CONTENTS

FROM THE CHAIR ................................................................. 1
FUTURE MEETINGS .............................................................. 3
ABA 2013 ANNUAL MEETING .................................................. 4
   Legal Opinions Committee .................................................. 4
   Securities Law Opinions Subcommittee;
   Federal Regulation of Securities Committee ....................... 8
   Audit Responses Committee .............................................. 8
   Professional Responsibility Committee ............................ 9
   Program on Venture Capital Financing Opinions:
   A Comparison of the California Approach ......................... 11
NOTES FROM THE LISTSERVE ..................................................... 14
   Attorney Verification of Accredited Investor Status
   Under Amended Rule 506 .............................................. 14
RECENT DEVELOPMENTS ....................................................... 19
   NYSBA Ethics Opinion 969 Client Indemnity To Its
   Lawyer As To A 3rd Party Opinion ................................ 19
LEGAL OPINION REPORTS ..................................................... 20
   TriBar's Supplemental Report on Opinions on
   Chosen-Law Provisions Under the Restatement .................. 20
   Chart of Published and Pending Reports .......................... 22
MEMBERSHIP ........................................................................ 24
NEXT NEWSLETTER ................................................................. 24

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FROM THE CHAIR

This is my first message to you as Chair of the Legal Opinions Committee. It is a privilege to serve in this role given the stature of this Committee and the active participation and support shown to it by its dedicated membership.

As all of us know, we have been blessed with outstanding Committee leadership over the years, most recently by Stan Keller. Stan brought to our Committee not only his tremendous knowledge of business law in general and opinion practice in particular, but also his sense of professionalism, and a belief that the practice of law is a noble profession. It is genuinely uplifting to be reminded that we are keepers of a great legal tradition, and that opinion practice properly understood exemplifies some of the best aspects of that tradition and our profession. We owe Stan a great debt for his service. Thankfully, as his contributions to this issue and to ongoing projects and upcoming programs demonstrate, we will continue to benefit from Stan’s leadership and support.

When this issue arrives we will be in the midst of the Fall season. Some of you will either be attending or just returned from the Fall meeting of the Working Group on Legal Opinions. As in the past, we will summarize the presentations and seminars at that meeting in our next issue of “In Our Opinion.”

We are also rapidly approaching the ABA Business Law Section’s Fall Meeting in Washington, D.C. on November 22-23, 2013. By now you should have received at least one if not more notices about that Meeting. The Committee plans to actively participate in the Fall Meeting, with our Committee meeting and two programs taking place on Friday, November 22. While I urge you to attend in person if you can, we will make arrangements for participation in the Committee meeting by telephone, though we cannot do that for the programs. Please note that as of this writing the times of the meetings and programs under “Future Meetings” in this newsletter are accurate, even though some of you may note that they vary somewhat from what appeared in the initial version of the meeting schedule sent to the membership.

The first Committee program in D.C. is co-sponsored with the Committee on Federal Regulation of Securities and will feature a discussion of the impact of the recent Rule 506 general solicitation and “bad actor” amendments on opinion practice. This topic is generating a great amount of attention, including in this newsletter where you can find a discussion on attorney verification of accredited investor status under “Notes from the Listserve.” This same program will also review the new TriBar Supplemental Report on Opinions on Chosen Law Provisions under the Restatement; this report appeared in the August 2013 issue of The Business Lawyer, and is discussed in this newsletter under “Recent Developments.”

Our Committee will also sponsor (this time with the Law & Accounting and Securitization & Structured Finance Committees) a program on true sale and other structured finance opinions. This is another topic that has received a great deal of attention in recent years (including proposals, dormant at the moment, to revise accounting requirements in ways that could impact requirements for true sale opinions).

Our Fall Meeting Committee activities will wrap up with the Committee’s reception to be held at 5:00 p.m. on Friday November 22. We are fortunate to have this reception sponsored by Goodwin Procter LLP, through the good offices of our Vice Chair, Ettore Santucci.

Our Committee continues to be involved in projects that will have a long term impact on opinion practice. We continue to work with the WGLO on developing a statement of common opinion practices, an effort co-chaired by Stan Keller, and for which Steve Weise serves as Reporter. And, under the tireless guidance of Ettore Santucci, we are nearing completion of our Outbound Cross Border Opinion Report, a
document which when published I believe you will find well worth the wait!

Of course, we will work to keep all of you informed of the Committee’s activities and developments in opinion practice through this newsletter. And that would not happen without the efforts of our Editor, Jim Fotenos. We – and I in particular – owe him a great debt, which grows with each issue of “In Our Opinion.”

- Timothy Hoxie, Chair
  Jones Day
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**FUTURE MEETINGS**

**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

**Legal Opinions Committee**
Friday, November 22, 2013

Committee Meeting:
9:30 a.m. – 11:00 a.m.
Washington Room, Ballroom Level

Program: “True Sale Securitization Opinions” (jointly sponsored with the Law & Accounting and Securitization & Structured Finance Committees)
8:00 a.m. – 9:30 a.m
Salon I, Ballroom Level

**Audit Responses Committee**
Friday, November 22, 2013

Committee Meeting:
2:00 p.m. – 3:00 p.m.
Plaza I, Ballroom Level

**Professional Responsibility Committee**
Saturday, November 23, 2013

Committee Meeting:
8:00 a.m. – 9:30 a.m.
Salon II, Ballroom Level

9:30 a.m. – 11:00 a.m.
Salon II, Ballroom Level

**Securities Law Opinions Subcommittee**
Saturday, November 23, 2013

Subcommittee Meeting:
10 a.m. – 11:00 a.m.
Salon IIIA, Ballroom Level

**ABA Business Law Section Fall Meeting (continued)**

3:30 p.m. – 5:00 p.m.
Salon II, Ballroom Level

Reception: 5:00 p.m. – 6:30 p.m.
Salon IIIB, Ballroom Level
Sponsored by Goodwin Proctor LLP

**Audit Responses Committee**
Friday, November 22, 2013

Committee Meeting:
2:00 p.m. – 3:00 p.m.
Plaza I, Ballroom Level

**Professional Responsibility Committee**
Saturday, November 23, 2013

Committee Meeting:
8:00 a.m. – 9:30 a.m.
Salon II, Ballroom Level

9:30 a.m. – 11:00 a.m.
Salon II, Ballroom Level

**Securities Law Opinions Subcommittee**
Saturday, November 23, 2013

Subcommittee Meeting:
10 a.m. – 11:00 a.m.
Salon IIIA, Ballroom Level
The ABA held its Annual Meeting in San Francisco on August 8-13, 2013. The Business Law Section had a full complement of meetings and programs. The following are reports on meetings held at the Annual Meeting of interest to members of the Committee on Legal Opinions.

Legal Opinions Committee

The Committee met on August 11, 2013. Following is a summary of the meeting:

**Cross-Border Project.** Ettore Santucci, Goodwin Procter LLP, Boston, the reporter for the Committee’s outbound cross-border legal opinions report, gave an update by phone on the status of the report. Drafts of the final three substantive sections of the report have been prepared — the no violation of law opinion, opinions on sovereign immunity, and doing business opinions — and are now being discussed by the drafting committee. The report next will be fully integrated and a complete draft should be available for review by the Committee at its meeting to be held at the Business Law Section’s Fall Meeting in Washington, D.C. on November 22 and 23, 2013. With the draft report’s broader exposure, the Committee intends to solicit the views of bar groups outside of the U.S. on the draft report, including the City of London Law Society and the Paris Bar Association.

Chair Stan Keller praised Ettore and the members of his editorial group (J. Truman Bidwell, Jr., Daniel Bushner, Peter Castellon, Sylvia Fung Chin, Edward H. Fleischman, Richard N. Frasch, Donald W. Glazer, Jerome E. Hyman, Stanley Keller, Noël J. Para, John B. Power, James J. Rosenhauer, and Elizabeth van Schilfgaarde). The report will be an extremely important one, relevant not only to cross-border opinion practice but also to domestic opinion practice, and it is hoped that it will promote a common understanding internationally of opinion practice.

**Joint Project on Common Opinion Practices.** Steve Weise, Proskauer Rose LLP, Los Angeles, reported on the status of the joint project undertaken by the Committee and the Working Group on Legal Opinions (“WGLO”) in preparing a description of common opinion practices. One challenge confronting the group is the use by some opinion givers of standard, extensive lists of qualifications and exceptions to the remedies or enforceability opinion and the appropriate allocation of responsibility for narrowing these qualifications and exceptions to those relevant to the transaction and to opinions given in connection with the transaction. Another is what to say about misleading opinions, and in particular whether a limitation on the scope of an opinion can itself mislead the opinion recipient in some circumstances. See Guidelines for the Preparation of Closing Opinions (Committee on Legal Opinions), 57 Bus. Law. 875, 876 ¶ 1.5 and note 8 (2002). While the group working on the project (which includes Steve as its reporter and Pete Ezell and Steve Tarry as co-reporters, Ken Jacobson, Stan Keller and Vladimir Rossman as co-chairs, as well as representatives of this Committee and a number of state bar associations through the WGLO) has prepared and reviewed several working drafts, there are differences that remain to be worked out among the participants, including but not limited to some representatives of the real estate bar, on describing certain opinion practices, such as the two noted above.

**AICPA Project to Revise “True Sale” Opinion Requirements.** Steve Weise reported on the status of the effort by the American Institute of Certified Public Accountants to revise the disclosures (and related support) concerning off-balance sheet entities and obligations. Among other proposals the AICPA was exploring whether to require a more extensive “true sale” opinion from the audit client’s counsel. The proposal would have expanded considerably the
The scope of the required opinion to include all relevant laws, including fraudulent conveyance laws. Representatives of the Committee, including Chair Stan Keller, Steve, and Will Buck of Sidley & Austin LLP, have been in discussions with representatives of the AICPA. AICPA’s representatives recently advised Steve, Stan and Will that the proposal to revise the true sale opinion requirements was being held in abeyance pending further guidance from accounting standards authorities.

California VC Sample Opinion. Tim Hoxie and Rick Frasch, co-chairs of the Opinions Committee of the Business Law Section of the California State Bar, reported on that Committee’s development of a sample venture capital financing closing opinion to complement its venture capital opinion report (“Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions,” 65 Bus. Law. 161 (2009)). A program on the sample opinion was to be presented later that day by a panel including Tim and Rick, together with Committee members Samantha Horn, Michael Kendall and Anna Mills. That panel would take a comparative approach to the sample opinion, comparing it to other models, such as the National Venture Capital Association form. The sample opinion is scheduled for approval by the full California Committee in November of this year, after which it is expected that the sample opinion, with its notes and commentary, will be published in The Business Lawyer. For a summary of the program, see “Program on California VC Sample Opinion” below.

WGLO. Chair Stan Keller reported on WGLO’s commemoration of Jim Fuld’s seminal article on opinion practice, “Legal Opinions in Business Transactions — An Attempt to Bring Some Order Out of Chaos,” 28 Bus. Law. 915 (1973), at its Fuld@40 seminar held May 13 and 14, 2013 in New York. (The panel discussions and breakout sessions are summarized in the WGLO Addendum to the Summer 2013 issue of the Committee’s newsletter (vol. 12, no. 4)). Stan reported that The Business Lawyer has indicated an interest in publishing the papers presented at the WGLO seminar, as they may be revised.

Drafting Closing Opinions so as to Limit Liability. Don Glazer described the breakout session that he had chaired at the WGLO May 2013 seminar entitled “Choosing One’s Words Carefully: Drafting Closing Opinions so as to Limit Liability” (summarized beginning at page A-23 of the Addendum to the Committee’s Summer 2013 newsletter). The theme of the session was the outsized risks opinion givers take when delivering third-party legal opinions, which Don illustrated by mentioning pending or recent actions by major financial institutions that were recipients of opinions and who have brought actions, primarily based on negligent misrepresentation, against the opinion givers. The monetary claims in these actions dwarf the fees received for delivering the opinions (in one case the claim was for more than $30 million for an opinion for which the firm was paid less than $2,000). To avoid this “sword of Damocles” hanging over opinion givers’ heads, Don proposed for discussion (without endorsing any of the suggestions) the following protections that opinion givers might adopt, which fall into two categories, procedural and substantive. Procedural protections include stating in the opinion letter one or more of the following to govern claims brought under the opinion letter (which the letter would state are agreed to by the opinion recipient by its acceptance of the opinion letter):

A choice-of-law provision;

A choice-of-forum provision;

A gross negligence standard to govern any claim of negligence or negligent misrepresentation; and

A waiver of a jury trial.

Substantive protections proposed for discussion by Don included:

- Including an explicit statement in the opinion letter that it be interpreted and construed in accordance with customary practice, which could include an explicit reference to this Committee’s Legal Opinion Principles (53 Bus. Law. 831 (1998)), such as that stated in the Boston Streamlined Opinion, 61 Bus. Law. 389, 397 (2005) (“This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law . . .”).

- Securing an indemnity from the opinion giver’s client for damages and expenses incurred by the opinion giver in defending against a negligence or negligent misrepresentation claim brought by an opinion recipient; and

- Including an express ceiling on the opinion giver’s monetary liability for any claim brought by the recipient against the opinion giver, such as is commonly done in diligence reports delivered by European counsel to recipients.

On the question of client indemnification of an opinion giver, Don cited the June 12, 2013 opinion (no. 969) of the New York State Bar Association’s Committee on Professional Ethics, 2013 WL 3854558, concluding “that a lawyer may prospectively request indemnity against potential malpractice or other claims that could be asserted by a third party.” Don also cited to the practice of a Colorado firm that routinely includes a limitation on damages equal to its errors and omissions policy limit in its legal opinions, which have been accepted by major financial institutions to whom it had delivered legal opinions.

The discussion of Don’s suggestions was spirited, but there was insufficient time to develop the issues thoroughly. Many of these topics may merit further consideration by the Committee.

Recent Developments. Steve Weise reported on the U.S. Supreme Court’s decision in American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (June 20, 2013), an extension of the Supreme Court’s emphatic endorsement, based upon the Federal Arbitration Act (9 U.S.C. §§ 1-16), of arbitration as an alternative to court proceedings highlighted by the Court’s decision in AT&T Mobility LLC v. Concepcion, 132 S.Ct. 1740 (2011). In light of this line of decisions, Steve reiterated his view that opinions givers, notwithstanding the not uncommon practice of broadly excluding from the remedies or enforceability opinion arbitration clauses, can consider removing that qualification, at least for plain vanilla arbitration clauses in commercial agreements. Don Glazer expressed a more cautionary view regarding the advisability of not including an exception from a firm’s form of closing opinion because of the general lack of knowledge among corporate lawyers of which provisions in an arbitration provision are enforceable and which are not.

Steve also reported on the Supreme Court’s grant of certiorari in In re Atlantic Marine Construction Company, 701 F.3d 736 (5th Cir. 2012), cert. granted, 133 S.Ct. 1748 (April 1, 2013). The case will give the Supreme Court the opportunity to resolve a split among the federal circuit courts of appeal on the enforceability of choice-of-venue clauses selecting a particular federal court. The Fifth Circuit in Atlantic Marine declined to enforce such a clause on the ground that private parties do not have the power to transcend federal
venue statutes. (“…Congress has by § 1404(a) removed a lateral transfer of cases among federal courts from the control of private contracts. While a contracted-for choice of forum remains a significant factor, it is not controlling.” 701 F.3d at 742.) The Fifth Circuit’s view is a minority one among the circuits, the majority of circuits in these cases following the approach adopted by the Supreme Court in Bremen (Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)) of giving effect to such selection clauses unless one of a few narrow exceptions applies. Steve suggested that opinion givers may wish to consider taking an express exception on agreements containing such selection clauses in (or that reasonably might be litigated in) the Third, Fifth and Sixth Circuits (the minority circuits), at least until the Supreme Court rules in Atlantic Marine.

Don Glazer reported on the decision of the Massachusetts Court of Appeals (Shahin v. I.E.S. Inc., 988 N.E.2d 873 (Mass. Ct. App. May 31, 2013)) in which the Court held that a contractual provision shortening the period for bringing an action on the contract is invalid unless it provides for operation of the “discovery rule,” pursuant to which a limitations period is tolled while the prospective plaintiff did not have, and could not have had in the exercise of reasonable due diligence, the information essential to bringing the suit. The Court relied upon the Massachusetts Supreme Court’s decision in Creative Playthings Franchising Corp. v. Reiser, 978 N.E.2d 765 (2012) in reaching its conclusion.

Finally, Don referred to the vexing problem of Sunday closing or “Blue Laws,” which Don has had occasion to revisit in preparing the 2013 supplement to Glazer & FitzGibbon on Legal Opinions. See generally Corbin on Contracts § 82.1 (Matthew Bender 2013). Under these laws agreements made on Sundays are illegal. See, e.g., Hunt v. Rhodes, 369 F.2d 623, 626 (1st Cir. 1966) (applying Massachusetts law: “… an agreement made in Massachusetts on Sunday is illegal”). See Sommer, Note, “Sunday Closing Laws in the United States: An Unconstitutional Anachronism,” 11 Suffolk U.L. Rev. 1089 (1977). While an anachronism, opinion givers in states (or opining on agreements whose chosen law selects states) with Blue Laws should be aware of them.

TriBar Opinion Committee. Stan Keller reported that TriBar has completed its choice-of-law supplemental report, which should appear in the August 2013 issue of The Business Lawyer. TriBar’s report on limited partnership third-party opinions is also under active preparation and should be published later this year or in early 2014.

Passing of the Gavel. At this, his final meeting, Chair Stan Keller thanked the Committee’s officers and the ABA staff for their support of his three-year tenure as Chair of the Committee. He expressed his pleasure at the honor bestowed on him as Chair and his pride in the work of the Committee. He symbolically passed the gavel to incoming Chair Tim Hoxie, affirming his confidence in Tim’s future leadership.

Tim expressed his and the Committee’s appreciation to the one person Stan left out of his encomiums — Stan himself. Tim praised Stan’s leadership, hard work, constant attention to the Committee’s activities, and commitment to the professionalism of opinion practice. While Stan’s tenure as Chair has ended, Tim took comfort in the fact that Stan’s active support of the Committee and its activities will continue, unabated.

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Securities Law Opinions Subcommittee; Federal Regulation of Securities Committee

The Subcommittee met on August 11, 2013, and once again discussed two projects that it is pursuing.

Most of the meeting was devoted to a further discussion of the proposed update of the Subcommittee’s 2007 report on “No Registration Opinions,” 63 Bus. Law 187 (2007). The update would, among other things, address the impact on opinion practice of the recently adopted amendments to the SEC’s Rule 506, which take effect in September 2013, in particular:

- Rule 506(c), which will require that in a Rule 506 offering involving “general solicitation,” the issuer must take reasonable steps to verify that all purchasers are “accredited investors.” The rule sets forth several non-exclusive “safe harbor” methods of verification, including use of certain third-party verification services.

- Rule 506(d), which will implement a “bad actor” disqualification, pursuant to which the Rule 506 exemption will not be available if the issuer or placement agent, or certain related persons of either, has been the subject of various criminal or administrative enforcement proceedings. The disqualification is subject to a reasonable care exception.

There was a preliminary discussion of which additional steps, if any, counsel should be taking in connection with delivery of a no-registration opinion in offerings to which these new provisions would apply. There was agreement to pursue this conversation by conference call in the near future.

The Subcommittee also had a further discussion of a possible report on opinions as to compliance with Exchange Act Rule 14e-1, delivered in the context of tender offers for non-convertible debt. This included an interesting exchange on the nature of such compliance opinions, given the informal nature of the relevant legal authority (a number of no-action letters, together with a growing body of interpretive positions conveyed through telephone advice by the SEC staff, at times permitting variance from the express provisions of the Rule), which may be contrasted with the traditional conception that a legal opinion expresses a view as to how the highest court of the relevant jurisdiction would decide a point. There appeared to be consensus that while this project should also be pursued, priority should be given to the update to the no-registration opinion report.

The next meeting of the Subcommittee will be in Washington in November 2013.

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Audit Responses Committee

The Committee met on August 11, 2013. There follows a summary of the substantive matters taken up at the meeting.

Updates. The Committee discussed the recurrent question of responding to auditor’s requests for audit letter response updates. The issues continue to be (a) the need for written requests from clients; (b) the inappropriateness of oral responses; and (c) the need for lawyers to be given sufficient time to respond to update requests. The Committee members in attendance agreed that the Committee should consider undertaking a project to provide guidance to practitioners about updates. The guidance would be designed to give users context about update requests but would not be overly prescriptive. While the guidance would assist practitioners, it would also be valuable in explaining to the accounting firms (and clients) why lawyers need a written request from the client, why the accounting firm should not ask...
for, and should not expect, oral responses to requests for updates, and why law firms need time to perform appropriate procedures in order to respond. The incoming Chair will seek volunteers for a working group to address updates.

Listserve. It is generally agreed that one of the most useful resources provided by the Committee is its listserve. Many questions come up frequently—such as how to respond to nonconforming requests. The Committee discussed how past listserve activity could be made more accessible. It was noted that the Business Law Section is working on ways to make content more accessible generally, including development of a taxonomy of key terms that may make content on a Committee’s webpage more easily searchable. However, there is no easy way now to search the listserve. A report summarizing listserve activity was prepared in 2004, and there was general agreement that a project to update this report would be worthwhile. This might be a good project for a younger lawyer to do initial work if one could be recruited.

Requests to Provide Information to Regulators. At least one self-regulatory organization, the National Futures Association, as part of its regulatory audits/examinations, requires regulated entities to request their lawyers to provide letters to the regulator that contain the same information as a letter to an auditor. Other regulators may make such requests. Some firms provide responses modeled on the ABA Statement of Policy, but the Policy is designed only for responding in the context of financial statement audits and is based on an understanding with the accountants as recipients.

The Committee discussed various issues raised by this type of request. These include uncertainties about what is “material” for purposes of a regulatory examination (as opposed to financial statements), potential privilege risks, the inapplicability of references to ASC 450-20 and financial statement disclosure, and concerns that reviewers of such letters (who may not be CPAs or lawyers) will not understand the scope and limitations of the response. There was also a discussion of what was the practical alternative. Declining to provide the letter may not be feasible, and using the ABA format may still be “better than making up something.” But lawyers who use the ABA format may wish to provide context for their response in the letter and also advise their clients about the potential privilege waiver issues.

The incoming Chair indicated that he would add future consideration of this issue to the Committee’s long-term agenda.

Transition. This meeting ended Jim Rosenhauer’s three-year term as Chair of the Committee. The Committee joined Tom White in thanking Jim for his leadership, particularly the successful publication of the Second Edition of the Auditor’s Letter Handbook.

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Professional Responsibility Committee

The Professional Responsibility Committee met on August 10, 2013. The following topics were discussed:

- Leadership. The Chairman noted that his term would end at the Business Law Section’s Annual Meeting in 2014, and invited those who were interested themselves or wanted to nominate someone to let him know as soon as possible. He also noted vacancies in
several other positions in the Committee’s leadership.²

- **Firm Counsel Connection.** Progress has been made in organizing and launching the Firm Counsel Connection, an initiative designed to create, on a regional level, a vehicle through which law firm in-house counsel can connect with one another, discuss common issues, and learn from one another’s experiences. There will be initial meetings in the following cities this fall: Birmingham; Boston; Chicago; Cincinnati; Cleveland; Dallas; Los Angeles; Minneapolis; New York; Philadelphia; Richmond; San Diego; San Francisco; St. Louis; Seattle; and Washington, DC.

- **Formal Opinions.** The Subcommittees on Liaison with the Center Committees and on Information Technology Issues in Ethics and Professional Responsibility are developing a request to the Standing Committee on Ethics and Professional Responsibility for the issuance of formal opinions dealing with the issues this Committee raised with several of the Ethics 20/20 changes.³

- **Behavioral Ethics Initiative.** The Committee is launching its Behavioral Ethics initiative, focused on the psychological and sociological factors that frame the context for and affect ethical decision making and compliance. This year a CLE program will deal primarily with cognitive biases and other aspects of cognitive psychology. The intention is to have another CLE program in 2014 that would address social and group psychology.

- **Upcoming Meetings.** In 2014 the Committee will meet at the Business Law Section’s Spring Meeting, the National Conference on Professional Responsibility, the Section’s Annual Meeting in Chicago, and the Section’s Fall Meeting. Dial-in participation will be available at all meetings.

- **Other Activities.** In the planning stage are:
  - The appointment of state liaisons to follow and report on developments, including ethics opinions and

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² Within three weeks after the meeting the Chair made the following appointments: (a) Keith Fisher, Lucian Pera, and Jim Rosenhauer as Vice Chairs of the Committee; (b) Lucian Pera as Co-Chair (with Phil Schaeffer) of the Firm Counsel Connection Subcommittee; (c) Jim Rosenhauer as Co-Chair (with Jim Tallon) of the Multinational Ethics and Professional Responsibility Committee; (d) Sarah Warren, of Fried Frank, as Editor of the Committee’s Newsletter, *The Ethical Business Lawyer*; and (e) Rob Evans, of Shearman & Sterling as editor of a new Committee column in *Business Law Today*.

³ The letter will include requests to revise Model Rule 1.0(n) to make its language consistent with the UCC, UETA, and E-Sign; to revise comment [2] to Model Rule 1.18 to minimize the risk of inadvertent disqualification of a lawyer in circumstances in which the lawyer has neither cleared conflicts, nor vetted the prospective client, nor, after doing so, invited the submission of information necessary to evaluate the prospective client’s position, claims, or defenses; to revise comment [1] to Model Rule 7.3 to eliminate the text referring to “automatically generated” responses, a term whose meaning is uncertain given present technology; and to revise Model Rule 5.5(d)(1) to provide that a foreign in-house lawyer may practice in an office of her employer in the United States so long as her advice on matters of the law of the U.S. jurisdiction is based upon the advice of a lawyer who is admitted to practice in any U.S. jurisdiction, rather than as now requiring it to be based on the advice of a lawyer who is licensed or authorized to give such advice by the specific jurisdiction whose law it relates to.
disciplinary rulings, in the state bars and in major city bars;  

- A possible Committee dinner at the 2014 Spring Meeting in Los Angeles; and 

- A regular Committee column in Business Law Today.4

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Program on Venture Capital Financing Opinions: A Comparison of the California Approach

The Legal Opinions Committee sponsored a program on August 11, 2013 entitled “Venture Capital Financing Opinions: A Comparison of the California Approach.” The panel was chaired by Tim Hoxie of Jones Day, San Francisco, the incoming chair of the Legal Opinions Committee, and included Rick Frasch, San Francisco, the reporter for the drafting committee of the Opinions Committee of the Business Law Section of the State Bar of California (the “California Opinions Committee”), which is preparing a “Sample Third-Party Legal Opinion for Venture Capital Financing Transactions” (the “Sample Opinion”); Samantha Horn of Stikeman Elliott, LLP, Toronto, Canada; Mike Kendall of Goodwin Procter LLP, Boston; and Anna Mills of the Van Winkle Law Firm, Charlotte, North Carolina.

The panel discussed how venture capital financings present different issues for opinion givers than do other private financings in which opinions are common (other than the obvious fact that they generally involve stock issuances rather than loans), why the California sample opinion project was undertaken, and how the resulting Sample Opinion compares with the form of venture capital financing opinion published by the National Venture Capital Association (the “NVCA Form”).

The panel began by addressing factors that distinguish a venture capital financing from other types of financing transactions. The following were highlighted:

- The early stage of development of the issuer and its typically limited budget for legal expenses means that many early stage companies have unresolved legal issues stemming from lax governance and poor recordkeeping (and perhaps the failure to have taken other actions to comply with applicable legal requirements) that can bear on matters relevant to the opinions, like the validity of prior securities issuances.

- At the same time, a typical venture capital financing is completed under a fair amount of time pressure as the issuer typically is in great need of the offered financing; this time pressure and the issuer’s limited resources often constrain the amount of time that can be spent analyzing and resolving potential legal issues.

- The business risks faced by many venture companies are often viewed as disproportionately greater than at least some of the legal risks they may face, leading counsel and client not to allocate as much time and money to resolving all possible legal issues.

The panel then discussed why the Sample Opinion was undertaken:


4 See footnote 2.
financings. The 2009 VC Report did not include a form of legal opinion for use in venture capital financings.

- California published its own form of sample opinion for use in unsecured loan transactions in 2010 (the “California Sample Loan Opinion”). It was envisioned at that time that a sample opinion addressing venture capital financings would be undertaken which would, among other things, illustrate capitalization and no registration opinions typical of such financings.

- Other than the NVCA Form, no other widely published form of opinion exists for venture capital financings.

The panel then compared the scope and format of the Sample Opinion to the NVCA Form:

- The NVCA Form (6 pages in length) focuses on the form of the opinions given and a no litigation confirmation, whereas the Sample Opinion (47 pages in length) provides a complete template for a closing opinion letter including assumptions, qualifications, the opinions, and a no litigation confirmation, with extensive explanatory footnotes. Like the California Sample Loan Opinion, the Sample Opinion relates each element of the Sample Opinion to California and national opinion literature so that the Sample Opinion can provide the practitioner with access to that literature.

- The NVCA Form covers only a Delaware corporation as the issuer, whereas the Sample Opinion addresses both Delaware and California corporations as issuer. The Sample Opinion discusses some of the issues faced by opinion givers who are not members of the Delaware bar but who give venture capital closing opinions on behalf of Delaware issuers.

- Warrant issuances and exercises are covered in the Sample Opinion, but not in the NVCA Form.

The panel then compared and contrasted the forms of opinions contained in the respective forms:

- Corporate existence/good standing (Sample Opinion No. 1). Similar to the NVCA Form opinion No. 1. The Sample Opinion focuses on the issuer’s valid existence rather than on its initial incorporation or organization, reflective of the recent trend with this opinion.

- Corporate power (Sample Opinion No. 2). Similar to the NVCA Form opinion No. 2. The Sample Opinion also discusses the “power” opinion to engage in the type of business engaged in by the issuer.

- Corporate authorization (Sample Opinion No. 3). Similar to the NVCA Form opinion No. 3.

- Capitalization: authorization of the new share issuance (Sample Opinion Nos. 4 and 5). Similar to the NVCA Form opinions Nos. 6 and 7. As does the NVCA Form, the Sample Opinion discourages the giving of separate opinions on all outstanding options, the reservation of shares available for issuance upon the exercise of options and warrants, and no violation of preemptive rights. But in contrast to the NVCA Form, the Sample Opinion includes a qualification that specifies the investigation the opinion preparers performed to give the opinion on the issuance of all outstanding shares that makes clear to the recipient the basis upon which the opinion is given, if it is given.
• Enforceability/remedies (Sample Opinion No. 6). Similar to the NVCA Form opinion No. 3, but the Sample Opinion also contains an extensive discussion of “as if” remedies opinions.

• No consents and approvals (Sample Opinion No. 7). Similar to the NVCA Form opinion No. 5, but, in contrast to the NVCA Form, the Sample Opinion, because of concerns that performance may be construed to cover future performance, addresses only consents and approvals required to “execute and deliver” the transaction documents and not their performance (other than with respect to the sale and issuance of the shares and warrants at closing).\(^5\)

• No violation (Sample Opinion No. 8). Similar to the NVCA opinion No. 4; however, as with the “consents and approvals opinion,” the Sample Opinion in its no violation opinions does not address the performance of the transaction documents (other than with respect to the sale and issuance of the shares and warrants at closing).\(^5\)

• No registration (Sample Opinion No. 9). Similar to the NVCA Form opinion No. 8, but the Sample Opinion also addresses warrants.

• No litigation confirmation. Both forms take similar approaches.

The panel concluded with a discussion of certain qualifications covered in the Sample Opinion:

• The incorporation by reference of the Schedule of Exceptions to the Stock Purchase Agreement. The Sample Opinion discusses the common practice of many opinion givers in venture capital financings of qualifying their entire opinion letter by reference to the disclosures made in the Schedule of Exceptions to the Stock Purchase Agreement. This approach may be justified in the case of venture capital financings due to cost and time constraints that are often present with early stage companies. This practice has proved controversial among opinion practitioners outside of the venture capital community, which was in evidence in the question and answer session that followed the panelists’ presentations.

• Laws (not) covered. The introductory paragraph to the qualification section of the Sample Opinion explicitly excludes certain laws from the coverage of the opinion letter (such as securities, tax, labor, and 20 other specified laws) unless expressly addressed in the opinion letter.

• Section 2115 of the California Corporations Code. In contrast to the NVCA Form, the Sample Opinion discusses the possible application of certain provisions of California’s “pseudo foreign” corporations provision (Section 2115) to the internal affairs of a Delaware (or other non-California) corporation.

• Other customary qualifications taken in opinion letters, including the bankruptcy and equitable principles limitations, the qualification taken for one-sided attorneys’ fee reimbursement clauses, venue selection provisions, jury trial waivers, exceptions for arbitration clauses, and other qualifications.

At the end of the panel’s presentation, a lively question and answer period followed.

The expectation of the drafting committee of the California Opinions Committee is that the Sample Opinion, if approved by the Business Law Section of the California State Bar, will be published in 2014.

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**NOTES FROM THE LISTSERVE**

[**Editor’s Note:** Dialogues on the Committee’s listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Members of the Committee may review the comments referred to below by clicking on the “Archives” link under “Listserve” on the Committee’s website.]

**Attorney Verification of Accredited Investor Status Under Amended Rule 506**

**Background.** Pursuant to Section 201(a) of the Jumpstart Our Business Startups Act ("JOBS Act"), Congress instructed the SEC to amend its Rule 506 (part of Regulation D) and Rule 144A to permit issuers to conduct private placements through the use of general solicitation or general advertising provided, in the case of the mandated amendment to Rule 506, “that all purchasers of the securities are accredited investors,” and that the amended Rule 506 “require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission.”6 Pursuant to Congress’ JOBS Act § 201(a) mandate, the SEC proposed amendments to Rules 506 (and conforming amendments to other provisions of Regulation D) and 144A on August 29, 2012 (Release No. 33-9354) and, after receiving and digesting over 225 comment letters, promulgated the final rule amendments on July 10, 2013 (Release No. 33-9415) (the “Adopting Release”).7 The amendments became effective September 23, 2013.

Revised Rules 502(c) and 506(c) now permit issuers relying upon Rule 506(c) to engage in general solicitation and general advertising as long as all purchasers of the securities sold in the offering are accredited investors.8 Revised Rule 506(c)(2)(ii) requires an issuer relying upon Rule 506(c) to take reasonable steps to verify that the purchasers of the securities sold in the offering are accredited investors (referred to hereinafter as the “Reasonable Verification

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6 JOBS Act § 201(a)(1). Congress’ mandate to the SEC with respect to Rule 144A instructed the SEC to permit sellers relying upon revised Rule 144A to offer the securities to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, “provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer.” Id. § 201(a)(2).

7 The very same day the SEC also proposed further amendments to Form D “intended to enhance the Commission’s ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation and general advertising under new paragraph (c) of Rule 506.” One of the revisions to Form D would require issuers to specify the “methods used to verify the accredited investor status of purchasers, . . .” Release No. 33-9416 (July 10, 2013).

8 Issuers may continue to conduct “quiet” Rule 506 offerings under revised Rule 506(b), under which Rule 502’s prohibition on general solicitation and general advertising will continue to apply. Issuers relying upon revised Rule 506(b) do not need to take the additional measures to verify accredited status and, by conducting the offering under Rule 506(b), the issuer could continue to sell to not more than 35 non-accredited investors. See Revised Rule 506(b)(2)(i) and Revised Rule 501(e).
In response to widespread requests from commentators, the SEC has adopted safe harbor methods of verifying accredited investor status. The specified safe harbors are non-exclusive and non-mandatory methods of verifying that a natural person is an accredited investor, and may be relied upon provided that the issuer does not have knowledge that such person is not an accredited investor. Revised Rule 506(c)(2)(ii).

Revised Rule 506(c) specifies four safe harbors. The first two address the documentation an issuer may rely upon to establish the Reasonable Verification Condition. To establish that a natural person meets the income test for qualifying as an accredited investor (individual income in excess of $200,000 in each of the two most recent years or joint income with that person’s spouse in excess of $300,000 in each of those years, and a reasonable expectation of reaching the same income level in the current year, Rule 501(a)(6)), an issuer may rely upon any IRS form that reports the purchaser’s income for the two most recent years, and obtain a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year.

If the issuer relies upon a prospective purchaser’s accredited investor status based on his or her net worth (individual net worth, or joint net worth with that person’s spouse, exceeding $1 million, excluding the person’s primary residence and related indebtedness) then, to meet the Reasonable Verification Condition with respect to such status, the issuer must review one or more of the following types of documentation, dated within the prior three months, and obtain a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed:

(i) With respect to assets: bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and

(ii) With respect to liabilities: a consumer report from at least one of the nationwide consumer reporting agencies.

Revised Rule 506(c)(ii)(B).

An issuer may also meet the Reasonable Verification Condition by obtaining written confirmation from one or more of the following specified “verification service providers” that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such person is an accredited investor:

10 The safe harbor is not available to establish that a purchaser falls into one of the categories of accredited investor other than a natural person meeting the income or net worth test. For such other accredited investors, an issuer relying upon revised Rule 506(c) will have to take reasonable steps based on the facts and circumstances to verify their status.

11 Revised Rule 506(c)(2)(ii)(A). If the purchaser is relying upon his or her joint income with his or her spouse, then the issuer must review copies of IRS forms that report income for the two most recent years in regard to, and obtain a written representation from, both the purchaser and his or her spouse.
In Our Opinion

A registered broker-dealer;

An investment adviser registered with the SEC;

A licensed attorney who is in good standing under the laws of the jurisdiction(s) in which he or she is admitted to practice law; or

A certified public accountant who is duly registered and in good standing under the laws of the place of his or her place of residence or principal office.

Revived Rule 506(c)(2)(ii)(C). 12

The Listserve Inquiry re Lawyer Confirmation of Accredited Investor Status. Lowell Noteboom of Leonard, Street and Deinard, Professional Association, Minneapolis, triggered a lively discussion by his inquiry of August 6, 2013 to the listserve noting that, because purchasers in private placements often do not want to disclose their tax returns and other financial information to the issuer, they may now seek to respond to an issuer’s insistence upon meeting the Reasonable Verification Condition by turning to counsel to provide a confirmation of the purchaser’s accredited investor status to the issuer. Lowell’s firm had already received one such inquiry, and stated that he expected to receive many more such requests. Lowell asked the listserve for its experience in responding to similar client inquiries.

The term “verification service provider” is the term used by the Commission to refer to those persons who assist in the determination that a purchaser is an accredited investor. Adopting Release at pages 28-29.

The fourth safe harbor specified in revised Rule 506(c) applies to persons who purchased securities in a “quiet” Rule 506 offering prior to the effective date of revised Rule 506(c) (September 23, 2013) and continue to hold such securities. In a subsequent Rule 506(c) offering, the issuer will qualify for this safe harbor by obtaining a certification from such person at the time of sale that he or she qualifies as an accredited investor (and provided that the issuer does not have knowledge that such person is not an accredited investor). Revised Rule 506(c)(2)(ii)(D).

The consensus of the commenters was that lawyers should exercise caution in the face of client requests for attorney confirmation of accredited investor status. As Joseph Heyison of Daiwa Capital Markets America Inc. observed, attorney confirmation of an individual’s accredited investor status “is less a legal opinion and more of an investigative effort,” and suggested that one form of any such confirmation would specify the documentation reviewed, state that, to the firm’s knowledge (appropriately defined and limited), it has no information contradicting the information supplied, that, based solely on such information, the firm believes that the client has the necessary income/net worth as specified for individual accredited investor status under Regulation D, and that “the issuer is responsible for determining whether this information is sufficient under the rule . . . .”

Several commenters expressed hesitancy to provide such confirmations (Thomas D. Kearns of Olshan Frome Wolosky LLP, New York, New York; Edward L. Wender, Venable LLP, Baltimore; Casey K. Tjang, Banc FM Advisors, USA; and Joan Conway Waller, Secore & Waller LLP, Dallas). Ed Wender cautioned that before providing any such confirmation, counsel should confirm that the firm’s malpractice insurance covers such confirmations. In subsequent remarks to the Editor, Ed Wender addressed the question of whether an attorney confirmation of accredited investor status is a legal opinion:

“Is the confirmation a legal opinion? The Commission’s release permits non-lawyers to provide the confirmation, so . . . presumably it is intended to be a factual confirmation that the tests for an accredited investor were satisfied. However, in my opinion the concept of what constitutes ‘reasonable steps’ would, if made by an attorney, likely be construed as a legal conclusion. Indeed, a broker-dealer contemplating making such a confirmation might ask counsel to advise him as to whether
the steps taken prior the confirmation satisfy the ‘reasonable steps’ requirement. ”

Phillip A. Quatrini of Rimon, PC, McLean, Virginia, observed that he would not style the confirmation as a legal opinion, but as a confirmation of facts appropriately qualified and based solely upon a review of income information as specified in Revised Rule 501(c)(2)(ii)(A) and, for a client’s net worth, upon a review of the client’s personal balance sheet as certified to the firm by the investor or by his or her accountant. Whether such a letter would be adequate for its intended purposes “would be up to issuer’s counsel.”

Etahn N. Cohen of Sugar Felsenthal Grais & Hammer LLP, Chicago, and Hillel Tendler of Neuberger, Quinn, Gielan, Rubin & Gibber, P.A., Baltimore, noted, as the SEC observed in its Adopting Release (at page 31), that the income component of accredited investor status is easier to verify than the net worth component, due to the challenges of determining the value of illiquid assets and the amount of an individual’s liabilities. Etahn suggested that, in giving a confirmation, the firm should rely upon the safe harbor documentation specified in revised Rule 501(c)(2)(ii)(A) and (B) to establish the income or net worth safe harbors.

Joan Conway Waller of Secore & Waller LLP added that merely because a purchaser qualifies as an accredited investor “does not necessarily mean that an investment is suitable for a client or an appropriate component of their existing portfolio.” Suitability determinations would typically be made by the investor together with his or her investment advisor.

Robert K. Morris of Reed Smith LLP, Philadelphia, expressed the view that law firms should be able to provide accredited investor confirmations, observing that whether an individual client is an accredited investor is a legal conclusion. The conclusion would be expressed to the client, and shared by the client with the issuer. It would be prudent to limit the client’s ability to furnish the confirmation to a particular issuer in connection with a particular proposed investment. It may also be prudent to state that the issuer may rely upon the confirmation only to the extent necessary to support the issuer’s assertion that it has taken reasonable steps to verify that the particular investor is accredited. The confirmation would have to be based upon documentation deemed satisfactory to the lawyer to establish the client’s accredited status. “Such underlying information,” noted Robert, “would have to be of the type that, if relied upon directly by the issuer, would satisfy the SEC’s reasonable verification requirement.”

Stan Keller closed the discussion by noting that he and his colleagues had considered the matter and that providing certification of accredited investor status is not something that his firm “would do as a routine matter.” However, for long-standing clients, an exception to this policy may be justified. For example, for individuals for whom lawyers at the firm are regular counselors in handling their financial affairs, such as trust and estate planning, providing confirmation of accredited status may be justified. Stan observed that the certification “is not a legal opinion but rather a factual confirmation. At the end of the day, it has to be satisfactory to the issuer to serve its reasonable verification purpose.” Stan cautioned that counsel providing a confirmation may not be free to put in the range of assumptions and disclaimers that might be included in a legal opinion. Stan noted that his observations related to the case where a lawyer had no involvement with the offering itself, and that any such involvement would raise different considerations.

The listserve dialogue on revised Rule 501(c) prompts these observations:

1. **Nature of Attorney Confirmation.** The “verification service provider” safe harbor for establishing accredited investor status for individuals states that it is available if the issuer obtains “a written confirmation from one of the
following persons or entities that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor . . . .” Revised Rule 501(c)(2)(ii)(C) (emphasis added).

Is the safe harbor available, therefore, if a confirmation (whether from lawyer, broker-dealer, investment advisor, or CPA) does not expressly state in the confirmation that the firm has “taken reasonable steps” to verify that the purchaser is an accredited investor within the prior three months, and has determined that such purchaser is an accredited investor? If such an affirmation is required, what is the point of providing a verification service provider confirmation without it?

2. Nature of Information Relied Upon. One clear role, acknowledged by the Commission in its Adopting Release (at page 31), for verification service providers is to protect the privacy of purchasers’ financial information. So, rather than provide the safe harbor information for a prospective purchaser’s income or net worth to the issuer, the purchaser can provide it to, for example, his counsel, and his counsel would then confirm, based upon the safe harbor information (and the requisite certifications as to expected income and statement of liabilities) that the purchaser qualifies as an accredited investor within the meaning of the income or net worth safe harbors. By relying upon the exact same information that the purchaser would provide to the issuer to establish the income or net worth safe harbor, a lawyer’s concerns over certifying that it has taken “reasonable” steps to verify the income or net worth of the purchaser would be obviated, since clearly the safe harbor documentation to establish a purchaser’s income or net worth should be the same whether provided to the issuer or to a verification service provider (assuming, in either instance, that the issuer or such provider “does not have knowledge that such person is not an accredited investor . . . .”). Revised Rule 506(c)(2)(ii).

3. Other Verification Information. It is when a lawyer does not rely upon safe harbor documentation to establish a client’s income or net worth that the challenges of providing an accredited investor confirmation surface. If establishing the verification service provider safe harbor requires the provider to state, in its confirmation, that it has taken “reasonable” steps to verify the accredited status of its client, and if the provider relies upon other than safe harbor documentation to establish the client’s income or net worth, then the provider will have to make the judgment that the information relied upon and/or the other steps taken by the provider to establish accredited status are “reasonable” within the meaning of revised Rule 506 — clearly a legal conclusion. As Stan Keller noted, reaching that conclusion may not pose difficulties for lawyers who have a close and extended relationship with, say, an estate planning client, but it is a judgment that would have to be made if other than safe harbor information is relied upon to establish accredited investor status.

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Ed Wender, in his concluding supplemental remarks, noted that the saving grace for lawyers asked by clients to provide accredited investor confirmations was that those lawyers “are likely the most expensive source for such confirmations.” Less expensive third-party verification service providers are now offering verifications, and clients may therefore look to them to provide this service.

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As always, members are encouraged to raise legal opinion issues on the listserve 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 listserve.

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RECENT DEVELOPMENTS

NYSBA Ethics Opinion 969
Client Indemnity To Its Lawyer
As To A 3d Party Opinion

This is a very recent (2013 WL 3854558, June 12, 2013) and very brief opinion from the New York State Bar Association Professional Ethics Committee. It asks and answers a very narrow question: whether a lawyer in New York may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third party who is also an addressee of an opinion letter to be provided to the client. Opinion 969 concludes that in the factual situation described the lawyer may ask for an indemnity. The facts (enhanced a bit for emphasis here to describe what the opinion giver was probably thinking about in requesting the ethics opinion) are as follows: the client is the lessor in a real estate transaction and is to receive an opinion letter from its lawyer as to the leasing documents; the lessee demands the same opinion letter, but the lawyer is reluctant to give an opinion letter to a third party such as the lessee; in an effort to facilitate the closing, the lawyer concludes that a client indemnity would sufficiently reduce the risk of giving the opinion letter to the non-client; to assure the propriety of this arrangement, the Committee is asked whether the lawyer may ethically request a prospective indemnification agreement from the client against claims that may arise out of an opinion letter given to the lessee.

Opinion 969 treats Model Rule 1.8(h) as the Rule of primary concern, although it also describes (but does not analyze) Rule 2.3, which is the rule that recognizes the propriety of third-party opinion letters. Rule 1.7 is the general rule relating to conflicts of interest and it specifically refers to conflicts arising out of the personal interests of a lawyer. Rule 1.8 contains specific rules as to certain conflicts.

Opinion 969 concludes that an indemnification can be requested because Model Rule 1.8(h) is applicable only to efforts to limit prospectively lawyer malpractice liability to a client. In the Opinion 969 situation the lawyer seeks to shift to the client the burden of any third-party malpractice type claims that may arise, but the client retains the right to make a malpractice claim against its lawyer based on the same opinion letter. This ethics opinion is novel and cites no compelling authority. It seems correct, however, in concluding that Rule 1.8(h) simply does not apply to the indemnity sought.

The New York version of Rule 1.8(h), were it applicable, would completely prohibit any agreement prospectively limiting a lawyer's liability to a client for malpractice. The ABA Model Rule (Rule 1.8(h)(1)) permits such a limitation, but only if the client is independently represented in making the agreement. Both the New York and ABA Model Rule version of Rule 1.8(h) relate only to limits on malpractice liability to a client, which was not involved in Opinion 969.

In the factual situation considered by Opinion 969 both the client and the third party are intended to receive the same opinion letter. That format makes clear that, notwithstanding the indemnification, the client retains its right to assert a malpractice claim against its lawyer as to the opinion letter. But giving the same opinion letter to the client and a third party is not the usual pattern we see. Does the conclusion expressed in Opinion 969 apply if only the third party receives the opinion letter? The answer appears to be “yes.” The client has retained its rights to assert a malpractice claim against its lawyer in connection with the handling of the overall transaction (which includes providing the third party opinion letter). As a result, Rule 1.8(h) should not be applicable to the grant of the indemnity even if only the third party is the addressee of the opinion letter.
Opinion 969 concludes that it is proper to “ask” for an indemnity but is silent on the application of other Model Rules to obtaining the indemnity. What Model Rules (if any) apply to obtaining the indemnity? Are any ethical concerns under the applicable state rules fully dealt with if independent counsel is engaged to advise as to the decision to indemnify and the particulars of the indemnification?

These questions are made more complicated by the fact that the ABA Model Rules have been adopted with many changes in the various States. The New York Rules are different from the ABA Model Rules in a number of respects relating to conflicts of interest. It is not clear that the answers to the questions posed above are the same under the New York and ABA Model Rules.

Opinion 969 suggests client indemnification as a new approach to dealing with the risk of giving opinion letters to third parties. But, if the client is to be asked for an indemnity, an analysis as to how the indemnification can be ethically obtained under the applicable rules and factual circumstances is required. These matters are not covered by Opinion 969.

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**LEGAL OPINION REPORTS**

**TriBar’s Supplemental Report on Opinions on Chosen-Law Provisions Under the Restatement**

In its 2004 report, *The Remedies Opinion – Deciding When to Include Exceptions and Assumptions* (the “*Remedies Opinion Report*”), the TriBar Opinion Committee discussed opinions on the enforceability of chosen-law provisions in agreements. That opinion might take the form of an enforceability opinion on the entire agreement when the law covered by the opinion is the chosen law or it might take the form of a separate opinion on the chosen-law provision alone when the provision chooses some other law to govern.

TriBar recently published a supplemental report (the “*Supplemental Report*”) amplifying the discussion in the Remedies Opinion Report of opinions on chosen-law provisions that are governed by choice-of-law rules based on the Restatement (Second) of Conflict of Laws.¹⁴

The Supplemental Report describes the difficulties in applying the Restatement’s choice-of-law rules. Under section 187(2) of the Restatement, the parties’ choice of governing law is given effect, subject to two exceptions. The first exception applies when the state whose law is chosen (the “chosen-law state”) has no substantial relationship to the parties or transaction and no other reasonable basis exists for that choice. Lawyers usually have no difficulty satisfying themselves that this exception does not apply.

The second exception applies when giving effect to the agreement under the chosen law would be contrary to a “fundamental policy” of the state whose law would have applied in the absence of a choice (the “default state”), but only if the default state has a materially greater interest in the issue than the chosen-law state. The Supplemental Report discusses the difficulties in determining that this exception does not apply. These difficulties include determining i) which state is the default state, ii) whether a fundamental policy of the default state will be violated when the default state is not the

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state whose law is covered by the opinion, iii) even if the state whose law is covered by the opinion is the default state, whether the policy implicated is “fundamental,” and iv) when applicable, whether the default state has a materially greater interest in the issue than the chosen-law state.

The Supplemental Report observes, as did the Remedies Opinion Report, that when an opinion applying the Restatement rules is given on the enforceability of a chosen-law provision that chooses the law covered by the opinion to govern the agreement, opinion preparers do not have to indicate in the opinion that the fundamental policies of some other state might be relevant under the fundamental policy exception to section 187(2) of the Restatement. It notes, however, that when another state has a significant relationship to the parties or transaction, some opinion preparers, to avoid misunderstanding, choose to point out that the opinion, in covering the chosen-law provision, does not address the possible application of the law of some other state.

The Supplemental Report also observes that the Remedies Opinion Report takes the position that, when the law covered by the opinion is not the chosen law, opinion preparers, when giving a separate opinion on the chosen-law provision, need only consider the fundamental policies of the state whose law is covered by the opinion letter and need not consider, or indicate that they have not considered, the possible application of the law of some other state. It notes that many lawyers support that position, but acknowledges that other lawyers are not comfortable with it. The Supplemental Report then observes that the lack of consensus over a separate choice-of-law opinion’s coverage of the fundamental policy exception has led many opinion preparers to make clear that they are not covering the possibility that the fundamental policies of some other state might have to be considered under the choice-of-law rules of the state whose law is covered by the opinion. It adds that opinion preparers who, in view of difficulties the report identifies, do not wish to cover the fundamental policies of even the state whose law is covered by the opinion often make clear that they are not covering the fundamental policy exception, such as by excluding from coverage the fundamental policies of all states.

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(See next page for Chart of Published and Pending Reports)
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 September 30, 2013.]

A. Recently Published Reports

<table>
<thead>
<tr>
<th>Section</th>
<th>Year</th>
<th>Title and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>2007</td>
<td>No Registration Opinions – Subcommittee on Securities Law Opinions</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Effect of FIN 48 – Committee on Audit Responses</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Negative Assurance – Subcommittee on Securities Law Opinions</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Sample Opinion – Committee on Mergers and Acquisitions</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>Diligence Memoranda – Task Force on Diligence Memoranda</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Survey of Office Practices – Committee on Legal Opinions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal Opinions in SEC Filings (Update) – Subcommittee on Securities Law Opinions</td>
</tr>
<tr>
<td>ABA Real Property Section (among others)</td>
<td>2012</td>
<td>Real Estate Finance Opinion Report of 2012</td>
</tr>
<tr>
<td>Arizona</td>
<td>2004</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>California</td>
<td>2007</td>
<td>Remedies Opinion Report Update</td>
</tr>
<tr>
<td></td>
<td>2007</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Venture Capital Opinions</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Sample Opinion</td>
</tr>
<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td>City of London</td>
<td>2011</td>
<td>Guide</td>
</tr>
<tr>
<td>Maryland</td>
<td>2007</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
</tr>
<tr>
<td>Michigan</td>
<td>2009</td>
<td>Statement</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Report</td>
</tr>
<tr>
<td>New York</td>
<td>2009</td>
<td>Substantive Consolidation – Bar of the City of New York</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Tax Opinions in Registered Offerings – New York State Bar Association Tax Section</td>
</tr>
</tbody>
</table>

15 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/](http://apps.americanbar.org/buslaw/tribar/).
## Recently Published Reports (continued)

<table>
<thead>
<tr>
<th>State/Association</th>
<th>Year</th>
<th>Report/Update Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2007</td>
<td>Update</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2011</td>
<td>Report</td>
</tr>
<tr>
<td>Texas</td>
<td>2006</td>
<td>Supplement Regarding Opinions on Indemnification Provisions</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Supplement Regarding ABA Principles and Guidelines</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Supplement Regarding Entity Status, Power and Authority Opinions</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Supplement Regarding Changes to Good Standing Procedures</td>
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<td>2013</td>
<td>Choice of Law</td>
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## B. Pending Reports

<table>
<thead>
<tr>
<th>Group</th>
<th>Report/Opinion Description</th>
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<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>Outbound Cross-Border Opinions – Committee on Legal Opinions</td>
</tr>
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<td></td>
<td>Revised Handbook – Committee on Audit Responses</td>
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<td>No-Registration Opinions (Update) – Subcommittee on Securities Law Opinions</td>
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<td>California</td>
<td>Sample Venture Capital Opinion</td>
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<td>Opinions on Partnerships &amp; LLCs</td>
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<td>Sample Personal Property Security Interest Sample Opinion</td>
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<tr>
<td>South Carolina</td>
<td>Comprehensive Report</td>
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<td>TriBar</td>
<td>Limited Partnership Opinions</td>
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<td>Choice of Law</td>
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<td>Texas</td>
<td>Comprehensive Report Update</td>
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<td>Washington</td>
<td>Comprehensive Report</td>
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<td>Multiple Bar Associations</td>
<td>Commonly Accepted Opinion Practices</td>
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</table>
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. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in January 2014. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

16 The URL is http://apps.americanbar.org/deh/committee.cfm?com=CL510000.