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**FROM THE CHAIR**

It is a privilege to share with you the Winter issue of our Committee’s Newsletter, “In Our Opinion.” As in the past, without the tireless work of our Newsletter editors, Jim Fotenos and Susan Cooper Philpot, we would have no newsletter to read. And I would like to thank Gail Merel for her efforts in helping us edit summaries of the Working Group on Legal Opinions Fall Program which make up the Newsletter’s Appendix.

**Fall Meeting of the Committee.** As with other editions of this Newsletter, we have included minutes of the meeting of the Legal Opinions Committee held this past November in Washington D.C., as well as minutes of the meetings of the Committees on Audit Responses, Law and Accounting Committee, and the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee. These minutes provide each of us a way to catch up on the substantive discussions that took place at each committee’s meeting. Our own minutes include several items you should note:

- they review the status of the Joint Project on Common Opinion Practices between this Committee and WGLO, which Steve Weise and Stan Keller discussed with us at the meeting;
- they describe a new project to develop a report on local counsel opinions being undertaken by this Committee jointly with a group organized at WGLO;
- they include a summary of George Williams’ comments on implications for opinions of the Volker Rule.

**Delaware Series LLCs.** Perhaps one of the most important items in this issue of the Newsletter is the second part of Norm Powell’s piece addressing opinions that relate to Delaware series LLCs. As most know, Norm contributed Part I of this article to our Fall 2014 issue, and this installment completes this important treatment of a topic that has not previously received attention.

**Can One Face Malpractice Exposure To a Recipient of a Third Party Opinion?** This issue contains a note by Stan Keller, our Committee’s immediate past Chair, on the *Crews* case. This case from a federal district court in Mississippi has stirred the opinion world by declining to grant an opinion giver’s motion to dismiss a claim by a non-client for malpractice relating to an enforceability opinion. While the law firm may have believed, because the existence of an attorney-client relationship is an element of a malpractice claim, that it would win its motion to dismiss the malpractice claim, the court instead determined that the allegations supported finding such a relationship existed. While as Stan notes this case (even if we believe it wrongly decided) would not necessarily have resulted in a different outcome from that which would follow were only a negligent misrepresentation claim to survive, it nonetheless is concerning. This is because much of how we think about third-party opinions rests on the notion that they are given to non-clients. And non-clients are not typically owed the same duties as are clients, who enjoy a fiduciary relationship with their counsel. This fiduciary relationship means that one’s obligations to explain advice (and opinions) and provide counsel as to what they mean and do not mean to clients differs from the obligations (or so we think) owed to a third party. It is not hard to imagine, as Stan posits, cases where finding one has an attorney-client relationship with a third party would in fact make a difference. Certainly views about “misleading” opinions would change markedly if one started with the proposition that one owed a fiduciary duty to every opinion recipient.

**WGLO Fuld Award.** As many of you know, WGLO each year awards its Fuld Award, named in memory of James Fuld, to someone who has contributed to opinion practice and its understanding in a meaningful way over time. This year (perhaps to demonstrate another way in which groups or entities can be persons) the award was bestowed on the TriBar Opinion...
Committee. I will not spend time here revisiting Truman Bidwell’s eloquent description of the contributions of the TriBar Opinion Committee to the development and acceptance of customary practice and the development of ever more consistent national standards for opinion giving: these contributions are well known. But this award reminds us all of the continued importance and vitality of the work of the Committee we simply know as “TriBar.” It has helped, with our own Legal Opinions Committee, committees in various states, and more recently the efforts of groups like WGLO, to promote understanding, uniformity, and yes, civility, in opinion practice. We all anxiously await its next reports!

Listserve. It has been quiet out there. This may mean that all 1500 members of this Committee are so well informed about opinion practice that they have no questions to share with the wider group. But it more likely means that we may have forgotten what a good resource the listserve can be for timely and informal discussion. You will see that our friends on the Audit Responses Committee are using their listserve, and this issue of the Newsletter contains summaries of those discussions (as it does ours when we have them).

Our listserve can be reached by sending an email to BL-OPINIONS@mail.americanbar.org. The listserve is monitored, which means that there are a couple of us who review messages before they are posted. And that means that if all 1500 of you decide to send a message to the listserve in the next few days we will be digging out for weeks. But I did want you to remember that the resource is there for members to use when they want to do so. The front page of our website also has an index to prior summaries of listserve dialogues that have appeared in the Newsletter.

Spring Meeting in San Francisco. I hope many of you reading this Newsletter will plan to attend the Section’s Spring Meeting in San Francisco this coming April 16-18. The meeting will be held at the San Francisco Marriott Marquis (affectionately known in these parts as the “Wurlitzer”) and the InterContinental Hotel.

Our Committee will be an active participant in the meeting. We will sponsor a program, with the Private Equity and Venture Capital Committee, on the new California Venture Capital Sample Opinion published in the most recent issue of The Business Lawyer (70 Bus. Law. 177 (2015)). We think it a particularly timely topic, and one appropriate to the Northern California location for the meeting. But the issues we will discuss relate generally to opinions on equity financings, and I think many of you — even many of you who would never think of yourselves as venture lawyers — will find the program interesting. And to plan, it is presently scheduled as a “kick off” program on Thursday morning, April 16 at 8:30 a.m. So it should give all an incentive to arrive early for the meeting! Our other Committee activities (our meeting and reception) will take place on Friday, April 17.

- Timothy Hoxie, Chair
  Jones Day
tghoxie@jonesday.com
What follows are the presently scheduled times of meetings that may be of interest to members of the Legal Opinions Committee. As of the date of publication of this issue of the Newsletter, meeting rooms have not been set. For updated information on meeting times and places, check [here](http://www.americanbar.org/groups/business_law/evnts_cle/spring_2015/schedule.html).

**Legal Opinions Committee**

**Thursday, April 16, 2015**

Program: “Recent Developments for Opinions in Venture Finance: The California Venture Capital Sample Opinion and Recent Changes to Private Offering Rules” (co-sponsored with the Private Equity and Venture Capital Committee)
8:30 a.m. – 10:00 a.m.

**Friday, April 17, 2015**

Committee Meeting:
3:30 p.m. – 5:00 p.m.

Reception: 5:00 p.m. – 6:00 p.m.

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**Professional Responsibility Committee**

**Thursday, April 16, 2015**

Program: “Clawbacks of Partnership and LLC Distributions: Lessons from Large Law Firm Bankruptcies”
10:30 a.m. – 12:30 p.m.

Program: “Murder, Mayhem and Misrepresentation: Ethical Issues in Acquiring Artwork”
2:30 p.m. – 4:30 p.m.

**Friday, April 17, 2015**

Committee Meeting:
2:30 p.m. – 4:30 p.m.

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**Securities Law Opinions Subcommittee**

**Friday, April 17, 2015**

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

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**Audit Responses Committee**

**Saturday, April 18, 2015**

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

Program: “In-House Counsel: What Should They Tell Auditors and How?”
Saturday, April 18, 2015
2:30 p.m. – 4:00 p.m.

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**Law and Accounting Committee**

**Saturday, April 18, 2015**

Committee Meeting:
11:00 a.m. – 12:30 p.m.
Working Group on Legal Opinions
New York, New York
May 11-12, 2015

ABA Business Law Section
Annual Meeting
Chicago
Hyatt Regency
September 17-19, 2015

ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 20-21, 2015
The 2104 Fuld Award was presented to the TriBar Opinion Committee. This was the first Fuld Award not made to an individual.

The Fuld Award is presented annually by the Working Group on Legal Opinions Foundation to a person who has made a significant contribution to the field of legal opinions. The award is sponsored by Proskauer Rose LLP, where Jim Fuld was a partner. The previous recipients were Arthur Field, Donald Glazer, Judge Thomas Ambro, Jerome E. Hyman, and James J. Fuld.

The Fuld Committee felt it singularly appropriate that the award to Jim Fuld in 2013 be followed with the presentation of the award to the TriBar Opinion Committee. TriBar was the first to respond to Jim Fuld’s urging to the bar that it bring order out of the chaos, and it did so with its seminal report, “Legal Opinions to Third Parties: An Easier Path,” 34 Bus. Law. 1891 (1979), replaced by TriBar’s “Third-Party ‘Closing’ Opinions,” 53 Bus. Law 591 (1998), widely considered the authoritative statement on opinion letter practice.

The early days of TriBar were exciting – it was the first time lawyers from different firms met to consider whether there was a common understanding of the meaning of closing opinions – and, as we all know, common ground was found, but it was not easy. The acceptance of the reports inspired by Jim Fuld has made us sometimes forget what was, if not “common” practice before TriBar’s reports, not “uncommon” practice at the time: so-called “two opinion” practice, i.e., requesting from an opinion giver an opinion the recipient’s lawyer would not give. The early members of the TriBar Opinion Committee represented many clients that accepted that custom. To their credit, the members of TriBar recognized that this competitive approach to opinion practice was not professional or wise.

TriBar’s reports on opinion practice have been enormously influential and have fundamentally changed opinion practice. The TriBar Opinion Committee, by reaching compromises that have allowed lawyers to see the utility in agreeing to common opinion norms, deserves much of the credit for that achievement.

Therefore, it was with great pleasure that the Fuld Committee presented the 2014 Fuld award to Don Glazer and Dick Howe, the Co-Chairs of the TriBar Opinion Committee, in recognition of both TriBar’s early work in beginning the process of bringing order out of chaos and for the continued excellence of its reports.

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

**BUSINESS LAW SECTION 2014 FALL MEETING**

The Business Law Section held its Fall Meeting in Washington, D.C. on November 21-22, 2014. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Fall Meeting of interest to members of the Committee on Legal Opinions.

**Legal Opinions Committee**

The Committee met on Friday, November 21. The meeting was attended, in person or by phone, by some 40 members of the Committee. There follows a summary of the meeting.
Joint Project on Common Opinion Practices. The bulk of the meeting was devoted to a review and discussion of the November 18, 2014 preliminary draft of a “Statement on Customary Opinion Practices” (the “Statement”) prepared by the working group appointed by the sponsors of the project — the Working Group on Legal Opinions Foundation (“WGLO”) and this Committee. The preliminary draft was made available to the Committee prior to the meeting. The working group consists of Steve Weise as its reporter, Pete Ezell and Steve Tarry as co-reporters, and Ken Jacobson, Stan Keller and Vladimir Rossman as co-chairs, as well as representatives of the Committee and, through the WGLO, representatives of a number of state bar associations.

Steve Weise and Stan Keller led the discussion. As noted in the Fall 2014 issue of the Newsletter (at pages 1-2), the project has now evolved to producing a statement, as the title of the current draft states, on customary opinion practices, and will serve as an update to the Committee’s Legal Opinion Principles (the “Principles”) (53 Bus. Law. 831 (1998)). Stan noted that the Statement as currently conceived is also intended to include those portions of the Committee’s Guidelines for the Preparation of Closing Opinions, 57 Bus. Law. 875 (2002) (the “Guidelines”) that address customary opinion practices but not those portions of the Guidelines that address purely practice “etiquette.” The working group’s objective is to present a complete statement of customary opinion practices that, like the Principles, is concise and reflects a broad consensus of opinion givers and recipients on customary opinion practices.

There followed a robust discussion of the draft Statement and the working group’s objectives. Questions addressed included:

- The scope of the project.
- Whether the Statement should replace the Principles and Guidelines or supplement them.
- If the Statement is to supplement but not replace in their entirety the Principles and Guidelines, which portions of the Principles and Guidelines would survive.
- The importance of keeping the Statement short and concise, like the Principles.
- Whether the Statement should carry forward the bifurcation represented by the separate Principles and Guidelines or incorporate them into one document, perhaps divided into separate sections.
- The importance of developing a product that will attract a broad consensus of sponsoring organizations, such as occurred with the “Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions,” 63 Bus. Law. 1277 (2008).
- Whether the final statement should include a principle-by-principle comparison between those presented in the Statement and those contained in the Principles and Guidelines (to the extent the Statement carries forward “principles” included in those prior documents).

At the conclusion of the discussion, Steve and Stan agreed that the discussion was helpful and the points made would be taken into account by the working group in their continued work on the Statement. The Committee will continue to be kept apprised of progress on the Statement as work continues.

Cross-Border Opinions Project. Ettore Santucci, reporter, noted that the report (Cross-Border Closing Opinions of U.S. Counsel) is currently in final editing, with the objective of finalizing the report during the first quarter of 2015, after which it will be published in The Business Lawyer. In response to a question of whether the report would include a sample
In Our Opinion

Ettore noted that inclusion of a sample opinion was beyond the scope of the project, but that sample opinion language is included in the notes to the report.

Local Counsel Opinions. Philip Schwartz (of Akerman LLP) reported that a group is being formed to begin the process of preparing a report on local counsel opinion topics. He reported on discussions over several recent WGLO seminars at which the topic of local counsel opinions was considered (see “Local Counsel — It’s Time for Our Own Report” in the WGLO Addendum to the Summer 2014 issue of the Newsletter (vol. 13, no. 4) at A-14 – A-15, and “Local Counsel — Should We Have Our Own Rulebook?” WGLO Addendum to the Winter 2013 issue of the Newsletter (vol. 13, no. 2) at A-3 – A-4).

Mr. Schwartz reported that at a breakout session held during the October 27-28, 2014 WGLO seminar, the participants in the discussion reached consensus that it was time to move forward and begin the drafting of a report on the topic of local counsel opinion letters. He reported that at that breakout session, the group had reviewed a comprehensive outline of issues particular to local counsel opinions, and that such discussions will help inform the initial drafting of a report on the topic of local counsel opinions. He also reported that it was the consensus of the participants in the breakout session that a report setting out relevant and useful principles about local counsel opinion practice in a format similar to that used in the Committee’s report on Closing Opinions of Inside Counsel (58 Bus. Law. 1127 (2003)) made the most sense under the circumstances. Further, Mr. Schwartz reported on the ongoing work of a joint committee of the legal opinion committees of the ABA’s Real Estate, Trust and Estate Law Section, American College of Real Estate Lawyers, and the American College of Mortgage Attorneys to draft a report on the topic of local counsel opinions in real estate transactions.

Mr. Schwartz reported that Bill Yemc (of Richards, Layton & Finger, P.A.), who was in attendance at the meeting, Frank Garcia (of Fulbright & Jaworski LLP) and he will be acting as the drafting committee for this project and that a steering committee consisting of lawyers from around the country who are involved with local counsel opinions is being formed to work with the drafting committee in preparing the proposed local counsel opinions report. He further reported that Tim Hoxie has agreed to serve on the steering committee and that others interested in participating should let him or Bill Yemc know of their interest.

It is the intent of the drafting committee to work closely with various bar groups to develop a report on local counsel opinion issues that all of the key consistencies in the legal opinions community can support. Consistent with that intent, it is the expectation of both the drafting committee and Tim Hoxie, as Chair of this Committee, that the drafting committee and this Committee will work together on this report, with the objective of producing a report that can be approved and published jointly by WGLO, this Committee and other bar organizations that choose to participate.

TriBar Opinion Committee. Dick Howe, co-chair of the TriBar Opinion Committee, reported on the status of TriBar’s three current projects, including its report on limited partnership opinions, its report on risk allocation provisions (indemnity provisions, contribution provisions, exculpation, etc.), and ’40 Act opinions. Dick and Don Glazer, TriBar’s other co-chair, reported on some of the difficulties TriBar is encountering in preparing the LP opinions report, including the fact that many issues involving LP opinions are different from opinions on LLCs and corporations (the focus of the TriBar LP opinions report is on opinions delivered for Delaware limited partnerships). Dick is hopeful that the LP opinions report will be completed in 2015.

WGLO. The Fall WGLO seminar was held October 27-28, 2014 in New York. Summaries of the sessions conducted at the Fall Meeting are included in this issue of the Newsletter in the WGLO Addendum.

Arthur Field reported that the Fuld Award for 2014 was presented to the TriBar Opinion
Committee. A description of the award is included below under “Fuld Award for 2014.”

The WGLO’s Spring Meeting will be held May 11-12, 2015 in New York.

Common Legal Opinion Qualifications. Chair Tim Hoxie reported that a report on common qualifications in third-party closing opinions will be published in the Winter 2014/2015 issue of The Business Lawyer. The report has been prepared by a working group headed by Gail Merel of Andrews Kurth LLP. It is not intended as a statement of customary practice but rather as a description of qualifications the members of the working group commonly see in their opinion practice.

The Volcker Rule Opinions. George Williams of Kaye Scholer LLP, New York, gave a short presentation on Volcker Rule opinions. Volcker Rule opinions are currently variations on the standard “not required to register as an investment company” opinion. Some issuers are exempt from the Investment Company Act of 1940 because they can rely on Section 3(c)(1) or 3(c)(7) of that Act. Such reliance, however, renders those issuers “covered funds” under the Volcker Rule (12 U.S.C. § 1851), which restricts the ability of banks and their affiliates to sponsor, finance, manage or hold ownership interests in covered funds. Accordingly, a practice is developing with regard to the delivery of opinions that provide comfort as to the ability of banking entities to engage with such issuers.

Some opinion recipients currently accept opinions to the effect that the issuer is not an investment company but is not relying on Section 3(c)(1) or Section 3(c)(7) of the ‘40 Act for that purpose. Others have reportedly been requesting specific advice about which exemption the issuer is relying upon if not Section 3(c)(1) or 3(c)(7). Among the other possible exemptions are Section 3(c)(5) and Rule 3a-7 under the ‘40 Act. In some cases, as for example in certain CLOs, reliance on Section 3(c)(1) or 3(c)(7) may be the only option under the ‘40 Act. In this case, compliance with the loan securitization exemption under the Volcker Rule itself (which is not an exemption under the ‘40 Act) may be the only way to avoid being a covered fund.

There still seems to exist a fair amount of variation in the willingness of firms to deliver opinions as to availability of the loan securitization exemption and in the form of any such opinion if given.

In all likelihood there will be a similar period of adaption with regard to any opinions that may be requested or delivered in connection with the recently adopted risk-retention rule. 79 Fed. Reg. 77602 (December 24, 2014). Because of the heavily factual nature of some of the requirements contained in that rule, the potential role of legal opinions, as opposed to representations and diligence, is also currently unclear.

Next Meeting. The next meeting of the Committee will be held at the Section’s Spring Meeting in San Francisco on Friday, April 17, 2015 from 3:30 p.m. to 5:00 p.m. A dial-in number will be provided for those unable to attend the meeting in person.

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

Audit Responses Committee

The Committee met on November 21, 2014. The principal discussion points are summarized below.

Update Project. The Committee discussed the final draft of the Committee’s Statement on Updates to Audit Response Letters. The Statement will be published in the Spring issue of The Business Lawyer. The Committee discussed additional ways to publicize the Statement. The AICPA has expressed interest in reporting on the Statement in its publications and will be able to link to the Statement on the Audit Responses Committee’s web page. It was agreed that the Statement should also be circulated to the PCAOB as a way to further
expand the message and provide greater access to the Statement for accountants. Relatedly, the Committee has been approved for a spring program to advise in-house counsel on dealing with audit response letters.

**Government Investigation Letter Hypothetical.** Most of the meeting was devoted to discussing different responses to requests by auditors for confirmation with respect to matters involving ongoing investigations of a client. This discussion was prompted by an auditor’s request asking a lawyer to confirm various matters related to an investigation in which a loss was probable, including reasons why the loss was not estimable and representations regarding the status of the investigation. The Committee members present generally agreed that many of the requested confirmations could not be provided, either because the lawyer was not in a position to make the confirmation or to do so would potentially breach the attorney-client privilege. Examples include a confirmation that the lawyers had not discussed settlement strategies with the board of directors and that the lawyers were in agreement with the company’s disclosures about the investigation.

The Committee considered whether lawyers could decline to respond to such a request. If a lawyer declines to respond altogether, auditors may refuse to issue an audit opinion, or may issue an audit opinion with a scope limitation. Lawyers differed on how they respond to auditors’ requests for information regarding investigations. Some lawyers may provide information orally but do not provide a written response. Others respond with a letter to create a controlled record of the information provided. The concern with an oral-only response is that the auditor will include in its work papers a memorandum of the conversation that does not accurately reflect the lawyer’s response. However, to accommodate an auditor’s need for assurance from the lawyer, an oral dialogue may be more efficient. The Committee discussed an intermediate approach, where after holding an oral conversation with the auditor, the lawyer would send the auditor a memorandum that memorializes in writing the lawyer’s response. This approach may accomplish the accountant’s objectives, while allowing the lawyer to maintain control over the communication.

**Audit Response Letters in Multi-Office International Firms.** The Committee briefly discussed practices for responding to audit letters submitted to international offices of U.S. firms. The question arose in a Committee listserv discussion (see “Summary of Recent Listserv Activity (Audit Responses Committee) in this issue of the Newsletter) of an appropriate way in which a law firm might respond to audit response letters based upon the jurisdiction governing the law firm’s representation of the client. Law firms appear to approach this subject in different ways. Some firms mandate that the billing office for the client subject to the audit response letter draft the response in accordance with local standards. Other firms apply the standards of the jurisdiction that appears to have the greatest connection to the client or the particular matter, based on various factors. Still other firms make available a set of uniform, template responses, which the office receiving the audit letter may further modify before submitting the response.

**Next Meeting.** The Committee’s next meeting will be at the Business Law Section Spring Meeting in San Francisco on Saturday, April 18, 2015, at 10 a.m. PDT.

- Thomas W. White, Chair
  Wilmer Cutler Pickering Hale and Dorr LLP
  thomas.white@wilmerhale.com

**Law and Accounting Committee**

The Law and Accounting Committee met on November 21, 2014. The principal items of discussion are summarized below:

**Presentation by Andres Vinelli.** The Committee was honored to have in attendance Andres Vinelli, Deputy Director and Chief Economist in the Office of Research and Analysis of the Public Company Accounting Oversight Board (the “PCAOB”). At the PCAOB, Mr. Vinelli identifies areas of audit
risk in the audits of exchange listed companies and conducts original research on accounting and auditing topics, in addition to analyzing various issues of interest to the PCAOB. Mr. Vinelli began by discussing the Audit Quality Indicators Project. The PCAOB has reviewed the comment letters received on this topic. As a part of this project, the PCAOB has looked at issues involved in “high” versus “low” quality audits and factors that go into such audits. The PCAOB focuses on the technology, the qualifications of the auditors working on the engagement, and the experience of the professionals used throughout the audit. The PCAOB conceptual release on Audit Quality Indicators should be issued in the first quarter of 2015.

Mr. Vinelli then briefly discussed the Root Cause Analysis Project and the PCOAB’s Standard Setting Agenda.

Presentation by Cullen Walsh and Scott Muir. The Committee was then fortunate to have Cullen Walsh, Assistant Director of the Financial Accounting Standards Board (the “FASB”), and Scott Muir, Practice Fellow with the FASB, join our meeting by telephone. Mr. Walsh is responsible for managing the FASB’s research agenda, including the Revenue Recognition Transition Resource Group Project. Mr. Muir is one of the project leaders on the FASB/IASB Leases Project and on the FASB Revenue Recognition Transition Resource Group Project. Mr. Walsh and Mr. Muir began a spirited discussion on the Revenue Recognition Project, and many Committee members asked questions during this time period. The speakers began with a discussion of the extensive due process involved in reaching the final standard and then discussed the scope of the project. They then described an overview of the new model, with a core principle being to recognize revenue to depict the transfer of promised goods or services to a customer in an amount which reflects the consideration to which the entity expects to be compensated. The speakers then discussed that there will be significant implementation guidance for various accounting issues, including those involving warranties, licenses, rights of return, customer options for additional goods or services, bill and hold arrangements, repurchase arrangements and non-refundable up-front fees. Mr. Muir and Mr. Walsh then discussed the significant disclosure requirements of the new standard. The new standard will be effective for all annual reporting periods beginning after December 15, 2015, with a one-year deferral permitted for non-public entities (although the FASB is considering an implementation deferral of one year for both public and non-public entities). Finally, Mr. Walsh then discussed the Transition Resource Group objectives and the timetable for future meetings of this group.

FASB Update. Randy McClanahan then gave a brief update of current FASB developments. The significant accounting pronouncement issued since the August meeting of this Committee was Accounting Standards Update No. 2014-17, which addresses “pushdown” accounting. Mr. McClanahan reported that this update applied to both public and private companies and provides for the optional election of pushdown accounting for an acquiree once an acquirer obtains control of the acquiree in a business combination.

Next Meeting. The next meeting of the Committee will be held at the Section’s spring Meeting in San Francisco, California, on Saturday, April 18, 2015.

- Randall D. McClanahan, Chair
  Butler Snow LLP
  randy.mcclanahan@butlersnow.com

Securities Law Opinions Subcommittee
Federal Regulation of Securities Committee

The Subcommittee met on November 22, 2014. As a preliminary matter, the Chair noted that the Subcommittee’s draft report “No Registration Opinions (2014 Update)” has now been posted, as a working draft, on the websites of the Federal Regulation of Securities Committee and the Legal Opinions Committee.
For the time being, the plan is to monitor the pending further proposed amendments to Rule 506 (which could, if adopted, raise additional issues for opinion givers similar to those addressed in the draft report) before deciding to finalize and formally publish the report.

The meeting then turned to the question, which has been discussed before, of a possible future project addressing Rule 14e-1 opinions given in connection with debt tender offers. The SEC staff is understood to be currently working on a no-action letter, and possibly other guidance, addressing the substantive legal requirements applicable to these transactions. The sense of the meeting was that this topic should be deferred and reconsidered in light of whatever guidance the staff may produce as a result of those efforts.  

The meeting concluded with a discussion, led by Vice Chair Tom Kim, of a possible future project addressing opinions delivered in respect of resales of securities. A number of useful suggestions were made, including as to relevant prior work done on the topic. The sense of the meeting is that the Subcommittee should pursue this one further.

The next meeting of the Subcommittee will be in San Francisco on April 17, 2015.

- Robert E. Buckholz, Chair
  Sullivan & Cromwell LLP
  buckholzr@sullcrom.com


[Editors’ Note: This summary of listserv activity during the period September-November 2014 among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response letters practice, but rather reflects views of individual members of the Committee on current practice topics. The comments referred to below may be viewed by clicking on the “Listserve” item on the Audit Responses Committee’s web page.]

1. Cross-Border Audit Responses

- Inquiry (Mary Donna Bishop): When we receive an audit letter request from a client in a foreign jurisdiction, whose auditor is also in that jurisdiction, and the request is made in accordance with the audit response standards of that jurisdiction, I consider under what law we represent the client in order to determine under which standards we should respond, rather than responding under the standards of the foreign jurisdiction. For example, if our U.K. lawyers are representing a client in Germany as its U.K. lawyers, advising the client under U.K. law, I respond in accordance with the U.K. standards for audit responses. If we are acting as U.S. counsel on a U.S. matter for an Australian client, I respond in accordance with the ABA standards. Is this position consistent with that which you take?
• **Response (Stan Keller):** This generally is the approach that we follow and that was discussed by a panel at a seminar on dealing with cross-border audit response requests. The first question is which office is the appropriate one to respond to the request, based upon such factors as location of the client, location of the auditor, accounting and auditing standards that apply, location of the relevant work for the client, etc. That office then replies in accordance with the conventions and customary practice applicable to it. Sometimes, more than one office is appropriate to respond (e.g., litigation being handled in different jurisdictions), in which case, each may respond in accordance with its own standards, but with an effort to coordinate the responses to avoid inconsistencies.

2. **“Specialist” Letter**

• **Inquiry (John Newell):** We just received the following inquiry (directly, not through the client) from [an accounting firm] with respect to one of our clients. It is obviously completely outside the treaty, but beyond that any voluntary response would require quite a bit of internal diligence. Has anyone encountered a request like this?

  “Another procedure we would like to perform this year is to ask our specialists whether they or their employers have any direct or indirect financial interests in the Company or transactions outside the normal course of business with the Company.”

• **Response (Stan Keller):** This is undoubtedly triggered by the audit standards on use of the work of specialists found in PCAOB AU 336 (SAS 73) and AICPA AU-C 620 (SAS 122), which require the auditor to evaluate the objectivity of the specialist being relied on. It is misguided in treating a lawyer's response on loss contingencies as relying on a specialist. Rather it is part of the verification procedure with respect to the client's assertions and is governed by SAS 12/AU 337. Moreover, the lawyer is recognized as having professional responsibilities. AU 336, in .02, expressly states that it excludes lawyers providing services in connection with loss contingencies to which 337 applies. Thus, if you choose to reply, a polite reference to the inapplicability of the request as provided in AU 336.02 would seem appropriate.

• **Response (Andrew Demetriou):** This is a very strange request and troubling request. [Accounting firm] has to comply with the independence rules for auditors (and has a policy prohibiting ownership of stock in audit client companies), but there is no similar obligation for counsel. Even if your firm has a policy in place concerning ownership of public securities and fairly robust centralized tracking and approval process to deal with prospective insider trading issues, their language about indirect ownerships could conceivably reach shares held through mutual funds, index funds, investment trusts, etc. I am pretty sure that you and your colleagues have no idea which securities they own indirectly. Further, my experience with law firm policies is that they typically exempt shares held indirectly (by mutual funds and the like) and probably have a de minimis
exception for immaterial holdings in public companies, so the tracking system may well not pick up interests covered by this request. I would just ignore this.

- Follow-up (John Newell): I was part of the group that drafted our communications to clients relating to the compensation adviser independence rules. Although we have very thorough internal procedures with respect to lawyers’ investments, there are indirect interests that might be within the [accounting firm] request that are essentially unknowable with any amount of diligence, even where not exempt from investment policies.

- Thomas W. White, Chair
Wilmer Cutler Pickering Hale and Dorr LLP
thomas.white@wilmerhale.com

### PRACTICE CORNER: LLC SERIES OPINIONS: PART II

This is the second and final part of a two-part note. Part I appeared in *In Our Opinion*, Fall 2014, vol. 14, no. 1 (pages 10-14), and focused on status, power, action, and enforceability opinions, in each case comparing typical formulations for limited liability companies (“LLCs”) with recommended formulations for separate series of assets of LLCs (“Series”). Statute-specific references in this note are to the Delaware Limited Liability Company Act (the “Delaware LLC Act”). As noted in Part I, there are significant differences between an LLC and a Series. Default rules in most LLC statutes may be, and often are, overridden by language in the LLC agreement. When opining on an LLC, it is therefore essential to review the LLC agreement, as well as the LLC’s certificate of formation, in addition to the governing statute. These concerns are even more salient in the case of a Series.

1. The “Admission” Opinion

The following are typical formulations of the “admission” opinion, the first for a Delaware LLC and the second for a Delaware Series of an LLC:

**LLC Formulation:** “Each of the Purchasers has been duly admitted to the LLC as a member of the LLC.”

**Series Formulation:** “Each of the Purchasers has been duly admitted to the LLC as a member of the LLC associated with the Series.”

Recognizing that acquiring a limited liability company interest, e.g., by assignment, bears no fixed correlation to achieving member status, this opinion addresses the independent, though perhaps contemporaneous, step of admission as an LLC member (and, thus, obtaining all rights of a member). As a general matter, only members may exercise membership rights (unless, of course, provision to the contrary is made in the LLC agreement), and only members associated with a given Series have any significant rights with respect to that Series. We use the term “Purchaser” to refer to the person who has acquired an interest in the LLC and is the subject of the opinions addressed in this Part II of the Note. A Purchaser may therefore be either a person acquiring an interest directly

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3 This note is based on the author’s article, “Opining on Limited Liability Company Series,” that first appeared in *The Practical Lawyer* (vol. 60, no. 4, at page 19 (August 2014)).

4 Del. Code Ann. tit. 6, §§ 18-101 to -1109. Unless otherwise indicated, all citations to § 18-___ are to the Delaware LLC Act.
from the LLC or a person acquiring by transfer and assignment an interest in the LLC from an existing holder of an LLC interest.

The diligence to give this opinion may include:

(a) Determining the preconditions to admission established by the applicable LLC statute.

(b) Determining the preconditions to admission as a member and, as appropriate, association as a member with a particular Series established by the applicable LLC agreement (including any series supplement) and, if relevant, the certificate of formation, subscription agreements, and the like.

(c) Confirming compliance with the foregoing insofar as relevant.

2. The “Obligations” Opinion

LLC Formulation: “Under the Delaware LLC Act, the Purchaser has no obligation to make any payments to the LLC in connection with its purchase of LLC interests or contributions to the LLC solely by reason of its ownership of LLC interests or its status as a member of the LLC except in each case as provided in any subscription agreement to which it is a party or the LLC agreement and except for its obligation to repay any funds wrongfully distributed to it.”

Series Formulation: “Under the Delaware LLC Act, the Purchaser has no obligation to make any payments to the LLC in connection with its purchase of LLC interests associated with the Series or contributions to the LLC or the Series solely by reason of its ownership of LLC Interests associated with the Series or its status as a member of the LLC associated with the Series except in each case as provided in any subscription agreement to which it is a party or the LLC agreement (including any series supplement) and except for its obligation to repay any funds wrongfully distributed to it.”

The “obligations” opinion is analogous to the “fully paid and non-assessable” opinion given in the corporate context. While the concept is the same, the phrasing is different: the words “fully paid and non-assessable” generally have no clear meaning in the LLC context. Instead, opinions should be drafted to speak directly to obligations to make payments or contributions. The diligence to give the obligations opinion may include:

(a) Reviewing the applicable LLC statute.

(b) Reviewing the applicable LLC agreement (including any series supplement) and, if relevant, the certificate of formation, subscription agreements, and the like.

(c) Confirming that none of the foregoing give rise to obligations of the type addressed by the opinion. Examples include both general provision for capital calls and specific provision for further contributions in narrowly described circumstances.

3. The “Liability” (Combined With “Obligations”) Opinion

LLC Formulation: “Under the Delaware LLC Act, the Purchaser has no obligation to make any payments to the LLC in connection with its purchase of LLC interests or contributions to the LLC solely by reason of its ownership of LLC interests or its status as a member of the LLC and no personal liability for the debts, obligations and liabilities of the LLC, whether arising in contract, tort or otherwise, solely by reason of being a Purchaser except as provided in any subscription agreement to which it is a party or the LLC agreement and except for its obligation to repay any funds wrongfully distributed to it.”
Series Formulation: “Under the Delaware LLC Act, the Purchaser has no obligation to make any payments to the LLC in connection with its purchase of LLC interests associated with the Series or contributions to the LLC or the Series solely by reason of its ownership of LLC interests associated with the Series or its status as a member of the LLC associated with Series A except insofar as such payments or contributions have already been made, and no personal liability for the debts, obligations and liabilities of the LLC, the Series or any other Series of the LLC, whether arising in contract, tort or otherwise, solely by reason of being a Purchaser or being associated with the Series except in each case as provided in any subscription agreement to which it is a party or the LLC agreement (including any series supplement) and except for its obligation to repay any funds wrongfully distributed to it.”

There is no analogue to the “liability” opinion in the corporate context, and the TriBar Committee has expressed its view that as opinion recipients become more comfortable with the protections afforded by LLC statutes, such opinions for LLCs will cease to be requested or given. The comparative novelty of Series, though, is such that this opinion may persist somewhat longer in the Series context. When given, the opinion generally is combined with the “obligations” opinion discussed at Section 2 above. The “liability” opinion does not address liabilities imposed on controlling persons by state or federal laws, because mere transferee or member status does not give rise to such liability. Similarly, the opinion does not address veil-piercing, alter ego, or similar theories, nor tortious or other wrongful conduct. The diligence to render the liability combined with obligations opinion may include:

(a) Reviewing the applicable LLC statute.
(b) Reviewing the applicable LLC agreement and, if relevant, the certificate of formation, subscription agreements, and the like.
(c) Confirming that none of the foregoing give rise to the specified liabilities on the part of transferees or members, as appropriate.
(d) In the case of a Series opinion, establishing the existence of internal shields between Series, and between each Series and the LLC itself.

LLCs are uniquely creatures of contracts entered into under enabling language in governing statutes. Many of the issues of greatest interest to participants will have been the subject of negotiation and will be governed by language in the LLC agreement. This is equally the case, if not more so, with Series. Series differ from LLCs, and the differences have consequences in the opinion context. Series are established by contract and generally are not persons distinct from the LLCs with which they are associated. Nor can a Series exist independent of the existence of the LLC with which it is associated. Valid existence is not a concept that can be applied to Series in the same way it is applied to LLCs, and good standing—a concept that depends on a government-monitored status—is simply inapposite. The governance of a Series may be identical to, or completely different from, the governance of the LLC with which it is associated. Because Series are established (or their establishment provided for) under an LLC agreement, they are truly creatures of contract, not of statute except in the broadest sense. Series do not issue LLC interests, nor do they have members. Rather, LLCs issue LLC interests. Certain such interests may be associated with a given Series, as may certain members of the LLC. It follows, then, that members are not admitted to a Series, but rather to the LLC (though, perhaps, associated with a Series). Conceptually, the opinion to the effect that a member has “fully paid for” his interest

system upgrades and pay down debt. As part of the transaction, the law firm provided an opinion in typical form for a financing transaction involving a municipal borrower. The opinion was addressed to the City and it stated that it could only be relied upon by the addressee and its successors and assigns. However, it is not unusual in municipal bond transactions for an opinion to be addressed to the borrower/issuer (similar to Exhibit 5 opinions in SEC-filed registration statements), and in such contexts it is clear that the opinion is intended to be relied upon by one or more third parties. That was the case here, with Crews alleging that delivery of the opinion was a condition to the consummation of its transaction with the City. After a change in administration the City disclaimed its obligation and brought an action to declare the financing to be void. Crews brought suit against the law firm based on the opinion.

Although the complaint has counts for both negligent misrepresentation and malpractice, the decision is limited to consideration of the malpractice claims because the motion to dismiss is addressed to those claims. Negligent misrepresentation is the typical basis for claims by opinion recipients against opinion givers. The court in this decision, however, found that under Mississippi law (the law it treated as applicable) malpractice was also a basis for a claim by the recipient against the opinion giver. The court identified the elements of a malpractice claim to be (i) an attorney-client relationship, (ii) negligence by the attorney and (iii) proximate cause of the injury. 2014 WL 6069320 at *2. These last two elements are also required for a negligent misrepresentation claim. See Restatement (Second) Torts § 552(1). The court described an attorney-client relationship as existing when (1) a person makes known its intent for the lawyer to provide it legal services and (2) the lawyer agrees to do so or fails to decline to do so, knowing that the person will rely on the lawyer to provide the services. It then found that the law firm’s providing its opinion to satisfy the condition of the agreement satisfied the requirements for an attorney-client relationship under Mississippi law. The court

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**Recent Developments**

**Federal Court Finds Opinion Giver Can be Liable for Malpractice**

In *Crews & Associates, Inc. v. City of Port Gibson, Mississippi* 2014 WL 6069320 (S.D. Miss. Nov. 13, 2014), a federal district court declined to grant a law firm’s motion to dismiss, finding that the recipient of the law firm’s opinion regarding the enforceability of the obligations of the City of Port Gibson as lessee under a lease purchase agreement adequately pleaded claims for “legal malpractice” as a matter of Mississippi law.

The City entered into a lease purchase agreement with Crews & Associates, Inc. to finance the purchase of equipment, make certain

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cited the Restatement (Third) of Law Governing Lawyers §14 Comment e (2000) but failed to note the differences between duties to a client and to a third-party non-client.

While it is possible that there could be subtle differences between the standard of conduct for a negligent misrepresentation claim and a malpractice claim, the outcome of a claim by a third-party opinion recipient on a faulty opinion is unlikely to be affected by whether the claim is based on negligent misrepresentation or malpractice. It would be unfortunate, however, if the court’s determination that an attorney-client relationship existed between an opinion giver and a third-party opinion recipient is applied more broadly because that relationship implicates other duties owed to a client that are not owed to non-clients. These include duties of loyalty, confidentiality and avoidance of conflicts, as well as application of attorney-client privilege protections. It would have been better if the court had recognized that negligent misrepresentation was the correct venue for the opinion recipient’s claim and malpractice was not.

- Stanley Keller
  Locke Lord LLP
  stanley.keller@lockelord.com
### Chart of Published and Pending Reports

[Editors’ 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 January 31, 2015.]

#### A. Recently Published Reports

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<tr>
<th>Organization</th>
<th>Year</th>
<th>Report Title</th>
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<td>ABA Business Law Section</td>
<td>2007</td>
<td>No Registration Opinions –Securities Law Opinions Subcommittee</td>
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<td>2009</td>
<td>Effect of FIN 48 – Audit Responses Committee</td>
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<td>2009</td>
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<td></td>
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<td></td>
<td>Legal Opinions in SEC Filings (Update) –Securities Law Opinions Subcommittee</td>
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7 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/).

8 This Report is the product of the Committee on Legal Opinions in Real Estate Transactions of the Section of Real Property, Trust and Estate Law, Attorneys’ Opinions Committee of the American College of Real Estate Lawyers, and the Opinions Committee of the American College of Mortgage Attorneys (collectively, the “Real Estate Opinions Committees”).
## Recently Published Reports (continued)

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<td>National Association of Bond Lawyers</td>
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<td>2012</td>
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## B. Pending Reports

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<tr>
<th>Section/Multistate Bar Association</th>
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No-Registration Opinions (Update) – Securities Law Opinions Subcommittee  
Sample Asset Purchase Agreement Opinion – Mergers and Acquisitions Committee |
| California                         | Opinions on Partnerships & LLCs  
Sample Personal Property Security Interest Opinion |
| Real Estate Opinions Committees    | Local Counsel Opinions |
| South Carolina                     | Comprehensive Report |
| Texas                              | Comprehensive Report Update |
| TriBar                             | Limited Partnership Opinions  
Opinions on Clauses Shifting Risk |
| Washington                         | Comprehensive Report |
| Multiple Bar Associations          | Commonly Accepted Opinion Practices |

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9 See note 6.
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@vwillawfirm.com.

NEXT NEWSLETTER

We expect the next Newsletter to be circulated in April 2015. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

10 The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL510000.
Addendum

Working Group on Legal Opinions Foundation

Fall 2014 Legal Opinion Seminar Summaries
## Addendum

Working Group on Legal Opinions Foundation

**Fall 2014 Legal Opinion Seminar Summaries**

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The following summaries have been prepared to provide an overview of the subjects covered at the panel sessions and concurrent breakout discussions held in New York on October 28, 2014. 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 May 11-12, 2015 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:

I. **Opinions on Choice of Law, Choice of Forum, and Enforcement of Judgments and Arbitral Awards in Cross-Border Transactions**

(Summarized by Ettore Santucci)

_Sylvia Chin, White & Case, New York, Co-Chair_
_Don Glazer, Newton, Massachusetts, Co-Chair_
_Ettore Santucci, Goodwin Procter LLP, Boston, Co-Chair_

The following is a summary of the panel discussion on this topic at the seminar.

Opinions on choice of law, choice of forum, and enforcement of judgments and arbitral awards often are given in transactions in which the agreement chooses the law of a country other than the United States as its governing law and therefore do not include an enforceability opinion on the agreement as a whole. Instead they are based on a stated assumption that, under the law of the non-U.S. country whose law has been chosen to govern, the agreement is valid and binding and each of its provisions, including the chosen-law clause, is enforceable under the governing non-U.S. law.

Non-U.S. opinion recipients ordinarily want comfort that key aspects of the agreement, such as provisions on choice of law, forum selection, the recognition and enforcement of foreign judgments, international arbitration and the enforceability of foreign arbitral awards, are effective under U.S. law because of the potential impact of these provisions on how claims to enforce rights against U.S. parties will be resolved (e.g., being confident in one’s ability to litigate breach of a German law contract before a German court as the exclusive forum or being confident that a suit brought by a U.S. party before a U.S. court will be dismissed in favor of binding international arbitration).

*Choice of Law Opinions.* Choice of law opinions on agreements that choose foreign law (“outbound” choice of law) as their governing law are often based on the application of the Restatement Second of Conflict Laws (§ 187), which uses a two-pronged test: (1) whether the chosen law jurisdiction has a sufficient relationship with the parties or the transaction, and (2) whether application of the chosen law would be contrary to a fundamental policy of the jurisdiction whose law would have applied in the absence of a choice-of-law clause and that jurisdiction (the “default” state) has a greater interest in the issues. Few states have statutes addressing outbound choice of law clauses (e.g., Tex. Bus & Comm Code ch. 271); most states apply the Restatement approach.
Applying the second prong of the Restatement test is difficult, as discussed in the recently published TriBar Opinion Committee’s “Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws,” 68 Bus. Law. 1161 (2013), which describes in detail how domestic practice differs: some opinion givers rely on the coverage limitation or customary practice as many understand it, some bar reports (e.g., California) state that the opinion does not cover the second prong of the Restatement test, and some opinion givers prefer to make it clear that they are not covering the second prong and do so in a variety of ways. Cross-border opinions differ from domestic opinions. It is even tougher to apply the second prong of the Restatement test cross-border because: (1) determining which is the default state or country is even more difficult, (2) the opinion giver cannot know how application of the chosen non-U.S. law to a given issue would turn out when the opinion giver knows little or nothing about the chosen law, (3) even if the opinion giver assumes that the covered law state is the default state and is confident that it knows what “covered state fundamental policies” are, it cannot know whether they are implicated by application of non-U.S. law, and (4) a lawyer cannot always determine what covered law state policies are fundamental.

Giving choice-of-law opinions cross-border is both possible and important, but the challenges of covering the second prong of the Restatement test are such that, regardless of how the opinion giver deals with the issue in domestic practice, the pending ABA Report on Cross-Border Opinions of U.S. Counsel concludes that, to help reduce the risk of misunderstanding, the opinion letter should expressly state that the opinion does not cover the fundamental policies of any jurisdiction, including those of the covered law state.

**Forum Selection Opinions.** Opinions on the enforceability of forum selection clauses are also difficult to give. The first issue to be determined by the opinion giver is whether the forum selection clause is mandatory or permissive, an interpretive issue that is not always as simple as it might appear because (1) the language/intent of the parties may be unclear, (2) the norm outside the U.S. (e.g., EU) is that a clause is presumed mandatory unless it is clearly permissive (but the opposite presumption prevails in the U.S.), and (3) which law a court will apply to the determination of the nature of the clause may not be clear. The analysis required when the forum selection clause is mandatory is different because the opinion means that a U.S. court would dismiss the case and send the plaintiff off to the chosen foreign court (so called “ouster”) though it may not know whether the foreign court will be available to resolve the dispute. Nonetheless the opinion is one that non-U.S. parties typically expect, and the opinion can be given so long as the covered law state has adopted the “modern view” that the parties’ choice is entitled to great deference (vs. the “old” view that “the court always knows best”).

Even under the modern view, however, the presumption of validity of an “outbound” forum selection clause can be rebutted (the so-called Bremen exception) when (1) dismissing the suit would be unreasonable or unjust (i.e., the contractual choice would deprive the plaintiff of its day in court), (2) the choice-of-forum clause was the product of fraud or over-reaching by the other party, or (3) letting the case be decided by a foreign court would contravene a strong public policy of the covered law state. Generally, the opinion giver cannot predict whether/how a court in the covered law state would apply the Bremen exception. Accordingly, the possible application of the Bremen exception is not covered by the opinion. While the exception need not be expressly stated, the panelists recommended that the opinion in the cross-border context refer to the possible application of the Bremen exception expressly to help reduce the risk of misunderstanding.

**Recognition and Enforcement of Foreign Judgments.** For opinions on the recognition and enforcement of foreign judgments, most states have adopted some version of the Uniform Foreign-Country Money Judgments Recognition Act (2005) and therefore giving the opinion is essentially a matter of statutory analysis. Opinion givers should be careful to conform the scope of the opinion (and its
International arbitration provisions are most often governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NY Convention”) and the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (the “FAA”). The principal goal of the NY Convention was to keep international disputes out of the national courts of signatory countries if the parties agree to arbitrate. The NY Convention was implemented in Chapter 2 of the FAA (“FAA/2”), which preempts state law. Most of the issues that have made case law at the state level “interesting” on domestic arbitration under Chapter 1 of the FAA do not arise in the international arbitration context under FAA/2, which applies only to arbitration agreements arising out of international contractual transactions. A transaction is not international if it is entirely between U.S. citizens unless it otherwise involves international commerce (e.g., concerns property located outside the United States or a contract to be performed outside the United States, or bears some other reasonable relationship to a foreign country). FAA/2 requires reciprocity: arbitration must be in a country that has signed the NY Convention and many opinion givers include an express assumption to that effect if the agreement is not clear.

U.S. courts have consistently compelled arbitration in cross-border transactions. However, a U.S. court may refuse to enforce an agreement to arbitrate if it finds that it is null and void, inoperative, or incapable of being performed. The opinion giver needs to conclude that five specific FAA/2 requirements are met: (1) a written agreement to arbitrate, (2) the non-U.S. country involved must be a signatory to the NY Convention, (3) the contract involves an international transaction, (4) the relationship among the parties is “commercial” and (5) the subject matter of the transaction is “arbitrable.” While “arbitrability” may seem like a broad concept, in practice U.S. courts have held very few, limited categories of disputes “not arbitrable” under U.S. law. Likewise, the presence of a “commercial” relationship” is unlikely to be an issue in cross-border transactions in which opinions are given.

Finally, the NY Convention and FAA/2 put the state’s enforcement powers behind an international arbitral award that has been properly rendered. The NY Convention and FAA/2 apply only to foreign arbitral awards, which are (1) made outside the U.S. and (2) not considered domestic awards under Chapter 1 of the FAA because they cover international contractual transactions. If arbitration takes place in the United States, even though it is pursuant to the arbitration clause of a cross-border transaction, Chapter 1 of the FAA (instead of Chapter 2) would likely apply. While state judicial decisions on domestic arbitration have been less consistent than decisions on international arbitration, and in some cases have raised doubts as to the enforceability of mandatory arbitration in certain situations, the U.S. Supreme Court applying the FAA has repeatedly affirmed the validity of arbitration clauses.

Under the NY Convention and FAA/2, U.S. courts are required to recognize foreign arbitral awards without re-evaluating the merits of the dispute. The NY Convention and FAA/2 set forth an exclusive (not illustrative) list of seven grounds for refusing recognition and enforcement of a foreign arbitral award. Consistent with U.S. policy favoring international arbitration, U.S. courts generally have declined to refuse enforcement of foreign arbitral awards on the basis of these defenses (including public policy) to avoid disrupting arbitration as an efficient dispute resolution mechanism cross-border. The defenses are: (1) incapacity of parties or invalidity of the arbitration agreement under governing law, (2) the arbitration proceedings lacked proper notice or due process, (3) the arbitrators lacked jurisdiction (e.g., the award relates to dispute not covered by arbitration clause or exceeds arbitrators’ authority), (4) the arbitration failed to comply with procedural requirements (e.g., improper composition of the panel), (5) the award is not binding, was set aside or has been suspended in the non-U.S. country where it was
rendered, (6) the subject matter of the dispute was not arbitrable under U.S. law, or (7) the award is contrary to U.S. public policy. An opinion does not cover the possible applicability of the seven defenses, whether or not the qualification is stated expressly.

2. **What Other Lawyers Should Know About Securities Opinions, Real Estate Opinions, Secured Transactions Opinions and Venture Capital Opinions**

   (Summarized by Richard (“Rick”) N. Frasch)

   *Robert Evans III, Shearman & Sterling LLP, New York - Chair*
   *Richard N. Frasch, San Francisco*
   *Robert E. Gordon, Mayer Brown LLP, Chicago*
   *Erik W. Hepler, Kirkland & Ellis LLP, New York*

   Opinion practice across various substantive law areas (e.g., federal securities, real estate, UCC secured transactions, and venture capital) is often similar in form and substance. Nevertheless, each practice area exhibits distinct variations in approach to particular opinion issues. This program highlighted those variations that opinion givers and recipients should be aware of when giving or receiving opinion letters.

   **Securities Opinions (Robert Evans).** Standard opinion requests in securities transactions generally include: (a) that the securities are duly authorized, validly issued, fully paid and non-assessable; (b) either that no registration is required under the Securities Act of 1933 (typically because the private offering exemption applies) or that a registration statement covering the offering has become effective and that no stop order has been issued; (c) that no qualification is required under the Trust Indenture Act of 1939 for offerings of debt securities; (d) that the issuer is not required to register as an investment company under the Investment Company Act of 1940; and (e) negative assurance on the prospectus/offering circular, typically referred to as 10b-5 letters.

   In the context of opinions on federal securities laws, opinion givers often limit the scope of their opinions in several ways. First, opinion givers often prohibit reproduction or redistribution of the opinion letter by the addressee and prohibit reliance on it by third parties, including any transferee of the securities. Second, qualifications regarding the enforceability of indemnification provisions and unearned interest provisions typically are included when remedies opinions are provided and remedies opinions typically are not given on underwriting agreements in public offerings. Third, securities law opinions in private offerings relying on Rule 506 now include assumptions regarding “bad actor” disqualification under new requirements applicable to Rule 506 offerings and assumptions regarding the procedures used to verify accredited investor status in connection with Rule 506(c) offerings involving general solicitation. Finally, negative assurance letters are generally given only in public offerings and 144A offerings.

   **Real Estate Opinions (Robert Gordon).** A major issue in real estate finance transactions is the allocation of responsibility for the opinions among in-house counsel, outside lead counsel and local counsel. In particular, the presence of local counsel is often associated with real estate financing, more so than with other types of financing transactions, due to the importance of local law issues associated with real estate. The introduction of local counsel adds a layer of complexity that needs to be addressed early in the process to avoid later delays or duplication of work. A joint committee comprised of members of the opinions committees of the ABA Real Property, Trust and Estate Section, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys is currently working on a local counsel opinion report. See also “Local and Non-Lead Counsel Opinion Letters – Priorities of Opinion Issues” in this Addendum.
There are several other areas in which real estate opinion practice may vary from other opinion practice areas. The existence of title insurance policies may reduce the need for legal opinions in areas such as compliance with laws, creation of the lien by the mortgage instrument, no violation opinions with respect to agreements of record, and priority of the lien created against the real estate. Other legal issues that are often addressed differently in real estate finance opinions than in other finance areas include: (a) non-violation of usury laws, (b) choice of law issues (often arising from the use of bifurcated choice of law provisions governing the mortgage lien versus the debt obligation), (c) performance opinions limited to performance at the closing, (d) generic qualification used in connection with remedies opinions due to the complex nature of real estate remedies, and (e) restrictions on who may rely on the opinions, especially in connection with the rating of securitized loans.

_U.C.C. Secured Transactions Opinions (Eric Helper)._ U.C.C. opinion practice may be different from other finance opinions in the following ways:

- **Opinions on creation of security interests.** Such opinions rely heavily on factual assumptions regarding rights in the collateral, value given, and collateral descriptions. These factual matters are often beyond the ability of the opinion giver to confirm directly.

- **Regulation U opinions.** “Reg U” refers to margin regulations promulgated by the Federal Reserve Board to regulate loans secured directly or indirectly by securities deemed to be margin securities. See “Margin Regulations Opinions” in this Addendum.

- **Opinions regarding perfection of security interests.** Typically, borrower’s counsel will limit its opinion to various components of the collateral, covering each separately, such as (a) property for which a security interest can be perfected by a U.C.C. filing; (b) investment securities, providing opinions regarding who is a “protected purchaser”; and (c) opinions regarding control agreements for deposit accounts. Opinions on the priority of security interests are seldom given by counsel for the borrower, except with respect to collateral perfected by possession or control, and then only as to the priority as against other security interests perfected under the U.C.C.

- **Assumptions and qualifications.** Specific forms of assumptions and qualifications may apply regarding: (a) prepayment clauses/penalties/unearned interest issues, (b) usury concerns, and (c) sometimes a generic exception typically limited by a practical realization qualification applicable to remedies opinions.

- **Reasoned Opinions.** Opinions addressing securitized transactions may include reasoned opinions on “true sale” characterizations and “non-consolidation” under bankruptcy laws.

_Venture Capital Opinions (Rick Frasch)._ Venture capital opinions may be different from other securities law opinions due to counsel’s limited involvement in the day-to-day operations of start-up companies, frequent time pressures mandating a quick close, and limited resources to fund transaction costs. As a result, at least five distinguishing characteristics appear in venture capital financing opinions:

- **Delaware corporations.** Many, if not most, start-up companies that seek venture financing are formed in Delaware even if physically located in another state. Consequently, opinion givers are often required to provide opinions under Delaware law as well as under the “local” law of the state in which the start-up company operates. Specific language is often included in the opinion letter that specifies the law covered by the opinion.
• **No registration opinions.** As with securities law opinions discussed earlier, opinions are often given to the effect that “no registration” of the offered securities is required under the Securities Act of 1933 and, sometimes, state securities laws. But venture capital opinions often include broad factual, and arguably legal, assumptions to support the opinions without the need for extensive diligence.

• **Due authorization.** The “duly authorized” opinion regarding the transaction documents is understood to cover only those corporate authorizations that can be provided at or before the date of the opinion letter and does not cover those other authorizations that may be needed to perform future contractual obligations under the transaction documents.

• **Performance opinions.** Other future-oriented opinions, such as “the performance of the transaction documents will not violate any law” or that “all consents have been obtained in connection with the performance of the transaction documents” are often limited to the “sale and issuance of the securities on or before closing date.”

• **Reference to disclosure schedules.** Due to the short time allowed for diligence, venture capital opinions are often qualified by any disclosures contained in the disclosure schedule or schedule of exceptions delivered in connection with the transaction documents.

A form of sample opinion for use in venture capital financing transaction has been prepared by the Opinions Committee of the Business Law Section of the State of California and is scheduled to appear in the Winter 2014/2015 issue of The Business Lawyer (70 Bus. Law. 177).

### CONCURRENT BREAKOUT SESSIONS I:

#### Current Opinion-Related Ethics Issues

The WGLO seminar included three simultaneous discussion sessions on the subject of Current Opinion-Related Ethics Issues. What follows are summaries of those three different sessions with a common theme.

*Donald W. Glazer, Newton, Massachusetts, Chair*
*(Summarized by Susan Cooper Philpot)*

The discussion at this session started with the question of who is the client of a lawyer representing the agent bank in a syndicated loan. Traditionally, lead counsel on the bank side only represents the agent bank, particularly in large syndications. Generally, the other banks are assumed to be represented by their own legal departments, although frequently this assumption is not stated expressly. Generally, the practice of lead counsel representing only the agent bank reflects the way multi-lender loans are conducted: disclosure, legal advice and decision-making largely takes place between the agent bank and lead counsel without the participation of the other lenders, some of which may not be identified until late in the transaction. Session attendees noted that sometimes non-agent banks may express concerns about not being represented by lead counsel in the transaction. In “club deals” involving a small number of lenders, joint representation of more than one lender by lead counsel may be a viable alternative. Whichever path is taken, lead counsel should have a signed engagement letter with the lead bank making clear which lender or lenders lead counsel is representing. A lawyer who labels himself “counsel to the deal” or “counsel to the banks” is at risk of being found by a court to have an attorney-client relationship with its attendant duties not only to the lead bank but also to other banks as well.
The session next contrasted the legal frameworks of a loan syndication and a securities underwriting. Since underwriters need the due diligence defense provided by Section 11 of the Securities Act of 1933, traditionally lead counsel has represented all of the underwriters, not just the lead underwriter. While this representation fits neatly within the legal framework of the securities laws, the dynamics of the typical underwriting can look similar to that of a syndicated loan. Counsel for the underwriters manages the offering largely in consultation with the lead underwriter. Other underwriters are largely passive or may not have been identified at the time that key due diligence, disclosure and legal decisions are made. Securities lawyers treat the non-lead underwriters, by their act of joining the syndicate, as having consented to lead counsel’s consulting with the lead underwriter in their place and as having delegated their decision-making authority to the lead underwriter, a practice generally permissible under the rules of ethics. However, this consent and delegation is not stated expressly in the underwriting documents but rather is understood as a matter of industry practice, thereby giving rise to a risk that if an offering goes badly, one or more non-lead underwriters or a passive co-lead manager might assert that lead counsel has breached its duties to them.

The issue of who is the client also arises in the local counsel arena. Typically, local counsel is engaged by the borrower in a loan syndication and by the issuer of the securities in an underwritten offering of securities. Local counsel’s job in each of those roles is to address the issues under the law of the local jurisdiction that the lenders or underwriters want to be addressed. While the lenders and the underwriters generally understand that local counsel is not representing them, an issue nevertheless exists whether local counsel is “adverse” to any of the parties in the transaction for purposes of the ethics rules on the avoidance of conflicts. Firms that do a substantial amount of local counsel work generally take the position that they are not “adverse” to any lender or underwriter because all parties to the transaction want local issues to be addressed in a proper and professional manner and, therefore, that they are not adverse to the opinion recipient on the matters covered by the opinion.

In each of the above situations, when the role of attorney/client is not made clear to all participants in the transaction, counsel risks being sued for failing to fulfill its duties to an unrepresented party later deemed a “client” and for representing conflicting client interests, whether in the subject transaction or in a subsequent transaction. Clients often do not understand when a lawyer is or is not “adverse,” but malpractice insurers note that any time a lawyer is sued on a matter involving an alleged conflict of interest, defense costs increase dramatically. In addition, each of these situations is exacerbated by a late arriving party to the transaction who has not had the opportunity to participate in the process fully and who may be added too late to be identified by a law firm’s internal processes for avoiding conflicts. Some law firms address possible conflicts by, for example, obtaining advance waivers in their client engagement letters, creating lawyer groups who limit their representation to only one side of the transaction (banks or borrowers, underwriters or issuers), avoiding matters that put the firm in conflict with an entity that may later become a client of one of the firm’s core practices, and generally encouraging parties they are not representing in a transaction to engage their own counsel. Some session attendees noted that the documents for municipal bond transactions traditionally provide for the waiver of conflicts by underwriters buying the bonds. Session attendees also noted that, in some transactions, they inform other parties in writing that they are not representing them. To date, however, express waivers of conflicts and express statements to parties that lead counsel is not representing them in the transaction are unusual. Instead, business lawyers usually rely on the unstated, implicit consent of all parties to the role counsel traditionally plays in loan syndications and securities underwritings.
The discussion at this session opened with consideration of a hypothetical relating to the role of counsel to the agent in a syndicated loan transaction and the adequacy of any agency agreement and other arrangements regarding counsel’s role. First, attention focused on determining who is the client. The consensus, consistent with the hypothetical, was that the agent’s counsel is generally styled as counsel to the agent bank and not as counsel to the “agent and the lenders.” It was noted there may be different customs in particular contexts. For example, in so-called “club deals” (deals in which there are only a few lenders, each with similar commitments and little, if any, broader syndication), counsel may agree to represent each lender. These distinctions were viewed as important. A number of comments raised questions as to whether the conduct of the negotiations and documentation are generally consistent with these denominated distinctions. For example, when representing an agent bank, does counsel ever style itself as counsel to the agent, as distinguished from counsel to the institution that is the agent (the former possibly suggesting a duty to the agent’s principals). In communication with lenders other than the agent does counsel consistently clarify its role – and should it need to? What if counsel discusses (orally or in writing) a point with a lender? Does this create a duty to that lender other than a duty any lawyer might have to any non-client third party? Is it advisable or feasible to have all communication with lenders go through the agent? There appeared to be a consensus this was desirable but perhaps not always feasible.

Consideration was also given to the documentation of counsel’s role, noting in particular references to that role in the credit agreement and in legal opinions. Engagement letters can often be helpful in clarifying roles but often will not be known to syndicate members and may not be very specific. There was a general consensus that the presumed sophistication of the lending parties makes it reasonable to allow each lender to determine if it needs separate counsel and to proceed without one should it so choose. Reference was made to McIntosh County Bank v. Dorsey & Whitney, LLP, 745 N.W.2d 538 (Minn. 2008), in which it was found the agent bank’s counsel did not have an attorney-client relationship with syndicate members. The session did not get into all of the case law that may be relevant on this issue.

In contrast to syndicated lending practice, in the context of securities underwriting counsel is normally styled as counsel “to the underwriters,” some of which underwriters often are not identified until very late in the transaction. Participants explored the distinction between the “primary client” and other syndicate members. Typically there is a “representative of the underwriters” who, by express agreement or market practice, interacts with counsel on behalf of all underwriters. It was noted that the form of the transaction, a securities underwriting versus a loan syndication, has given rise to different market practices and likely also differences in legal responsibilities.

The discussion turned to conflicts of interest with both existing and former clients. Often in an underwriting syndicate, the identity of “lower level” syndicate members may not be known until near closing, thus raising the possibility that counsel to the underwriters may be adverse to late-added underwriters in unrelated matters. Reference was made to the magistrate judge’s decision in Chemical Bank v. Affiliated FM Insurance Co., 1994 WL 141951 (S.D.N.Y. April 20, 1994), to suggest that generally representation of the underwriters in these situations should not conflict with ethics rules so long as the matters are truly unrelated. It was noted that ABA Model Rule 1.7(b) supports a similar, perhaps more flexible, approach.

Finally, the discussion touched on negative assurance letters and the importance of the express statements in the letters as to what counsel is, and is not, confirming. It was noted that this approach works fairly well for underwriters’ counsel.
James A. Smith, Foley Hoag LLP, Boston, Chair
(Summarized by Jennifer Mewaldt)

This session focused on conflict of interest questions that may arise in syndicated loans, public offerings, private equity fund formations and other similar transactions in which it may be challenging to identify who, among the syndicate members or pool of investors, is a lawyer’s client or an adverse party.

The discussion initially centered on whether, in syndicated loan transactions and public offerings, lead counsel for borrowers and issuers consider themselves to be adverse to all members of the lending or underwriting syndicate, or only to the administrative agent or lead underwriter. Participants noted that these types of transactions present unique problems because membership in the syndicate typically fills out only late in the process and institutions that commonly participate in syndicates are sometimes reluctant to grant advance waivers of conflicts.

Those who regularly act as counsel for borrowers and issuers were asked to indicate, by a show of hands, whether in practice they run conflicts on, and obtain requisite waivers from, everyone in the syndicate, or only the administrative agent or lead underwriter. While not unanimous, the majority treat only the administrative agent or lead underwriter as adverse. Participants pointed out that it is impractical to be expected to clear conflicts with respect to last-minute additions to the syndicate. They also noted that, while opinions are typically addressed to all members of the syndicate, it is rare to negotiate either the opinions or the transaction documents with any party other than the administrative agent or lead underwriter. Participants further observed that lenders and underwriters who join syndicates at the eleventh hour do so with full knowledge of who represents the borrower or issuer.

It was noted that the practical problems in treating all members of a syndicate as adverse are particularly severe for local counsel for borrowers and issuers, as local counsel is often brought into a deal only in the waning days or hours of the transaction. Participants expressed the view that local counsel may not be directly adverse to any members of the syndicate, even the administrative agent or lead underwriter, since their involvement in deals is typically limited to rendering opinions and they have a duty to the recipients of those opinions to be accurate and not misleading. A discussion ensued as to whether negotiation of the opinion changes that calculus, and the view expressed was that it should not, particularly where the terms of the deal are not changed as a result of the opinion negotiation.

The participants also talked about whether counsel retained by administrative agents and lead underwriters owe duties to other members of the syndicate. The view of commercial lending lawyers is that they represent only the institution serving as administrative agent, and that the other members of the syndicate are represented by their own in-house or other lawyers. The view of capital markets lawyers is that they represent all of the underwriters, but that the other members of the syndicate, by implication or in the agreement among underwriters, delegate to the lead underwriter the authority to communicate with counsel for the underwriters and make legal decisions in consultation with such counsel on behalf of all of the underwriters. Participants debated whether, despite the view of commercial lending lawyers, counsel for the agent bank could find itself owing some duties to other members of the syndicate, even in transactions where that counsel has tried to make it clear that it is representing only the agent bank, if that counsel renders legal advice to those other members. It was pointed out that conference calls among syndicate members present particularly challenging situations, as it is not always clear whether in-house or other lawyers representing syndicate members are participating in those calls and it is often difficult for counsel for the agent bank not to give legal advice on those calls. A discussion followed about whether a disclaimer in a credit agreement would be sufficient, but no consensus on that issue developed. Disclaimers made at the outset of such conference calls might also be helpful.
While not extensively discussed, participants observed that private equity fund formation can raise conflict of interest issues similar to those presented in syndicated loan transactions and public offerings. Counsel for fund sponsors are frequently called on to provide opinions to investors over multiple closings, so that the knowledge of who the recipients will be is often far removed from the negotiation of the opinion. The question arises as to whether the mere rendering of an opinion to investors results in their being directly adverse to counsel for the fund sponsor. The situation is further complicated if side letters are required by investors, as those side letters are often negotiated by, and covered by separate opinions of, counsel for the sponsor.

One participant pointed out that the ethics rules applicable to lawyers in the area of conflicts of interest have been, by-and-large, written by litigators, and that deal lawyers who do syndicated loan, capital markets and fund formation work should consider becoming more involved in ethics committees to ensure conflict of interest rules make sense for those types of transactions.

PANEL SESSIONS II:

1. Recent Opinion Developments
   (Summarized by John B. Power)

   John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator
   Donald W. Glazer, Newton, Massachusetts
   Stanley Keller, Locke Lord LLP, Boston
   Allen K. Robertson, Robinson, Bradshaw, & Hinson, P.A., Charlotte
   Steven O. Weise, Proskauer Rose LLP, Los Angeles
   Sterling Scott Willis, Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., New Orleans

   The following summarizes the presentations given on this panel:

   1. Reports

   Chart of Recent Published and Pending Reports. John Power drew the audience’s attention to the Chart of Recent Published and Pending Reports as of September 30, 2014 in the program material.¹

   2014 NABL Report. Allen Robertson reported on the August 2014 report of the National Association of Bond Lawyers (“NABL”) on “The 501(c)(3) Opinion in Qualified 501(c)(3) Bond Transactions” (the “501(c)(3) Report”).² This report discusses an opinion in a tax exempt bond financing for a charitable organization (e.g., a nonprofit hospital or an educational institution) on the tax exempt status of the charitable organization. The prevailing practice is for this opinion to be given by counsel for the charitable organization and relied upon by bond counsel, although in some cases the opinion is given by bond counsel alone. The report summarizes how an entity becomes, and maintains its status as, a 501(c)(3) organization, the form of the 501(c)(3) opinion itself (including various formulations of the opinion), and the diligence that may be required to give the opinion. Opinion diligence includes, among other things, determining that the organizational documents set forth the charitable purposes of the organization and have appropriate provisions for distribution of assets on dissolution of the organization,

¹ An updated version of the Chart is reproduced in this issue of the Newsletter under “Legal Opinion Reports — Chart of Published and Pending Reports.”
² The 501(c)(3) Report can be found in the ABA Opinions Committee Legal Opinions Resource Center by clicking on the following link: http://apps.americanbar.org/buslaw/tribar/materials/nabl_201408.pdf.
whether the Internal Revenue Service has recognized and currently recognizes the organization as a 501(c)(3) organization, and whether the organization has operated in furtherance of the exempt purpose for which it was granted its tax exempt status. Special diligence requirements arise for certain kinds of organizations, for example, hospitals and educational institutions.

Allen noted that, because the representation of 501(c)(3) charitable organizations is widely dispersed among lawyers around the country, many lawyers who are not bond practitioners are called upon to give the 501(c)(3) opinion in tax exempt financings for the charitable organizations they represent. NABL’s goal in publishing the 501(c)(3) Report is to provide a resource for opinion givers and bond counsel who rely on such opinions. He also mentioned other opinion reports of the NABL, including the fourth edition of its model bond opinion report published in 2003 and the third edition of its report on the function and professional responsibilities of bond counsel published in 2011.

Reports of the ABA Business Law Section. Stan Keller summarized two reports of the ABA Business Law Section:

- **No Registration Opinions.** The Securities Opinions Subcommittee of the Federal Regulation of Securities Committee has completed a working draft of its “No Registration Opinions (2014 Update)” report, which updates the Subcommittee’s earlier “No Registration Opinions” report, 63 Bus. Law. 187 (2007). The updated report deals with the effect on no registration opinions of the recent changes to the Rule 506 exemption under the Securities Act of 1933. Those changes are the addition of a new “bad actor” disqualification condition for use of Rule 506 and the addition of a new exemption (Rule 506(c)) that permits general solicitation so long as sales are made solely to accredited investors whose status has been verified by reasonable actions. (The existing Rule 506 exemption that prohibits general solicitation but permits up to 35 non-accredited investors is now Rule 506(b)). The report has been posted on the Fed Reg Committee’s website but is not being finalized and published at this time while the SEC’s proposal for additional changes to Rule 506 remains pending.

- **Updating Audit Responses.** The Audit Responses Committee has completed its report on “Updates to Audit Response Letters,” which is scheduled to be published in the May 2015 Business Lawyer. The report provides guidance on the process of updating audit response letters and recognizes that no one form of update letter is in common use.

Pending Real Estate Local Counsel Opinion Report. Scott Willis observed that a pending report by national real estate bar associations on local counsel opinions would likely recommend that responsibility for particular opinions be allocated between local and lead counsel based on each counsel’s competence in the law being covered and its relationship to a party or the collateral, rather than on whether it is “local” or “lead” counsel. The report would likely also address opinion and ethics issues for local counsel in transactions in which local counsel has little or no contact with the client or involvement in the negotiation of the transactional documents. Scott said that a draft of the report is expected to be circulated some time in 2015.

2. Cases

**Court Jurisdiction in Malpractice Action Against Lawyers in Another Jurisdiction.** Steve Weise reported on **CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz**, 2014 WL 4059761 (August 14, 2014).

3 The sponsoring associations are the American Bar Association’s Section of Real Property, Trust and Estate Law, the American College of Real Estate Lawyers, and the American College of Mortgage Attorneys.
in which a New York law firm was sued for malpractice in the federal district court in Kansas by a plaintiff whose officers located in its Kansas office managed the legal services giving rise to the action. Faced with a hostile tender offer, the plaintiff’s general counsel initiated the engagement of the defendant firm to assist in the defense by making unsolicited telephone calls from Kansas to New York. While the representation involved extensive mail, email and telephone traffic between New York and Kansas, the defendant’s lawyers performed their services in New York and neither they nor their firm had any connection with Kansas. The tender offer was successful, and this action, brought by new management, alleged faulty advice to prior management about the terms of agreements with banks engaged to assist in defending the tender offer. On a motion to dismiss or to change the venue to New York, the Kansas court found that it did not have jurisdiction based on all of the facts of the case, including the defendant’s not having solicited the engagement in Kansas or, as the court found, performed any legal services there. The court denied the motion to dismiss but ordered a change of venue to a New York federal district court. Steve suggested that this case may be useful to an opinion giver in an action on a legal opinion given to a recipient in another state but cautioned that the court decisions in this area are inconsistent and fact driven.

Responsibility for Later Developments. Stan Keller described the decision of the Massachusetts Appeals Court (an intermediate appellate court) in Minkina v. Frankl, 86 Mass. App. Ct. 282, 16 N.E.3d 492 (App. Ct. 2014), which, although not an opinion case, deals with several concepts relevant to opinions. The decision addresses the standard for malpractice in a case in which the defendant lawyer advised the plaintiff on the application of an arbitration provision to an employment discrimination claim. Traditionally a legal opinion represents the professional judgment of the opinion giver as to how the highest court in the applicable jurisdiction would decide the matter covered by the opinion. In Minkina, the court ruled that a lawyer is not responsible for failing to anticipate a change in the law subsequently announced by the highest court in the state. The court also discussed whether a different standard applies to lawyers who hold themselves out as expert in an area. It noted that Massachusetts applies the standard of a reasonable lawyer and has not adopted the legal specialist standard, but that even if the higher standard applied, it still would not have been violated in this case.

Enforceability of Usury Savings Clause. Don Glazer reported on NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800 (R.I. 2014), a Rhode Island Supreme Court decision holding that a loan bearing an interest rate in excess of 21% violated the Rhode Island usury statute notwithstanding a usury savings clause. The clause provided that, if the payee received an amount that exceeded the maximum amount permissible under applicable usury laws, the excess amount would be deemed a payment of principal or, to the extent in excess of unpaid principal, refunded to the borrower. The court ruled that the clause violated public policy and was unenforceable and therefore the promissory note was void (with the apparent result that neither its principal nor interest could be collected by the lender). Don said that the enforceability of such savings clauses varies from state to state, and opinion givers should review the applicable law carefully when giving an opinion on a loan that might be usurious if a savings clause were not given effect.

3. Recent Legislation

Consent by a Stockholder of a Delaware Corporation Effective at a Future Time. Don Glazer also discussed an opinion question regarding Delaware General Corporation Law (“DGCL”) § 228(c). That section was recently amended to clarify that a person executing a stockholder consent may provide that it will become effective at a future time within the next 60 days, including a time determined upon the occurrence of an event. (The motivation for the amendment was to permit persons to sign stockholder consents in advance that are to be effective after becoming stockholders to parallel a recent amendment to DGCL § 141(f) that permits persons to sign board of director consents in advance that are to be effective
after becoming directors.) Even though the statute can be read to permit a stockholder to sign a consent and condition its effectiveness on the stockholder’s future receipt of the document the stockholder is approving, some prominent Delaware law firms are unwilling to give a duly authorized opinion on the basis of a stockholder consent if the signing stockholders did not receive the final form of the document being approved as recommended by the board of directors before signing the consent in situations where the DGCL contemplates, as it does for amendments to a certificate of incorporation or for a merger agreement, that the final document as so recommended will be submitted to stockholders before they take action on it. This position can raise practical problems when a private company has many stockholders, some of whom are difficult to reach, and wishes to engage in a transaction promptly after the board has taken action and recommended approval to stockholders. One solution with which at least one leading Delaware law firm is comfortable is to have stockholders grant an agent a power of attorney or proxy to execute a consent for them and for the agent to sign the consent only after receiving the document being approved.4

2. Margin Regulations Opinions
(Summarized by Richard R. Howe)

David Aman, Cleary Gottlieb Steen & Hamilton LLP, New York
Erik Lindauer, Sullivan & Cromwell LLP, New York
Bradley Sabel, Shearman & Sterling LLP, New York

The drafters of the Securities Exchange Act of 1934 believed that excessive margin credit contributed to the 1929 crash. Accordingly, in Section 7 of that Act they authorized the Board of Governors of the Federal Reserve System to prescribe rules and regulations with respect to the amount of credit that may be extended on a security. The Federal Reserve Board has adopted Regulations T, U and X under this authority. Regulation T applies to broker-dealers, Regulation U to banks and other lenders, and Regulation X to U.S. borrowers. Under Section 29 of the Securities Exchange Act, a contract made in violation of the Exchange Act or a rule or regulation thereunder (such as the margin regulations) is void or voidable.

Although both lenders and borrowers are impacted, opinions on margin regulations are most commonly requested from borrower’s counsel. The margin regulations require borrowers to disclose the purpose of loans that are secured directly or indirectly by margin stock and have the effect of limiting the amount of credit that can be made available for that purpose where there is direct or indirect security. The TriBar report on Third-Party “Closing” Opinions takes the position that opinions dealing with margin regulation compliance must be express and should not be implied from the fact that an opinion is given that a particular agreement is valid and binding, nor should it be implied from a broad “no violation of law” opinion.5

There are two common approaches to address margin regulation compliance when opinions are requested, both addressed in connection with a “no violation of law” opinion. One approach is to “add back” the margin regulations to the normal recital of laws that are covered in the general no violation of law opinion. The second approach is to refer expressly to the margin regulations in the no violation opinion itself.

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4 See also Tim Hoxie’s note, “DCGL § 228: Order of Actions Still Important in Delaware Despite Recent Changes to Rules for Written Consents” in the Fall 2014 (vol. 14, no. 1) issue of the Newsletter, at 18.

Any margin rule compliance opinion is necessarily highly fact dependent, based among other things on (i) the purpose for which the loan proceeds are to be used, and (ii) whether or not the loan is secured directly or indirectly by margin stock. The opinion giver may rely on representations in the credit agreement or factual certificates. When a loan is directly or indirectly secured by margin stock, Regulation U requires the borrower to complete and sign the face of a Form U-1 or G-3 on which the borrower certifies to the amount and purpose of the loan. If the credit is for the purpose of purchasing or carrying margin stock, the lender is obligated to identify the collateral and its loan value on the reverse of the form and maintain the form in its loan file. A false statement on this form is a federal offense, so reliance on it by opinion givers is appropriate.

Regulation U prohibits lenders from extending credit for the purpose of purchasing or carrying “margin stock” if the credit is secured directly or indirectly by margin stock and the credit exceeds the loan value of the assets directly or indirectly securing the credit.

An “extension of credit” includes not only loans but also repurchase agreements, sales of securities with delayed delivery or payment, and purchases of a bond or a note (except in a public offering). Other situations, including those involving more complex financial products, may also involve an extension of credit, such as a deep-in-the-money option. It was noted that lenders and borrowers customarily do not seek or obtain third-party legal advice on margin issues associated with these more complex structures, relying instead only on advice from their own counsel.

“Margin stock” under Regulation U is defined to include equity securities traded on a U.S. securities exchange, foreign stock traded on a U.S. exchange or which has ADRs traded on a U.S. exchange, debt securities convertible or exchangeable into margin stock or issued with warrants or rights to purchase margin stock, such warrants or rights, and mutual fund shares (except money market funds and certain mutual funds that invest in U.S. government securities). “Restricted” stock of the same class as other margin stock, even if it cannot be sold without registration under the Securities Act of 1933, is nevertheless margin stock. But shares of public companies quoted in the pink sheets, as well as shares of private companies (including shares of wholly-owned subsidiaries) are not included as margin stock. Since 1974, the loan value of margin stock has been 50% of its market value.

The issue of whether a particular loan constitutes “purpose credit” or is secured directly or indirectly by margin stock is not always immediately obvious or clear. While opinion givers may rely on Forms U-1 and G-3, care should be exercised to consider, for example, arrangements that amount to “indirect” security under interpretations by the Federal Reserve Board. For example, indirect security may exist if more than 25% of the assets covered by a negative pledge clause consist of margin stock. The absence of indirect security may be confirmed in appropriate circumstances by obtaining a specific representation regarding the mix of assets subject to the loan covenants from the borrower in the loan agreement or in an accompanying certificate. An unsecured loan to a company whose assets consist primarily of margin stock would generally be considered to be indirectly secured by that margin stock. Loans to a shell company that issues debt securities or borrows from banks to finance a tender offer for a public company may also be deemed to be borrowings indirectly secured by the target stock, although specific interpretive guidance from the Federal Reserve staff may be available in some circumstances to rebut any presumption of indirect security. In addition, loans to investment companies that regularly invest in margin stock and more than 25% of whose assets are margin stock are presumed to be both purpose credit and to be indirectly secured by margin stock.

Loans by a broker-dealer are generally subject to different margin requirements reflected in Regulation T. When giving an opinion regarding a loan made by banks or non-bank Regulation U lenders that includes a no violation of Regulation T opinion, opinion givers assume (expressly or implicitly) that a loan initially made by banks or other lenders will not subsequently be assigned to a broker-dealer.
However, opinion givers in these types of loan transactions are often not expected to address Regulation T.

**CONCURRENT BREAKOUT SESSIONS II:**

1. **ABA Cross-Border Opinion Report – What It Means For Your Practice**  
(Summarized by David Brittenham)

   *J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York, Co-Chair*  
   *Noël J. Para, Alston & Bird LLP, New York, Co-Chair*  
   *Elizabeth van Schilfgaarde, NautaDutilh, New York, Co-Chair*

   This session focused on a discussion of the pending ABA Cross-Border Opinions of U.S. Counsel Report and its implications for the practices of the session participants, with the goal of gaining insights on the participants’ international transactional practices, their opinion practices in that context, and how the Report will be useful to participants.

   It was noted that, even for mid-sized U.S. firms, transactional work increasingly has an international component. The area is highly complex and the traps for the unwary are fairly dramatic. Prior to this Report, there has been relatively little literature to guide practitioners.

   The session largely focused on assessing outbound opinion practice and considering questions and scenarios raised by participants. Many participants give cross-border opinions, defined as opinions involving agreements governed by non-U.S. law. It was noted that non-U.S. lawyers sometimes ask for opinions on enforceability under U.S. law of agreements governed by non-U.S. law, and that the request is generally resolved by giving an opinion on the validity of the choice of non-U.S. law to govern the relevant agreements, which also might include an opinion on recognition of foreign judgments.

   One participant noted that some U.S. lawyers ask for the reciprocal opinion – that local non-U.S. counsel give an opinion that, if the local jurisdiction were to apply its own law instead of the law chosen in the agreement, the agreement would be enforceable. Some discussion ensued about whether such an opinion could be given, and if given, the extent to which it would have any value.

   The discussion then turned to questions raised by various participants relating to transactions involving issues governed by multiple legal regimes. The first question involved opinion practice where a single law firm has offices that can each cover one of the multiple legal regimes. Participants generally agreed that would not change their firm’s otherwise usual practice of delivering separate opinions on each applicable set of laws that take customary assumptions with respect to other applicable laws not covered by the opinion.

   A second question involved financings with agreements governed by different laws – for example, a New York law guarantee of an English law loan. Participants felt that it would be appropriate for an opinion on the enforceability of the guarantee under New York law to include the omnibus assumption with respect to due authorization, execution, delivery and enforceability of the loan.⁶

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⁶ As stated in the Report, the “Omnibus Cross-Border Assumption” assumes “that each provision of the agreement (including the governing law clause) is valid, binding and enforceable under the Chosen Law [the governing law of the agreement, e.g., the law of England], taking into account not only substantive provisions of the law of the non-U.S. jurisdiction of the Chosen Law…, but also the conflict-of-laws principles of the Chosen Law.” Cross-Border Closing Opinions of U.S. Counsel at 7 (draft of August 26, 2014).
A third question involved corporate authorization opinions on agreements governed by non-U.S. laws, and the extent to which an opinion giver should be concerned about the degree to which the directors and officers understand the substance of the agreement. Participants generally were of the view that as a matter of corporate authorization a general understanding of the transaction is sufficient regardless of which law governs the agreement or the language in which it is written. Participants noted that, if an agreement is in a language other than English, their practice is to require an English translation and to assume for opinion purposes that the English translation is controlling. One participant posed the question of whether, if a director simply signs a written consent, that action would still be valid even if the director has no understanding of the transaction, noting that the director might be breaching his fiduciary duty but that breach would not necessarily void the action.

Participants generally agreed that the Report would be very useful in their practices.

2. **Local and Non-Lead Counsel Opinion Letters - Priorities of Opinion Issues**
(Summarized by Kenneth P. (“Pete”) Ezell, Jr.)

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

This breakout session was a continuation of discussions that began at the Spring 2013 WGLO seminar and continued at a Concurrent Dinner session at the Fall 2013 WGLO seminar and a Concurrent Session at the Spring 2014 WGLO seminar. The focus of these sessions has been on the special issues faced by lawyers serving as "local counsel" and issuing third-party legal opinions in that capacity. This session focused on the topics that might be addressed in a report on local counsel opinion issues and on next steps to be taken to move forward on such a project.

*Real Estate Local Counsel Opinion Report.* The session began with a report on the status of the local counsel opinion report that is being prepared by a joint committee composed of members of the opinion committees of the ABA Real Property, Trust and Estate Section, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys. There was a general consensus that the WGLO working group considering a local counsel opinion report should coordinate its efforts with the joint real estate committee so that, wherever possible, the work product of the two groups is not inconsistent.

*Form of the Report.* The participants generally agreed that local counsel practitioners would be best served by a local counsel opinion report that sets out relevant and useful principles about local counsel opinion practice in a format similar to that used in the ABA Business Law Section's report on *Closing Opinions of Inside Counsel*, 58 Bus. Law. 1127 (2003). Further, it was generally agreed that any such local counsel opinion report would probably not include an illustrative form of local counsel opinion letter as an attachment, due to the differences in opinion practice among lawyers in different jurisdictions.

*Special versus Local Counsel.* There was an extensive discussion about the differences between local counsel (which is largely based on a geographic distinction) and "special" counsel (who provide advice and opinions on specialized areas of law). The participants in this breakout session generally agreed that "special" counsel opinions do not generally follow a common scheme and are often reasoned opinions. There was a general consensus that this report should focus primarily on what are traditionally

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7 See “Local Counsel – Should We Have Our Own Rulebook?” in the WGLO Addendum to the Winter 2013 (vol. 13, no. 2) issue of the Newsletter at A-3; “Local Counsel – It’s Time for Our Own Report” in the WGLO Addendum to the Summer 2014 issue of the Newsletter (vol. 13, no. 4) at A-14.
considered "local counsel” issues. It was further generally agreed that this report could address "special” counsel opinions through distinguishing references in one or more footnotes in the report.

Opinions Typically Rendered by Local Counsel. The materials for this breakout session included an extensive outline of opinion topics that might be considered for inclusion in a report on issues particular to local counsel opinion letters. These topics include types of transactions customarily involving local counsel opinions, opinions often requested of local counsel, opinions not typically requested of local counsel, assumptions often seen in opinion letters rendered by local counsel, and issues relating to who should be permitted to rely on a local counsel opinion.

Next Steps. There was a general consensus that the next step is to organize a steering committee and working group for this project which, taking into consideration the feedback received during this breakout session, should begin the process of drafting a report on the topic of local counsel opinion letters for consideration at future WGLO sessions.

3. **Opinion Recipients — Priorities of Opinion Issues**

   (Summarized by Sharon A. Kroupa)

   Dina Moskowitz, Standard & Poor’s Rating Services, New York, Co-Chair
   Read H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair

   The goal of this session, which was a continuation of prior sessions focused on the concerns of opinion recipients, was to identify three top opinion issues that opinion givers are currently having with opinion recipients in an effort to resolve at least those three issues. The session chairs intend to approach a cross section of opinion recipients with respect to these issues in the context of both private and public (capital markets) financings. To the extent that the chairs are successful in reaching a consensus with opinion recipients with respect to the top three recurring opinion issues, they intend to continue working through other identified opinion issues. The following three opinion issues were identified for purposes of the initial discussion with opinion recipients:

   **Good and Valid Title in Secondary Sales of Stock.** This opinion request is generally for an opinion that the seller of stock in a secondary sale is conveying good and/or marketable title to the underwriter, an opinion request that makes little sense in the context of corporate statutes with respect to the issuance and transfer of stock. Participants at the session confirmed that investment banks still include this opinion request in the form of opinion attached to an underwriting agreement, but the group viewed it as a trap for the unwary, particularly since the opinion request is uniformly withdrawn when challenged. The group acknowledged that an opinion as to the protected purchaser status under Article 8 of the UCC, with appropriate assumptions, is a reasonable opinion to request and receive in connection with secondary sales of stock.

   **No Conflicts with Agreements.** The second opinion for which there was broad consensus in terms of approaching opinion recipients was the broad “no conflicts with agreements” opinion request. The group discussed and agreed that it is customary and accepted practice to limit the opinion to a specific universe of agreements, whether by referencing agreements filed as exhibits to the company’s SEC filings or by identifying particular agreements on a schedule attached to the opinion.

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8 See “The Recipient Speaks” in the WGLO Addendum to the Summer 2013 (vol. 12, no. 4) issue of the Newsletter at A-1; “Discussion with Recipients About Third-Party Closing Opinions II – Private Financing Opinions” in the WGLO Addendum to the Winter 2013 (vol. 13, no. 2) issue of the Newsletter at A-10; and “Discussion with Recipients About Third-Party Closing Opinions III – Capital Market Opinions” in the WGLO Addendum to the Summer 2014 (vol. 13, no. 4) issue of the Newsletter at A-3.
Opinions Not Limited to the Transaction (i.e. General “Status” Opinions). These opinion requests pertain to the general status of the company with respect to matters which are outside the particular transaction giving rise to the opinion, including whether the company is (i) in breach of its organizational documents, (ii) in violation of any law pertaining to the conduct of its business or (iii) subject to any litigation that could impact the company or its business. Participants agreed that requests for factual confirmations as to general status not limited to the subject transaction are not appropriate and such fact-based opinions should be excluded. The group acknowledged the validity of the opinion that the execution, delivery and performance of the transaction documents do not violate governing documents or law, but also noted that the “no violation of laws” opinion has become less meaningful due to the well-understood limitation, sometimes also expressly included in opinions, to laws generally recognized to be applicable to the parties and the transaction. To the extent that an opinion giver is requested to opine that a particular transaction does not violate any court orders, participants agreed that the opinion giver is entitled to limit the opinion to scheduled court orders. In that instance the opinion giver is able to provide a legal conclusion based on a specified list of orders.

Having identified three opinions to present for discussion, the group discussed whether it made sense to identify particular hot button issues from the recipients’ perspective, including those discussed in prior WGLO sessions, in order to establish whether there might be grounds for a “give and take” discussion. If the chairs are able to communicate a consensus position embraced by the WGLO with respect to an issue of particular concern to the recipient community, recipients may be more inclined to reciprocate by eliminating problematic opinion requests, such as those identified earlier. It was suggested that the knowledge qualifier was one of those hot button issues for recipients. The group discussed a potential middle ground which would allow the opinion preparers the discretion to exercise their professional judgment as to whom to consult within the “knowledge group” rather than identifying a particular group of attorneys with respect to work performed for the client within a particular time frame. There was agreement that the narrower the opinion, the easier it is to broaden the knowledge group.

Discussion ensued as to whether there might be common qualifications upon which there is general consensus which also could be proposed to opinion recipients for confirmation as to general acceptability. The chairs agreed to present a list of common qualifications when they meet with opinion recipients to confirm that the qualifications do not raise issues for them.

A number of other opinions were discussed to determine whether broad consensus existed which could be communicated to opinion recipients over time. The group discussed opinions regarding economic remedies that turn on reasonableness, including problems with make-whole premiums that may become payable in an accelerated or mandatory prepayment context. The group ultimately determined that trying to reach a consensus with respect to the reasonableness or enforceability of a make-whole premium is an issue upon which there is not uniform consensus and that certain opinion recipients, including insurance companies, still request this opinion on a regular basis.

Discussion ensued regarding the incorporation of state bar reports or an express statement regarding “customary practice” into the opinion. The group acknowledged that incorporation of the longer state bar reports is not likely to be acceptable but that an opinion recipient may be more amenable to the incorporation of the Legal Opinion Principles, 53 Bus. Law. 831 (1998).

The group also discussed the scope of the so-called no litigation “opinion” (now commonly referred to as the no litigation “confirmation”) in the context of the transaction and the frequency with which the confirmation is requested and delivered. A significant majority of the opinion reports still address the no litigation confirmation in one form or another. Discussion ensued regarding the role of legal counsel in performing this aspect of the diligence process, which remains important for lenders. The group discussed the alternative of limiting the confirmation to the firm’s internal litigation docket and
how counsel can assist the client in organizing the process by which any relevant claims or proceedings are analyzed with respect to the representations and warranties provided by the client in the operative transaction documents.

Discussion ensued with respect to whether assignability provisions have become sufficiently standardized such that they might be presented to opinion recipients for confirmation as well. The group acknowledged that the Wachovia limitation (providing that reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of the assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time) has become a customarily accepted provision. However, it was noted that there may be other acceptable enhancements to the original Wachovia provision (such as the Wachovia “expanded” provision) and that the chairs should hold off on approaching recipients with a more limited provision so as not to be precluded from presenting the “expanded” formulation at a later time. 9

The group discussed the appropriate form of opinion covering an increase in a credit facility (i.e. a full opinion covering all issues originally covered or a truncated opinion). One opinion recipient indicated that he generally requests the full range of opinions in that instance to make it clear that the original recipients are entitled to rely as to the increased proceeds under the credit facility as well. There was not uniform consensus within the group as to the circumstances when a truncated opinion might be acceptable.

9 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:

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.

See “Assignability Issues in Third-Party Opinions” in the WGLO Addendum to the Summer 2012 (vol. 11, no. 4) issue of the Newsletter at A-7.

In closing, the chairs discussed the universe of opinion recipients to be contacted by the chairs with regard to the top three opinion issues and requested that participants provide the names of specific individuals, including in-house counsel at commercial and investment banks, insurance companies and rating agencies. The chairs are hopeful that, given an opportunity for discussion, they can help to sensitize opinion recipients to the issues facing opinion givers while also offering compromise with respect to issues of particular importance to the recipients.