expertise to render the opinion for the client, it is not always clear at the time of intake what opinion will be requested or rendered.

Customary Practice. Because of the constraints of time, session members were not able to address the numerous issues that arise about customary practice. Co-chair Bob Pannell raised an insightful question about whether the education of opinion committees could lead to “routine suitability evaluations of transactions to identify deals and parties that would be better served by the delivery of abbreviated closing opinions based on customary practice.”

Co-chair Pannell also pointed the session to several questions about customary practice: (i) Is customary practice effective only when both sides to a transaction have similar internal standards for giving opinions, even though customary practice itself is based on the experiences more generally of opinion givers and recipients? (ii) Does a law firm need a strong policy-setting opinion committee in order to determine whether to grant or refuse opinion requests? (iii) Should an opinion committee develop a “charter” similar to the charters of corporate audit committees? (iv) How should opinion
committees be structured, staffed and governed? (v) What functions should the opinion committee perform?

**Opinion Craftsmanship.** The session briefly addressed the co-chairs’ questions for firms about enhancing opinion craftsmanship, more by questions than by answers or solutions. The questions raised included whether there is available within the law firm model opinions, whether law firm training for legal opinions is different from training in substantive disciplines, whether opinion committee members are only trained “on the job,” and whether the education of opinion committee members is adequate.

Co-chair Rob Evans made the observation that there is a real concern that recipients seldom learn much about opinions and their purpose. Perhaps in addition to educating lawyers at their firms that give opinions, opinion committees should make an effort to educate those who represent opinion recipients.

Session attendees generally concurred in the notion expressed by the co-chairs that there continue to be too many “last minute” and “late night” opinion reviews. Participants acknowledged that opinion committee members need to be “nimble and quick.”

3. **Will (Should) Opinions be Prepared by Opinion Specialists?**
   (Summarized by A. Mark Adcock)

   *David L. Miller, Pillsbury Winthrop Shaw Pittman LLP, McLean, Chair
   A. Mark Adcock, Moore & Van Allen PLLC, Charlotte, Reporter*

   Participants first considered the question, “with which authorities should opinion practitioners be conversant?” Several participants suggested that the person responsible for the initial draft of the opinion should be familiar with any relevant internal forms of the opinion and seek input from subject matter specialists within the firm, as appropriate. It was further suggested that the opinion committee should be familiar with national opinion reports published by TriBar and the ABA, the bar opinion reports (if any) of the opinion giver’s state, as well as major treatises on opinions.

   One member of the group noted that in a multi-state transaction, it is dangerous to knowingly rely on a state report that provides that an opinion means something less or different than as stated in recognized national opinion reports, because there is a danger that the opinion recipient may not understand the meaning or scope of the opinion. In an interstate transaction, if the opinion giver intends a more limited meaning than that stated in national reports or the plain language of the opinion, then the opinion giver should consider making the more limited construction clear.

   In concluding the discussion with respect to this first question, it was noted that firm opinion committees often use an annotated form, citing relevant sections of TriBar and other authorities with respect to (a) the meaning of the opinion, and (b) the diligence customarily conducted to support the opinion.

   Participants next considered the question, “should someone on the opinion committee prepare the opinion?” Some participants stated that in their firms a transactional lawyer (typically an associate under the guidance of the deal partner) prepares the initial draft of the opinion, with review and sign-off by a member of the opinion committee or other reviewer. Other participants believed it is preferable for a lawyer experienced in opinions to prepare the opinion, or to have an associate prepare the opinion under the guidance of a lawyer experienced in preparing opinions.
The final question considered was “what are the risks of brevity in an opinion (i.e., failing to expressly state assumptions and exceptions deemed to be implicit by bar reports)?” There was general agreement that the shorter the opinion, the more familiarity was necessary with the bar reports by both the opinion giver and the recipient. There was also general agreement that, from the standpoint of being able to win a motion to dismiss a complaint against the opinion giver in court, it is preferable to have more disclosure in the opinion rather than less, although the opinion giver should prevail after a trial on the merits if the claim is based on the failure to state an assumption or exception that is clearly stated in relevant bar reports to be implicit as a matter of customary practice. Several firms are now expressly providing that the opinion should be interpreted in accordance with customary practice as articulated in the ABA Legal Opinion Principles (53 Bus. Law. 831 (1998)), or some other short authority, which is sometimes attached as an exhibit to the opinion. Some participants noted that this practice would be helpful in guiding a court to read into the opinion implicit assumptions, exceptions and excluded bodies of law under customary practice as described in state and national bar reports.

PANEL SESSIONS II:

Perceiving and Acting on Opinion Risk
(Summarized by E. Carolan Berkley)

Joel M. Miller, Miller & Wrubel P.C., New York, Chair
Julie M. Allen, Proskauer Rose LLP, New York
Lori S. Gordon, Chicago
Philip H Schaeffer, White & Case LLP, New York

This panel focused on three areas – the intake process and how to identify unworthy clients; how to deal with problems during the transaction; and who serves the risk management function within the law firm.

Lori Gordon identified a number of red flags that can alert a firm to an unworthy client:

- Has another firm refused to do the work for this potential client or is the potential client switching from another firm in the middle of a transaction?
- Does the potential client have a history of suing law firms?
- Is the transaction a dubious one with no apparent business purpose?
- Is this a high stress engagement – for example, a sophisticated transaction being done by an unsophisticated client?

If any of these red flags is present, it is recommended that the firm exercise heightened scrutiny before accepting the engagement. For example, the firm should consider conducting a thorough screening process using relevant data bases to identify any further red or yellow flags. However, as background checks have their limitations, a clean history should not outweigh individual judgment.

The panel discussed the use of an intake committee, the desirability that its members be well respected partners with the clout to decline an engagement, and the benefits of having an appeal process to an executive committee or other higher body.

The panel next discussed what to do when a problem with an opinion arises during the transaction: How can a firm encourage partners to raise problems with the right people and in a timely
manner? Who should be the gatekeeper to problem solving resources within the firm: the opinion committee, the general counsel, both, or someone else?

If there is a pervasive risk management philosophy coming from the very top levels of the firm, it will be easier to obtain support without fear of retribution when dealing with unworthy clients and problematic transactions.

Lori Gordon then set forth a “don’t do” list that can provide guidance when a partner is confronted with a serious problem with an opinion letter. Her list included: don’t be afraid; don’t sit on a problem; don’t try to fix it by yourself; don’t talk to your pals, but do talk to the right people in the firm who have been identified by the appropriate risk management partners; don’t write detailed emails or leave detailed voicemails – instead, walk down the hall and talk to the right person; and finally, don’t try to cover up the problem.

The biggest risk in opinion practice is not the contents of the opinion itself, but rather engaging in flawed transactions or transactions with bad clients. It is critical not only to have a process for identifying potential new matters and clients that may fall into these areas of risk, but also to try to identify existing clients who over time may become unworthy clients or engage in risky transactions.

CONCURRENT BREAKOUT SESSIONS III (DILIGENCE AND OPINION LIMITATIONS):

1. Complex Agreements: How Do They Affect Opinions?
   (Summarized by Kenneth R. Blackman)

   Robert S. Risoleo, Sullivan & Cromwell LLP, Washington, D.C., Chair
   Kenneth R. Blackman, Fried, Frank, Harris, Shriver & Jacobson LLP, New York, Reporter

   This discussion group considered the typical remedies opinion — that an agreement is “valid and binding” and “enforceable against a party in accordance with its terms” — in the context of complex agreements. Examples of complex agreements include the following:

   ● The documentation for a collateralized debt obligation with different tiers of payouts;
   ● Project finance documentation;
   ● Agreements containing complicated mathematical formulas or pricing terms; and
   ● Joint venture agreements

   Complex agreements will often include a full suite of boilerplate provisions, some of which raise enforceability concerns. More significantly, material business provisions specifically tailored to the transaction might present opinion issues if the provisions are ambiguous or, even if not ambiguous, do not cover all possible cases. In the latter circumstance, a court might determine that there is a missing term and then interpret the agreement by supplying a term that is reasonable. The possibility also exists that in particular cases the mathematical formulas or pricing mechanisms reach unexpected or indeterminate results which cause the agreement to be unenforceable as written. Further, when a single transaction is encompassed in several agreements, the possibility of conflicting provisions cannot be dismissed.

   In the face of such potential problems with complex agreements, the group discussed how counsel should approach the remedies opinion, especially given the “New York view” that the remedies opinion addresses each and every undertaking in the agreement, not merely the “essential” terms. To what extent – if any – does the remedies opinion imply that the contract “works” as the parties intend?
Many participants believed that the remedies opinion can be given in the face of ambiguous or conflicting provisions, although all seemed to agree that counsel, to the extent that it is consistent with the client’s interest, should attempt to fix problems of which counsel is aware. The work required to deal with the problems might include, for example, the testing of mathematical formulas and other complicated terms to ascertain whether they operate as intended. Some participants observed that testing mathematical formulas, pricing mechanisms and other technical provisions to determine whether they operate as intended is commonly viewed to be outside the normal expertise of counsel. It may be more appropriate, therefore, for counsel to qualify the opinion by excluding coverage of the operation of those provisions. The participants’ experience with this approach varied, with some indicating that opinion recipients will accept this practice in certain circumstances.

Many participants expressed the view that “enforceable in accordance with its terms” as interpreted under customary practice means that the agreement can ultimately be enforced, even if a court ruling is required to interpret the contract and even if that interpretation might effectively delete or significantly modify one or more of its provisions. Of course, if a known defect is so severe that the opinion giver believes it raises the question of whether there has been a “meeting of the minds,” then no contract may exist and the opinion cannot be given.

In cases where a known defect goes to a material term, and the opinion preparers believe it is possible that the expectations of the opinion recipient will not be realized, the view was expressed that the opinion giver should be reluctant to give an opinion in part because the prospect of a claim for negligent misrepresentation would increase. On the other hand, if the danger is that the expectations of the opinion giver’s client would be frustrated by the ultimate interpretation of the contract, the opinion giver may face difficulties with its own client if the opinion giver has identified a problem but does not disclose it to its client prior to closing. The safer course in such circumstance would be to discuss the matter with the client and either propose taking an exception for the offending provision or refuse to give an opinion which, in either case, would hopefully lead the parties to document their agreement with greater precision.

The group also considered legality opinions that are required to be given in SEC registered offerings. Such opinions are required regardless of the complexity of the securities and even where the contract for the securities has ambiguities or inconsistencies. In such circumstances, the investors are not at the negotiating table or directly represented by counsel. Moreover, the SEC will not, as a general matter, permit a qualification to be taken in an exhibit 5 validity opinion, and any such qualification, even if permitted, would need to be disclosed. These considerations suggest that the risk to the opinion giver is heightened, and therefore the need for counsel’s diligence in the preparation of the opinion is of critical significance.

Another area discussed by the group was joint venture agreements where one or more of the parties may consciously include ambiguous language. The group’s consensus was that opinions are seldom requested in these situations. Whether the presence of consciously ambiguous language is one reason for the relative absence of opinions in such situations was discussed briefly.
2. **Rethinking the Opinion Giver of the Remedies Opinion**  
(Summarized by Norman M. Powell)

*Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Co-Chair*  
*Gail Merel, Andrews Kurth LLP, Houston, Co-Chair*  
*Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, Wilmington, Reporter*

In this concurrent session, participants considered alternatives to prevailing U.S. practice for borrowers’ counsel to provide remedies opinions to lenders in commercial loan transactions. More particularly, the group focused on whether there might be circumstances in which adherence to the prevailing U.K. model (where counsel to the lender addresses the enforceability of the loan documents as well as other matters requested by the lender), as opposed to the U.S. third-party model, could make for a more effective and efficient opinion process. Discussion was based on a hypothetical transaction in which a lender seeks assurances from local counsel with respect to the remedies available to it in the relevant jurisdiction under the lender’s form of real estate mortgage. For simplicity, it was assumed that all other matters – enforceability of the related loan agreement and other transaction documents, entity status, power and authority opinions, and the like – would be attended to otherwise. Against that background, participants considered whether the borrower should be required to engage local counsel to provide the remedies opinion or whether the lender should seek the comfort it requires from its own local counsel, either in the form of a legal opinion or less formal advice.

There was general agreement that requiring the borrower to engage local counsel in these circumstances has a number of limitations. The relevant documents are generally, if not always, prepared by lender’s counsel, often on forms long used by the lender or its counsel and negotiated on the borrower’s behalf, if at all, by the borrower’s primary counsel for the deal, and not its local counsel. The borrower’s local counsel, too often engaged very late in the transaction, is likely to be unfamiliar with the lender’s particular form of mortgage, and in any case does not have any of the duties that arise from an attorney-client relationship with the lender. That combination often results in borrower’s counsel having to invest time in developing a basic familiarity with the mortgage (which lender’s counsel likely already has) while trying – in the face of a tight closing schedule – to render as limited an opinion as possible. Participants also noted that a remedies opinion from borrower’s counsel speaks only to the enforceability of the remedies specified in the lender’s document and does not consider, nor is it accompanied by non-opinion advice concerning, any other remedies or issues relating to that document that may be of interest to the lender. Borrower’s local counsel not only has no obligation to provide such broader advice to the lender, but is generally precluded from doing so by its duties to the borrower.

Particularly where lender’s local counsel serves as such in repeated transactions, there was consensus that lender’s own local counsel would also develop a beneficial familiarity with its own client’s forms, leading to efficiency and insight. Further, lender’s own local counsel would more likely provide, under the terms of its engagement, the kind of broader advice identified above – the scope of its duties being governed by its attorney-client relationship with the lender, and not limited to the four-corners of its legal opinion. In addition, familiarity with the forms could also lead to more tailored or “better” closing opinions, since the lender’s local counsel would, over time, have a greater opportunity to do the research and analysis that might be required to narrow or even eliminate some common qualifications to a remedies opinion. In that connection, one of the co-chairs noted that the practice, on the part of some third-party opinion givers, of including “laundry lists” of qualifications, untailored to the particular transaction, may have developed in part due to the time constraints and cost limitations commonly

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2 For example, this concurrent session did not consider the U.K. practice of a lender’s receiving from its own counsel opinions as to a borrower’s entity status and additional opinions.
experienced by borrowers’ local counsel rendering opinions on unfamiliar form documents that they have little time to consider. The group’s discussion led quickly to a consensus that lenders themselves, as well as the efficiency and effectiveness of the opinion process, would in most instances be better served by the lenders’ seeking the advice and assurances from their own local counsel. There was also general agreement that in a single lender transaction the formality of a lender’s own counsel delivering a written remedies opinion to its own client likely adds little, whether in scope or quality, to the advice rendered by lender’s own counsel, when that advice is otherwise properly and sufficiently rendered in the course of the representation.

Recognizing however that delivery of an opinion letter, whether by borrower’s local counsel or lender’s local counsel, is required in a great many transactions, the group’s expectations for next steps were tempered. While it was generally agreed that looking to lenders’ local counsel would likely result in better and less expensive local law remedies opinions, several participants thought such a practice unlikely to gain acceptance anytime soon. Given the broader duties owed by a lawyer to its client than by an opinion giver to a third-party opinion recipient, some also cautioned that a lender’s own local counsel, if asked to give a written remedies opinion, might want to alter existing opinion practice to take into account, in the written opinion to its own client, some of the broader issues they may have discussed (or otherwise addressed) during the representation outside of the scope of the opinion letter. On the other hand, it was observed that repeated representation of the same lender, coupled with an ongoing familiarity with the lender’s form documents, would likely not only streamline local counsel opinion practice but also lead to revisions to the form documents themselves where appropriate.

Many participants were of the view that by continuing to focus on those circumstances – such as the types of local counsel opinions explored in this session – where the benefits of a change in practice are very clear, progress might gradually be made over time. In addition, the view was expressed that WGLO’s “big tent” provides an excellent forum for continuing to explore the issue of which counsel is in the best position to render the legal opinions that are now commonly required.

3. The Role of Facts in Legal Opinions
(Summarized by Peter H. Blessing)

Louis G. Hering, Nichols, Arsht & Tunnell LLP, Wilmington, Co-Chair
Richard R. Howe, Sullivan & Cromwell LLP, New York, Co-Chair
Peter H. Blessing, KPMG LLP, Connecticut, Reporter

The topic for this session was the role of facts in opinions on legal issues, such as opinions on due incorporation or due authorization, and not on factual confirmations such as negative assurance or pending litigation.

The group considered the use of certificates to establish facts versus reliance upon assumptions, implicit or explicit, to establish facts, as well as the practice of attaching or not attaching certificates to the opinion letter. Attaching a certificate to an opinion letter puts the recipient on notice of the contents of the certificate, but at the same time allows the recipient to comment upon the certificate and request changes to it.

The participants considered these issues in the context of four hypothetical problems.
Hypothetical 1

This hypothetical involved an opinion of outside counsel to a borrower delivered to a lender. Unfortunately, on the eve of closing, it is discovered that the sole member of the borrower (an LLC) had transferred its interest to an affiliate, but the borrower had apparently neglected to formally admit the transferee as a member of the LLC. This could have resulted in the unintentional dissolution of the borrower. The client gives assurances to its outside counsel that the problem was just the internal paperwork and wants counsel to assume the transferee had been admitted as a member of the LLC. The issue discussed was whether the lawyer could make such an assumption under these circumstances.

Suggestions for resolving this uncertainty included: (i) securing a written confirmation from the transferor and transferee of the admission of the transferee as a member of the LLC; (ii) following the procedures of applicable law, if available, to revoke an unintentional dissolution of the LLC; or (iii) use of an explicit assumption that the transferee had been admitted as a member of the LLC.

Hypothetical 2

This hypothetical involved a requested legal opinion concerning whether a client’s proposed sale of its assets would be less than “substantially all” of its assets under § 271 of the Delaware General Corporation Law. Management of the client does not want to have to obtain shareholder approval for the sale. Management is willing to certify as to facts that would support the conclusion that less than substantially all of the assets were being sold. The question discussed was whether the opinion giver might be required to go beyond the facts provided (e.g., to financial statements and other company disclosures).

Such an opinion often is not technically a third-party opinion; it is addressed to the client, but third parties may rely on it. In certain cases, it can be a third-party opinion embedded in the due authorization opinion.

It was noted that, as an initial matter, the question of what constitutes “all or substantially all” of a company’s assets for purposes of DGCL § 271 is a legal question, and its resolution would require careful review of applicable case law on the question. Once that legal analysis has been conducted, the question then becomes how to establish, in any particular instance, whether the proposed sale, as a factual matter, would constitute a sale of substantially all of the client’s assets.

There was a consensus that it would not be necessary to look at information beyond what was provided by the client if it appears to the opinion giver to be relevant to the issue and the opinion giver is not aware of its being unreliable or incomplete. Depending on the circumstances, a reasoned opinion summarizing the facts serving as the basis for the opinion might be given.

Hypothetical 3

The third hypothetical involved a client’s use of a legal opinion from its own counsel beyond its intended purpose. The client sought advice on the tax consequences of a transaction and provided a statement of facts. The client’s tax lawyer recited the facts in the opinion and provided analysis and a conclusion. The opinion contained a customary Circular 230 legend and a statement that it could not be shown to anyone without the opinion giver’s prior consent. Nevertheless, the client distributes an offering memorandum to various parties for a tax shelter transaction that contains the same statement of facts set out in the opinion, together with a statement of what the tax consequences would be, without any attribution to the opinion giver, and with a warning that investors should consult their own tax advisors. The IRS subsequently determined the client’s transaction to be an abusive tax shelter.
There was no consensus on whether the opinion giver would have to do anything in these circumstances, though there was agreement it would be exposed to suit. A participant familiar with tax-exempt bond financings emphasized the need for due diligence with respect to tax opinions rendered in these types of financings, and noted that a D.C. Circuit case has held that there can be no reasonable basis excuse without reasonable investigation.3

**Hypothetical 4**

This hypothetical involved a local counsel acting for a publicly-held corporation in connection with a financing. The local counsel is asked to deliver a standard closing opinion covering due incorporation and due authorization of the transaction documents. Counsel is also asked to opine that the execution, delivery and performance by the client of the transaction documents would not violate its charter documents or any agreement known to counsel to which the client is bound, and also that, to counsel’s knowledge, no litigation is pending or threatened against the client. Counsel has not previously represented the client and does not know anything about any agreements to which the client might be a party (other than the transaction documents). Should counsel give the requested opinion?

On the one hand, it is true from the hypothetical that the attorney does not know of any agreement to which the client is a party that would be violated by its execution, delivery and performance of the transaction documents. On the other hand, the consensus of the group was that further inquiry into the relevant facts should be undertaken by counsel if the firm were to provide such an opinion. One participant said he would request a list of material agreements and upon reviewing them could give the opinion, limited to those agreements.

The session’s chairs summed up the discussion to the effect that some diligence is often needed to support the facts, but the extent will depend on the context.

**CONCURRENT BREAKOUT SESSIONS IV (THIRD-PARTY OPINION FORMAT OF THE FUTURE):**

1. **Another Look at the Accord**
   (Summarized by Christopher J. Rockers)

   Christopher J. Rockers, Husch Blackwell, LLP, Kansas, Co-Chair
   Philip B. Schwartz, Akerman Senterfitt LLP, Miami, Co-Chair
   Leonard H. Gilbert, Holland & Knight LLP, Tampa, Reporter

   This breakout session addressed the 1991 Legal Opinion Accord developed by the ABA’s Section of Business Law. More specifically, the session considered whether a contractual or “normative” approach such as that set out in the Accord is a viable alternative to reliance on customary practice. The group reviewed the Accord and what it achieved, how it contributed to opinion practice, and why it largely failed to be widely accepted by opinion givers and recipients.

   The Accord attempted to define the meaning of specific language in third-party closing opinions, and was designed to provide a “standard” that could be incorporated by reference into an opinion letter. While it was generally agreed that the Accord’s approach did not gain widespread acceptance, opinions

3 Weiss v. SEC, 468 F.3d 849 (D.C. Cir. 2006).
on why the Accord failed varied widely. It was noted that the Accord’s approach was used for an extended period by practitioners outside of New York but that its use was never embraced by opinion givers and opinion recipients in New York. Many thought that the Accord failed because it was too dense, or was biased in favor of opinion recipients. The Accord’s stated premise was that it was “an endeavor to meet the reasonable needs of the opinion giver and the opinion recipient by providing a framework that is both sensible and fair.” This premise was not largely embraced by practitioners. Nonetheless, no one in the session disagreed with the idea that important concepts of customary practice that are followed today have their origins in, or were more fully developed by, the Accord.

It was also noted that the “incorporation by reference” concept is not limited to the Accord and is being used today. For example, the Boston Bar Association’s streamlined form of opinion (61 Bus. Law. 389 (2005)) incorporates the Legal Opinion Principles issued by the ABA’s Business Law Section.

Co-chair Phil Schwartz prepared a paper for the session urging a return to a “normative” approach such as that taken by the Accord. The group did not reach a consensus but the majority of the group expressed serious doubt that such an approach would work today. The session participants questioned whether practitioners are ready to embrace a comprehensive set of contractual or normative standards, but acknowledged that such standards could address many of the issues and concerns facing opinion givers and recipients today — concerns similar to those faced by opinion givers and opinion recipients over 20 years ago.

2. Choosing One's Words Carefully: Drafting Closing Opinions so as to Limit Liability
(Summarized by Robert H. Saunders)

Donald W. Glazer, Boston, Chair
Robert H. Saunders, Thompson & Knight LLP, New York, Reporter

The session began with Mr. Glazer noting two major developments in opinion practice over the past 20 years. First, law firms have established opinion committees, adopted policies and prepared forms. Second, law firms have narrowed the scope of their opinions. For example, the no breach opinion typically no longer covers agreements known to counsel but instead only scheduled agreements. These efforts have improved the quality of opinions and made opinions more precise. However, they have not reduced the number of lawsuits against opinion givers. Nor have they reduced the pressure on a law firm when a suit is brought. One cannot tell what juries will do, and if a law firm does not win a motion to dismiss, the expense and stress of litigation can force a firm to settle a case even if it believes it ultimately will win.

Local and Special Counsel Opinions. The session first considered the interplay between local and special counsel opinions.

In the past, special counsel for the transaction gave broad opinions, relying on local counsel for specific matters beyond special counsel’s expertise. Special counsel did not have to agree with the local counsel’s opinion but were expected to conclude that local counsel was reputable and repeat local counsel’s opinions in its umbrella opinion.

Today, special counsel ordinarily assumes rather than relies on the matters covered by local counsel’s opinion, and local counsel give their opinions directly to the opinion recipient. Even the SEC now allows this practice for Exhibit 5 validity opinions, permitting an opinion of special counsel to refer to local counsel’s opinions without relying on them. Practice in this regard varies.
The only significant exception to current practice appears to be in public law bond transactions, in which umbrella opinions still are given.

Incorporation of Customary Practice. The session next considered express incorporation of customary practice in an opinion letter. This might be done in four ways.

First, counsel could incorporate the Accord by reference. The consensus was that this is now rare (although not unheard of in certain areas such as mortgage loan opinions). Many opinion recipients refuse to accept opinions incorporating the Accord. The reasons vary, among them being that the Accord is perceived as being overprotective of opinion givers, long and complex, and unfamiliar to most recipients.

Second, one could incorporate by reference the ABA Legal Opinion Principles (53 Bus. Law. 831 (1998)) (as is done in the Boston Bar Association streamlined form of opinion) (61 Bus. Law. 389 (2005)), or the Statement on Customary Practice (63 Bus. Law. 1277 (2008)) approved by numerous bar associations. One participant noted that in his experience the Boston Bar Association approach has been accepted by recipients—sometimes with the Principles attached to the opinion—about 90% of the time. In the California venture capital opinion, the drafters had initially wanted to take a similar approach, but venture capital firms objected, so now the possibility of doing so has been relegated to a footnote (although some venture capital firms may be reconsidering their objections). One participant involved in the Dechert litigation (89 A.D. 3d 615, 934 N.Y.S. 2d 119 (App. Div. 2011)) noted that incorporation by reference of the ABA Legal Opinion Principles would have been as effective in that litigation as the express assumptions taken in the Dechert opinion because the Principles state that the validity of signatures is assumed even if not stated expressly.

Third, one can incorporate a bar association report by reference. The Arizona, Florida and Maryland bar association reports offer this as a possibility. Most large Maryland firms, however, do not incorporate by reference the Maryland report, but some small firms do in intrastate transactions. A consensus appears to exist, however, at least among lawyers in large Maryland firms, that incorporation of the entire Maryland report places an undue burden on recipients and that, if the recipient is not in Maryland, it is unlikely to be accepted. One Florida attorney noted that his firm does not incorporate the Florida report or refer to customary practice. Another attorney (not a Georgia lawyer) noted that a relatively recent Georgia white paper on opinions from the Georgia real estate bar is sometimes attached to Georgia opinions his firm has reviewed.

One attorney noted that many firms when giving substantive non-consolidation opinions incorporate a New York City Bar Association report on that subject by reference (46 Bus. Law. 717 (1991)) and have experienced little pushback.

Some firms incorporate the TriBar reports, with little objection. It was noted that the TriBar reports do not always take definitive positions on issues—but that is also true of customary practice generally. One attorney, a member of TriBar, stated that he would not accept a reference to TriBar reports but would accept a reference to the ABA Legal Opinion Principles or customary practice.

Fourth, one can just state in the opinion that it is to be interpreted in accordance with customary practice. Many New York firms do not do this but at least one major New York firm does and has experienced very little pushback. One participant noted that if his proposed reference to customary

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Some participants asked whether a reference to customary practice might be inconsistent with assumptions and qualifications that themselves are inconsistent with customary practice. The response was that customary practice contemplates that it may be varied by express statements in an opinion letter.

Limitations on Reliance. Panelists from several firms noted that they use the “Wachovia” language regarding reliance on the opinion by non-addressees of the opinion letter. One participant noted that she now uses an expanded formulation of the original “Wachovia” language, in the form discussed and developed at a number of prior WGLO sessions, that tries to limit the re-starting of a limitations period and states that an assignee has no greater rights than its assignor (although one participant noted that it may be hard for an assignee to determine what rights its assignor had). The expanded “Wachovia” formulation also states that claims may be brought with respect to an opinion only by the administrative agent, an original lender or the required lenders.  

Some firms also try to limit reliance to the original members of the syndicate, with mixed experience regarding pushback.

Procedural Limitations. Mr. Glazer noted that procedural limitations are not common in U.S. opinions, but are fairly common in foreign opinions. These usually relate to governing law and forum but may also include waiver of a jury trial and arbitration. Some participants expressed the view that U.S. law firms have been too timid with regard to such matters.

One participant noted that she specifies in her opinion letters on Texas law that Texas law should govern, but she generally does not do so when multiple laws are being covered in a single opinion letter.

With respect to tort law, a question was raised as to whether one can select a governing law. Apparently, one can, at least for claims of negligent misrepresentation, although not for fraud or willful misrepresentation. It was suggested that a side letter, with acceptance, was the best way to assure

[Editor’s Note: The following is the text of the Wachovia “expanded” formulation that was included in the summary of a breakout session (“Assignability Issues in Third-Party Opinions”) held at WGLO’s Spring 2012 seminar (see the Summer 2012 issue of the newsletter (vol. 11, no. 4) at pages A-7—A-8):

“The opinions expressed in this letter are solely for the benefit of the addressees and for the benefit of any successor to the Administrative Agent pursuant to Section ___ of the Credit Agreement, in each case in connection with the Subject Documents. We consent to reliance on the opinions expressed herein, solely in connection with the Subject Documents, by any party that becomes a Lender subsequent to the date of this opinion letter in accordance with the provisions of the Credit Agreement (each an “Additional Lender”) as if this opinion letter were addressed and delivered to such Additional Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Additional Lender have any greater rights with respect hereto than the original addressees of this letter on the date hereof nor, in the case of any Additional Lender that becomes a Lender by assignment, any greater rights than its assignor, (ii) in furtherance and not in limitation of the foregoing, our consent to such reliance shall in no event constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) any such reliance also must be actual and reasonable under the circumstances existing at the time such Additional Lender becomes a Lender, including any circumstances relating to changes in law, facts or any other developments known to or reasonably knowable by such Additional Lender at such time.

[Include other typical language as to the opinion speaking as of its date, disclaiming any responsibility to update, and limiting publication of the opinion.] Furthermore, all rights hereunder may be asserted only in a single proceeding by and through the Administrative Agent or the Required Lenders.”]
application of the chosen law, but a workable alternative would be for an opinion letter to condition its acceptance on the recipient’s agreeing to the choice of law stated in the opinion letter.

The consensus seemed to be that it is not clear what jurisdiction would be best to pick for governing law and therefore choosing a forum probably is more important, especially in states such as Massachusetts that have a business law court.

With respect to pre-dispute waivers of a jury trial, in some jurisdictions, such as California, that is not possible.6

One panelist suggested incorporating by reference the governing law and forum selection provisions in the related loan agreement.

Substantive Limitations. Mr. Glazer noted that he had co-authored an article some years ago advocating the inclusion in opinion letters of caps on liability. D. Glazer and J. Lipson, “Courting the Suicide King: Closing Opinions and Lawyer Liability,” 17 Bus. L. Today 59 (March/April 2008). He said that he had thought that recommendation had been universally ignored, but he recently learned that a Colorado firm—not a large one, but with multiple offices in that state—had been including a cap for some time, with few problems, and that the cap also had been accepted by several major banks. The cap was several million dollars (up to the limit of the firm’s professional liability insurance). The firm generally provides opinions on smaller transactions.

One attorney in support of the inclusion of liability caps questioned why opinion givers do not fight over matters lawyers routinely fight over for their clients. Another, with an accounting firm, noted that accounting firms routinely impose caps on their liability of one to six times their fees, and they are very careful about limiting their exposure.

Mr. Glazer closed with a final thought. One argument against fee caps has been that they might lessen the incentives for attorneys to do a careful job in preparing opinions. He speculated that the effect might be just the opposite—that seeing a multi-million dollar liability cap stated explicitly in an opinion might highlight for a firm the stake it has in providing a correct opinion and, in fact, increase its incentive to do everything needed to do a good job. He also noted that seeing a large cap might lead law firms to question more deeply whether giving any opinion in knotty situations was justified given the risk involved.

3. Third-Party Closing Opinion Format of the Future: A Litigator’s Approach
(Summarized by Steven O. Weise)

Jeffrey M. Smith, Greenberg Traurig LLP, Atlanta, Chair
Steven O. Weise, Proskauer Rose LLP, Los Angeles, Reporter

This breakout session dealt with methods for mitigating risks associated with potential claims based upon an opinion letter. These included:

- Caps on damages – It was noted that as a matter of legal ethics, these are probably not possible with clients, but should be enforceable with non-clients, such as in the case of third-party closing opinions.

6 [Editor’s Note: See Grafton Partners L.P. v. Superior Court, 36 Cal. 4th 944, 32 Cal. Rptr. 3d 5 (2005).]
• Choice of law – The ethics and liability rules of some states are considered more favorable to lawyers than those of other states. As a matter of contract and tort law, it should be possible to have an effective choice-of-law clause (within the bounds of applicable choice-of-law rules).

• Forum selection – In part, this would support a choice-of-law clause by requiring the litigation to be prosecuted in a forum that gives effect to the contractual choice-of-law provision. It also could be possible to have an agreement that any dispute would be arbitrated (perhaps mirroring any arbitration provision in the transaction documents).

The participants recognized that currently these ideas are not commonly used for opinion letters. However, it also was noted that if new ideas are not tried, they will not come into common use.

PANEL SESSIONS III:

Recent Developments
(Summarized by the Panelists)

John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator
James Gadsden, Carter Ledyard & Milburn LLP, New York
Gail Merel, Andrews Kurth LLP, Houston
Philip H. Schaeffer, White & Case LLP, New York
Steven O. Weise, Proskauer Rose LLP, Los Angeles

Legal Ethics: Conflicts of Interest: Choice of Law. Phil Schaeffer discussed a 2013 revision to a comment on Model Rule 8.5 of the Model Rules of Professional Conduct. Model Rule 8.5(b)(2) provides that, for conduct not in connection with a matter pending before a tribunal, the applicable professional rules are those of the jurisdiction in which the conduct occurred, or if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction. That paragraph and comment [5] to Rule 8.5 add that a lawyer is not subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur. Comment [5] to Rule 8.5 has now been amended to add further that, with respect to conflicts of interest, in determining the lawyer’s reasonable belief, a written agreement between the lawyer and the client that reasonably specifies a particular jurisdiction may be considered, if the agreement was obtained with the client’s informed consent.

Frequently in cross-border international transactions, a U.S. licensed lawyer may be called upon to provide services which may adversely impact the interests of a concurrent client of that lawyer or the lawyer’s firm with the result that, under nearly universal U.S. professional rules following Model Rule 1.7(a)(1), such services are precluded because of a conflict of interest. That same preclusion would occur if another lawyer in the same firm represents that concurrent client by reason of the universally adopted Model Rule 1.10(a). In the case of a lawyer licensed outside of the U.S., a conflict of interest typically exists only if the matters in which the concurrent clients are represented are the same, substantially related or involve the use of one client’s confidential information against the interests of the other. However, notwithstanding that more liberal rule in overseas jurisdictions, the U.S. licensed lawyer who is associated with that overseas lawyer would be disqualified as would be the lawyer’s firm. This is anomalous since the overseas lawyer could ordinarily act against the concurrent client’s interests under overseas conflict of interest rules.
Phil commented that the effect of the newly added Comment is to employ traditional choice of law rules to such conflict-of-interest issues. The client and lawyer can choose the conflict of interest regime to be applied to the conduct of the lawyers by agreement; a traditional method of choosing law applicable in multijurisdictional matters. If the jurisdiction in which the lawyer is licensed has adopted this new Comment [5], and the U.S. lawyer has agreements with the clients that meet the requirements of this new Comment, it will facilitate a finding that the lawyer reasonably believed that the less stringent conflict rules of the non-U.S. jurisdiction apply.

Choice of Law Clauses. Jim Gadsden discussed *IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.*, a December 2012 New York Court of Appeals decision holding that a contractual provision choosing New York law to govern a guaranty precluded use of New York conflict-of-law principles to apply the law of another jurisdiction. In this case a Brazilian holder of defaulted notes (“IRB”) brought a collection action in New York against their Uruguayan issuer (“Inepar”) and a Brazilian guarantor (“IIC”). Loan documentation signed by Inepar and IIC chose New York law to govern the notes and the guaranty “without regard to conflict-of-law principles.” The guaranty itself chose New York law to govern the guaranty without any reference to excluding choice of law principles, and provided that IIC submitted to the jurisdiction of New York courts. IIC moved for summary judgment, arguing that the guaranty was void under Brazilian law because it was not authorized by IIC’s board of directors.

Citing New York statutes validating contractual choice of New York law and of New York courts, as well as the Restatement (Second) of Conflict of Laws § 187(2), the Court of Appeals affirmed the dismissal of the summary judgment motion, finding that New York substantive law applied without reference to New York’s conflict-of-law rules. Although the issue was raised on appeal, the Court did not address the issue of whether the lack of board authority was outside the scope of the contractual choice of law clause and governed instead by the internal affairs doctrine (i.e., that the law of the jurisdiction of incorporation governs internal corporate matters). Consistent with the Restatement, the case seems to stand for the proposition that under New York law a contractual choice of New York law, without more, has the same effect as a contractual choice of New York law that also expressly excludes the application of New York’s conflict-of-law rules.

Choice of Forum Clauses. Steve Weise reported that the U.S. Supreme Court granted certiorari on April 1, 2013 in *In re Atlantic Marine Construction Company*, 701 F.3d 736 (5th Cir. 2012), 133 S. Ct. 1748.


8 For a further discussion of this decision, see “Recent Developments – N.Y. Court of Appeals Affirms Parties’ Choice of New York” in the Winter 2012 issue of the newsletter (vol. 12, no. 2).

In the trial court, the guarantor had argued that its guaranty was void under Brazilian law because it was never authorized by its board of directors. The trial court rejected the contention but concluded that, even if the contention were valid, the guarantor was nevertheless bound by the guaranty under the doctrine of apparent authority, as articulated under New York law. The Appellate Division of the Supreme Court (New York’s trial court) affirmed the trial court’s decision, but on the ground but that the guaranty had been “implicitly ratified” by the guarantor, concluding, contrary to the trial court, that the plaintiff had failed to establish its entitlement to summary judgment under the doctrine of apparent authority.

New York’s General Obligations Law § 5-1401, permitting parties to commercial agreements to select New York law as the law governing their agreement, notwithstanding whether the agreement bears a reasonable relation to New York, is nevertheless subject to the mandatory choice-of-law rules of NY UCC § 1-105(2).
Under the “modern view,” mandatory choice-of-forum clauses are generally enforceable, unless enforcement would be “unfair or unreasonable.” *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Although some opinion givers choose to take an express *Bremen* exception when opining on a choice-of-forum clause, most believe that it is not necessary to do so, which is the position stated in TriBar’s report on the remedies opinion – “Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 58 Bus. Law. 1449, 1501-1502 (2003).

The federal circuits have been inconsistent in the weight to be given to the *Bremen* “modern view” when deciding whether to transfer venue from one federal court to another under 28 USC § 1404(a) (*forum non conveniens*) pursuant to a choice-of-forum clause. In *Atlantic Marine*, the Fifth Circuit denied a writ of mandate to require a Texas federal district court to transfer venue to a district court in Virginia as called for in a forum selection clause. The court reasoned that private parties do not have the power to transcend federal venue statutes, and in effect placed a heavy burden on the party seeking to enforce the forum selection clause to establish why it was an abuse of discretion to refuse to enforce it. A concurring opinion argued that the correct Section 1404(a) analysis is that these clauses are enforceable unless the *Bremen* exception applies, and observed that the Fifth Circuit is in the minority among the circuits in its analysis. The Supreme Court is now in a position to resolve the difference in the circuits.

Although TriBar treats change of federal venue the same as other choice-of-forum clauses, Steve suggested that opinion preparers may wish to consider taking an express exception for federal venue transfers in the Third, Fifth and Sixth circuits (the “minority circuits”), at least until the Supreme Court rules in *Atlantic Marine*.

**Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions.** Gail Merel reported on progress by a group of WGLO members on a compilation of qualifications that, in the experience of the authors, are commonly taken by opinion givers in remedies opinions and commonly accepted by lenders in U.S. domestic loan transactions. The group consists of lawyers from seven states. The project has made major progress, as evidenced by a 34-page exposure draft report included in the program materials for the seminar.

**Joint Project on Commonly Accepted Opinion Practices.** Steve Weise reported on the status of this joint project undertaken by WGLO and the ABA Legal Opinions Committee to prepare a report on common opinion practices for comment and sponsorship by a wide spectrum of bar committees and other opinion groups. He said that the first portion of the project report is almost ready to be presented for discussion to WGLO and the ABA Committee, with only a few remaining issues to be resolved.