

IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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James F. Fotenos and Susan Cooper Philpot, Editors

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FROM THE CHAIR

I am pleased to share with you the Spring 2017 issue of *In Our Opinion*. As I was thinking of what to highlight in my cover note, it hit me that it is high time for this Newsletter itself to be the main topic. Over the years Jim Fotenos and Susan Cooper Philpot, with great help from Stan Keller, Tim Hoxie and others, have made it the crossroads not only for our Committee's members, but also for the national community of lawyers who focus on opinion practice. Since I have been part of it, that community has grown significantly larger and more diverse. Production of content and guidance by our Committee, TriBar and the Securities Law Opinions Subcommittee, among others, is as robust as ever. The Working Group on Legal Opinions ("WGLO") has taken a leading role in bringing together state bar groups, building consensus and amplifying the guidance they develop for their members; and the semi-annual WGLO seminar has become a hub for sharing knowledge and practical advice. What has not changed is the unmatched reach of our Committee: over 1,400 members, access to the resources of the ABA Business Law Section, and a strong partnership with The Business Lawyer and Business Law Today. The Newsletter is an invaluable tool in maintaining and increasing that reach. In addition to disseminating content produced by various bar organizations, bar groups and individuals, the Newsletter focuses attention on emerging topics and acts as the repository for a wealth of information. Four times a year *In Our Opinion* serves up a full, tasty menu like clockwork – I have gone back to past issues many times to find answers or at least point me in the right direction. I pray that Jim and Susan continue to be as generous with their talent and time as they have been in the past. Please join me in thanking them.

Broadening the Reach of Our Committee. As broad as our Committee's reach is, it is never enough. Complacency is toxic. To keep our efforts fresh, Rick Frasch is heading up a project to establish a Twitter handle for our Committee. Those who participated in our Committee's

Spring 2017 meeting in New Orleans heard Rick's initial report. Anna Mills and Christina Houston are working with Rick to craft our Committee's social media strategy, which you will hear more about at the 2017 annual meeting in Chicago. While I realize that the average report on opinion issues stands to 144 characters as the Pacific ocean to a kiddie pool, the immediacy of Tweets and their brevity are Twitter's main attractions. As practitioners we increasingly rely on blogs and social media feeds to bring to our attention topical, urgent content. That is the start, not the end of our analysis, but without it we would likely miss important developments. The same applies to opinion issues. For many of us the ListServe is a first stop when we face difficult practical issues and want to bring to bear our collective wisdom quickly. Bar reports and the Committee's Legal Opinion Resource Center expand our knowledge base. Twitter will complement these sources and extend the continuum to maximize the effectiveness of our Committee. In addition, the work Rick, Anna and Christina are doing will help us reach younger practitioners, many of whom are not yet members of our Committee but should be exposed to our work and access our collective experience on opinion issues. I look forward to your help to make these efforts successful.

Update on New Projects. Outreach beyond traditional constituencies is the common denominator of two projects that our Committee has approved:

1. First, picking up on our Committee's report on cross-border opinions (*Cross-Border Closing Opinions of U.S. Counsel*, 71 Bus. Law. 139 (Winter 2015-2016)), we are undertaking a joint effort with interested lawyers in other countries to promote convergence in cross-border opinion practice. The core constituency for our Committee is U.S. practitioners across states and practice areas, but increasingly many of our members' practices have a cross-border

dimension. This project seeks to make our Committee a leader internationally in the field of legal opinions.

2. Second, we are beginning work on a new report that would improve, rationalize and standardize practice for giving third-party closing opinions covering intellectual property issues in financing or acquisition transactions. Preparation of the report will require collaboration with other ABA committees with expertise in IP for technology companies, brand-centric enterprises, life sciences/pharmaceutical companies, fin-tech/health-tech, and even privacy/data analytics.

I hope both projects will be catalysts for renewed creativity within our Committee and for closer interaction with U.S. and international bar groups outside our historically target audience. I look forward to ideas and help in making both projects successful during my term as Chair of the Committee.

Progress Towards Finalizing the Statement of Opinion Practices. Coming back to our Committee's "core business," I am glad to report that after active debate in New Orleans on the then latest draft of the *Statement of Opinion Practices* a lot of good work has been done to build a broad consensus and resolve a small handful of language issues. I do not want to declare victory prematurely, but I believe the "joint" part of this joint project of our Committee and WGLO is front and center and everybody is showing an admirable focus on making the final product as good and authoritative as it can be. Please stay tuned for more detail from Stan Keller and Steve Weise in the coming months.

Security Interest Opinions Under The Hague Securities Convention. I want to highlight the article Carl Bjerre, Sandra Rocks, Ed Smith and Steve Weise have contributed to this issue of the Newsletter on the choice-of-law rules that the Hague Securities Convention provides for many commercial law issues affecting intermediated securities. This area of the law is technically

intricate and the Convention (which became effective on April 1, 2017) preempts portions of the corresponding choice-of-law rules provided or mandated by common law, Articles 1, 8 and 9 of the UCC, and related federal book-entry regulations. Several discussions at TriBar and WGLO have identified a host of difficult issues that opinion preparers need to analyze. The article addresses differences in the choice-of-law results under the Convention, compared to those under the UCC, as they affect opinions of counsel, primarily regarding enforceability and perfection of security interests with respect to intermediated securities. The authors are recognized as the foremost experts on these topics and I am sure many members of our Committee and other readers will benefit from their rigorous, as well as practical analysis.

Section's Annual Meeting in Chicago – September 14-16, 2017. Please do not forget to register for the ABA Business Law Section's Annual Meeting in Chicago on September 14-16, 2017. In the next this issue of the Newsletter we will give you information about meetings and programs of likely interest to the members of our Committee

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FUTURE MEETINGS

**Working Group on
Legal Opinions Foundation
New York, New York
May 8-9, 2017**

**ABA Business Law Section
Annual Meeting
Chicago, IL
Sheraton Chicago Hotel & Towers
The Gleacher Center
September 14-16, 2017**

**ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 17-18, 2017**

BUSINESS LAW SECTION 2017 SPRING MEETING

The Business Law Section held its Spring Meeting in New Orleans on April 6-8, 2017. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Spring Meeting of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Committee met on Friday, April 7. The meeting was attended, in person or by phone, by approximately 50 members of the Committee. There follows a summary of the meeting.

Statement of Opinion Practices. Stan Keller updated the Committee on the status of the Statement of Opinion Practices (Draft of March 28, 2017) (the “Statement”). The Statement is a joint project of the Committee and the Working Group on Legal Opinions (“WGLO”). The purpose of the Statement is to update the Committee’s *Legal Opinion Principles* (53 Bus. Law. 831 (1998)) in its entirety and selected provisions of the Committee’s *Guidelines for the Preparation of Closing Opinions* (57 Bus. Law. 875 (2002)). The project committee consists of some 30 members, with Stan and Ken Jacobson as co-chairs, Steve Weise as reporter, and Pete Ezell and Steve Tarry as co-reporters, and representatives of the Committee and a number of state bar associations.

Separately, the project committee has developed core principles (the “Core Principles”), a concise statement of key opinion principles, drawn from the Statement, that is designed for use by law firms that wish to incorporate them by reference or attach them to opinion letters (as some firms now do with the *Legal Opinion Principles*). The most recent draft of the Core Principles is also dated

March 28, 2017; the recent drafts of the Statement and Core Principles are available on the front page of the Committee's website, available [here](#).¹

The Statement was circulated to interested opinion groups in the summer and fall of 2016, and the most recent drafts of the Statement and Core Principles reflect the project committee's review of the comments received on the earlier draft of the Statement. The revised Statement and the Core Principles were presented to the Committee for approval. If approved by both the Committee and WGLO, they will be resubmitted to interested opinion groups, including numerous bar associations, for final review and approval, after which it is the expectation of the project committee that both the Statement and the Core Principles will be published.

The Committee discussed the Statement, including concerns about aspects of it raised by Dick Howe, a member of the project committee. After discussion, the Committee voted to approve the Statement; the vote was not unanimous and, in light of the concerns expressed by Mr. Howe (which were joined in by several others) and noting that action remained to be taken on the Statement by the Board of WGLO, the Committee granted the Chair discretion on how to proceed, including bringing the Statement, perhaps as revised to address Mr. Howe's concerns, input from the WGLO board and other comments, back to the Committee for a further vote.

Hague Securities Convention. The Hague Securities Convention went into effect April 1, 2017. The Convention provides rules to determine a choice of law between the laws of different countries when determining legal issues pertaining to securities credited to a securities account held with an intermediary. Currently, only the United States, Mauritius, and Switzerland have adopted the Convention,

but other countries are expected to follow. When *any* of the following are located in a different country the choice-of-law rules of the Convention are likely to be implicated:

- The account holder;
- An issuer of any of the securities;
- Any party to a transfer of securities;
- Any intermediary;
- The location of the security certificates; and
- Any adverse claimant.

Steve Weise gave a brief status report on the Convention. He and Carl Bjerre, Sandra M. Rocks, and Edwin E. Smith have made several presentations on the Convention for the American Law Institute and other seminar sponsors. Their presentation materials have been posted on the Committee's website, and are accessible from the front page of the website under "Discussion Documents," available [here](#).²

Steve and Sandra will be preparing a note for the Spring 2017 issue of *In Our Opinion* addressing the opinion implications of the Convention, and a seminar on the topic will be held at the WGLO seminar to be held May 8-9, 2017 in New York.

Local Counsel Opinion Project. Philip Schwartz (Akerman LLP) updated the Committee on the status of the project that has been undertaken to prepare a principles-based report on the topic of opinions of local counsel. The project, which is a joint endeavor of the Committee and WGLO, is being spearheaded by a drafting committee that includes Phil, Frank Garcia (Norton Rose Fulbright US LLP) and Bill Yemc (Richards, Layton & Finger, P.A.). Phil reported that earlier this year the drafting committee prepared a revised draft of the proposed report, which was commented on

¹ The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

² The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

by members of the 17-person steering committee overseeing the project. He reported that a further revised draft is expected to be circulated shortly to the members of the steering committee for their review and that he hopes to have an exposure draft ready for review by this Committee sometime in the Fall of 2017.

Phil highlighted two issues in the draft report on which the Committee does not yet have a consensus. The first issue is how far the report should go in providing guidance on opinions not typically included in local counsel opinion letters. The second issue is which guidance provided in the report is part of customary practice and therefore need not be expressly stated in a local counsel opinion letter. Phil reported that these two topics, among others, will be considered at a breakout session to be held at the upcoming Spring 2017 WGLO meeting.

Future Committee Projects. Chair Ettore Santucci discussed future Committee projects at length in his Chair's letter introducing the Winter 2016-2017 issue of *In Our Opinion*. At the meeting Ettore focused on one of those future projects, a report on intellectual property opinions. The focus of the report would be third-party closing opinions covering intellectual property issues in financing and in acquisition transactions and negative assurance letters given on intellectual property disclosures in capital markets transactions. After discussion, the Committee decided that the Chair should approach IP lawyers and the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee with a view to establishing a working group to develop objectives and an outline of the issues to be addressed in any such report.

One other project discussed by the Chair in his Chair's letter is the cross-border opinions convergence project, the objective of which is to promote convergence in cross-jurisdictional opinion practice, including the promotion of common opinion usage. Truman Bidwell of Sullivan & Worcester LLP, who is assisting the Chair in launching this project, reported that discussions are beginning with counsel in the

initial target countries (England, Germany, France, the Netherlands, and Canada) to solicit their views on the value of such a project and their interest in working on it. Exploratory discussions will continue in the spring and summer with a view to determining whether sufficient interest exists to appoint a working group to work on the project by the September 2017 meeting of the Committee in Chicago.

Social Media. Rick Frasch is working with Christina Houston and Anna Mills to expand the Committee's use of social media, including Twitter. To encourage ABA members to access the ABA Twitter account (@ABALegalOpinion), Rick and Christina passed out cards providing instructions (including links to a website) on how to download Twitter on phones and computers. Rick promised a demonstration of the expanded ABA Twitter account for the Committee at its September 2017 meeting in Chicago.

Survey of Law Firm Opinion Practices. John Power and Arthur A. Cohen (Haynes and Boone, LLP) are co-chairs of this subcommittee, which is working on an update of the Committee's 2010 survey (published in 68 Bus. Law. 785 (2013)). The subcommittee met for two hours that morning and is making good progress in developing a questionnaire. John estimated that the survey would be available for distribution in 2018.

AICPA "True Sale" Opinion Requirements. Tom White (WilmerHale) reported on the ongoing discussions between an ad hoc group of representatives of the Committee and the Audit Responses Committee (consisting of Tom, Steve Weise, Stan Keller, and Will Buck) that has been in discussions with the AICPA, on and off, for over a year on AICPA's latest efforts to revise the disclosures of (and related support for) the accounting treatment for off-balance sheet entities and obligations. Among other items, the AICPA has focused on whether more extensive "true sale" opinions are needed from the audit clients' counsel. The ad hoc group has in the past found the AICPA's suggestions for expanded opinion coverage to be unrealistic and has urged the AICPA to

narrow what it is seeking to matters appropriate for a legal opinion. Among other points, the ad hoc group has pointed out to the AICPA that fraudulent conveyance and veil-piercing issues are heavily factual and not appropriate topics for legal opinions. The ad hoc group expects to continue its dialogue with the AICPA.

Next Meeting. The next meeting of the Committee will be held at the Section's annual meeting in Chicago on September 14-16, 2017.

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Audit Responses Committee

The Committee met on April 8, 2017. The principal discussion points are summarized below.

Confirmation.com. Committee Chair Noël Para reported to the Committee that on February 24, 2017, the Committee issued its *Statement Regarding Electronic Audit Response Request and Delivery Platforms*. Attached to the Statement is a copy of the short-form Confirmation.com user agreement. The Statement was approved by the Committee at its November 18, 2016 meeting, subject to minor revisions, which were incorporated into the published Statement, to reflect that the guidance in the Statement would generally apply to other electronic audit letter platforms. The Statement is published on the Committee's website (accessible [here](#)), and a link to the Statement is included in a blog post that Alan Wilson prepared for TheCorporateCounsel.net regarding electronic audit letter platforms.³ Thomas White commented on interactions with Confirmation.com, and members of the Committee engaged in discussion regarding the

status of the adoption of electronic audit response letter platforms, particularly among larger accounting firms.

ABA and Strafford CLE Webinars. Messrs. White and Para discussed the success of a webinar they presented with Miranda Mandel (in-house counsel at ALAS, Inc.) in January 2017 entitled "Audit Responses – What You Need to Know in 2017." The webinar covered a host of topics, ranging from the purpose of audit responses to best practices when preparing audit responses. The webinar was widely attended, demonstrating an increased awareness of and focus on the audit letter process and the Committee's initiatives. A copy of the presentation slides has been uploaded to the Committee's website (under "Materials"). Stanley Keller mentioned that he, Mr. Wilson and others presented a CLE webinar presentation in March 2017 through Strafford Publications directed to in-house counsel, entitled "Audit Response Letters and Disclosures: In-House Counsel's Role in Balancing Auditor Demands and Company Privileges."

Update on Law and Accounting Committee. Randy McClanahan provided an update from the ABA Law and Accounting Committee meeting that immediately preceded the Committee's meeting. Mr. McClanahan noted that the PCAOB is expected to issue a final standard regarding the auditor's reporting model in the second quarter of 2017. The adoption of a final rule in this regard would culminate a process involving a handful of different proposals since the process began with a 2008 recommendation by the Department of the Treasury's Advisory Committee on the Auditing Profession. Mr. McClanahan reported that the PCAOB recently began exploring possible revisions to Auditing Standard ("AS") 2405, *Illegal Acts by Clients*, including whether a need exists to provide auditors with better guidance regarding their responsibility in the course of their audits to consider illegal acts by clients. Members of the Committee discussed the possible outcomes of any PCAOB concept release or rulemaking with respect to AS 2405, noting that the PCAOB may

³ The URL of the Committee's website is <http://apps.americanbar.org/dch/committee.cfm?com=CL965000>.

consider requiring auditors to obtain confirmations from lawyers regarding a client's compliance with laws, which are not anticipated by the current ABA *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*. The Committee, in conjunction with the Law and Accounting Committee, will closely monitor regulatory efforts in this regard.

Discussion of Developments in RPM Case. The Committee discussed recent filings in the ongoing SEC enforcement action against RPM International Inc. and its general counsel. See *SEC v. RPM International Inc.*, Case No. 16-cv-01803 (D.D.C. September 9, 2016).⁴ Mr. White summarized the basic allegations in the SEC's complaint and commented on RPM's and its general counsel's motions to dismiss, as well as the SEC's memorandum in opposition that was filed in response thereto.

The SEC alleges that RPM failed to properly accrue for and disclose a loss contingency. The loss contingency at issue involves a government investigation prompted by a *qui tam* complaint alleging that an RPM subsidiary overcharged the government under certain government contracts. As noted in its complaint, the SEC claims that RPM became aware of the government investigation in March 2011, though it did not disclose or record an accrual for a loss contingency until April 2013. In this regard, the SEC emphasizes that the Department of Justice (the "DOJ") provided a copy of the *qui tam* complaint, which had been partially unsealed, to RPM in August 2012 and that RPM submitted a settlement offer to the government on January 10, 2013, just two days after it filed its Form 10-Q for the second quarter ended November 30, 2012.

⁴ The complaint is accessible from the SEC's website (www.sec.gov) under "Enforcement — Litigation Releases Archive: 2016/Fourth Quarter (LR-23639, September 9, 2016)." Defendants sought transfer of the case to the United States District Court for the Northern District of Ohio, which was denied by the Court on December 20, 2016. 2016 WL 7388284 (D.D.C.).

Among the arguments set forth in the motions to dismiss, RPM and its general counsel assert that the relevant government investigation did not rise to the level of an asserted claim and that relevant accounting and disclosure rules under ASC 450-20 (formerly FAS 5) did not otherwise require accrual or disclosure of this loss contingency. Interestingly, with respect to allegations that he did not adequately advise the company's auditors, RPM's general counsel asserts that RPM's auditors were in contact with RPM's outside counsel handling the government investigation and that the auditors should have inquired further of RPM's outside counsel if the auditors had questions surrounding facts necessary to determine the appropriate disclosure or accrual requirements in respect of each periodic report at issue. Notably, the filings made in the case did not discuss the conversations RPM or its general counsel had with the company's outside securities disclosure counsel.

Predictably, the SEC's memorandum in opposition to the defendants' motion to dismiss challenges each of RPM's and its general counsel's arguments. Of note, the SEC specifically contests arguments that RPM was prohibited from disclosing the existence of the DOJ investigation, which the DOJ requested to be kept confidential. In its March 24, 2017 memorandum in opposition, the SEC states:

A leading FCA treatise explains that upon receipt of a partially unsealed *qui tam* complaint, the company could either (i) seek the court's permission to disclose the existence of the complaint, or (ii) "disclose the existence of [the] DOJ investigation," which would "giv[e] the investing public the necessary information about risks the company faces, yet . . . would not violate the seal order, since the disclosure would not mention the existence of the sealed *qui tam* complaint." John T. Boese, Civil False Claims and Qui Tam Actions § 1.12[C] (2016).

Members of the Committee discussed the facts of the case and the positions taken by the respective parties. The Committee noted the significance of the *RPM* case in a number of respects. The case illustrates not only the difficult judgments attendant to government investigations, but also to *qui tam* suits, which by their nature remain confidential. The case also exemplifies the difficult considerations associated with handling settlement offers and the challenges facing in-house counsel, particularly the way in which the SEC looks to in-house counsel as the primary decisionmaker in certain disclosure matters.

With respect to government investigations, Mr. Keller reminded the Committee that the *Second Report of the Committee on Audit Inquiry Responses Regarding Initial Implementation* (32 Bus. Law. 177 (1976)) provides guidance in this regard, noting that government investigations do not necessarily constitute unasserted claims. Notwithstanding, attorneys and their clients may determine that disclosure of such investigations is appropriate in certain circumstances, even if not required. Should a client decide to provide disclosure in such a circumstance, Mr. Keller advised that it is important to inform the company's auditors to ensure that the auditors understand the company's assessment of the investigation being disclosed.

The Committee also discussed the complex disclosure considerations that arise in the context of settlement discussions, as illustrated by the SEC's emphasis on the timing of RPM's settlement discussions in comparison to its disclosure timeline. Mr. Keller noted that while settlement proposals factor in to a company's assessment of the likelihood of liability and the range of liability, the presence of a settlement offer is not conclusive to the determination of whether disclosure or an accrual is required.⁵

⁵ For an extensive note on the *RPM* litigation, see Stan Keller's article "*Dealing with Government Investigations in Audit Responses*" in the Fall 2016 issue of *In Our Opinion* at 14-17 (vol. 16, no. 1).

SAIC Case. Mr. Keller noted that the Supreme Court has granted certiorari to decide whether the alleged failure to provide disclosure required under Regulation S-K, Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations) gives rise to a private right of action. *Leidos, Inc., fka SAIC Inc., v. Indiana Pub. Ret. Sys.*, 818 F.3d 85 (2d Cir. 2016), *cert. granted*, No. 16-581 (U.S. Mar. 27, 2017). As a reminder, the *SAIC* case has been a topic of much discussion at prior Committee meetings in light of its holding suggesting that in certain circumstances where a claimant has knowledge of sufficient facts that could give rise to a claim against a company, there may have been manifested to the company an awareness of a possible claim or assessment (although it would appear that the "present intention to assert" prong might not be satisfied in such case).

Future Committee Discussion Topics/Projects. The Committee next discussed ideas for future Committee discussion topics, which could also serve as the basis for future Committee Statements. A handout of possible topics was circulated at the meeting and is posted on the Committee's website with the agenda for this April 8 meeting.

Listserve Activity. A summary of recent activity on the Committee's listserve is included in a later section of this issue of the Newsletter.

Next Meeting. The Committee's next meeting is scheduled for the Business Law Section's Annual Meeting in Chicago, September 14 – 16, 2017.

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⁶ Alan J. Wilson, Esq., of Wilmer Cutler Pickering Hale and Dorr LLP, Content Director of the Committee, served as secretary of the meeting and prepared these minutes.

Law and Accounting Committee

The Law and Accounting Committee met on April 8, 2017. The principal items of discussion are summarized below.

Summary of Financial Accounting Standards Advisory Council (“FASAC”) Meeting. Tom White reported on the FASAC meeting that occurred on April 5th at FASB’s offices. The Committee discussed some of the matters that were the subject of this meeting.

FASB Update. Randy McClanahan gave an update of current FASB developments, including the recent conversation of the Committee's leadership with Jim Kroeker, Vice Chairman of the FASB and Sue Cosper, Technical Director of the FASB. The discussion focused on the definition of materiality, distinguishing liabilities from equity, the exposure draft on share based payment transactions, the going concern standard issued by the Auditing Standards Board, the FASB pronouncement on clarifying the definition of a business, and the revenue recognition transition resource group process.

PCAOB Update. The Committee discussed the PCAOB's Standard Setting Update that was issued on March 31, 2017. The Committee focused heavily on a new addition to PCAOB’s research agenda regarding the auditor's consideration of noncompliance with laws and regulations. Several Committee members volunteered to monitor this process.

Next Meeting. The next meeting of the Committee will be held at the Section’s fall meeting in Chicago on Saturday, September 16, 2017.

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Securities Law Opinions Subcommittee Federal Regulation of Securities Committee

The Subcommittee met on April 7, 2017. The participants discussed final comments on a revised draft of a report addressing Exchange Act Rule 14e-1 opinions delivered in connection with debt tender offers. The revised draft, which was circulated to Subcommittee members by e-mail on March 20, 2017, incorporated comments made at the Subcommittee’s September 2016 meeting and comments received after that meeting. The consensus of the participants was that the report, upon revision to reflect the comments discussed during the meeting and separately submitted to the Chair and Vice Chair of the Subcommittee, would be in final form and ready for publication. The report has been submitted for publication in the Fall 2017 issue of *The Business Lawyer*.

The Chair proposed that the Subcommittee begin work on its next report, focused on opinions delivered in the context of securities resale transactions and asked for volunteers for a drafting committee.

The next meeting of the Subcommittee will be held at the Section’s Annual Meeting in Chicago, September 14-16, 2017.

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**SUMMARY OF RECENT
LISTSERVE ACTIVITY
SEPTEMBER 2016 -
MARCH 2017
(AUDIT RESPONSES
COMMITTEE)**

[Editors' Note: This summary of listserve activity during the period September 2016 - March 2017 among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response 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.⁷]

Applicable Accounting Standards. A Committee member reported that an auditor initially sent a standard audit inquiry letter asking the member's firm to respond in accordance with the FASB Accounting Standards Codification (the "ASC"). After providing an audit response letter that referenced the ASC, the member's firm received a follow-up request from the auditor asking the member's firm to "please re-send a confirmation that is in accordance with the International Financial Reporting Standards (IFRS)."

In the member's view, the only obligation under the ABA Statement of Policy is to respond in accordance with the ASC. The member asked if this view was appropriate and if any countervailing considerations applied before

sending another response in accordance with the ASC.

In response, it was noted that it is customary for lawyers to answer a "non-conforming request" for an audit response (e.g., one mentioning IFRS) with a "conforming response" that cites the ASC. As explained in the response, guidance for responses is limited to those under U.S. accounting standards as set forth in the *ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information* and related commentary (31 Bus. Law. 1737 (1976)). It was observed that one respondent has seen this issue arise a few times each year in audit inquiry letters from auditors located in places such as the U.K., Germany, other European countries and the Cayman Islands. In the respondent's experience, auditors typically do not submit a second "non-conforming request" after receiving a "conforming response" to the "initial non-conforming request."

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⁷ The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL965000>.

RECENT DEVELOPMENTS

Security Interest Opinions Under The Hague Securities Convention

The Hague Securities Convention became effective as a matter of U.S. law on April 1, 2017.⁸ It provides choice-of-law rules for many commercial law issues affecting intermediated securities and thereby preempts portions of the corresponding choice-of-law rules provided or mandated by the common law, Articles 1, 8 and 9 of the Uniform Commercial Code (“UCC”) and by related federal book-entry regulations.⁹ In most cases, the choice-of-law results under the Convention will be the same as those under the UCC, but there are some differences. This article addresses those differences as they affect opinions of counsel, primarily regarding

enforceability and perfection of security interests.

The Convention’s choice-of-law rules apply to a wide range of commercial law issues affecting the ownership or transfer of interests in “securities held with an intermediary,”¹⁰ which generally tracks what U.S. lawyers know as UCC Article 8’s indirect holding system. The Convention defines “securities” as “any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein,”¹¹ a definition broader in some respects than the corresponding one in UCC Article 8. However, the Convention’s scope is fixed, in contrast to the scope of UCC Article 8, which is subject to expansion beyond securities by agreement between the intermediary and its customer or account holder.¹² The Convention’s exclusion of “cash” (i.e., credit balances) from the definition of “securities” also contrasts with the UCC Article 8 system.¹³ Nonetheless, the Convention is designed like the UCC to be flexible in scope overall, with fluid, broad

⁸ The Convention is formally known as the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary. Its text is available on the web site of the Hague Conference on Private International Law at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>. For more detailed treatment of the Convention, *see, e.g.*, PEB Commentary No. 19, Hague Securities Convention’s Effect On Determining the Applicable Law for Indirectly Held Securities (April 11, 2017); Carl S. Bjerre, Sandra M. Rocks and Edwin E. Smith, Changes in the Choice of Law Rules for Intermediated Securities: The Hague Securities Convention is Now Live (forthcoming, Business Law Today, _____ 2017); Roy Goode, Hideki Kanda, and Karl Kreuzer, with the assistance of Christophe Bernasconi (Permanent Bureau), Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (2d ed. 2017), available at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=72>.

⁹ *E.g.*, 31 C.F.R. 357.10 *et seq.* (TRADES regulations).

¹⁰ *See* Conv. art. 2(1) (listing the issues covered).

¹¹ Conv. art. 1(1)(a).

¹² *See* UCC §§ 8-501(a) (defining “securities account” as an account to which financial assets may be credited), 8-102(a)(9)(iii) (scope of financial asset is subject to agreement). The Convention uses “financial asset” as part of its definition of “security,” but it does not define the term financial asset.

¹³ Credit balances may be covered under UCC Article 8 either because they are considered part of the securities account itself or because the intermediary and customer have agreed to treat them as a financial asset. *See* UCC § 9-108 cmt. 4 (“[A] security interest in a securities account would include credit balances due to the debtor from the securities intermediary, whether or not they are proceeds of a security entitlement.”); UCC § 9-314 cmt. 3 (“This claim would be analogous to a ‘credit balance’ in the securities account, which is a component of the securities account even though it is a personal claim against the intermediary.”).

coverage that will meet the demands of market practices.¹⁴

The Convention applies to any transaction or dispute “involving a choice” between the laws of two or more nations¹⁵ — a circumstance that may arise in any intermediated securities transaction, either at the transaction’s outset or later in its life. Without limitation, the “choice” will be involved whenever any of the issuer, the underlying certificates or the issuer’s books, or a wide range of parties (including account holder, intermediary, clearing corporation, secured party, adverse claimant, creditor of account holder, and creditor of intermediary) have connecting factors to different nations, regardless of whether the nations in question are parties to the Convention.¹⁶ It should also be emphasized that many of these elements, while having been acknowledged by U.S. lawyers for general transaction planning purposes, have been immaterial to a choice-of-law analysis under UCC §§ 8-110 and 9-305 alone.

Given the very broad range of facts that can cause the Convention’s “choice” to arise, it is advisable that virtually every intermediated securities transaction be planned with both the Convention and the UCC in mind. For purposes of opinion giving, at the most basic level this will include taking assumptions or otherwise confirming (a) that the account in question is a “securities account” as defined in both the

Convention and the UCC,¹⁷ and (b) that the broker, custodian bank, clearing corporation or similar party is an “intermediary” as defined in the Convention and a “securities intermediary” as defined in the UCC.¹⁸

The commercial law issues to which the Convention applies are those (and only those) enumerated in Convention article 2(1). The issues are expressed in broad and sometimes overlapping terms, but for purposes of this article it suffices to note that the issues clearly include perfection of a security interest and the exercise of remedies against collateral. A number of other important issues are also covered by the Convention, including priority (not discussed in this article because security interest opinions cover priority only in specialized circumstances), whether a purchaser takes free of adverse claims (also not discussed here because opinions in secondary sales transactions are a separate subject), and the characterization of a transaction as being a collateral transfer to secure an obligation or an outright disposition as against third parties.

A. Perfection

While opinions on perfection typically do not expressly address choice of law,¹⁹ they nonetheless implicate choice-of-law rules indirectly. This is because of the principle that a lawyer should not give an opinion that the

¹⁴ The Explanatory Report, referring to “exchange traded financial futures and options” and to credit default swaps, suggests that securities held with an intermediary for purposes of the Convention could encompass some assets that might be considered commodity contracts or might otherwise not be considered securities or other financial assets under the UCC.

¹⁵ Conv. art. 3.

¹⁶ Conv. art. 9.

¹⁷ See Conv. art. 1(1)(b); UCC § 8-501(a). As a matter of customary practice, security interest opinions are not typically understood to cover the classification of collateral. Cf. Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions – Revised Article 9, 58 Bus. Law. 1449, 1467 n.79 (2003) (“The attachment opinion covers the *legal* sufficiency of the description of the collateral, but not its *factual* accuracy The opinion preparers are expected to determine whether the description of the collateral is, as a matter of law, sufficient, but do not have to inspect the collateral to determine whether the description of collateral is factually correct or accurate.” (emphasis in original)).

¹⁸ See Conv. art 1(1)(c); UCC § 8-102(a)(14).

¹⁹ See Special Report of the TriBar Opinion Committee, *supra* note 10, at 1460.

lawyer believes would be misleading.²⁰ To opine on perfection or enforceability under the law of a given jurisdiction is, by implication, to suggest that it is reasonable to conclude that the jurisdiction is in fact one to which the applicable choice-of-law rules point with respect to some component of the relevant collateral. Accordingly, with the Convention now sometimes pointing to a different jurisdiction's law for perfection purposes than would the UCC alone, counsel who are asked to give opinions on perfection in transactions within the Convention's scope will want to take a fresh look at the applicable law and the transaction documents or other underlying facts. Some perfection opinions that posed no issue of being misleading before April 1, 2017, may now pose one, and vice versa.

The transactions that potentially pose such an issue differ, depending on whether the secured party intends to perfect by control or by filing.

1. Perfection by Control: the Primary Rule, Transition Rules and Fallback Rules

For secured parties intending to perfect by control, the Convention's so-called "Primary Rule" is the principal focus. The Primary Rule, which appears in article 4(1), permits the intermediary and debtor/customer to choose the applicable law for all of the article 2(1) issues by

means of a provision in the account agreement.²¹ Either of two types of provision can serve this purpose: an express general governing law clause, or an express provision that a particular law is applicable to all of the article 2(1) issues.²² Many readers will note that both of these are directly parallel to the provisions on which the UCC's main choice-of-law provisions also depend, namely UCC § 8-110(e)(1) and (e)(2). An important limitation, imposed only by the Convention and not the UCC, is that the account agreement provision is effective only if it designates the law of a jurisdiction in which the intermediary has a "Qualifying Office" — a topic further discussed below. For account agreements entered into before the April 1, 2017, the Convention provides two transition rules that under certain conditions will assure an agreement's effectiveness after April 1.²³ For account agreements that do not effectively

²¹ The meaning of "account agreement" is worth pausing over. The Convention's definition of account agreement refers to "the agreement" between those parties governing the account. Conv. art. 1(1)(e). The Explanatory Report makes clear that this agreement may consist of more than one document; however, it is probably advisable for opinion givers to avoid relying on the law designated only in a free-standing control agreement as the applicable law unless the control agreement amends the chosen law of the account agreement to designate the applicable law.

²² Conv. art. 4(1) ("... the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law").

²³ See Conv. art. 16(3) (giving this effect to "express terms of an account agreement which would have the effect, under the rules of the State whose law governs that agreement, that the law in force in a particular State, or a territorial unit of a particular Multi-unit State, applies to any of the issues specified in Article 2(1)"); Conv. art. 16(4) (giving this effect to an agreement "that the securities account is maintained in a particular State, or a territorial unit of a particular Multi-unit State"). Both of the transition rules are subject to the Qualifying Office requirement, and both are framed as "interpretations" of the Primary Rule. See, e.g., Explanatory Report ¶¶ 16-1 to 16-9.

²⁰ See Committee on Legal Opinions, ABA Section of Business Law, Guidelines for the Preparation of Closing Opinions, 57 Bus. Law. 875, 876 (2002); TriBar Opinion Committee, Third-Party "Closing" Opinions, 53 Bus. Law. 592, 602-03 (1998) (hereinafter "1998 TriBar Report").

designate the law of a jurisdiction under the Primary Rule or the transition rules, the Convention sets out a cascade of fallback rules that determine the applicable law.²⁴

The core of the Primary Rule's Qualifying Office requirement (which is also an element of the transition rules and the first fallback rule) is that the law designated by the account agreement must be that of a jurisdiction in which the intermediary has, at the time the agreement (or a relevant amendment) is entered into, an office engaged in the business or other regular activity of maintaining securities accounts.²⁵ For "Multi-unit States" such as the United States,²⁶ the office may be located anywhere in the Multi-unit State; for example, a governing law clause in an account agreement designating the law of New York will be given effect even if the intermediary's only U.S. office is in Atlanta.

In order to avoid the possibility of misleading the recipient, an opinion on perfection by control should not be given unless the opinion giver is sufficiently confident — or takes an assumption — that the Convention points to the law of the opining (or "covered")

²⁴ See Conv. art. 5(1), (2), (3). These fallback rules are similar in structure to UCC § 8-110(e)(3), (4) and (5), but differ in their particulars.

The Convention's rules generally do not include any renvoi; in other words, the law designated by the Convention does not include the designated jurisdiction's own choice-of-law rules. This parallels the UCC's designation of jurisdictions' "local law" in §§ 8-110, 9-305 and elsewhere. The only exception (a limited, but important, internal renvoi relating to perfection by filing under Conv. art. 12(2)(b)) is addressed below. See note 34.

²⁵ Conv art. 4(1), second sentence. The maintenance of accounts may be carried out by the office alone or together with other offices, and the accounts maintained at the office need not include the account that is the subject of the transaction. See generally Explanatory Report ¶¶ 4-21 to 4-40; see also Carl S. Bjerre and Sandra M. Rocks, A Transactional Approach to the Hague Securities Convention, 3 Capital Markets L.J. 109, 119–21 (2008).

²⁶ See Conv. art. 1(1)(m).

jurisdiction under the Primary Rule (or transition or fallback rules). As a means of reaching this confidence in the absence of an assumption, the opinion giver might rely on a certified copy of the account agreement, or a representation or certification from the intermediary. Relatedly, to cover the Qualifying Office requirement, the opinion might rely on a representation or certification from the intermediary, or an assumption might be taken; and in either case the applicable language should be focused on the correct point in time, which may have preceded the closing of the transaction and the rendering of the opinion.²⁷ Alternatively, the opinion giver could exclude the possible effect of the Convention from the scope of the opinion.

2. Perfection by Filing

For secured parties intending to perfect by the filing of a UCC financing statement, the Convention brings two additional potential changes for opinion givers. Each is applicable only under limited circumstances. The first involves transactions in which the Primary Rule (or the transition or fallback rules, as the case may be) designates the law of a non-U.S. jurisdiction. The second involves transactions in which UCC Article 9 provides that the debtor is located in a non-U.S. jurisdiction.

The first change applies to transactions in which the Primary Rule (or the transition or the fallback rules) designates the law of a non-U.S. jurisdiction; in such event, that non-U.S. law determines the jurisdiction (if any) in which to perfect by filing.²⁸ This is a notable departure from the choice-of-law rules provided by the UCC alone, where the sole determinant of the

²⁷ In cases where the account agreement is amended so as to change the law that it expressly designates, the Qualifying Office requirement must be satisfied at the time of the amendment. See Explanatory Report ¶ 4-28.

²⁸ Conv. art. 2(1)(c) (Convention governs the requirements, if any, for perfection of a disposition). In this respect the Convention's rules for perfection by filing do not differ from those for perfection by control, discussed above.

jurisdiction in which to perfect by filing has been the location of the debtor, and where the law designated by the account agreement or by § 8-110's fallback rules has been immaterial.²⁹ For example, under the UCC a corporate debtor that is organized under the law of New York is located in New York,³⁰ and the result has been that an opinion limited to New York law can cover perfection of a security interest by filing in the New York Secretary of State's office. The same result continues under the Convention if the Primary Rule (or the transition or fallback rules) designates the law of New York.³¹ But if, say, the Primary Rule designates the law of a non-U.S. jurisdiction such as England, then that non-U.S. law applies to perfection, with the effect that it ousts any application of the UCC's place of filing rules. Thus, a New York law opinion on perfection by filing could, at least in certain circumstances, be misleading if the opinion does not cover the jurisdiction determined under the Convention or does not exclude the Convention from the scope of the opinion and the opinion giver believes that the

opinion would be misleading to the opinion recipient.³²

So long as the Primary Rule (or the transition or fallback rules) designates the law of a U.S. jurisdiction, then the Convention does an impressively good job of accommodating UCC Article 9's own rules regarding the location in which to perfect by filing — except when Article 9 provides that the debtor is located in a non-U.S. jurisdiction. Suppose that the account agreement effectively designates the law of New York under the Primary Rule, but that the debtor is a corporation organized under the law of Ontario, Canada with its chief executive office in Toronto. Under UCC Article 9 alone, perfection by filing would be appropriate in Ontario under its Personal Property Security Act;³³ but under the Convention, the UCC Article 9 rules are recognized only “if the law in force in a territorial unit [here, New York] of a Multi-unit State [here, the United States] designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration.”³⁴ As Ontario is not a territorial unit of the United States, the result is that Ontario law, and thus an Ontario PPSA filing, is not recognized as applicable or relevant under U.S. law to the extent the Convention

²⁹ See UCC §§ 9-305(c)(1) (perfection by filing depends on law of location of debtor); 9-307 (determining location of debtor).

³⁰ See UCC §§ 9-307(e), 9-102(a)(71).

³¹ Under purely U.S. variations on these facts, analogous substantive results also continue under the Convention, but whether an opinion on perfection by filing should be given on those variations depends on a law firm's policies regarding filing in other U.S. jurisdictions. If the Primary Rule designates the law of New York but Article 9 provides that the debtor is located in, say, the District of Columbia, then perfection by filing continues to be substantively appropriate in the District of Columbia (see discussion of Conv. art. 12(2)(b) below); however under the Convention just as under the UCC alone, law firms' willingness to cover District of Columbia law for this purpose may vary. Conversely, if Article 9 provides that the debtor is located in New York but, say, the Primary Rule designates the law of Pennsylvania, then perfection by filing continues to be substantively appropriate in New York; however under the Convention law firms' willingness to cover the law of Pennsylvania for this purpose may vary.

³² There is an argument that such an opinion would not be misleading in transactions where the collateral consisting of securities held with an intermediary is not a material part of the collateral as a whole that the opinion covers. This argument would not apply to the secondary sale context, in which the securities (often delivered through an intermediary) are the only subject of the opinion letter.

³³ See UCC §§ 9-305(c)(1), 9-307(b)(3).

³⁴ Conv. art. 12(2)(b). This is the limited internal renvoi referred to above.

applies.³⁵ Instead, rather surprisingly, the Convention calls for filing in New York, because perfection is one of the article 2(1) issues and the Primary Rule points to New York. For opinion purposes, the change here is the relevance and effect of a New York filing, rather than the non-recognition of an Ontario filing, because a U.S. opinion giver would not be covering an Ontario filing even in the absence of the Convention. Of course Canadian law would typically remain relevant to other significant matters — such as the effects of an insolvency in the debtor’s home jurisdiction — even if, as will often be unlikely, there is no other relevant collateral involved in the transaction.

B. Remedies/Enforceability

The issues enumerated in Convention article 2(1) include “the requirements, if any, for the realisation of an interest in securities held with an intermediary.” This includes collateral-based remedies such as foreclosure of a security interest in intermediated securities.³⁶ The fact that the Convention covers this topic constitutes a notable substantive change as compared to

choice of law under the UCC alone.³⁷ It may also deserve some thought by opinion givers in connection with remedies opinions on security agreements that cover intermediated securities, *i.e.* that the security agreement is a valid, binding and enforceable agreement of the borrower.

A remedies opinion covers the extent to which the courts will enforce each of the provisions of an agreement, including those that are unrelated to breach – notably a choice-of-law provision.³⁸ How then might the remedies opinion be affected in a transaction where the security agreement’s governing law clause designates a law (*e.g.*, New York) that differs from, for example, the law designated by the Convention’s Primary Rule (*e.g.*, England)?³⁹ Some may view such transactions as requiring no particular change to prior opinion practice; after all, enforceability opinions continue to be understood as being subject to mandatory

³⁵ Of course a prudent lawyer would nonetheless file in Ontario with an eye toward possible proceedings in that jurisdiction, not to mention the need for filing in Ontario for transactions that also cover inventory, receivables or other collateral of a type not within the scope of the Convention.

In contrast to the Ontario example, UCC Article 9 deems many non-U.S. debtors to be located in the District of Columbia. *See* UCC § 9-307(c). Thus the change discussed in this paragraph would not apply to those debtors, nor to debtors that might separately be deemed to be located in the District of Columbia under § 9-307(f), (h), (i) or (j).

³⁶ Convention Art. 2(1)(f). *See also* Explanatory Report ¶ 2-28 (“For example, if, upon the default of a collateral provider, a collateral taker wishes to sell the collateral given to it by the collateral provider, the Convention law will determine whether it can do so and what conditions apply to the exercise of that power.”).

³⁷ Under the UCC alone, the enforceability of such remedies provisions is determined simply by the agreement’s general governing law clause (without constraint by, for example, a Qualifying Office requirement), so long as the transaction bears a reasonable relationship to the chosen law. *See* UCC § 1-301(a).

³⁸ *See* 1998 TriBar Report, *supra* note 13, at 620 & n.66, 621 (provisions that “choose the law by which the agreement is to be governed” are among those covered by the remedies opinion), § 4.4 at 634; Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions, 59 Bus. Law. 1483, 1495 (2004) (hereinafter “TriBar Report on the Remedies Opinion”).

³⁹ It bears emphasizing that the Primary Rule (as well as the interpretive and first fallback rule) turns on provisions in the account agreement, not in the security agreement.

choice-of-law rules,⁴⁰ and those mandatory rules now include the Hague Securities Convention. Other firms may conclude that it is good practice to make explicit that the remedies opinion (or the opinion as a whole) does not cover the effect of mandatory choice-of-law rules. Still other firms may choose to adopt a specific roster of bodies of excluded mandatory choice-of-law rules, or may now adapt an existing roster to include the Convention.

C. A Word About Creation

The fundamental opinion point concerning creation of a security interest, *i.e.* that the security agreement creates a valid security interest in the securities account in favor of the lender, is not affected by the Convention. In other words, the creation of a security interest, strictly as between the debtor and secured party without regard to effects as against third parties, is not one of the issues listed in Convention

article 2(1).⁴¹ While the UCC does declare that a security agreement is generally effective against third-party purchasers and creditors, as well as between the parties,⁴² for Convention purposes it is clearly proper to distinguish the agreement's effects between the parties (which are not covered) from its third-party effects (which are covered).

* * *

The Convention presents a certain number of isolated changes affecting opinion practice in intermediated securities transactions, but overall the Convention is remarkably consonant with the choice-of-law rules prevailing under the UCC alone. During this period in which U.S. lawyers are adjusting to the changes, it is helpful to keep in mind the benefits that the Convention is likely to bring over the long term. The recent U.S. ratification is expected to be followed by other ratifications. This prospective harmonization of choice-of-law rules across national borders should result in facilitating transactions, by greatly reducing legal uncertainty as well as the costs to the parties of

⁴¹ The Convention covers “the . . . effects against the intermediary and third parties of a disposition of securities held with an intermediary,” Conv. art. 2(1)(b), and while “disposition” is defined as including the grant of a security interest, Conv. art. 1(1)(h), in context the secured party itself cannot be understood as being one of the “third parties.” *See also* Explanatory Report ¶ 2-9 (discussing the overlapping of various article 2(1) issues, notably the overlap of “effects against the intermediary and third parties” of a disposition with “the relevant perfection requirements, which are referred to in Article 2(1)(c)”). Cf. Conv. art 1(1)(i) (defining “perfection” as “completion of any steps necessary to render a disposition effective against persons *who are not parties to that disposition*”) (emphasis added).

That the Convention does not cover the creation of a security interest as between the debtor and secured party is qualified by the separate point, discussed above, that the Convention does cover “the requirements, if any, for the realisation of an interest in securities held with an intermediary.”

⁴² UCC § 9-201(a).

⁴⁰ *See* 1998 TriBar Report, *supra* note 13, § 4.5 at 634; TriBar Report on the Remedies Opinion, *supra* note 31, at 1495 n.62 (subject to concerns about a possibly misleading opinion, “[a] remedies opinion does not require an exception for the possibility that the substantive law of a state whose law is excluded from the opinion by the coverage limitation might be applied to some aspects of the agreement as a result of a mandatory choice of law rule”).

investigation, negotiation and compliance with varying bodies of substantive law.

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NOTES FROM THE LISTSERVE

Including Explicit References to Customary Practice in Opinion Letters

[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 "Listserve" on the Committee's website.]

Including Explicit References to Customary Practice in Opinion Letters

It is widely accepted that third-party opinion letters are prepared and understood in accordance with the customary practice of lawyers who regularly give opinions and who review them for clients. Lawyers look to

customary practice to identify the work (factual and legal) that opinion givers are expected to perform to give opinions. Customary practice also provides guidance and how certain words and phrases commonly used in opinions should be understood.

As noted in the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008) ("Customary Practice Statement"), "[s]ome closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies." *Id.* at 1278.

In its report on *Cross-Border Closing Opinions of U.S. Counsel* (71 Bus. Law. 139, Winter 2015-2016) ("Cross-Border Report"), the Legal Opinions Committee notes that, in third-party opinion letters given by U.S. lawyers to non-U.S. parties ("Cross-Border Transactions"), where the non-U.S. opinion recipient is not represented by U.S. counsel and neither the recipient nor its counsel is familiar with U.S. customary practice, "the recipient runs a serious risk of misunderstanding an outbound opinion that is based on U.S. customary practice." *Id.* at 145. Accordingly, the Committee recommends "that opinion givers include in their third-party closing opinions an express statement that the opinions they are giving are intended to be interpreted in accordance with U.S. customary practice." *Id.* at 146.

By his email to the Listserve of April 12, 2017, Daniel H. Devaney IV of Cades Schutte LLP, Honolulu, asked whether it is reasonable to include an express statement referring to U.S. customary practice in a cross-border closing opinion letter *without* regard to whether (i) the recipient is represented by U.S. counsel and (ii) the recipient and its counsel are familiar with U.S. customary practice.

Stan Keller (Locke Lord LLP), who was a member of the editorial group that prepared the Cross-Border Report, responded that a fair reading of the Cross-Border Report's discussion of U.S. customary practice does not limit the recommendation to include an express statement

in cross-border opinion letters only to circumstances where the non-U.S. recipient is not represented by U.S. counsel. Ettore Santucci (Goodwin Procter LLP), the Reporter for the Cross-Border Report, agreed with Stan and added that including an explicit reference to U.S. customary practice in a cross-border opinion letter is also advisable to provide a framework for interpreting the opinion letter and the customary diligence conducted to prepare it for any court (particularly a non-U.S. court) that may have occasion to review the opinion letter.

The Cross-Border Report, in its note 15, includes two examples of reference to U.S. customary practice for inclusion in a cross-border opinion letter. One includes an explicit reference to the *Legal Opinion Principles* prepared by the Legal Opinions Committee (53 Bus. Law 831) (1998)) with an alternative of attaching the Principles to the opinion letter. [The Committee is in the process of preparing the *Statement of Opinion Practices*, and its abbreviated version, the *Core Principles*, which would replace the *Legal Opinion Principles* – see “Minutes of Meeting of Legal Opinions Committee Held During the Business Law Section’s 2017 Spring Meeting in this issue of the Newsletter.]

Note 15 of the Cross-Border Report also includes, as an example of a reference to U.S. customary practice, a more generic statement, as follows:

“This opinion letter shall be interpreted in accordance with the customary practice of the United States lawyers who regularly give, and lawyers who regularly advise recipients regarding, opinions of the kind included in this opinion letter.”

71 Bus. Law. at 146 n. 15.

While the Customary Practice Statement makes clear that customary practice governs the interpretation of opinion letters whether or not an explicit reference to customary practice is included in the opinion letter, many opinion givers now routinely include such references in

closing opinions given in corporate transactions, whether domestic or cross-border, as suggested by Don Glazer and Stan Keller some 12 years ago in their *A Streamlined Form of Closing Opinions Based on the ABA Legal Opinion Principles* (61 Bus. Law. 389, 397 (2005) (suggesting the inclusion of an explicit reference to the *Legal Opinion Principles* in a closing opinion letter).

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

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LEGAL OPINION REPORTS

(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 April 30, 2017.]

A. Recently Published Reports⁴³

ABA Business Law Section	2009	Effect of FIN 48 – Audit Responses Committee Negative Assurance – Securities Law Opinions Subcommittee
	2010	Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
	2011	Diligence Memoranda – Task Force on Diligence Memoranda
	2013	Survey of Office Practices – Legal Opinions Committee Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee Revised Handbook – Audit Responses Committee
	2014	Updates to Audit Response Letters – Audit Responses Committee
	2015	No Registration Opinions (Update) – Securities Law Opinions Subcommittee Cross-Border Closing Opinions of U.S. Counsel
	2016	Report on Use of Confirmation.com – Audit Responses Committee
	2012	Real Estate Finance Opinion Report of 2012
	2017	Local Counsel Opinion Letters in Real Estate Financing Transactions
	ABA Real Property Section (and others) ⁴⁴	
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report Update Comprehensive Report Update
	2009	Venture Capital Opinions
	2014	Sample Venture Capital Financing Opinion
	2015	Revised Sample Opinion
Florida	2011	Comprehensive Report Update
Georgia	2009	Real Estate Secured Transactions Opinions Report

⁴³ 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/>. Reports marked with an asterisk have been added to this Chart since the publication of the Chart in the last quarterly issue of this Newsletter.

⁴⁴ These Reports are 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)

City of London	2011	Guide
Maryland	2009	Update to Comprehensive Report
Michigan	2009 2010	Statement Report
Multiple Bar Associations	2008	Customary Practice Statement
Multiple Law Firms	2016	White Paper- Trust Indenture Act §316(b)
National Association of Bond Lawyers	2011 2013 2014	Function and Professional Responsibilities of Bond Counsel Model Bond Opinion 501(c)(3) Opinions
National Venture Capital Association	2013	Model Legal Opinion
New York	2009 2012	Substantive Consolidation – Bar of the City of New York Tax Opinions in Registered Offerings – New York State Bar Association Tax Section
North Carolina	2009	Supplement to Comprehensive Report
Pennsylvania	2007	Update
South Carolina	2014	Comprehensive Report
Tennessee	2011	Report
Texas	2006 2009 2012 2013	Supplement Regarding Opinions on Indemnification Provisions Supplement Regarding ABA Principles and Guidelines Supplement Regarding Entity Status, Power and Authority Opinions Supplement Regarding Changes to Good Standing Procedures
TriBar	2008 2011 2011 2013	Preferred Stock Secondary Sales of Securities LLC Membership Interests Choice of Law

B. Pending Reports

ABA Business Law Section	Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee Updated Survey – Legal Opinions Committee Debt Tender Offers – Securities Law Opinions Subcommittee Resale Opinions – Securities Law Opinions Subcommittee Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee & Legal Opinions Committee
California	Opinions on LLCs & Partnerships Sample Personal Property Security Interest Opinion Exceptions and Other Qualifications to the Remedies Opinion
Multiple Bar Associations	Statement of Opinion Practices Core Opinion Principles Local Counsel Opinions ⁴⁵
National Association of Bond Lawyers	Update of Model Letter of Underwriters’ Counsel
Texas	Comprehensive Report Update
TriBar	Limited Partnership Opinions Opinions on Clauses Shifting Risk Bring Down Opinions
Washington	Comprehensive Report

⁴⁵ A joint project of the ABA Legal Opinions Committee, the Working Group on Legal Opinions, and other bar groups.

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](#).⁴⁶ 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 July 2017. Please forward cases, news and items of interest to Ettore Santucci (esantucci@goodwinlaw.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

⁴⁶ The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.