CONTENTS

From the Chair .................................................................................................................................................. 1

Future Meetings .................................................................................................................................................. 3

Former Editor Martin Brinkley Chosen as 14th Dean of the
University of North Carolina at Chapel Hill School of Law .......... 4

Business Law Section 2015 Spring Meeting .......................................................... 5
  Audit Responses Committee ................................................................................................. 5

Summary of Recent Listserv Activity
December 2014 – March 2015 (Audit Responses Committee) ............ 6

Recent Developments ................................................................................................................................. 8
  Subcommittee on Securities Law Opinions, Committee on Federal
Regulation of Securities, Completes Its Update of “No Registration
Opinions” ..................................................................................................................................................... 8
  California Court of Appeal Rules That Enforcement of Out-of-State
Forum Selection and Related Choice-of-Law Clauses in Employment
Agreement Violate California’s Public Policy; Implications for Forum
Selection Clauses and Predispute Jury Trial Waivers in Commercial
Agreements Governed by Out-of-State Law ................................................................. 9

Notes from the Listserv ............................................................................................................................... 12
  The Corporate Action Opinion
  (Due Authorization, Execution and Delivery) ................................................................. 12
  Other Listserv Dialogues ................................................................................................................. 14

Legal Opinion Reports ................................................................................................................................. 14
  South Carolina Third-Party Legal Opinion Report ......................................................... 14
  Chart of Published and Pending Reports .................................................................................. 17

Membership ...................................................................................................................................................... 20

Next Newsletter ............................................................................................................................................... 20

Addendum, WGLO 2015 Spring Seminar ................................................................. A-1

© 2015 American Bar Association
All Rights Reserved
FROM THE CHAIR

I am happy to forward to you the Summer 2015 issue of “In Our Opinion.” As in the past, we have to thank our editors, Jim Fotenos and Susan Cooper Philpot, for their tireless work. And of course this edition of the newsletter includes the very informative semi-annual addendum summarizing the recently-held Spring seminar of the Working Group on Legal Opinions Foundation.

We are pleased to include in this issue a tribute to Martin H. Brinkley, who edited the newsletter from 2006 to mid-2010. Proof that there is life after the newsletter, Martin has been appointed the 14th Dean of the School of Law of the University of North Carolina at Chapel Hill. An honor, yes, but also an opportunity to share with and educate the next generation of lawyers (and members of the Legal Opinions Committee). Congratulations, Martin!

This issue notes the completion of a new report on legal opinion practice in South Carolina. We are pleased to have a summary of the background to the report prepared for us by Jennifer Blumenthal, who was involved in the preparation of the South Carolina report. Jennifer’s summary notes that the report articulates customary practice as understood in South Carolina, and as such is another state bar report that helps local practitioners provide opinions both consonant with local requirements and national practice. It is helpful to the development of a national opinion practice when state bar organizations prepare opinion reports that describe how lawyers in a state can provide opinions under that state’s laws that can be understood by recipients in other states because they are prepared in accordance with customary practice. As Jennifer notes, the South Carolina report is available online through the links cited in her summary. (Yes, you have to read the summary.)

This issue also includes a discussion of a recent California Court of Appeal decision, Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141, 2015 WL 3407191 (May 28, 2015). Verdugo addresses forum selection clauses; the Verdugo court declined to enforce such a clause because it believed that to do so could lead to a substantive result contrary to a fundamental California public policy. One can debate whether the California court’s skepticism is appropriate about the approach that its sister state court (Texas) might take, or whether the policies the California court sought to protect were sufficiently fundamental as to merit the refusal to enforce the forum selection clause, but the case nonetheless is a reminder that choice of law and forum selection clauses present similar issues and that, in cases where a court might decline to enforce a choice of law clause it may well also not enforce a forum selection clause choosing a different forum. Jim Fotenos provides a cogent discussion of the case, as well as a discussion of how the qualification some now generally include in choice of law opinions — that the opinion does not mean that a clause will be enforced in the face of a contrary fundamental policy of a state whose law would otherwise apply — can also be understood to provide the same limitation on opinions relating to forum selection clauses.

In the last issue I noted the tremendous enthusiasm that Committee members showed at the Spring Meeting in San Francisco. Who would have thought legal opinion practice could be so captivating. This spirit of participation carried over during the past quarter to our Listserv, where I was pleased to see several spirited discussions take place. Jim has summarized them for us in this issue.

I hope that we can continue the same level of enthusiasm we saw in San Francisco when we meet in September in Chicago. By now most of you know that our Section’s Annual Meeting will take place from September 17 – 19 at the Hyatt Regency in Chicago. Our Committee will meet on Saturday morning, September 19. I will communicate with you before then on our agenda, but I hope to see many of you there.

We are sponsoring at least two programs in Chicago. One program (co-sponsored with the Securitization and Structured Finance Committee) will look at the opinion implications
of recent developments in the financial markets, including the Volker Rule and recent cases under the Trust Indenture Act of 1939 (yes, one of those “other” securities acts). The second program (co-sponsored with the Commercial Finance Committee) will look at issues facing finance lawyers giving opinions on secured transactions, as well as true sale and nonconsolidation opinions.

In addition to our Committee meeting and programs in Chicago, we will have a meeting of the survey subcommittee. As many of you know, developing meaningful empirical data about opinion practices is difficult, but some of what we learn is of great interest. Putting together the survey is a huge undertaking, and though it remains several years out, we have begun now. Interested members can attend the subcommittee meeting (which, given its 7:30 a.m. start time on Saturday, will separate the dedicated from the others).

I hope all of you have found some time for family and friends over the course of the summer. Please enjoy what remains of it, and I hope to see you in Chicago.

- Timothy Hoxie, Chair
  Jones Day
tghoxie@jonesday.com
What follows are the presently scheduled times of meetings and programs of the Annual Meeting 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.

Legal Opinions Committee

Friday, September 18, 2015

10:30 a.m. – 12:30 p.m.

Program: “Impact of Financial Markets Developments on Opinion Practice; Current Issues and Approaches”
2:30 p.m. – 4:30 p.m.

Reception: 5:30 p.m. – 6:30 p.m.

Saturday, September 19, 2015

Subcommittee Meeting
(Survey of Opinion Practices)
7:30 a.m. – 8:30 a.m.

Committee Meeting:
9:30 a.m. – 11:00 a.m.

Professional Responsibility Committee

Friday, September 18, 2015

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

Program: “Professionalism Redux”
2:30 p.m. – 4:30 p.m.

Saturday, September 19, 2015

Program: “Ethics Issues in Bankruptcy”
10:30 a.m. – 12:30 p.m.

Securities Law Opinions Subcommittee

Friday, September 18, 2015

Committee Meeting:
4:30 p.m. – 5:30 p.m.

Law and Accounting Committee

Saturday, September 19, 2015

Committee Meeting:
8:00 a.m. – 9:30 a.m.

Audit Responses Committee

Saturday, September 19, 2015

Committee Meeting:
11:00 a.m. – 12:00 p.m.
We are delighted to report that former editor Martin H. Brinkley has been chosen to be the 14th Dean of the School of Law of the University of North Carolina at Chapel Hill. Martin served as the sole or co-editor of the newsletter from 2006 through the summer of 2010, and was instrumental in the development of the newsletter as the source for current developments and discussion of legal opinion practice. Martin left the masthead of the newsletter as co-editor to serve as President of the North Carolina Bar Association (2011-2012), the youngest occupant of that position in more than fifty years. Martin, a partner in the law firm of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., Raleigh, North Carolina, will remain associated as Of Counsel to Smith Anderson.

A native of Raleigh, Martin is a 1987 Phi Beta Kappa and summa cum laude graduate of Harvard University. He received his law degree from UNC – Chapel Hill in 1992, where he was executive articles editor of the North Carolina Law Review. After law school, Martin served as a law clerk to Chief Judge Sam Ervin III of the United States Court of Appeals for the Fourth Circuit. From 1996-2000, Martin returned to UNC School of Law as an adjunct professor. Martin is a recipient of the Bar Association’s Citizen Lawyer Award, UNC School of Law’s Pro Bono Alumnus of the Year Award, and other awards recognizing his pro bono service to individuals and charitable institutions.

Founded in 1845, UNC School of Law boasts an active network of 11,000 living alumni, more than half of whom live and work in North Carolina, including governors, judges, U.S. senators, members of congress, private practitioners, public interest lawyers and business leaders. The University of North Carolina at Chapel Hill is the nation’s first public university.

Martin was a deft editor of the newsletter. He could tackle complex (and, at times, verbose) articles and turn them quickly into more readable and organized products. During his tenure as editor, he shouldered the primary responsibility for editing the summaries of the
seminars held at the semi-annual meetings of the Working Group on Legal Opinions. Martin has been missed at the Newsletter but no one can doubt that he was enticed away from us for even more demanding challenges.

We congratulate our former editor on his appointment as Dean of the UNC School of Law!

- The Editors

BUSINESS LAW SECTION
2015 SPRING MEETING

The Business Law Section held its Spring Meeting in San Francisco on April 16-18, 2015. In the Spring 2015 issue of the Newsletter there appeared summaries of the meetings of the Legal Opinions Committee, Law and Accounting Committee, and Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee. There follows a summary of the meeting of the Audit Responses Committee held at the Spring Meeting.

Audit Responses Committee

The Committee met on April 18, 2015. The principal discussion points are summarized below.

Electronic Audit Response Platform. Most of the meeting was dedicated to a presentation by Brian Fox and Payton Baran of Confirmation.com about their new electronic “legal confirmation” platform. Confirmation.com is a service provider that currently operates an electronic platform for the audit confirmation process, which is the process for requesting customers, vendors and financial institutions to confirm information in the company’s financial records regarding receivables, payables, assets and liabilities. Many accounting firms use this service to streamline the confirmation process and enhance anti-fraud protections.

Confirmation.com has now developed an electronic system for “legal confirmations.” Accounting firms that subscribe to the service will prepare request letters, get client authorization and transmit the requests to law firms using an electronic platform. The law firm will access the request online and upload the response, which will then be transmitted back to the accounting firm. A major advantage to accounting firms and law firms is that the platform can provide a single master list of law firms to which requests can be transmitted and a direct conduit to the right person at each firm to receive and handle audit requests. This would help mitigate the problem of an audit letter not being addressed to the right person at the firm. The accounting firms pay for the service, which is free to law firms.

Confirmation.com has a pilot program under way and expects to roll the program out more broadly this summer.

The Committee engaged in a robust discussion of the Confirmation.com platform. Among other comments, Committee members noted that law firms have a variety of practices and procedures for responding to audit inquiry letters and indicated that the program would have to be flexible enough to accommodate each firm’s practices and procedures. Messrs. Fox and Baran agreed, noting that the program does not attempt to dictate the form of response from the law firm or the internal process that the firm follows to prepare its response. There were also questions about protection of confidentiality. The representatives noted that Confirmation.com only provides the electronic platform and did not have any access to the information that is transmitted from the law firm to the accounting firm. Confirmation.com also complies with

2 The URL is http://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL510000/full-issue-201505.authcheckdam.pdf.
industry standards for protection of electronic information.

The Committee members generally indicated interest in the project and look forward to seeing how the platform works in practice.

**Recent Listserve Activity.** The Chair distributed a summary of discussions on the Committee’s Listserve during the period December 2014 to March 2015. For a summary of this activity, see “Summary of Recent Listserve Activity (Audit Responses Committee)” below.

**Update Project:** The Committee’s Statement on Updates to Audit Response Letters has been finalized and will be published in the Spring 2015 issue of *The Business Lawyer.* [70 Bus. Law. 489.] On July 9, 2015, AICPA added the Committee’s Update Statement as an exhibit to its current auditing standard for inquiries to lawyers, and thus the Statement is now part of auditing standards for private company audits. The standards do not apply to audits in public companies, which are subject to PCAOB standards.

**Program:** The Committee presented an informative CLE program on “In-House Counsel: What Should They Tell Auditors and How?” on the afternoon of April 18. The program focused on how outside counsel can assist their in-house clients who are often on the front lines in responding to external auditors’ needs for information about legal matters, especially matters such as major lawsuits and government investigations. The panel featured Peter Brown of PwC, Stan Keller of Locke Lord, Maryann Waryjas of Great Lakes Dredge and Dock Corporation, and Tom White of WilmerHale. Alan Wilson of WilmerHale was the Program Materials Coordinator. Links to an audio recording of the program and the program materials will be posted on the Committee’s webpage (accessible [here](#)).

**Next Meeting.** The Committee’s next meeting will be at the Business Law Section’s Annual Meeting in Chicago on Saturday, September 19, 2015, at 11 a.m.-noon CDT.

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

---

**SUMMARY OF RECENT LISTSERVE ACTIVITY DECEMBER 2014 – MARCH 2015 (AUDIT RESPONSES COMMITTEE)**

[Editors’ Note: This summary of Listserve activity during the period December 2014 – March 2015 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. **Canadian Request.** A committee member asked about the appropriate response to an audit request from a Canadian client when there are no pending claims identified in the request. He proposed to follow his firm’s usual procedure and use standard forms containing references to the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (31 Bus. Law. 1709 (1976)) (“ABA Statement”) and Accounting Standards Codification Topic 450-20 (“ASC 450-20”). He also asked for suggestions as to a reply if claims were described in the audit
request. Rob Collins of Toronto noted that there had been a presentation on Canadian practices at the Committee’s meeting in Vancouver several years ago and provided the following observations:

- As a Canadian lawyer, I would advise my U.S. counterparts to respond along the following lines: we are not qualified to practice law in Canada and are unfamiliar with the JPS[3]; we are, therefore responding in accordance with the Treaty — and then proceed to do so.

- Canadian lawyers respond in a similar fashion (transposing the ABA Statement and the JPS — and similarly disavowing knowledge of U.S. GAAP) to requests from U.S. issuers referring to ASC 450-20 (or Statement of Financial Accounting Standards No. 5 (“FAS 5”)) — and have never had pushback from U.S. auditors.

- It makes no difference as to whether there are outstanding or pending claims to describe (as an aside, the major Canadian auditing firms are quite lax in preparing the request letter so the norm is not to have claims described so that, in Canada, the law firm has to identify and describe the exceptions more often than the client does).

- Modern Canadian case law affords privilege protection to the client from other uses of the response where the audit response from the law firm discloses privileged information on the theory that the response is being prepared as a result of a statutory requirement for the issuer to issue audited financial statements prepared in accordance with GAAP. This explains why the request comes from (and the response is addressed to) the issuer (rather than the auditor)-as opposed to the U.S. approach where the response is addressed to the auditors. In light of developments in both statutory and case law since the 1970s, the JPS is badly due for an overhaul but this seems a relatively low priority for both professions in Canada in the current environment. There is a joint task force considering this issue but progress is snail-like.

Tamra Thomson, Director of Legislation and Law Reform of the Canadian Bar Association, added that, “despite the snail’s pace,” the Canadian Bar Association and the Auditing and Assurance Standards Board had issued an exposure draft of a proposed updated JPS last year. The comment period recently expired.

2. Requests for Confirmation Concerning Illegal Acts. Attorneys continue to receive audit request letters asking them to “confirm that all information brought to your attention indicating the occurrence of a possible illegal act committed by the Company, or any of its subsidiaries, agents or employees, has been reported to [XYZ CPAs] and to the Company’s Audit Committee.” This request appears in requests from one of the Big Four firms and has

---

3 Joint Policy Statement Concerning Communications with Law Firms Regarding Claims and Possible Claims in Connection with the Preparation and Audit of Financial Statements, approved by Canadian Bar Association and Auditing Standards Committee (Jan. 1978). See also Assurance and Related Services Guideline (AuG) 46 — Communications with Law Firms Under New Accounting and Auditing Standards (guidance with respect to IFRS).

4 The exposure draft can be found at http://www.cba.org/CBA/advocacy/pdf/Exposure-JPS-Eng.pdf.
been discussed previously by the Committee. The prevailing practice among law firms is not to respond to this request, and many firms expressly disclaim responding to this request as being outside the scope contemplated by the ABA Statement.

3. Amendments to FAS 5 and ASC 450-20. An audit request letter contained the following:

We understand that whenever in the course of performing legal services for the Credit Union, with respect to a matter recognized to involve an unasserted possible claim or assessment which may call for financial statement disclosure, if you have formed a professional conclusion that the Credit Union should disclose or consider disclosing such possible claim or assessment as a matter of professional responsibility to them, you will so advise them and will consult with them concerning the question of such disclosure and the applicable requirements of the U.S GAAP Codification of Accounting Standards ASC Codification Topic: 450-20, Contingencies — Loss Contingencies consistent with FASB Accounting Standards No. 5, as amended to the present date of this response.

(Emphasis in original.)

This letter is somewhat unusual in the “consistent with” and “as amended” language at the end. The inquiring Committee member asked whether the use of the “as amended” language was problematic.

In response to this query, Committee members expressed various views regarding whether references to the accounting standard in audit inquiry letters and in responses should refer to ASC 450-20 or FAS 5 (which ASC 450-20 supersedes) and whether such references should encompass amendments to the standards. The Committee has issued a Statement on the effect of the Accounting Standards Codification, which can be found on the Committee’s webpage and in the Second Edition of the Auditor’s Letter Handbook (“Committee on Audit Responses, Statement on the Effect of the FASB Codification on Audit Response Letters”).

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

**RECENT DEVELOPMENTS**

**Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, Completes Its Update of “No Registration Opinions”**


The updated report is principally intended to address the impact on opinion practice of the 2013 amendments to the SEC’s Rule 506. Discussion leading up to the new report focused particular attention on two aspects of the amended Rule:

- the requirement that in a Rule 506(c) offering, involving “general solicitation,” the issuer must take reasonable steps to verify that all purchasers are “accredited investors”; and
• the Rule 506(d) “bad actor” disqualification provisions applicable to offerings under both Rule 506(b) and Rule 506(c).

Because these provisions required changes to offering practices, they raised questions as to what additional steps, if any, opinion preparers should be taking in connection with delivering the opinion, and how, if at all, these new elements should be reflected in the opinion letter itself. While the 2007 report provided a solid framework for that analysis, the update discussions also touched on ABA Ethics Opinion 335 (1974), which addresses the ethical obligations of a lawyer delivering a no registration opinion. The new report reflects that ethical and regulatory expectations of the opinion preparers are separate and distinct from the drafting conventions commonly followed in these opinions.

The Subcommittee considered that the pending further amendments to Rule 506—particularly the proposed changes that would add a disqualification for Rule 506(b) offerings if the issuer had failed to file a Form D in a previous offering—could, if adopted, raise additional issues for opinion preparers. This led to an initial decision, in October 2014, to post the update report as a draft on the ABA Legal Opinions Committee’s website, pending further SEC action on the rule proposals. Given the apparent lack of movement on those proposals, the Subcommittee determined to proceed to publication.

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


The challenges of assessing the validity of forum selection and choice-of-law clauses are illustrated by the recent California Court of Appeal decision in Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141, 2015 WL 3407191 (May 28, 2015). The underlying action is a wage and hour lawsuit brought by a California employee of defendant working in defendant’s Irvine offices in California. Alliantgroup, a national firm providing specialty tax consulting services, is headquartered in Harris County, Texas, and its employment agreement with plaintiff selected, as its chosen law, the law of Texas, and provided for the resolution of all disputes to be conducted exclusively in the Texas state courts in Harris County.

Plaintiff alleged various violations by Alliantgroup of California’s wage and hour laws under California’s Labor Code, which, under Labor Code § 219(a), are protections that are not waivable by contract. While California generally honors forum selection clauses, where a party’s claims are based on unwaivable statutory rights, under California law the burden falls on the party relying upon the forum selection clause to show that enforcement of the clause will not diminish in any way those unwaivable statutory rights.

In its defense of the Texas forum selection clause, Alliantgroup argued that the Texas courts would “most likely” reject the chosen law of plaintiff’s employment agreement and apply California law. That hedged argument did not meet the burden placed upon Alliantgroup to establish the validity of the forum selection clause:
“… Alliantgroup must show enforcing the forum selection clause ‘will not diminish in any way’ [plaintiff’s] statutory rights. … although Alliantgroup postulates about what a Texas court is ‘likely’ to do, it carefully avoids making any specific and definitive argument that Texas courts either have applied or will apply California wage and hour laws despite a choice-of-law clause designating Texas law.”

2015 WL 3407191 at *10 (emphasis in original).

The Court of Appeal observed that Alliantgroup could have eliminated any uncertainty on the matter by stipulating to the application of California law in any Texas proceeding addressing plaintiff’s claims. Alliantgroup failed to do so. Accordingly, the Court of Appeal reversed the trial court’s order staying plaintiff’s action against Alliantgroup.

Implications of Verdugo for Predispute Jury Trial Waivers in Loan Agreements Selecting Out-of-State Law.

Financial institutions typically include predispute jury trial waivers in their loan agreements, which often are governed by New York law. Predispute jury trial waivers are invalid in California. Grafton Partners L.P. v. Superior Court, 36 Cal. 4th 944, 32 Cal. Rptr. 3d 5 (2005). In this unanimous decision by the California Supreme Court, the Court concluded that the “inviolable” right to trial by jury in California, mandated by the California Constitution and the implementing statute, cannot be waived by a predispute waiver, such as that typically found in loan and other commercial agreements. The Court analyzed Section 631 of California’s Code of Civil Procedure, and concluded that predispute jury trial waivers were not one of the six means permitted under Section 631 by which the right to jury trial may be waived and that, under California’s Constitution (Article I, § 16), California courts have no authority to expand the means by which a jury trial may be waived beyond those explicitly set forth in CCP § 631.

Grafton could not be more emphatic in its conclusion that predispute jury trial waivers in California are invalid.

Verdugo and Grafton raise the obvious question of whether a California court would enforce a New York forum selection clause in a loan agreement between, say, a New York bank and a California borrower if, for example, the borrower brought an action against the lender in California state court. In New York, a predispute jury trial waiver is enforceable. Grafton, 32 Cal. Rptr. 3d at 16-17 (acknowledging the validity of predispute jury trial waivers in New York). Assume the lender in our example moves to dismiss or stay the action based on the forum selection clause in the loan agreement. What should the California court do?

The lender could distinguish Verdugo and the cases the Verdugo court relied upon by arguing that the underlying claims borrower is seeking to vindicate — its contractual rights under the loan agreement — are not protected by any fundamental policy of California’s. Verdugo involved a plaintiff seeking to vindicate nonwaivable substantive rights, i.e., her wage and hour claims. On the other hand, Grafton makes clear that the right to jury trial is a fundamental right and cannot be waived by contract prior to a dispute. Resolution of a party’s claims by trial by jury is fundamental to the resolution of a party’s claims, whether those claims are based on nonwaivable rights or not. We will have to await a litigated case joining these issues for the answer from the California courts.

For opinion givers, Verdugo highlights the challenges in giving opinions on forum selection and choice-of-law clauses. The California State Bar Business Law Section’s Opinions Committee notes in its Report on Third-Party Remedies Opinions (2007 Update) (“CA Remedies Report”) that a forum selection clause “is not enforceable where it has the effect of waiving important rights.” Id. at B-14. According to the California Opinions Committee, the common qualification in opinion letters containing a remedies opinion referring to
waivers of broadly or vaguely stated rights, statutory or constitutional rights, unknown future defenses, and rights to damages is sufficient to cover this possibility. Many opinion givers routinely exclude from their remedies opinion forum selection clauses. See G. Merel et al., Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions, 70 Bus. Law 121, 138 (Winter 2014-2015) (“Common Qualifications”).

California counsel for a California borrower under a loan agreement with a New York lender where the chosen law is New York might be asked to give either an “as if” remedies opinion or a separate opinion that the choice of New York law in the loan agreement is valid under California law. Under an “as if” remedies opinion, the chosen law of the agreement is irrelevant, as the opinion giver assumes California law applies to the agreement and therefore the opinion giver would include qualifications appropriate in California to a California remedies opinion on a loan agreement whose chosen law is California, including a qualification excluding from the remedies opinion any predispute jury trial waiver in the loan agreement.

California follows the approach of the Restatement (Second) Conflict of Laws § 187 (Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th, 459, 11 Cal. Rptr. 2d 330(1992)). Because the lender in our example is a New York lender, there would be a reasonable basis for the choice of New York law to govern the loan agreement, and accordingly our opinion giver could give an opinion in the following form if the opinion giver is rendering an opinion solely on the choice-of-law provision of the loan agreement (the form is that suggested by the California Opinions Committee):

“Based on Lender’s principal place of business and state of organization, the court should give effect to [section ___ — the choice-of-law clause] of the Loan Agreement, except to the extent that any provision of the Loan Agreement (i) is determined by the court to be contrary to a fundamental policy of the state whose law would apply in the absence of a choice-of-law clause, and (ii) that state has a materially greater interest in the determination of the particular issue than does the state whose law is chosen.

California Remedies Report at B2 - B3.


It is the position of the California Opinions Committee that the exception to the stand-alone choice of law opinion quoted above is understood, even if not stated, and that the “fundamental policies” referred to (which would include fundamental policies of California if its law would apply in the absence of the choice-of-law clause) need not be specified. California Remedies Report at B-3. That position, however, is not universally shared and many California lawyers choose to take an express exception for the fundamental policies of all states.

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

[Editors’ Note: Dialogues on the Committee’s Listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers (and not their respective law firms) on opinion topics of current interest. Members of the Committee may review the comments referred to below by clicking on the “Archives” link under “Listserves” on the Committee’s website.]

The Corporate Action Opinion
(Due Authorization, Execution and Delivery)

Jaipat S. Jain of Lazare Potter & Giacovas LLP, New York, New York, prompted a robust response to his inquiry of June 26, 2015 concerning this assumption his firm typically includes in its legal opinions for a borrower on loan documents:

“We have assumed without investigation the due execution and delivery for value of the Transaction Documents by each of the parties thereto and each of the documents delivered in connection therewith by each of the parties thereto.”

Lender requested that Jaipat exclude from this assumption the borrower (Jaipat’s firm’s client), thus requiring the firm to opine that the loan documents were duly executed and delivered by Jaipat’s firm’s client. Jaipat asked the listserv whether lender’s request was appropriate or whether lender’s request could be viewed as requesting a confirmation of facts.

The consensus of the responders (there were 17!) was that the lender’s request was legitimate, and that to the extent the corporate power opinion implicates questions of fact, those are typically handled through reliance on certificates and unstated assumptions. As noted by Stan Keller, the corporate power opinion is among the “most basic and widely recognized opinions,” and that the proposed assumption undermined the value of that opinion to the extent it includes within its scope the borrower.

What triggered the broadest response to Jaipat’s inquiry was the question of verifying “execution” and “delivery” in the context of closings that typically now occur in cyberspace rather than in old fashioned conference rooms with all parties and their counsel present. As noted by R. Marshall Grodner of McGlinchey Stafford, Baton Rouge, and others, “…although in the past (some would say distant past) witnessing the signing of the document(s) and the handing over of the document(s) to the other side may have been a prerequisite for these types of opinions, assumptions and modern rules of contract formation make this witnessing unnecessary.” (Grodner).

One of these assumptions, particularly relevant in cyber closings and in contexts where the opinion preparers often have not even met the officer(s) signing the documentation or witnessed their signatures, as noted by Frank T. Garcia of Norton Rose Fulbright US LLP, Houston, and others, is the assumption of the genuineness of the signatures of all parties to the documentation, including the signatures of the opinion giver’s client. This assumption need not be stated. Committee on Legal Opinions, American Bar Association, Business Law Section, Legal Opinion Principles IID, 53 Bus. Law 831, 833 (1998); TriBar Opinion Committee, “Third-Party ‘Closing’ Opinions,”
express qualification that he is “solely opining on those elements of execution and delivery related to the law of the opinion [covered] state.”

Jaipat supplemented his inquiry asking whether his firm could properly assume that resolutions authorizing the transaction had been properly executed and delivered by remote directors or shareholders (or by members or managers with respect to alternative entities).

To this supplemental inquiry, Stan Keller replied that, as to director and shareholder actions of a client, the opinion preparers rely on their own knowledge, appropriate certificates, and unstated assumptions. A separate question arises as to whether to go “up the chain” when shareholders or, in the LLC/LP context, members, managers, or partners are themselves entities. Stan pointed to TriBar’s conclusion in its report on LLC opinions that going up the chain (in the absence of knowledge to the contrary) was not necessary:

“...opinion preparers may assume, without so stating, that when an approval is given by a member or manager that is not a natural person, the member or manager is the type of entity it purports to be, that it was authorized to approve the transaction, and that those acting on its behalf had the approvals they required. As with any unstated assumption, opinion givers may not rely on this assumption if reliance is unreasonable under the circumstances in which the opinion is given or they know it to be false.”

TriBar Opinion Committee, Third-Party Closing Opinions: Limited Liability Companies, 61 Bus. Law 679, 689 note 52 (2006). Marshall Grodner demurred, stating his belief that going up the chain was required, but that he addresses the matter by stating an express assumption as to the requisite approvals from the parties up the chain.

Stan did note, however, that when the opinion giver represents parties up the chain, counsel will typically “satisfy themselves as to the adequacy of actions [taken] at those levels.”

5 Some opinion givers prefer to state the assumption of the genuineness of all parties’ signatures to the relevant documentation particularly after the decision of the Appellate Division of the New York State Supreme Court in Fortress Credit Corp. v. Dechert, 89 A.D.3d 615, 934 N.Y.2d 119 (2011). The Dechert case involved a fraudulent $50 million loan transaction arranged by Marc Dreier. The defendant law firm (Dechert LLP) delivered a legal opinion that the loan documents had been duly executed and delivered and that the loan was a valid and binding obligation of the borrowers. The plaintiff/lenders sued Dechert after Dreier’s arrest, asserting that they relied on Dechert’s opinion. However, the New York Appellate Division of the Supreme Court (New York’s trial court) dismissed the plaintiffs’ complaint, primarily on the ground that the complaint failed to allege the necessary factual predicates to establish that Dechert breached any duty of care to plaintiffs. The Appellate Division also noted that “[t]he opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, [that Dechert] made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts.” 89 A.D.3d at 617.

Other Listserve Dialogues

Readers are also encouraged to review recent dialogues on whether (i) it is appropriate to provide a legal opinion on behalf of a borrower on whether a loan triggers a higher capital charge for high volatility commercial real estate loans under Basel III (the consensus of the responders was that it is not); and (ii) on whether a market practice has developed in rendering opinions under the Trust Indenture Act of 1939 in connection with debt restructurings in response to recent opinions from the Southern District of New York finding certain restructurings violative of TIA § 316(b) (the consensus of the responders is that a market practice has not yet developed but that how the issue is handled may depend on the specific circumstances of the particular transaction). See Marblegate Asset Management, LLC v. Education Management Corp., 2014 WL 7399041 (S.D.N.Y. December 30, 2014); Marblegate Asset Management, LLC v. Education Management Corp., 2015 WL 3867643 (S.D.N.Y. June 23, 2015); and Meehancombs Global Credit Opportunity Funds v. Caesars Entertainment Corp., 2015 WL 221055 (S.D.N.Y. January 15, 2015). See also the summary of the panel discussion held at the WGLO Spring 2015 Legal Opinions Seminar, “Opinion Implications of Recent Cases Under Section 316(b) of the Trust Indenture Act,” in the Addendum to this issue of the Newsletter. Readers may access these dialogues by going to the Listserve/archive section of the Committee’s website.

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

### LEGAL OPINION REPORTS

#### South Carolina Third-Party Legal Opinion Report

On January 22, 2015, the House of Delegates of the South Carolina Bar voted to approve the South Carolina Third-Party Legal Opinion Report by the Legal Opinion Ad Hoc Committee of the Corporate, Banking and Securities Law Section of the South Carolina Bar, as approved by the Corporate, Banking and Securities Law Section Council on December 10, 2014. The Report is posted on the South Carolina Bar’s website at http://www.scbar.org/Portals/0/FinalSCOpinionReport.pdf. It can also be found through the Legal Opinion Committee’s Legal Opinion Resource Center at http://www.scbar.org/ports/0/finalscopinionreport.pdf.

---

6 The URL is http://mail.americanbar.org/scripts/wa.exe?A0=BL-OPINIONS
The purpose of the Report is to (i) provide guidance to South Carolina attorneys in preparing third-party legal opinions, (ii) establish and define acceptable opinion practices in the state, (iii) identify opinion issues specific to state law and practices, (iv) confirm customary opinion practice, and (v) adopt certain national guidelines governing opinion practice to be followed in the state. The Report addresses state-specific issues and considerations, including issues faced by South Carolina attorneys acting as local counsel in multi-state transactions. The Report relies on existing reports of the ABA and TriBar opinion committees, on nationally recognized opinion treatises, and on specific state statutes and case law for support.

One of the triggering events that led to the call for a South Carolina report was an unpublished order of a local master-in-equity (i.e., a judge of an equity court in the state) in a 2005 foreclosure case wherein the unauthorized practice of law (“UPL”) was held to have invalidated the note and mortgage (the lender did not use a South Carolina attorney to close the transaction). Many practitioners in the state became concerned about the implications of such a ruling on opinion practice, particularly on local counsel mortgage enforceability opinions, if the reasoning in the case were to be followed by the higher courts in the state. Those concerns led to discussions about opinions in general, which in turn led to the formation in 2006 of the opinion committee tasked with preparing the Report. The committee was made up of attorneys from across the state, from both large and small firms, including corporate, banking, tax, real estate and commercial transactional attorneys, as well as litigators, familiar with the issues relating to third-party opinions.

The Exposure Draft of the Report was made available online for public comment in January 2013. The committee received comments from a number of attorneys across the country. Those comments were compiled and a final draft of the Report was submitted by the committee to the Section Council for adoption in 2014.

The Report opens with an annotated illustrative form of opinion, which has been widely accepted and is currently in use by many practitioners in the state. Following the illustrative form, the Report includes ten sections covering opinion topics in greater detail. Part VI goes into detail on real estate related opinions and includes a discussion of UPL in relation to mortgage opinions, including ethical considerations and the impact on enforceability. While UPL is not typically addressed in an opinion letter, including in an opinion letter to a lender on aspects of a loan transaction, including a stated assumption in the opinion letter that there has been no unauthorized practice of law in the transaction is customary in South Carolina. Notwithstanding that assumption, a South Carolina opinion giver should consider whether any unauthorized practice of law is implicated in the transaction.

---

7 South Carolina is an attorney-closing state. To date, the South Carolina Supreme Court has identified five areas requiring attorney supervision: (i) title searches, (ii) preparing loan documents, (iii) conducting closings, (iv) recording real estate and lien instruments, and (v) disbursements. An independent South Carolina licensed attorney must supervise the necessary aspects of a real estate related transaction. The failure to have such attorney supervision constitutes UPL (a felony).

8 The South Carolina Supreme Court agreed with the positions taken by the master-in-equity and by the Court of Appeals in earlier cases when it ruled in Matrix Financial Services Corporation v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) that a lender engaged in the unauthorized practice of law will be denied equitable relief in the courts.

---

9 The assumption in the Report’s illustrative form opinion is stated as part of the “no illegal activity” assumption:

“There is no fraud, undue influence, duress, mutual mistake of fact, illegal or criminal activity (including, without limitation, the unauthorized practice of law) in connection with the execution and delivery of the Transaction Documents by any of the parties or in connection with the closing of the transactions contemplated by the Transaction Documents.”
both from an ethical standpoint (whether the delivery of the opinion could be deemed aiding and abetting UPL) and from a substantive enforceability standpoint (whether a note and mortgage could be deemed unenforceable as a result of any associated UPL). The opinion giver should not give the opinion if the opinion preparers have actual knowledge that any unauthorized practice of law has occurred. These issues appear to be unique to South Carolina.

Jennifer C. Blumenthal
McNair Law Firm, P.A.
Charleston, South Carolina
jblumenthal@mcnair.net

(See Chart of Published and Pending Reports on following page.)
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 June 30, 2015.]

A. Recently Published Reports

<table>
<thead>
<tr>
<th>Organization</th>
<th>Year</th>
<th>Report Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>2009</td>
<td>Effect of FIN 48 – Audit Responses Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Negative Assurance – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>Diligence Memoranda – Task Force on Diligence Memoranda</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Survey of Office Practices – Legal Opinions Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Revised Handbook – Audit Responses Committee</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>Updates to Audit Response Letters – Audit Responses Committee</td>
</tr>
<tr>
<td></td>
<td>2015</td>
<td>No Registration Opinions (Update) – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td>ABA Real Property Section (and others)</td>
<td>2012</td>
<td>Real Estate Finance Opinion Report of 2012</td>
</tr>
<tr>
<td>Arizona</td>
<td>2004</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>California</td>
<td>2007</td>
<td>Remedies Opinion Report Update</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Venture Capital Opinions</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>Sample Venture Capital Financing Opinion</td>
</tr>
<tr>
<td></td>
<td>2015</td>
<td>Revised Sample Opinion</td>
</tr>
<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td>Georgia</td>
<td>2009</td>
<td>Real Estate Secured Transactions Opinions Report</td>
</tr>
<tr>
<td>City of London</td>
<td>2011</td>
<td>Guide</td>
</tr>
</tbody>
</table>

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/).

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)

<table>
<thead>
<tr>
<th>Location</th>
<th>Year</th>
<th>Report/Update</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>2009</td>
<td>Update to Comprehensive Report</td>
</tr>
<tr>
<td>Michigan</td>
<td>2009</td>
<td>Statement</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Report</td>
</tr>
<tr>
<td>National Association of</td>
<td>2011</td>
<td>Function and Professional Responsibilities of Bond Counsel</td>
</tr>
<tr>
<td>Bond Lawyers</td>
<td>2013</td>
<td>Model Bond Opinion</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>501(c)(3) Opinions</td>
</tr>
<tr>
<td>National Venture Capital</td>
<td>2013</td>
<td>Model Legal Opinion</td>
</tr>
<tr>
<td>Association</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>2009</td>
<td>Substantive Consolidation – Bar of the City of New York</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Tax Opinions in Registered Offerings – New York State Bar Association Tax Section</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2007</td>
<td>Update</td>
</tr>
<tr>
<td>South Carolina</td>
<td>2015</td>
<td>Third-Party Legal Opinions Report&lt;sup&gt;12&lt;/sup&gt;</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2011</td>
<td>Report</td>
</tr>
<tr>
<td>Texas</td>
<td>2006</td>
<td>Supplement Regarding Opinions on Indemnification Provisions</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Supplement Regarding ABA Principles and Guidelines</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Supplement Regarding Entity Status, Power and Authority Opinions</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Supplement Regarding Changes to Good Standing Procedures</td>
</tr>
<tr>
<td>TriBar</td>
<td>2008</td>
<td>Preferred Stock</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>Secondary Sales of Securities</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>LLC Membership Interests</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Choice of Law</td>
</tr>
<tr>
<td>Multiple Bar Associations</td>
<td>2008</td>
<td>Customary Practice Statement</td>
</tr>
</tbody>
</table>

---

<sup>12</sup> This report has moved from “pending” to “published” since March 31, 2015, the date of the chart included in the Spring 2015 issue of the newsletter. See the report on its adoption under “Legal Opinion Reports — South Carolina Third-Party Legal Opinion Report” in this issue of the newsletter.
### B. Pending Reports

<table>
<thead>
<tr>
<th>Organization</th>
<th>Topics</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>Outbound Cross-Border Opinions – Legal Opinions Committee</td>
</tr>
<tr>
<td></td>
<td>Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee</td>
</tr>
<tr>
<td>California</td>
<td>Opinions on Partnerships &amp; LLCs</td>
</tr>
<tr>
<td></td>
<td>Sample Personal Property Security Interest Opinion</td>
</tr>
<tr>
<td>Real Estate Opinions</td>
<td>Local Counsel Opinions</td>
</tr>
<tr>
<td>Committees (Among Others)</td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td>TriBar</td>
<td>Limited Partnership Opinions</td>
</tr>
<tr>
<td></td>
<td>Opinions on Clauses Shifting Risk</td>
</tr>
<tr>
<td>Washington</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>Multiple Bar Associations</td>
<td>Commonly Accepted Opinion Practices</td>
</tr>
</tbody>
</table>

13 See note 11.
MEMBERSHIP

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her here. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in October 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)

---

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

Working Group on Legal Opinions Foundation

Spring 2015 Legal Opinion Seminar Summaries
Addendum
Working Group on Legal Opinions Foundation
Spring 2015 Legal Opinion Seminar Summaries

Table of Contents

<table>
<thead>
<tr>
<th>Panel Sessions I</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Volcker Rule and Related Opinions</td>
<td>A-1</td>
</tr>
<tr>
<td>Joint Project on Statement on Customary Opinion Practices</td>
<td>A-2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Concurrent Breakout Sessions I</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opinions on No Violation of Law and No Breach or Default of Contracts (Three Simultaneous Sessions)</td>
<td>A-3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Panel Sessions II</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recent Opinion Developments</td>
<td>A-10</td>
</tr>
<tr>
<td>Opinion Implications of Recent Cases under Section 316(b) of the Trust Indenture Act</td>
<td>A-14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Concurrent Breakout Sessions II</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Opinions in Real Estate Secured Finance Transactions (How Dirt Lawyers Do It)</td>
<td>A-16</td>
</tr>
<tr>
<td>Tax Opinions — Why You Should Care</td>
<td>A-20</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Panel Sessions III</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Ethics Issues Relating to Opinion Practice</td>
<td>A-23</td>
</tr>
</tbody>
</table>
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 May 11-12, 2015. The summaries were prepared by panelists, leaders of the concurrent sessions, session reporters, or members of the audience. The next WGLO seminar is scheduled to be held on October 26-27, 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:

1. **The Volcker Rule and Related Opinions**  
   (Summarized by Cynthia Baker)

   Cynthia Baker, Partner, Chapman and Cutler LLP, Chair  
   Daniel Nelson, Executive Director & Assistant General Counsel, J.P.Morgan, Corporate and Investment Bank, Legal Department  
   Carol Hitselberger, Partner, Mayer Brown LLP  
   Ellen Marks, Partner, Latham & Watkins LLP

   This session focused on new types of legal opinions being provided in securitization transactions related to the Volcker Rule’s restrictions on investments by commercial banks in hedge funds and private equity funds (defined as “covered funds” under the Rule). The most common of these new opinions are (1) opinions that an entity is not a covered fund because it is excluded from the registration requirements under the Investment Company Act under an exclusion other than Sections 3(c)(1) and 3(c)(7) of that Act, and (2) opinions based on the “loan securitization exclusion” in the Volcker Rule. A third type of opinion, that an asset-backed security is not an “ownership interest” in a covered fund, has been discussed among industry and bar groups, but the panelists indicated it is not being given on any regular basis. A joint project on Volcker Rule opinions is being sponsored by the ABA Business Law Section’s Securitization and Structured Finance, Legal Opinions and Banking Committees, led by Ellen Marks of Latham & Watkins LLP. That group is working on a white paper on ownership interest opinions under the Volcker Rule and on other issues related to opinions and the Volcker Rule. Committee members interested in participating should contact Ms. Marks to be added to the joint project’s distribution list.

   The panelists noted that the Volcker Rule is actually a set of common rules adopted by the Federal Reserve, the Office of Comptroller of Currency, the Securities and Exchange Commission and the Commodity Futures Trading Commission, so that the first step in an opinion may be to identify the applicable regulatory agency and regulations. A brief review of the rules requirements was presented. It was noted that, particularly for opinions on the loan securitization exclusion rules, textual inconsistencies in the regulations and the heavily factual nature of the analysis can make these opinions challenging opinions to render. Opinion givers and recipients may need to discuss whether factual issues are to be handled by assumptions, certificates or diligence (or a mix of all three). Samples or templates for both the “investment company” and “loan securitization exclusion” Volcker Rule opinions were provided in the
WGLO seminar materials. The panelists noted that the Volcker Rule imposes extensive compliance-reporting requirements on banks, and legal opinions on these issues may serve as an important component of that documentation.

[Editors’ Note: An example of an opinion on the Volcker Rule when the circumstances permit is: “The Company is not, and after giving effect to the [transaction] will not be, a ‘covered fund’ within the meaning of the regulations implementing Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Volcker Rule) by virtue of its not being an ‘investment company’ under the Investment Company Act of 1940 for reasons other than the exemption under Section 3(c)(1) or Section 3(c)(7) of that Act.” Sometimes the specific exemption or exclusion from the Investment Company Act being relied upon is identified.]

2. **Joint Project on Statement on Customary Opinion Practices**
   (Summarized by Stanley Keller)

   *Kenneth M Jacobson, Katten Muchin Rosenman LLP, Chicago, Co-Chair*
   *Stanley Keller, Locke Lord LLP, Boston, Co-Chair*
   *Kenneth P (Pete) Ezell, Jr., Baker Donelson, Bearman, Caldwell & Berkowitz PC, Nashville*
   *Stephen C. Tarry, Vinson & Elkins LLP, Houston*
   *Steven O. Weise, Proskauer Rose LLP, Los Angeles*

   This panel discussed the joint project of the Working Group on Legal Opinions Foundation and the Legal Opinions Committee of the American Bar Association’s Business Law Section to identify selected aspects of customary practice and other practices applicable to third-party legal opinions that are commonly understood and accepted throughout the United States. The panel indicated that the joint project is an effort to foster a national opinion practice that will be widely recognized and endorsed. The committee that is working on the project includes representatives of various state bar groups, and the expectation is that these state bar groups, along with others, would ultimately endorse the project’s work product.

   The panel explained that the committee has examined the existing literature on legal opinions, including various bar reports, and has focused on updating and amplifying the *Legal Opinion Principles* (53 Bus. Law. 831 (1998)) and *Guidelines for the Preparation of Closing Opinions* (57 Bus. Law. 875 (2002)). This effort has resulted in the preparation of a draft “Statement on Customary Opinion Practices” designed to replace the Principles, and included selected provisions of the Guidelines, but that draft Statement would leave the Guidelines in place. In response to comments that it might be preferable to have a more comprehensive Statement that could replace both the Principles and Guidelines, the committee is preparing, as an alternative, a more comprehensive draft Statement to see how it might work and whether it would be feasible. Issues to be considered in evaluating this alternative are, among others, whether the alternative approach (i) can function in the way the Principles do now, as a short statement that is widely accepted and can be incorporated in or attached to an opinion letter, and (ii) would require addressing issues that could cause unacceptable delay in completing the project.

   The panel then discussed some of the issues being considered on selected substantive provisions of the draft Statement and concluded by describing the contemplated next steps on the project.
CONCURRENT BREAKOUT SESSIONS I:

**Opinions on No Violation of Law and No Breach or Default of Contracts**

The WGLO seminar included three simultaneous discussion sessions on the subject of Opinions on No Violation of Law and No Breach or Default of Contracts. What follows are summaries of those three different sessions with a common theme:

**Simultaneous Session 1.**

*Cynthia A. Baker, Chapman and Cutler LLP, Chicago*

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

*John K. Lawrence, Dickinson Wright PLLC, Detroit, Reporter*  
(Summarized by John K. Lawrence)

The session discussion focused entirely on opinions regarding no violation of law. It began with a review of the opinion literature.

The ABA Legal Opinion Accord defined the content of the opinion as being that performance by the opinion giver’s client of its agreement was neither prohibited by, nor would expose the client to a fine, penalty, or other sanction under, a statute or regulation.\(^1\) In order to more clearly delineate such opinions from the remedies opinion, the 1998 TriBar Report was written more narrowly. It made clear that the remedies opinion covers laws that affect the enforceability of the agreement forming the subject of the opinion, but not laws that merely create an adverse consequence, such as a fine, to a party to the agreement.\(^2\)

There was consensus that the opinion is customarily understood to cover statutes and regulations, and not common law matters (as these are generally not capable of “violation”). Some firms expressly state that limitation in their opinions.

The literature identifies the laws covered by the opinion as being those laws that a lawyer in the jurisdiction whose law is addressed, exercising customary diligence, would reasonably recognize as being applicable to the entity, the transaction or the agreement to which the opinion relates. Some participants noted a trend to tighten this standard further by referring to a lawyer of that jurisdiction skillful in transactions of the type involved. Only some opinion givers, however, use that tighter formulation, and it does not appear to have been adopted in the literature.

In the discussion, participants made several points. Compliance with laws by a borrower in its business may be difficult to address if counsel is too remote from the client. In many instances, counsel representing a client in large borrowing transactions is not retained by it in the ordinary course of conducting its business operations. In such circumstances, if a lender requires advice on specific regulatory compliance issues, it should be prepared to look to special regulatory counsel, for instance in loans to health care enterprises or borrowers in other regulated industries. It was recognized, however, that borrower’s transactional counsel may need to be prepared to respond on the narrower issue of required regulatory approval for the client to borrow.

---


The discussion also addressed the issue of opinion coverage of future performance. Participants suggested that, particularly in real estate lending transactions, future performance coverage should be understood to be limited to payment issues.

Project finance was recognized as a particularly challenging situation, because there may be no continuing entity, many regulatory issues at different levels of government are involved, and the budget generally will not provide funding to deal with legal issues not anticipated and addressed at closing. In such cases, it is often necessary to bring in multiple specialist counsel for closing. Such opinions also must deal with types of matters, such as local ordinances, permits, licensing, environmental laws, and others, that are customarily excluded from consideration by borrower’s counsel in other types of lending transactions. For these reasons, some participants expressed the view that project finance was regarded as an outlier or special case, in which customary practice differed from that generally applicable to other types of lending transactions.

Participants were generally in agreement that caution is appropriate with respect to broad “no violation” opinions, and that preferable practice was to use separate opinions on specific regulatory matters. Others noted that they would exclude regulatory laws specific to the entity type of their client, where they do not ordinarily provide regulatory advice to that client.

On the specific issue of coverage of future discretionary actions by the borrower client, several participants criticized the example included in the materials regarding a loan by a foreign lender permitting future discretionary advances if secured by a future pledge of borrower’s uranium rods, which pledge would be prohibited under law at the time the opinion is rendered. While, as noted in the materials for this session, the literature generally takes the view that no exception would be required by the opinion giver in that example, several participants stated that, based on their experience as opinion givers and counsel for recipients, they would expect an exception to be taken on those facts, even though a pledge is not required at the time the opinion is rendered and could only be required in the future based on purely discretionary future action on the part of the borrower.

In determining what the baseline rule should be on the laws to be covered in the opinion, it was suggested that it is important to recall that loan documentation is often finalized before any discussion of opinion coverage occurs. It was also noted that some recognition should be accorded to the fact that lenders themselves conduct some level of due diligence in making their credit decisions. The proper role of borrower’s counsel in providing support to a lending transaction, absent a lender’s targeted request for advice on specific regulatory compliance issues, is not clear.

Some states, such as Florida, have adopted a list of specifically excluded legal issues in their opinion reports. The TriBar Committee has taken the opposite approach, perhaps in part to avoid inadvertent omission of one or more matters. Experienced opinion litigation counsel have suggested that they have had better success defending counsel who have included express coverage limitations in their opinions than those who have relied on the general scope limitation concepts currently contained in the customary practice literature. Many participants indicated that their firms routinely use express disclaimers of coverage of identified categories of laws in their lending transaction opinions. The consensus appeared to be that practice is shifting to the use of specific, longer exclusion lists.

---

The last topic considered was the practice regarding legislation, including (a) laws already adopted but with a delayed effective date that has not yet occurred, (b) laws passed by the legislature or Congress but not yet approved by the executive, and (c) bills pending before the legislature or Congress. Participants regarded the question of whether there is any duty on the part of an opinion giver to disclose such matters as a question of judgment on the facts and circumstances of the particular case. Most appeared to think that if a law already signed but not yet in force would have relevance to the subject of the opinion, it should likely be disclosed in those instances where the opinion giver is aware of the statute. The example given was a significant revision to the Uniform Commercial Code, such as the 2001 revisions to Article 9, which took effect after a lengthy transition period. The participants did not agree, however, on the issue of whether the opinion giver has a duty to search for information regarding such laws not yet in effect. Some expressed doubt that the client would want to pay for such work.

Simultaneous Session 2.

Timothy G. Hoxie, Jones Day, San Francisco. Co-Chair
Gail Merel, Andrews Kurth LLP, Houston, Co-Chair
A. Mark Adcock, Moore & Van Allen, PLLC, Charlotte, Reporter
(Summarized by A. Mark Adcock)

The session began with a discussion of the differences between the no violation of law opinion or no breach or default opinion on the one hand and an enforceability opinion on the other. There is clearly overlap between the enforceability opinion and the other opinions, but they are not the same. For example, it was noted that violation of certain laws may void the agreement (thereby preventing enforcement), while violation of other laws may result in only a fine or other penalty. In the first instance the opinion overlaps with enforceability, but not in the second. Similarly, an agreement might be breached by entering into a transaction agreement, yet that fact does not make either the transaction agreement or the agreement with which it conflicts unenforceable. This can be true even if the breach is of provisions in charter documents so long as the breach does not go to whether or not the transaction agreement is properly authorized. Consequently the no violation and no breach or default opinions supplement, rather than duplicate, the enforceability opinion.

Discussion turned to what the no violation of law opinion means when it includes “performance” of obligations under the transaction agreements (i.e., “. . . performance of the obligations does not violate. . .”). One participant observed that some opinion givers are reluctant to include “performance” in the no violation of law opinion, instead opining only that execution and delivery of the transaction documents will not violate applicable laws. Others confine the “performance” that they address to the performance of obligations at closing, or to performance of specified obligations (like repayment of a loan). These approaches appear to be more common in transactions where the opinion recipient might be less interested in future performance generally (as in many loans) or where future performance might be viewed as more difficult to address (as in some venture capital situations or construction loans). These limitations, where accepted, can limit diligence required to give the opinion.

As to those opinions which do cover future performance without any express limitation, it was generally agreed that there is an implicit assumption in all legal opinions addressing performance that the parties will in the future perform their obligations in compliance with applicable laws if it is possible to do so. The parameters of this assumption, however, might not be as clear as might be thought. For example, where the agreement requires actions that cannot be legally performed unless future authorizations are obtained, can the opinion giver assume these authorizations will be obtained? Some were uncomfortable not noting such an issue in an opinion, though that course might be suggested in the right circumstances by the desire to avoid a misleading opinion rather than any inability to deliver the no violation opinion.
The discussion then turned to what laws are excluded from opinion letters generally and from the no violation of law opinion in particular. A few participants indicated that their firms rely on the ABA Legal Opinion Principles for the description of excluded laws, either by express reference to the Legal Opinion Principles, or implicitly. Most of the participants, however, indicated that they include in their opinions both a non-exclusive list of specific laws that are not covered, as well as an express statement in the opinion letter that the opinions cover only those laws that a competent lawyer exercising customary professional diligence would reasonably recognize as applying to the transaction.

Those who do not use a list of excluded laws expressed concern that a court might conclude that any law omitted from a long list of exclusions must be covered by the opinion letter even when the list purports to be non-exhaustive. Those who do use a list do so because legal opinions commonly exclude some laws that a competent lawyer exercising customary professional diligence would reasonably recognize as applicable, and they want to be clear that the listed laws are not covered even if recognized to be relevant. This is common, for example, in equity financings involving securities issuances, where securities laws are excluded (unless specifically addressed), even though clearly applicable. Most laws included in a list of excluded laws are listed because opinion givers are not typically expected to cover such laws unless they do so expressly, often with very particular assumptions or other qualifications. Sometimes the lists serve to address laws where there may not be a clear consensus as to whether or not they are included: investment company laws may be an example of such laws. Some participants indicated that their firms also like to include a list of excluded laws as an internal check, so that if any of the typically excluded laws are not listed, an opinion reviewer will more easily recognize that such laws are being covered and that a lawyer with the requisite expertise needs to be involved in the opinion process.

While most participants said they include in their opinion letters some type of statement limiting the covered laws to only those laws a competent lawyer in the relevant jurisdiction, exercising customary professional diligence, would reasonably recognize as applying to the transaction, it was agreed that opinion givers do not always word these types of statements in the same way. The group considered briefly, for example, one variant which limits the laws covered by the opinion letter to only those laws that “in our experience” customarily apply to transactions of the type covered by the opinion letter or by the transaction documents. Those who limit their opinions by reference to their own experience believe they are using a more favorable formulation by adding a subjective element to the limitation. One participant expressed the concern, however, that -- where the opinion giver is a large, sophisticated law firm -- such a rephrasing of the exclusion could actually work to expand the universe of laws covered beyond those that would otherwise be included by customary practice (the thought being that, if the experience of the particular firm is greater than average, the firm could be held to a higher standard than that of what a competent lawyer practicing in the jurisdiction exercising customary professional diligence would reasonably recognize as applicable to the transaction).

Finally, the discussion turned to whether participants’ firms typically rely on customary practice to exclude future laws from the coverage of the opinion or whether they are, instead, choosing to add language to make that exclusion express. Many participants in the session indicated that their firms’ opinions provide expressly that the opinion addresses only laws “in effect” on the date of the opinion. It was acknowledged, however, that if an opinion preparer knows of a relevant law that has been enacted to take effect at a future date during the term of the transaction documents, he or she will likely want to consider whether, under the particular facts and circumstances, the opining firm wants in some way to call the enactment of that future law to the attention of the opinion recipient.

The group did not have time to separately discuss opinions on no breach or default of contract and some suggested that that topic be taken up in a future seminar session.
Simultaneous Session 3.

Louis G. Hering, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Co-Chair
Stephen C. Tarry, Vinson & Elkins LLP, Houston, Co-Chair
Frank T. García, Norton Rose Fulbright US LLP, Houston, Reporter
(Summarized by Frank T. García)

1. The No Violation of Law Opinion

Laws covered and excluded. The laws included in, and excluded from, the scope of the no violation of law opinion were discussed in this session by reference to the following alternative formulations:

(a) in reliance on customary practice, no express statement of specific excluded laws is made other than the opinion giver’s limitation of the laws covered by the opinion letter to the laws of specified jurisdiction(s) (the “covered law limitation”);

(b) limited detailed exclusions from law coverage are made by augmenting the covered law limitation with a reference to a limited number of specified laws;

(c) moderately detailed exclusions from law coverage are made by augmenting the covered law limitation with a moderate listing of specified excluded laws (the “Moderate List Exclusion”), with the covered or excluded laws, as applicable, defined by terms like “Applicable Laws” or “Excluded Laws,” and

(d) extensively detailed exclusions from law coverage are made by augmenting the covered law limitation with an extensive laundry list of excluded laws.

No session participant used only the covered law limitation to qualify their no violation of law opinion, and most participants indicated they are utilizing a form of the Moderate List Exclusion.

The consensus of the session’s participants also favored qualifying the remedies opinion with the same law coverage limitation—list or otherwise—used to qualify the no violation of law opinion. However, caution was noted that such usage could result in inadvertently or inappropriately limiting the remedies opinion; e.g., (a) laws addressed by the no violation of law opinion are limited to statutes and published rules and regulations (as judicially construed), whereas the laws addressed by the remedies opinion also include common law considerations; and (b) certain laws excluded from the scope of the no violation of law opinion, if excluded from the scope of the remedies opinion, could result in narrowing the recipient’s intended scope of the remedies opinion.

The “in-our-experience” qualifier. Customary practice limits the scope of the opinion to laws that a lawyer in the applicable jurisdiction, exercising customary professional diligence, would recognize as being applicable to the transaction documents. Some opinion givers add an “in-our-experience” qualifier to this formulation, and the group considered two variations of this qualifier:

• some opinion givers use an “in our experience” qualifier without referring to an objective standard to modify it (e.g., the opinion covers laws, rules and regulations that “in our experience” are generally applicable to transactions of the type provided for in the transaction documents), and
others express this qualifier with a more objective standard (e.g., the opinion covers laws, rules and regulations that “in our experience” lawyers in the covered jurisdiction exercising customary professional diligence would reasonably be expected to recognize as being applicable to transactions of the type provided for in the transaction documents).

The consensus of the participants favored the latter formulation (with a more objective standard). Some participants, however, questioned what the “in-our-experience” qualifier is intended to accomplish or mean. Although no clear response was developed to this question, many participants noted that its use, without an objective standard, may have unintended consequences for the opinion giver, such as potentially holding the opinion giver to a higher standard if the opinion giver has more expertise in rendering opinions on a particular topic than the typical lawyer in the jurisdiction whose law is being covered.

Future performance. Addressing performance of provisions that are required to be complied with subsequent to closing was not generally viewed as problematic, since the actions or inactions are required by the transaction documents and can be objectively evaluated in relation to applicable law in effect at closing (however, there was no discussion regarding laws passed on or before closing that go into effect subsequent to closing). To the extent an agreement contains extensive provisions of required performance, whether or not the related obligations are material, some participants suggested limiting the scope of evaluated performance to specified undertakings; e.g., payment, lien creation, guaranteeing. On the other hand, participants generally concurred that the performance of actions not required by an agreement, that are discretionary to the party (such as discretionary future borrowings under a credit agreement), is beyond the coverage of the no violation of law opinion. However, some concern was expressed that it may be difficult, at times, to distinguish required from discretionary actions.

Other topics discussed. Other brief discussion points made regarding the no violation of law opinion:

- knowledge qualifier: limiting the opinion to “laws known by us” was strongly discouraged due to its subjectivity; none of the session’s participants indicated using a knowledge qualifier when rendering this opinion.

- anti-terrorism, anti-corruption, sanctions and similar statutory schemes: these statutes are customarily excluded from laws covered by the no violation of law opinion (however, it was noted that related diligence concerns as to these matters might impact the original client intake process).

- “misleading opinions”: If an opinion giver is rendering an enforceability opinion, but not a no violation of law opinion, and recognizes that a violation of law would result from the execution, delivery and performance of the transaction documents, are there any circumstances in which a remedies opinion should somehow disclose the violation of law if the violation does not itself affect the enforceability of the transaction documents? No conclusion was reached on this point.

2. The No Breach or Default of Contracts Opinion

Constituent documents. An extensive discussion of the no violation of constituent documents (i.e., certificate of incorporation, bylaws, etc.) opinion was outside the session’s intended scope.
However, the participants were asked if they ever had been excused from rendering a no violation of constituent documents opinion in connection with rendering an “execution and delivery” opinion on the expressed basis that it may be considered, by some, as subsumed by the “corporate” power and remedies opinions. No participant indicated they had been so excused or that they had asked to be so excused, and no discussion was conducted as to whether such opinion is or is not subsumed by the “corporate” power and remedies opinions.

Nature of evaluated breach. No disagreement was expressed regarding the nature of breach evaluated by the opinion giver when rendering a no breach or default of contracts opinion, which is a breach of, or default under, a provision requiring performance in a reviewed contract, and not any other form of adverse consequence. For example, a change of control provision in a transaction document that requires mandatory prepayment under an existing credit agreement deals with an adverse consequence, but such change of control would not involve a breach or default of the existing credit agreement. If a breach could result, participants noted the primary solution: draft the transaction document to avoid the potential breach. If a resultant event is not a “breach” but constitutes another form of adverse consequence, some participants felt that appropriate disclosure may be considered if necessitated by “misleading opinion” principle.

Contracts Reviewed. The session’s participants concurred that the opinion letter should expressly identify the contracts covered by the no breach or default of contracts opinion, either by listing them in, or referring to them in an attachment to, the opinion letter, or alternatively, referring to them in the opinion letter by reference to a publicly available document (e.g., periodic SEC filings). If the opinion is requested but no contracts are reviewed (since none are specified for review), participants differed, for varying reasons, on whether to resist rendering the opinion or to agree to render the opinion by referring to an attachment that states “NONE”.

“Conflict with”. The participants concurred in the use of the terms “breach or default” when rendering this type of opinion, rather than the use of the phrase “conflict with” (even when the opinion relates to transaction documents that use the “no conflict” terminology in representations and warranties), though many noted that they still occasionally receive opinions using the phrase “conflict with” instead.

Financial covenants. Similar to the differing view expressed in bar reports, the session’s participants were split on whether a no breach or default of contracts opinion, without further clarification, covers financial covenants. Some participants felt that despite recitations in bar reports to the contrary, recipients tend to expect coverage of their agreements, subject to expressed exclusions or qualifications. It was the consensus of the participants that if financial covenants are intended (or desired) to be excluded from the scope of the opinion letter, it is advisable to state the exclusion expressly in the opinion letter rather than relying on an implicit exclusion that may exist under customary practice. If financial covenants are covered in the opinion letter, it was generally agreed that either relying upon an officer’s certificate for calculations and understanding of related accounting definitions or making corresponding express assumptions is appropriate.
PANEL SESSIONS II:

1. **Recent Opinion Developments**
   (Summarized by John B. Power and the Panel)

   *John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator*
   *Donald W. Glazer, Newton, Massachusetts*
   *Stanley Keller, Locke Lord LLP, Boston*
   *James G. Leyden, Jr., Richards, Layton & Finger, Wilmington*
   *Thomas M. Thompson, Buchanan Ingersoll & Rooney PC, Pittsburgh*
   *Steven O. Weise, Proskauer Rose LLP, Los Angeles*

   The following summarizes the presentations given on this panel:

   1. **Bar 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 March 31, 2015 in the program materials. He noted that the following reports moved from pending to published since the September 30, 2014 version of the chart presented at the fall 2014 seminar:

   - Negative Assurance Report – ABA Federal Regulation of Securities Committee Subcommittee on Securities Law Opinions
   - No-Registration Opinions (Update) – ABA Federal Regulation of Securities Committee Subcommittee on Securities Law Opinions
   - Updates to Audit Response Letters – ABA Audit Responses Committee
   - Sample Venture Capital Opinion – California
   - Revised Sample Opinion – California

   Georgia’s 2009 Real Estate Secured Transactions Report was added to the published list, and Don Glazer noted that the South Carolina Comprehensive Report listed as pending in the 2015 chart had recently been published.

   *Pending TriBar Report on Opinions on Limited Partnerships.* Jim Leyden, co-reporter for this report of the TriBar Opinion Committee, stated that so far TriBar has spent most of its time analyzing the limited partnership due formation and valid existence opinions, focusing on Delaware limited partnerships. Following are some of the issues on those topics that will be addressed in the report.

---

4 An updated version of the Chart is reproduced in this issue of the newsletter under “Legal Opinion Reports — Chart of Published and Pending Reports.”
Corporations are incorporated on the date the charter is filed with the Secretary of State. However, Delaware limited partnerships often are formed long after the certificate of limited partnership is filed with the Delaware Secretary of State. The key document in forming a limited partnership, the limited partnership agreement, can be entered into before, at the time of, or after, the filing of the certificate of limited partnership and can be made effective at any time. All a due formation opinion means, therefore, is that, at some point, the limited partnership was formed. This is true even if defects initially prevented formation of the limited partnership, so long as the defects are cured by the date of the opinion letter.

The valid existence opinion requires that, as of the date of the opinion letter, (1) a current partnership agreement exists between at least two different persons, at least one of whom is a general partner and one a limited partner, and (2) a certificate of limited partnership is on file with the Delaware Secretary of State that is executed by all general partners and that otherwise complies with the Delaware Revised Uniform Limited Partnership Act. The valid existence opinion on newly-formed limited partnerships is relatively straightforward. That opinion on long-existing limited partnerships can present more difficult issues. In the latter context, the TriBar report will discuss how to handle past amendments to the partnership agreement and how to deal with the possibility that on the date of the opinion letter the limited partnership has been dissolved.

When necessary to the opinion as proposed to be given, due adoption of amendments to the partnership agreement may be (1) confirmed by the opinion preparers, (2) covered by an assumption in the opinion letter or (3) supported by a factual certificate from a reliable source.

A dissolved limited partnership continues to exist after dissolution until the filing of a certificate of cancellation with the Delaware Secretary of State, with the power to wind up its affairs. The report will address whether opinion preparers are required to determine whether dissolution has occurred when giving a valid existence opinion and whether and how a valid existence opinion can be given on a limited partnership that has been dissolved. The report will note that, if the opinion letter also includes an opinion on the power to enter into and perform an agreement, that opinion will necessarily require opinion preparers to determine, for example by a factual certificate, or expressly assume, that either (1) the partnership has not been dissolved, or (2) the transaction is incident to winding up the affairs of the partnership.

Lightning Round Summary of Selected Other Bar Report Projects

Published and Pending Reports of the ABA Federal Regulation of Securities Committee Securities Law Opinions Subcommittee: No Registration, Resales, and Debt Tender Offers. Stan Keller noted that a draft of the Subcommittee’s update to its Report on No Registration Opinions to reflect changes to Rule 506 (principally the addition of (i) a disqualification for “bad actors” and (ii) Rule 506(c) to permit general solicitation in certain cases) has been posted since Fall of 2014 on both the ABA Federal Regulation of Securities Committee and Legal Opinions Committee websites. Stan reported that, in light of the SEC’s inaction on additional changes the SEC proposed, the Subcommittee recently decided to issue the updated report in final form. The report will be published in an upcoming issue of The Business Lawyer.

The Subcommittee has also decided to prepare a report on opinions on resales of securities, including resales by both affiliates and non-affiliates holding restricted securities and resales under the so-called “4 (1 1/2)” exemption. Finally, the Subcommittee is continuing work on a report on opinions relating to debt tender offers. Although the SEC recently provided some interpretive guidance, there are many issues still remaining which could be addressed in the report.
ABA M&A Committee Pending Illustrative Opinions. Tom Thompson reported that a subcommittee of the ABA Mergers and Acquisitions Committee is preparing illustrative opinions for use in asset purchase transactions, and is also updating its illustrative opinions for use in stock purchase transactions. These efforts are still in an early stage. The illustrative opinions will be attached as exhibits to reports of the M&A Committee on the transactions to which they relate.

2. Recent Cases

Arbitration Clauses: Mutuality. Birckhead Electric, Inc. v. James W. Ancel, Inc., 2014 WL 2574529 (D.C. MD. 2014). Don Glazer and Steve Weise reported on this decision by a U.S. District Court applying Maryland law, holding unenforceable for lack of mutual consideration an arbitration clause that obligated one party to a contract to arbitrate but not the other, in a contract that was otherwise supported by mutual consideration.

Don and Steve commented that, notwithstanding a series of recent U.S. Supreme Court decisions upholding the validity of arbitration clauses, case law on the enforceability of arbitration clauses continues to be inconsistent, and some judges have ignored or creatively sought to avoid following the Supreme Court decisions. Steve commented that some lawyers’ practice of excepting all arbitration clauses from an enforceability opinion is unnecessary, because the Federal Arbitration Act and many state arbitration statutes establish a strong public policy supporting arbitration, and the U.S. Supreme Court has consistently enforced arbitration clauses, e.g., by holding that the Federal Arbitration Act preempts state laws that void arbitration agreements as unconscionable. Don countered that the hostility shown by some lower courts to arbitration clauses justifies the practice of many firms of including an exception for arbitration clauses in their model opinions so that transactional lawyers if pressed to give an opinion on an arbitration clause will consult with other lawyers who closely follow the case law before agreeing to give the opinion.

Court Jurisdiction Over Opinion Recipients. Fulbright & Jaworski LLP v. Eighth Judicial District Court, 342 P.3d 997 (Nev. 2015); BNSF Railway Company v. Superior Court (Kravoletz), 185 Cal. Rptr. 3d 391 (Cal. App. 2d Dist. 2015). Opinion givers sometimes express concern about the possibility that a lawsuit on a legal opinion given to a recipient in another state might be tried in a court in that state that the opinion givers perceive as possibly hostile or less familiar with opinion practice. A court’s jurisdiction can be based on general jurisdiction over a law firm in any matter because of such continuous and systematic contacts by the firm with the court’s state as to render it essentially “at home” (in the words of a recent U.S. Supreme Court case) in that state. Alternatively, the court’s jurisdiction over a law firm can be based on specific jurisdiction resulting from continuous and systematic contacts with the court’s state in a particular matter that is the subject of the litigation. Steve Weise pointed out that case law in this area is inconsistent and that results are highly dependent on the facts in each case. He then reported on the following two very recent cases of interest that are instructive even though neither involved a third-party legal opinion.

Steve discussed the Fulbright case, a malpractice action by a Nevada-based client against a Texas law firm, in which the Nevada supreme court vacated the trial court’s denial of a motion to dismiss because the plaintiff failed to make a prima facie case that Nevada courts had either general or specific personal jurisdiction over the defendant law firm. The court concluded that the facts that a firm lawyer was a registered lobbyist for two years in Nevada and firm attorneys had been admitted pro hac vice for two different clients in lengthy litigation there were not sufficient to establish that the firm’s contacts were so continuous and systematic as to establish general jurisdiction (i.e. the law firm essentially was

---

5 E.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
not “at home” in the forum state.). Relying on the facts that the Texas firm’s representation had been solicited by the client, the subject matter was a Texas real estate development, and the firm’s contacts with Nevada in the matter were limited (to correspondence to the client in Nevada and attendance of a partner of the firm at two investor presentations by the client in Nevada, neither of which had a clear connection to the cause of action), the court concluded that the plaintiff failed to make a *prima facie* case of *specific personal jurisdiction*. Steve emphasized that in both this case and the *Wachtell* case the respective courts emphasized that the defendant law firm did not solicit the business in the forum state.\(^6\)

He also reported on the *BNSF Railway* case, a wrongful death action brought in a California court based on the plaintiff’s exposure to asbestos in the defendant’s facility in Kansas. A California Court of Appeal issued a writ of mandate to quash service of process in the trial court for lack of *general jurisdiction*. The defendant railroad was a Delaware corporation with its headquarters in Texas, and had 3,520 employees (8.1% of its total workforce) and 1,149 miles of track (less than 5% of total track), and generated 6% of its revenues, in California. The defendant had track in 28 states, and the largest concentration of its track and employees was in Texas. Based on these facts the court determined that the business conducted in California was absolutely large but relatively small and did not render the defendant at home in California, using as its basic principle the due process clauses of the Federal and state constitutions and finding in effect that maintenance of the suit would offend traditional notions of fair play and substantial justice.

*[Editors’ Note: The California Supreme Court granted plaintiff’s petition for review of the decision of the Court of Appeal in *BNSF Railway* on July 22, 2015. 2015 WL 4481264. Accordingly, the decision of the Court of Appeal is no longer considered published and may not be cited or relied upon. Cal. Rules of Court 8-1105(e)(1), 8.1115(a).]*

3. **Lightning Round Brief Summaries of Cases and Statutes**

*Choice of Law: Wise v. Zwicker & Associates, P.C.,* 780 F.3d 710 (6th Cir. 2015). Section 187(2) of the *Restatement (Second) of Conflict of Laws* validates governing law provisions in contracts unless one of two exceptions applies. In the *Wise* case, the Sixth Circuit considered whether the second exception to Section 187(2) – the fundamental policy exception – applied to a contractual provision that was valid under the law of Utah, the state whose law was chosen as the governing law of the contract containing the provision, but invalid in Ohio, the state where the plaintiff resided. Don Glazer commented that the decision provides extraordinarily helpful guidance on the meaning of “fundamental policy” and “material greater interest,” key terms in the second exception, and details the considerations for determining which state’s law would govern in the absence of a governing law clause. Don also observed that *Wise* demonstrates the difficulty of predicting how a court will balance the many factors that must be taken into account in determining whether the second exception applies.

*What is an Opinion? Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund,* 135 S.Ct. 1318 (Mar. 24, 2015). Stan Keller briefly commented on the U.S. Supreme Court’s recent *Omnicare* decision. While basically the decision has nothing to do with third-party legal opinions since it involved the standard for liability under §11 of the Securities Act for statements of opinion in a prospectus, the Court’s emphasis on the particular facts and circumstances and the relevant context for

\(^6\) See the summary in the winter 2014 issue of the newsletter (vol. 14, no. 2) (pages A-11 -- A - 12) of Steve’s discussion at the Fall WGLO seminar of *CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz*, 2014 WL 4059761 (D. Kan. August 14, 2014). In that case a Kansas-based client filed a malpractice action against a New York law firm in a federal district court in Kansas, and the court ordered a change of venue to a district court in New York, finding that the legal services were rendered in New York and not Kansas.
ascertaining the reasonable expectations of the reader regarding the work expected to be done as the basis for the opinion provides support for reliance on customary practice for giving and interpreting third-party legal opinions.

**Delaware GCL §204 Opinions.** Don Glazer discussed recent developments under Section 204 of the Delaware General Corporation Law, the recently adopted section that provides a procedure for corporations to validate retroactively shares, whether void or voidable, that were defectively issued. Don commented that to date non-Delaware lawyers frequently turn to Delaware lawyers for opinions on shares validated under Section 204 rather than giving opinions on those shares themselves without the help of Delaware counsel. Depending on when the defect occurred relative to other stock issuances by the corporation, Delaware counsel’s opinion may cover the valid issuance of all of a corporation’s shares or just the shares subject to Section 204 validation; in the latter case, non-Delaware counsel would give an opinion on all of the corporation’s outstanding shares, expressly relying on Delaware counsel’s opinion for the Section 204 shares. Either way, Delaware counsel ordinarily will authorize non-Delaware counsel to rely on its opinion when non-Delaware counsel gives opinions on future stock issuances, thus allowing non-Delaware counsel to give those opinions, either expressly relying on Delaware counsel’s opinion or not, without having to involve Delaware counsel in the future.

**Proposed DGCL Amendments.** Stan Keller mentioned pending legislation to amend the Delaware General Corporation Law to provide increased flexibility to boards of directors to authorize the issuance of shares and in the delegation of authority to make equity compensation awards. If adopted, these amendments will make it easier to give opinions on the valid issuance of shares of Delaware corporations and will address some issues previously identified, such as giving opinions on “at the market” offerings.

2. **Opinion Implications of Recent Cases under Section 316(b) of the Trust Indenture Act**
   (Summarized by Susan Cooper Philpot)

   **David A. Brittenham, Debevoise & Plimpton LLP, New York, Co-Chair**  
   **Gregory A. Fernicola, Skadden, Arps, Slate, Meagher & Flom LLP, New York, Co-Chair**  
   **George M. Williams, Jr., Kaye Scholer LLP, New York, Co-Chair**  
   **Susan Cooper Philpot, Cooley LLP, San Francisco, Reporter**

   This panel explored the impact on opinion practice of certain recent cases under Section 316(b) of the Trust Indenture Act of 1939 (the “TIA”). The TIA is a Depression-era federal law designed to protect retail bondholders against abuses by both the issuers of the bond and the majority vote of fellow bondholders. The TIA requires the appointment of an independent and qualified trustee to act for the benefit of the bondholders and specifies various substantive bondholder protections that must be included in a trust indenture entered into by the issuer of the bond and the indenture trustee. TIA minority holder protections apply directly to public debt covered by the TIA and are often incorporated in privately placed debt as well. Specifically, Section 316(b) of the TIA provides that, subject to certain limited exceptions, the right of any indenture security holder to receive, or sue for, payment of the principal of and interest on such security, on or after the due dates for such payments, shall not be “impaired or affected” without the consent of such holder. Bankruptcy is generally understood to be an implied exception to Section 316(b). Recent cases have interpreted Section 316(b) broadly and in a manner that may impact opinions given in connection with indentured debt.

   The first case discussed by the panelists was *Marblegate Asset Management v. Education Management Corp.*, 2014 WL 7399041 (S.D.N.Y. 2014). In *Marblegate*, plaintiffs held unsecured, parent-guaranteed bonds that were subject to a TIA indenture. The issuer of the bonds became financially distressed and proposed a restructuring whereby all of its assets would be transferred for the benefit of its secured creditors, the parent guarantee of the bonds would be terminated, and the unsecured bondholders
would receive a smaller amount of debt and equity in exchange for their bonds. The exchange offer was accepted by a majority of the bondholders and the minority bondholders sued to enjoin the restructuring. While denying an injunction, the court nonetheless, in dicta, considered the merits of plaintiffs’ substantive claims that the TIA affords broad protection against nonconsensual debt restructurings and that TIA Section 316(b) protects not only the procedural legal entitlement to demand payment but also the broader substantive right to actually obtain such payment. The court cited the unpublished case of *Federated Strategic Income Fund v. Mechala Grp. Jam. Ltd.*, 1999 WL 993648 (S.D.N.Y. 1999). The court concluded that plaintiffs had demonstrated a likelihood of success on the merits of their TIA claim in that the restructuring would leave the issuer of the bonds as an empty shell corporation and the only obligor of the bonds, thereby violating non-consenting bondholders’ rights under TIA Section 316(b).  

The second case discussed was *Meehancombs Global Credit Opportunity Funds, LP v. Caesars Entertainment Corp.*, 2015 WL 221055 (S.D.N.Y. 2015). The facts in *Meehancombs* are more complicated but in some ways similar to those in *Marblegate*. Bonds were issued by a subsidiary under a trust indenture and guaranteed by its parent. Following a change of control of the issuer and its parent, the acquiring company bought out a majority of the bondholders for cash representing a substantial premium over market in exchange for a bondholder exit consent amending the bonds to terminate the parent guarantee, consenting to measure the covenant restricting disposition of substantially all of the issuer’s assets to be based on the assets as of the date of the amendment, and generally agreeing to support any restructuring the acquiring company proposed. Non-consenting bondholders filed an action alleging that the removal of the parent guarantee violated Section 316(b) of the TIA in that it left non-consenting bondholders with a worthless right to collect principal and interest from an insolvent issuer. The court ruled in favor of the non-consenting bondholders, holding that removing the guarantee was sufficient basis for a claim under TIA Section 316(b), even though a payment was not yet due.

*Marblegate* and *Meehancombs* potentially impact opinions given on bonds issued under the TIA. Typically at the time the bonds are originally issued, issuer’s counsel will opine that the bonds are enforceable and that performance under the bonds does not violate applicable law and/or material agreements of the obligors under the bonds. For the most part, these opinions may remain unchanged, but special attention may need to be given to provisions providing automatic guarantee releases and to subordination-related provisions that trigger default if the bonds cease to remain validly subordinated. These two cases, however, may have a more direct impact on those opinions rendered in connection with a debt restructuring transaction. At the time of a restructuring, issuer’s counsel may provide opinions to the indenture trustee, to a dealer-manager in a tender or exchange offer with a covenant stripping exit consent and/or to the providers of new financing in connection with the restructuring. Additional assumptions, qualifications, disclosure or opinion backup may be called for in these restructuring opinions, especially in the absence of an appropriate savings clause in the transaction documents.

The panel expressed the view that the decisions in these cases may change prevailing practice in the area of indentured debt. Any restructuring that transfers assets away from the issuer, releases third-party guarantees and/or amends an indenture to facilitate such changes in the future should be evaluated in light of the *Marblegate* and *Meehancombs* decisions. Additionally, future deals may favor private over public bond offerings, with the private bond adoption of TIA provisions being more limited.

---

7 The court subsequently entered a final judgment for the plaintiffs on the merits. 2015 WL 3867643 (June 23, 2015).
CONCURRENT BREAKOUT SESSIONS II:

1. **Legal Opinions in Real Estate Secured Finance Transactions**  
   **(How Dirt Lawyers Do It)**  
   (Summarized by Sterling Scott Willis)

   **Kenneth P. (Pete) Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, Co-Chair**  
   **Philip B. Schwartz, Akerman LLP, Miami, Co-Chair**  
   **Sterling Scott Willis, Fishman Haygood, L.L.P., New Orleans, Reporter**

   This session considered customary practice for real estate opinion letters in loan transactions secured by U.S. real estate, focusing in particular on some of the similarities and differences between opinion letter practices of real estate attorneys and opinion letter practices of commercial finance attorneys. The session focused on the Real Estate Finance Report of 2012 (the “2012 Report”). The 2012 Report is a joint project of the Legal Opinions Committees of the ABA Section of Real Property, Trust and Estate Law (“RPTE”), The American College of Real Estate Lawyers (“ACREL”), and the American College of Mortgage Attorneys (“ACMA”).

   **Background of 2012 Report.** The 2012 Report is the latest in a series of efforts by national real estate bar groups to provide guidance regarding customary practice in real estate opinions. The initial efforts in the early to mid-1990s began with the Business Law Section’s Accord (47 Bus. Law. 167 (1991)), which was favorably received by real estate practitioners with certain modifications (the “Real Estate Adaptations”). When it became apparent by the late 1990s that the Accord-style opinion was not being widely accepted, a joint committee composed of members of the Legal Opinions Committees of RPTE and ACREL produced an inclusive opinion form containing all of the various provisions incorporated by reference into a normal Accord opinion as modified by the Real Estate Adaptations (the “Inclusive Opinion”). The Inclusive Opinion was widely used by real estate lawyers around the United States for many years following its promulgation.

   A few years ago, the Legal Opinion Committees of the RPTE, ACREL and ACMA made a decision to update and modernize the Inclusive Opinion in light of the continuing development of customary practice. In the process of updating the Inclusive Opinion, a decision was made that a single form of opinion for real estate transactions was neither achievable nor desirable, and the 2012 Report became a discussion of customary practice in rendering opinion letters in financing transactions secured by real estate, with suggested model language and a form of illustrative opinion. The 2012 Report focuses solely on opinions of lead or sole counsel to the transaction and expressly does not address local counsel issues.

   **Remedies/Enforceability Opinions.** Real estate practice is believed to be similar to commercial financing practice in the treatment of the bankruptcy exception and equitable principles limitation to the remedies opinion. A significant difference, however, appears to be the common use in real estate opinion practice of a generic qualification for remedies opinions and far less use of the generic qualification in commercial finance transactions. The real estate practitioners in this session agreed that there is almost universal acceptance of some form of the ABA/ACREL generic qualification and limited assurance that is generally written as follows:

   8 The Report is published at 47 REAL PROP. TR. & EST. J 213 (2012).
Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty), and the judicial enforcement in accordance with applicable Law of the obligation of the Guarantor to repay as provided in the Guaranty the amounts set forth in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived); (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest [or upon a material default by the Borrower in any other material provision of the Transaction Documents]; and (iii) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above.

The ABA/ACREL generic qualification contrasts with the practical realization qualification sometimes used in other contexts. Real estate practitioners feel that the ABA/ACREL generic qualification and assurance is more precise than the practical realization qualification. There was some discussion about whether the ABA/ACREL generic qualification could or should be used and accepted in the commercial finance area, and some suggested that it is already being used in many commercial finance transactions. However, a significant number of participants in the session did not feel that use of the ABA/ACREL generic qualification in commercial finance transactions is appropriate. There was also discussion regarding what remains in an enforceability opinion if the broad generic qualification and assurance is provided and whether the ABA/ACREL generic qualification has the effect of rendering the remedies or enforceability opinion irrelevant. Some participants argued, however, that the generic qualification simply reverses the “each and every” standard of interpreting the remedies opinion and instead covers the key terms as to enforceability that are expected to be covered by real estate lenders.

Those in attendance at the session also discussed how the use of the ABA/ACREL general qualification may render unnecessary an additional laundry list of specific exceptions; but many noted that their practice is to include a list of specific items qualifying their opinions even when including the generic qualification. There was a strong consensus that use of the ACREL/ABA generic qualification is considered market in the real estate context and has gained widespread acceptance from many national and regional lenders.

Many of those participating in the session indicated that they use the generic qualification to cover all of the transaction documents covered by the opinion letter and not just the mortgage and other security documents. However, it was conceded by the real estate practitioners in attendance that, in dealing with non-real estate loan documents, such as guaranties or indemnity agreements, it may be more appropriate to use other carve outs or modifications for these additional documents instead of the generic qualification.

Usury or Choice of Law Opinions. Like reports of other bar groups on the business side, the 2012 Report takes the position that both usury and choice of law opinions are normally implied in an enforceability opinion. However, the guidance provided in the 2012 Report is to treat these topics separately so that an opinion giver will focus on the specifics with respect to each such opinion.
It was noted that the use of bifurcated governing law provisions (where certain provisions of the security documents dealing with the creation, attachment, perfection, priority and enforcement of the lien are governed by the law of the state where the property is located and the interpretation of the remainder of the agreement is governed by the law of another state) have become common. Most participants felt that bifurcated choice of law provisions, at best, create confusion, and that it would be better if the governing law of the security documents were the law of the state where the real property is located.

**Opinions on Mortgages.** Similar to UCC Article 9 opinions, real estate practice, as described by the 2012 Report, is to give form-of-documents opinions, as opposed to creation-or-perfection-of-a-lien opinions. An opinion as to the enforceability of a mortgage means only that the mortgage contractual provisions are enforceable; it does not mean that any liens are created or perfected. The 2012 Report does not discuss personal property security interests in real estate transactions and, in the view of some real estate practitioners, personal property in real estate transactions is relevant only with the respect to fixtures or in connection with certain specific types of real estate projects such as hotels and medical facilities. However, a number of participants in the session indicated that they are often asked to provide Article 9 opinions on personal property security interests created by the mortgage. It was also a consensus of those participating in the session that it is customary practice to exclude adequacy of description opinions from real estate finance opinions.

**Excluded Laws.** One significant distinction between real estate practice and commercial finance practice, as noted in the 2012 Report, is that most real estate opinions on mortgage documents do not cover federal law. It is believed that most real estate mortgage documents are uniquely governed by state law, and seldom are federal law issues involved. Likewise, local law, including specifically matters that may relate to real estate such as zoning, land use and permitting, are considered under customary practice to be excluded from coverage by real estate finance opinions. It was noted that the general practice is for the lender to obtain comfort with respect to these issues from service companies, not law firms. While the 2012 Report makes clear that, under real estate customary practice, coverage of local laws is excluded from the coverage of an opinion letter, the Report recommends that it is best to expressly exclude coverage of local law from the scope of the opinion letter.

**Characterization.** It was noted that, while the characterization of a transaction (i.e., lease versus financing transaction; lease versus sale) is often expressly excluded from the scope of an opinion letter, some participants believe that such an exclusion is unnecessary because this opinion is not implied in a remedies opinion under customary practice.

**Opinions Not Commonly Requested or Given.** There was a discussion about certain opinions that are considered inappropriate in real estate opinions. This includes opinions regarding the adequacy of remedies, since such opinions may put the opinion giver in the ethical dilemma of having to give advice contrary to the client’s interest. On the other hand, some noted that there is a cost-benefit consideration to take into account, since the refusal of a borrower’s counsel to give this type of opinion might lead the lender to hire its own local counsel, at further expense to the borrower. Other opinions that should be avoided include one-action and anti-deficiency opinions, priority opinions, and opinions with respect to lender qualification to transact business and taxation.

(Summarized by Roderick (Rick) A. Goyne)

Allen K. Robertson, Robinson, Bradshaw & Hinson, P.A., Charlotte, Chair
Roderick (Rick) A. Goyne, Baker Botts LLP, Dallas, Reporter

This breakout session discussed a range of topics relating to legal opinions delivered in connection with financings involving the issuance of tax-exempt municipal bonds (including general obligation bonds and revenue bonds issued by a governmental entity for its own use and revenue bonds issued by a governmental entity for the benefit of a nonprofit or for-profit user). Allen Robertson, as the chair of the session, stimulated an animated, thorough and far-ranging discussion.

The session covered, among other things, the evolution of municipal bond financings in the United States and the implications for legal opinions, particularly of bond counsel. Among the particular issues addressed were: the unique role of bond counsel; the allocation of responsibilities in opinion coverage as among bond counsel and other counsel representing various parties in a financing; changes in the role of bond counsel and the scope of its legal opinion, including changes implemented over time by the National Association of Bond Lawyers (“NABL”); and certain securities laws issues in connection with the issuance of municipal bonds.

The session opened with an historical overview of municipal financings in the United States, beginning with the second half of the 19th century when over 200 cases in the area were decided by the United States Supreme Court. Until Erie Railroad Co. v. Tomkins, these cases formed the basis of a substantial body of federal common law relating to municipal financings. In the late 1800’s, as a result of numerous bond defaults and repeated assertions of defenses of invalidity by issuers at the state level, underwriters of municipal bond issuances began to engage counsel who were independent of the issuer and were viewed, at least informally, as “counsel for the transaction” to render an opinion regarding the validity of the bonds. (In recent years, as bond counsel and transaction parties became more sensitive to the ethical implications of the question of the identity of bond counsel’s client, the governmental issuer generally has come to be recognized as the only client of bond counsel.) Bond counsel would receive a transcript of proceedings relating to the bond issuance and, based upon a satisfactory review of the transcript, issue an unqualified opinion which then was printed on the bonds themselves in order to provide legal assurance to the purchasers of the bonds, thereby enhancing the marketability and transferability of the bonds. This led to the development of the concept of “nationally recognized bond counsel,” the designation for a group of firms recognized as expert in the field. At times when there were either legal uncertainties or outright impediments to an individual financing or type of financing, bond counsel also might become involved in the drafting of clarifying or enabling legislation at the relevant state level in order to facilitate the financing.

The core of bond counsel’s opinion addresses the validity of the bonds under state law and, since the late 1960’s, the exemption from federal income taxation of interest thereon. In 1982-83, NABL published its first “model” opinion which has since been revised and now includes explicit bankruptcy and related insolvency exceptions. Over the years, NABL also has revised its published guidance for the issuance of an approving opinion. Unqualified bond opinions have always been understood to be given with a high degree of certainty. Initially, NABL’s opinion reports described this standard as one in which “it would be unreasonable for a court to hold to the contrary.” NABL now describes this standard as one which requires bond counsel to be “firmly convinced.”
If an offering document is prepared with respect to an issue of municipal bonds, the form of the approving opinion of bond counsel is included in the offering document. (Printing the opinion on the bond certificate is no longer meaningful in a DTC-book-entry-only world.) With the exception of its opinions issued in transactions involving Internal Revenue Code Section 501(c)(3) entities, bond counsel does not state reliance upon the opinions of others in the transaction. In publicly offered deals, underwriters ask bond counsel to deliver a supplemental opinion that addresses the exemption of the bonds from registration under the Securities Act of 1933, as amended, and the absence of the need to qualify an indenture in respect of the bonds under the Trust Indenture Act of 1939, as amended. In the event that the structure of a particular transaction involves what could be characterized as a separate security for purposes of the federal securities laws, bond counsel or the counsel for the ultimate recipient of the proceeds of the financing will provide these federal securities law opinions as to the separate security.

In the case of transactions in which there are offering documents relating to the bonds, bond counsel in its supplemental opinion letter also will provide an opinion to the effect that the summaries of the relevant documents constitute fair and accurate summaries. In turn, counsel for the ultimate recipient of the proceeds of the financing will provide a form of negative assurance opinion, as will counsel for the underwriter, on the offering documents.

The discussion also underscored the fact that although municipal bonds may be exempt from the registration requirements of the federal securities laws, they are not exempt from the anti-fraud provisions of the federal securities laws. Participants in the session discussed both in general terms and with specificity, circumstances in which the Securities and Exchange Commission has brought actions against lawyers in connection with their involvement in municipal bond financings.

3. Tax Opinions — Why You Should Care
(Summarized by Kenneth R. Blackman)

Peter H. Blessing, KPMG LLP, New York, Co-Chair
Bryan C. Skarlatos, Kostelanetz & Fink, LLP, New York, Co-Chair
Kenneth R. Blackman, Fried, Frank, Harris, Shriver & Jacobson, LLP, New York, Reporter

This session focused on the role of opinions (both third-party opinions and opinions to clients) in tax practice with a view to informing non-tax practitioners what they should be aware of regarding tax opinions. The discussion focused on:

- The extent, if any, to which the tax opinion process differs from the process used for non-tax transactional opinions; and

- The role of the Internal Revenue Service (the “IRS”) in tax opinion practice.

Highlights of the discussion are summarized below.

Unlike other practice areas, opinions inhere in tax practice as the end result of advice to the client or to a third party as to the tax treatment of a given transaction or event or form of business organization. Tax advice is often informal and is presented in short memoranda, emails and telephone calls. More formal tax advice may be reflected in written opinion letters. Formal opinions often appear as closing conditions to business transactions or as exhibits to Securities and Exchange Commission (the “SEC”) disclosure documents that have descriptions of the tax consequences of a transaction or the tax status of business organizations.
It was noted that the verbiage of tax opinions is different from corporate practice in that tax opinions are often expressed with different levels of confidence; the words “will”, “should”, “more likely than not”, “substantial authority”, “realistic probability of success” and “reasonable basis” are used in tax opinions to describe the level of confidence of the opining lawyer. What these standards mean and how the use of a particular standard affects exposure to tax penalties must be explained to the client, since, other than “will” and “more likely than not,” the expressions may convey to an unversed reader a higher level of comfort than their technical meaning entails. Further, the Co-Chairs noted that “should” opinions are not appropriate unless the tax practitioner has a high degree of comfort that a court would reach a favorable outcome as a matter of first impression on the particular facts in the aggregate. The problem of assessing probability of result is compounded when a particular matter has multiple tax issues, each of which has its own confidence level, but which in the aggregate may have a different confidence level from that of any of the individual elements.

Tax practitioners are also subject to a level of regulation not experienced in other practice areas. Law firms often require their tax practitioners to register as tax preparers with the Treasury Department. Also, through the Treasury Department, the IRS in Circular 230 has promulgated rules regarding, among other things, (a) the behavior of tax practitioners, (b) the impact of opinion verbiage on how tax returns are filed and whether penalties may be assessed for advice that turns out not to be accepted by the IRS and (c) a law firm’s oversight responsibilities with respect to its tax practice. In addition, the SEC staff’s views on the tax disclosures in SEC disclosure documents and the tax opinions often required to accompany those disclosures are set forth in Staff Legal Bulletin 19.

For example, Section 10.37(a)(2) and (a)(3) of Circular 230 require practitioners to base written advice on reasonable factual and legal assumptions (including assumptions as to future events), to reasonably consider all relevant facts, to use reasonable efforts to ascertain the facts, not to rely upon any representation, statement or other item if reliance would be unreasonable, to relate the applicable law and authorities to the facts, and finally, when evaluating a Federal tax matter, not to take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit. Along the same line, Section 10.37(b)(1)-(3) of Circular 230 allows practitioners to rely on the advice of another person only if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances.

It was noted that the IRS has removed from Circular 230 former Section 10.35. That section included detailed provisions requiring disclosure of various matters and led to the use of so-called “Circular 230 Disclaimers” in emails. While those disclaimers are no longer required and have largely disappeared, the rules do not prohibit disclaimers in email and other communications, and the Co-Chairs suggested that it may be appropriate to include disclaimers in communications regarding tax related matters where the advice given is preliminary in nature.

Another important feature of Circular 230 is Section 10.36 which imposes oversight responsibilities on the one or more individuals who have or share principal authority for overseeing a firm’s practice governed by Circular 230. Such individuals must take reasonable steps to ensure that adequate procedures are in effect for purposes of complying with Circular 230 and to ascertain whether the procedures are being followed. Further, they must take prompt corrective action if they know, or have reason to know, of non-compliance. Implicit in these requirements is the need to identify a tax group which in some firms may raise interpretive issues.

As tax opinions often turn on mixed questions of fact and law, the client’s representations expressed in certificates are critical to the opinion process. As a result, before relying on a certificate from a client, a practitioner will need to assess the client’s sophistication and the reliability of the client’s judgment as to the underlying facts, particularly where those facts are actually judgments as to mixed
questions of fact and law, as, for example, judgments as to business purpose, profit potential, lack of intention to sell, economic substance, arm’s length pricing and worthlessness.

When courts look at the question whether reliance on a tax opinion is in good faith for purposes of tax penalty protection, the assessment courts make is whether a sufficient analysis was made. The questions that arise include:

- Are the facts provable and does the client stand behind them;
- Has the law been fairly applied to the facts;
- Are conflicting authorities dealt with in a balanced manner;
- Is congressional intent or tax policy used appropriately to construe an ambiguity; and
- Is the opinion broad enough in its scope.

Opinions that are too good to be true run the risk of not providing penalty protection.

The risks of malpractice were discussed. When written opinions are introduced into evidence to support a finding of reasonable cause to avoid imposition of tax penalties, they naturally are the subject of scrutiny. Judges in a few decisions have excoriated the tax advisors involved in structuring the transaction, and they also have derided various aspects, both substantive and formal (even trivial, such as typos), of written opinions. Further, failure to establish or to follow internal firm controls may raise issues and be asserted as evidence of malpractice.

In sum, what did non-tax practitioners learn from this session? First, that tax opinions are issued against a regulatory background principally set forth in Circular 230; second, that Circular 230 uses a “reasonableness” approach to describe the required standard for attorney conduct; third, that the words tax lawyers use to describe their level of confidence in an opinion include some verbiage not ordinarily seen in non-tax opinions and that have meanings that are not obvious; fourth, that the factual (including mixed questions of fact and law) predicates to an opinion are often established through certificates and assumptions that, at least to the extent factual, can be relied upon if reasonably based but that are often not pre-scripted, can be *sui generis*, and require great care to avoid inappropriate legal representations or assumptions; and fifth, that special procedures may be needed to avoid malpractice claims in light of the informal and non-uniform nature of the context in which advice is requested and must be given. But, in the end, tax lawyers employ the same analytical skills as non-tax lawyers, and one wonders whether the old French saying is apt:

“Plus ça change, plus c’est la même chose.”

[Editors’ Note: See the two-part article on the Service’s 2014 adoption of revisions to Circular 230 (“Treasury Adopts Revisions to Circular 230”) in the Fall 2014 issue of the Newsletter (vol. 14 No. 1) (at 20-23), and (“Proposed Revisions to Circular 230: Is the Treasury Acknowledging the Role of Customary Practice in the Preparation of Tax Opinions?”) in the Spring 2013 (vol. 12, no. 3) issue of the Newsletter (at pages 14-22).]
PANEL SESSIONS III:

**Current Ethics Issues Relating to Opinion Practice**
(Summarized by Craig D. Singer and John K. Villa)

*Craig D. Singer, Williams & Connolly LLP, Washington, D.C., Co-Chair*
*John K. Villa, Williams & Connolly LLP, Washington, D.C., Co-Chair*

The purpose of the panel was to discuss the operation of certain legal ethics rules that may arise for opinion practitioners. The panelists used hypothetical scenarios as a springboard for discussion with the attendees. The hypotheticals and excerpts from the ABA Model Rules of Professional Conduct were provided to attendees in advance as part of the program materials. Several attendees “volunteered” in advance to give initial responses to the hypothetical scenarios to facilitate a wider discussion. The panelists then “graded” the initial responses. Discussion was lively, with many attendees participating.

In the first hypothetical scenario, a lawyer represents a real estate developer in connection with a private placement of stock, for which the lawyer is expected to deliver legal opinions, and the lawyer is aware of certain facts about the transaction that are not contained in the offering materials. The panelists and participants discussed the lawyer’s ethical duties to his client, including the duty of confidentiality under Model Rule 1.6, the duty to report within a client organization under Model Rule 1.13, and the permissible bases for withdrawal from a representation under Model Rule 1.16. They also discussed the lawyer’s ethical duties to non-clients, including the duty not to assist a fraud under Model Rule 1.2 and the duties with respect to statements to third parties under Rule 4.1 entitled “truthfulness in statements to others.” The discussion focused on the interplay between the lawyer’s duties to assist the client in completing a lawful transaction and to maintain the confidentiality of information learned in the course of the attorney-client relationship with the lawyer’s obligation not to assist the client in committing a fraud. Participants also expressed views about the lawyer’s right to decide whether he is willing to put his name on a legal opinion in furtherance of a transaction. The panelists also discussed the potential consequences of the lawyer’s decision, either to assist the client in the transaction and deliver the requested opinions or not to do so, on potential lawsuits by stock purchasers or by the client, as the case may be. Similar issues are discussed in the panelists’ recent article, “The Opinion Is What the Opinion Says: Understanding So-Called ‘Duties of Disclosure’ to Non-Clients,” in the Fall 2014 issue of In Our Opinion (vol. 14, no. 1) (pages 14-17).

In a second hypothetical scenario relating to conflicts of interest, a lawyer is asked to represent his client, and to give closing opinions, in connection with the sale of two parcels of real estate, when the lawyer’s firm represents or has in the past represented the buyers in connection with other matters. The discussion centered on Model Rules 1.7 and 1.9, which address a lawyer’s obligations concerning conflicts of interest with current clients and former clients, respectively. The first component of this hypothetical implicated Rule 1.7, because the lawyer’s partner represented the buyer in an unrelated litigation matter. The second component of this hypothetical implicated Rule 1.9, because the lawyer had previously represented the buyer of the second parcel in an arguably related transaction. In both scenarios the participants discussed the availability and consequences of client consent to the conflicts of interest.