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I am pleased to share with you the Summer 2018 issue of In Our Opinion. It includes the usual wealth of information about the work of our Committee and other substantive committees in which many of our members participate. Its main feature is an essay written by Arthur Field to celebrate the twentieth anniversary of TriBar II and the continued vitality of that report in opinion practice. Reading Arthur’s piece is a treat particularly for those of us who were not involved in Silverado, the formation of TriBar, and the writing of foundational reports that constructed key pillars of opinion practice. While I am not that much younger than members of our Committee who were there at the beginning and continue to be active with our Committee’s work today, I feel like an apprentice in the shop of masters.

As a student of art sometimes I wonder what it must have been like to be a painter in the Florence of Botticelli. I will never know, because I practice law in the 21st Century. But the practice of law is not only facilitating commerce, advancing the interests of clients in their daily trading, and keeping abreast of the state of the art in whatever market we participate in. It is also, thank the Lord, thinking deep thoughts about the law as norms of social and political behavior that govern the functioning of our complex society. Forgetting that is as unforgiveable as it would have been for an apprentice in master Botticelli’s shop to think that the job was simply painting the portrait of the next wealthy Florentine merchant alongside the obligatory saints and martyrs.

Opinion practice is lawyers’ lawyering at its best. When we deal with the content and wording of legal opinions, the boundaries of what are appropriate or inappropriate requests for opinions, and the work required to give them, we are first and foremost dealing with our own reputation and that of our firms if the work is not done well. Even more importantly, we are interacting with peers, an aspect that inspires many of the basic principles of opinion practice: opinions are expressions of professional judgment, not a business negotiation where some win and some lose; opinions are just one element of how counsel for the opinion recipient serves its client, not a substitute for careful advice; and many more.

Lawyers’ lawyering is not that popular in today’s practice of business law. Our younger colleagues are encouraged by their mentors, and often forced by the business of law, to focus more intently on the market for their services, the pressure of securing clients, and the challenge of keeping them happy by delivering high quality service at the right cost. All of these demands are critical aspects of the legal profession. After all, without those wealthy patrons looking up at a crucifixion from the lower left, Botticelli and his apprentices would have starved. He and his Florentine peers also knew a thing or two about being fierce competitors in a tough market and harsh critics of each other’s work. Their apprentices (who can be compared to our associates today) also lived in a harsh environment – most of them left the shop long before being allowed to put a brush to a canvas touched by their master. There was a lot to be learned, many a brush to be cleaned, many a pigment to be mixed into paint. Does that remind you of your time as a young associate?

But Arthur’s essay reminds us, as does the debate at every meeting of our Committee, that there is more to what we do than learning techniques and executing them well. One of the awe-inspiring aspects of pre-renaissance Florence is that it built the foundation for the dome of their Duomo to support a structure of a size that no then-known technology could possibly have built. It took 200 years for that technology to be developed by a fellow known as Brunelleschi. That should teach us something about vision, self-confidence and the power of the human intellect, and also a little about the recklessness of forward thinkers. Although I never met him, I gather Mr. Fuld had all of those qualities bundled into one. And those who teamed up with him in the early days of TriBar
and our Committee were surely his peers. It would be silly to think that a Silverado can happen regularly or that the level of creative, rigorous thought that went into TriBar I and TriBar II is something every lawyer can aspire to. There is a reason why we all know Botticelli’s name and can visualize some of his paintings. And Brunelleschi’s dome is still a wonder. TriBar II was its own kind of masterpiece. But let’s remember that a new master is born every day and new masterpieces will come. It never stops, thank the Lord again…

Which brings me to some relevant thoughts as Chair of our Committee:

1. Masters must have apprentices to fulfill their mission. All of us who think about legal opinions have an obligation to bring along younger lawyers who will learn from us, take over more and more of the work, and eventually be better than we ever were. In Austin at the Annual Meeting we will spend some time talking about ways to increase the membership of our Committee by attracting talented young lawyers. This is a critical topic; while it is also part of “ABA business” because declining membership is straining the organization, it is germane to what our Committee is well known for: looking far ahead for the good of the profession. So I would ask each one of you to think of ways to carry well into the future the quality and impact of the work that Arthur’s essay describes going back decades. **We must all be masters to apprentices of our choice and there is no time to waste.**

2. As Arthur says, TriBar II will continue to be a critical piece of guidance for a long time. But to think that “our work is done” would be ludicrous. Our Committee, in collaboration with TriBar, WGLO, and state and international bar groups, continues to produce important guidance on issues that are highly relevant to today’s practitioners. Two active projects of our Committee, achieving international convergence on cross-border legal opinions in financing transactions and the development of a consensus on intellectual property opinions in financing transactions, address important areas of today’s business law practice. Time will tell whether our work will be as impactful as that of TriBar in the early days, but if it is not it should not be for lack of trying. **Please get involved in these projects.**

3. As I enter the last year of my mandate I am thinking about my successor. I encourage all of you to think about what should be put on his or her agenda. I have joked since day one that the title should be “latest chair” because I believe that the vitality and uniqueness of our Committee comes from former chairs playing an active role in our ongoing work. I hope that continues, and not just for my own sake. **Let’s cultivate the collegiality and collaboration that fuels everything our Committee does.**

At the risk of stretching the analogy too far, let me go back to Botticelli and his apprentices. Our paint brushes are words, our colors legal concepts, our paintings well-drafted contracts and cogent analysis. We do have clients, and just like Botticelli had no choice but to paint them staring up at the saints, and make them look better than they did in real life, but we too must serve our clients well. But also there must be pride in signing one’s name to one’s work. Botticelli’s masterpieces have lived far longer and are far better known than his patrons. As Arthur’s essay tells us, Silverado and TriBar I and II were momentous accomplishments that many masters had a hand in creating. I am grateful for the opportunity to work alongside them and every member of our Committee who cares deeply about the work we do.

Please register for the ABA Business Law Section Annual Meeting in Austin, Texas, at the Fairmont Austin and Austin Convention Center.
on September 13-15, 2018. In addition to our full Committee meeting, we will hold meetings of the cross-border and intellectual property opinions task forces. I look forward to seeing you in Austin.

-  Ettore A. Santucci, Chair
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**LEGAL OPINIONS COMMITTEE**

**Friday, September 14, 2018**

Survey of Opinion Practices Task Force:
7:30 a.m. – 9:00 a.m.

Cross-Border Opinions Task Force:
9:00 a.m. – 10:30 a.m.

Program: “Allocating the Risk in Your Legal Opinions for Risk Allocation Clauses”
2:00 p.m. – 3:30 p.m.

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

Reception: 5:00 p.m. – 6:00 p.m.
Sponsor: Locke Lord LLP

**Saturday, September 15, 2018**

Intellectual Property Opinions Joint Task Force:
12:00 p.m. – 1:00 p.m.

**SECURITIES LAW OPINIONS SUBCOMMITTEE, FEDERAL REGULATION OF SECURITIES COMMITTEE**

**Thursday, September 13, 2018**

Subcommittee Meeting:
2:30 p.m. – 3:30 p.m.

**Law and Accounting Committee**

**Saturday, September 15, 2018**

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

Program: “Critical Audit Matters: What Lawyers Need to Know About the PCAOB’s New Auditor Reporting Standard”
10:30 a.m. – 12:00 p.m.

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.¹

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¹ The URL is
TriBar II
(Third-Party “Closing” Opinions):
A Product of the 1990s But Still Vital Today

Editors’ Note: We are delighted to include in this issue of the Newsletter Arthur Field’s wonderful essay that follows commemorating the 20th anniversary of the publication of TriBar’s report on Third-Party “Closing” Opinions, 53 Bus. Law. 591 (1998), commonly referred to as TriBar II. TriBar II is the touchstone by which all other opinion reports are measured. It remains the source of the principles of third-party legal opinion practice. Its influence has only grown since its publication in 1998.

Ettore Santucci, Chair, ABA Legal Opinions Committee, and J. Truman Bidwell, Jr. (an original member of the TriBar Opinion Committee) have provided editing assistance to Mr. Field in preparing this article. They note as follows: Arthur Field was instrumental in the formation of TriBar and was its second leader (after Stan Komaroff of New York). He guided the early and often delicate deliberations of the members of TriBar, whose clients had varied, and often competing, interests to reach consensus on early TriBar positions and publications, which comprise the foundation for legal opinion practice as it exists today. Arthur served as the Reporter for both TriBar I and TriBar II. The influence of his work on opinion literature is profound.

TriBar II
(Third-Party “Closing” Opinions):
A Product of the 1990s But Still Vital Today

Third-party legal opinions have probably been in use since colonial times in the form of certificates of title to real estate. In the
post-Civil War period, “opinions” took on a new role as assurances to lenders and purchasers of stock. In the era of railroad expansion, many local governments borrowed or invested to bring the railroad to their town. All too often the rail line, when built, did not end up connected to any regional rail center. Use of the rail line was limited and the much anticipated local boom became a bust. The bonds issued to finance the line fell into default. Seeking to avoid the consequences of their over-enthusiasm, local governments often claimed that issuance of the bonds was beyond their power or had not been properly authorized (by their predecessors in office) and thus the town or city was not liable to repay the bonds. The U.S. Supreme Court heard many of these cases in the late 1800s. Purchasers became leery of the validity of railroad bonds and suddenly the role of legal opinions expanded as attorneys were asked to review the power and authority of governmental entities to issue them. The meaning of, and diligence required to give, these opinions was imprecise, but they provided a significant level of reassurance to lenders and investors. How this practice sprung up is unknown, but one suspects it may have been the idea of the investment bankers who wanted to continue to be able to sell municipal bonds.

A significant body of literature developed as to municipal bond opinions. But it was not until the 1970s that transactional attorneys (outside the municipal bond area) first began to critically examine and describe their own practices in giving and receiving third-party opinions. An article in The Business Lawyer in 1973 (28 Bus. Law. 914) by James Fuld of New York inspired this examination and the formation of the TriBar Opinion Committee (“TriBar”). The Committee was initially composed of members of the three largest New York bar associations. By then third-party opinions had evolved considerably from their early beginnings. They were no longer limited to power and authorization, but covered enforceability of the transaction documents and a variety of other matters. At the outset of the discussions which resulted in the first TriBar report published in 1979 (“TriBar I”), it was far from clear that a consensus could be reached on the meaning of language used for opinions and the diligence required to give them. After much hard work and many compromises, TriBar I was published. It established consensus on customary practice in the preparation and issuance of legal opinions and provided a vocabulary for further opinion letter discussions. Acceptance of TriBar I was surprisingly swift and widespread in New York. Since New York law was used as the governing law in many transactions, there was considerable and immediate interest in TriBar I across the country.

In the 1970s and early 1980s opinion practice (outside the securities area) was dominated by major money center banks (which acted as short term lenders) and insurance companies (which acted as long term lenders). These institutional lenders accepted legal opinions only from law firms on their own approved list to represent borrowers. If the borrower’s usual attorney was not on the list, a change of attorney to one on the list was required. Opinion givers followed the requirements dictated by these lenders in part to facilitate better communication with the lender’s counsel, but also to gain inclusion in the lender-approved lists. Opinion liability claims were not unknown, but in many jurisdictions (including New York) third-party opinion claims were not recognized because there was no privity between the opinion giver and the recipient.

This same time was a period of discussion, consideration and constructive criticism of opinion practice and many reports were written by bar associations. Some of these discussions related to opinions given in SEC and tax practice which were heavily influenced by administrative action; these had only modest influence on the more general discussions which were taking place and did not significantly influence TriBar I or, for that matter, subsequent TriBar reports.

Modern opinion practice began to take form in the 1990s, culminating in the publication of TriBar II in 1998. TriBar II was shaped by (i) the numerous reports by various bar associations on opinion practice, (ii) discussions relating to the ABA Model Rules of Professional Conduct ("Model Rules") and the Restatement of the Law Governing Lawyers ("Restatement"), (iii) litigation and administrative actions relating to legal opinions and (iv) changing business patterns. The decade of the 1990s involved the most intensive activity ever relating to legal opinion practice.

A. Background for TriBar II

1. Bar Opinion Activity in the 1990s - State Bar and Real Estate Reports

TriBar I stated that the remedies opinion applies to “each and every” undertaking of the opining attorney’s client under the relevant documentation. The illustrative opinion included only bankruptcy and equitable principles as exceptions to this rule. The equitable principles limitation was widely accepted but relatively new. Shortly after publication of TriBar I, the Corporations Committee of the Business Law Section of the California Bar took the position that the remedies opinion covered only “material” contractual undertakings. The California concern was that, if the New York position were adopted, a number of exceptions would be required to be stated in opinion letters in order to give a remedies opinion under California law. Over the next few years a number of business law and real estate bar groups issued reports suggesting the need in their jurisdiction for further exceptions if the TriBar I approach were followed. In New York many remedies opinions continued to be given with exceptions limited to those for bankruptcy and equitable principles. In doing so, New York attorneys relied on cases in New York that favored enforcement of provisions in contracts between sophisticated parties and the rarity of litigation about opinions. Thus the need for exceptions and assumptions became a matter of considerable interest and discussion among those attorneys giving and receiving opinion letters.

2. The Accord Process and the Accord

The first meeting ever of attorneys from across the country interested in opinion practice was organized by the ABA Section of Business Law (“BLS”). It was held at Silverado, California in 1989. Problem areas and alternatives to customary practice were researched and discussed in preparation for, and then at, the Silverado conference. Research papers were prepared on “Remedies Opinions and Exceptions,” “Dealing With Facts” and “Liabilities” among other subjects. After the Silverado Conference a national educational effort was made by the BLS to bring additional attention to opinion practice issues. A drafting committee was formed which produced the Accord (47 Bus. Law. 167 (1991)), an alternative to the use of customary practice in giving third-party opinions. In giving an Accord opinion, the opinion giver specifically incorporates the Accord by reference into the opinion letter.

The decision to provide an alternative to customary practice was the subject of spirited debate. The Accord follows a Restatement type format with “black letter” followed by “Commentary” and “Technical Notes.” Some thought this a poor format for teaching about opinion practice. But adherents of the Accord saw the TriBar I style of establishing customary practice as a “slippery slope” destined to remain unacceptably imprecise. They envisioned the Accord as a new and more precise approach to opinions. Their view prevailed. The TriBar-California Bar dispute over the meaning of the remedies opinion (the original reason for BLS involvement) was sidestepped in the Accord. The Accord was published in the Business Lawyer in November 1991, having first been published as an “exposure draft” in February 1991.

The Accord was controversial even before it was published. TriBar quickly published two very brief reports supporting the acceptance of the Accord as an alternative to customary practice. Although the Accord contemplated “modifications and private ordering” that could be used to facilitate any opinion recipient...
requirement, opposition to the Accord from institutional lenders was immediate and substantial. That opposition solidified after its publication. There was also significant opposition by bar groups to the complex system required to be understood to properly utilize the Accord. Although it initially had significant support, the Accord never gained acceptance for use in larger transactions and it did not achieve broad use. By 1993 it was clear that the principal impact of the Accord would be on the thinking about legal opinions.

The BLS Legal Opinions Committee also provided “Guidelines For the Preparation of Closing Opinions” (the “Guidelines”), which were published with the Accord as a single document. The Guidelines were seen as supplementing the Accord, but applicable whether or not the Accord was used in giving an opinion. The Guidelines were welcomed as “user-friendly,” consisting of only 10 pages without footnotes. This was in contrast to the Accord which consisted of 54 pages that described an integrated system. The Guidelines achieved wide acceptance, were revised in 2002 (57 Bus. Law. 875) and are still in general use.

The major impact of the Accord was to act as a catalyst for state bar transactional, real estate and bond counsel activity related to opinions. In the early 1990s many state bars took a position on various opinion issues, sometimes on the Accord and sometimes on the Guidelines; some published opinion reports related generally to opinion practice in their state. While a number of TriBar members were heavily involved in the Accord project, the Committee continued to publish its own reports. A report on the remedies opinion was published in 1991 (46 Bus. Law. 959) and another report on U.C.C. security interest opinions was published in 1993 (49 Bus. Law. 359).

The various bar opinion reports indicated that there was a national consensus on most opinion issues, with the TriBar-California dispute as to the meaning of the remedies opinion remaining as the principal open issue. Many institutional lenders accepted California remedies opinions without requiring clarification of them, probably based on private assurances that the diligence required by the TriBar approach was being followed. (A California bar report stating that the diligence for the two approaches was substantially similar was issued in 2004, finally creating the basis for the present national opinion consensus.  


A restatement of the law relating to attorneys was a novel idea when proposed by the American Law Institute in the 1980s. Its goal was to analyze how various areas of the law (including contracts, torts, agency and professional ethics) dealt with the conduct of attorneys. The project was a contentious one when it began and as it progressed. The Model Rules had been adopted by the ABA in 1983 and slowly began being adopted on a state-by-state basis. While prior ethics guidance had made no mention of third-party opinions, opinion givers assumed that such opinions were ethically proper. Model Rule 2.3 recognized the ethical appropriateness of the third-party opinion. Section 95 of the Restatement followed the approach of Model Rule 2.3 (“Evaluation for Use by Third Persons”) in approving the giving of third-party opinions. Comment a under Section 95 includes the following statement: “Custom and practice determining the scope of diligence in represented situations is articulated in bar-association reports, treatises and articles.” As the Restatement developed in the 1980s and 1990s, the law of attorney liability was also developing. However, lawsuits by clients against attorneys were still unusual and third-party lawsuits against opinion givers were rare. The relationship of ethics rules to liability was unclear. The preamble to the Model Rules (at ¶ 20) states that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been

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breached.” The discussions of the Restatement proceeded over more than a decade. It was published in 2000.

B. Litigation and Administrative Action in the 1990s

1. Litigation

When TriBar I was published in 1979, most opinion givers believed that there was a risk of liability for a negligently given third-party opinion. But for many years there were few cases finding liability. However, in 1992, the New York Court of Appeals, which had been quite conservative in protecting professionals from non-client liability, decided Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E. 2d 318. That case left no doubt that there was liability to the addressee of a negligently given third-party opinion that the addressee had relied on. In 1998 a Fifth Circuit case, applying Texas law, First National Bank of Durant v Trans Terra Corp. Internat’l, 142 F.3d 802, took the same position. As the risk of liability became clearer, the need for a broadly recognized national opinion practice became greater.

2. Administrative Action

In the late 1980s and early 1990s nearly a third of the over 3,000 federally chartered savings and loan associations failed. These associations were principally consumer banks that tended to lend to the real estate industry. The account holder losses were largely federally insured. Billions of dollars were lost. The regulators of these banks took a variety of actions against those they deemed at fault; some went to jail. A large number of law firms were sued by regulators alleging that they knowingly or negligently provided improper advice to their banking clients. At least $145 million dollars was recovered from law firms in settlements. The most publicized of these settlements was with the Kaye Scholer firm in New York. In March 1992 administrative proceedings against Kaye Scholer were filed claiming $275 million in damages. At the same time sequestration orders were filed against all Kaye Scholer partners affecting 25% of distributions to them from the firm. One of the charges against Kaye Scholer related to opinions given by the firm to a banking client as to the propriety of certain bank investments. Lenders to Kaye Scholer were said to have threatened to cut off credit lines to the firm because of the regulatory action against it. Within a week Kaye Scholer settled for $45 million, signing a consent decree that specifically regulated how Kaye Scholer opinion letters relating to banking regulatory matters were to be given. While the opinions involved in these cases were not third-party opinions, the regulators looked to third-party opinion standards in evaluating them. It was not clear whether other administrative agencies would copy the “hardball” tactics of the banking regulators, but business law firms and bar associations were alarmed because the spotlight, as never before, was on legal opinion practice.

C. Changing Business Patterns in the 1980s and 1990s

“Junk” (less than investment grade) bonds became an alternative source for debt financing in the 1980s. And in the mid-1980s and the 1990s regional and later nationwide banking emerged. Opinion practice in larger transactions became less New York-centric. Deal documentation became more complex. Bankruptcy became a strategy for reorganization. Mergers and acquisitions resulted in more businesses with a national and even international reach. Attorneys followed their clients across state lines, raising new practice questions. Traditional law firm relationships with clients weakened as lawyers were no longer selected to serve on the boards of publicly held companies. The role of inside attorneys became more prominent and inside attorney opinions, which had often been unacceptable to opinion recipients, became acceptable in many situations. Business litigation increased as did litigation against attorneys.
The TriBar II Report: Responding to the New Opinion Environment

In the March/April 1992 issue of Business Law Today TriBar expressed its “general support for a broad range of Accord concepts” and for the Guidelines. TriBar also announced that it had already undertaken to review TriBar I, its addenda and its then recent report on the remedies opinion and stated that a TriBar report replacing TriBar I and most other TriBar reports was to be issued “within a year.” (Predictions of how long it takes to produce opinion reports were no better in the 1990s than they are today. TriBar II was published six years later in 1998.)

By 1992 it was clear that (1) there was an unprecedented law firm and institutional lender focus on legal opinions, (2) the Accord and the process relating to the drafting of the Restatement of the Law Governing Lawyers had brought new insights to the opinion practice, and (3) new lending patterns had changed a New York-centric opinion practice to a national one. Shortly thereafter, it became clear that Accord opinions would not be widely accepted as a substitute for opinions utilizing customary practice. Through most of the 1990s TriBar I remained usable and widely used, although it had become outdated by changes in transaction patterns, liability relating to opinions, as well as aggressive administrative actions.

The challenge for TriBar in preparing TriBar II was to respond to an environment that (a) called for the articulation of a national opinion practice involving changes in business patterns and liability rules, and (b) maintaining the confidence of institutional lenders, rating agencies and other frequent opinion recipients. TriBar II was not to be a mere technical “update.”

D. From TriBar I to TriBar II

TriBar I is a commentary on a characteristic transaction, a pension trust simultaneously lending to and purchasing the stock of a Delaware corporation. The opinion giver is a New York attorney. The aim of the report was to describe what attorneys customarily did with respect to a third-party opinion in a “plain vanilla” transaction limited to New York law except as to the client, a Delaware corporation. It is interesting to note that the TriBar I Illustrative opinion letter contains no “laws covered” provision. The opinion letter assumes (without any statement in the opinion letter) that the transaction documentation is governed by New York law.

The many issues involved when a transaction is not “plain vanilla” were left unexplored in TriBar I. These issues were simply beyond the task then undertaken.

By contrast, TriBar II is a “brief” closing opinion treatise of 88 pages, including 240 footnotes, with four illustrative opinions attached. When TriBar II was drafted, the Committee included representatives of bar groups in Atlanta, Boston, Chicago, Delaware, Ontario and Pennsylvania. Thus issues of the governing law of the transaction documents and the covered law of the opinion letter had become central in TriBar II. There are four other areas of striking difference between TriBar I and TriBar II, reflecting the bar discussions of the 1980s and 1990s:

(1) TriBar I articulated the language of specific opinions; TriBar II articulates the language of opinion restrictions, principally exceptions and assumptions;

(2) The TriBar I illustrative opinion is given by a law firm but the commentary deals with what an opining attorney does in order to be able to give an opinion. TriBar I does not deal with the question of when or whether knowledge of an attorney in the opinion giver firm other than the attorney giving the opinion is relevant in giving an opinion. TriBar II limits the knowledge ordinarily applicable to an opinion giver to that of the “opinion preparers,” those actually working on the opinion;

(3) TriBar II (but not TriBar I) deals at some length with the quality of factual material that can be used to provide an opinion and includes the concept of a misleading opinion; and
In Our Opinion

E. TriBar II Now and in the Coming Years

Experience with TriBar II remains positive. Its users do not seem to feel a need to replace it. Indeed, any replacement effort would raise the question of how to retain the delicate balance that permits it to be broadly acceptable. Nevertheless, changes in opinion practice in the past twenty years have been significant. The risk of a lawsuit involving an opinion letter is much higher than in the past. There has long been a great disparity between available malpractice coverage and the amounts involved in larger transactions. This raises questions for opinion givers about the economics of taking opinion risk (which involves clerical mistakes as well as those relating to professional matters) in very large transactions. Opinion letters have become ever-longer. This may reflect an opinion giver conclusion that stating matters that would be understood if unstated may help to obtain favorable pre-trial resolution of opinion claims. Transaction documentation has become more complex and as a result the remedies opinion may cover issues unfamiliar to transactional attorneys such as litigation procedural issues.

Any typical cost-benefit analysis tends to result in fewer recipient objections to opinion restrictions, faster closing schedules and less polished documentation for transactions. Guidelines set out by financial institutions for their own attorneys raise new and potentially troubling questions for the relationship of attorneys for financial institutions with their clients. Opinions about new types of entities, for example LLCs, opinions in cross border transactions and “bring-down” opinions raise new diligence questions. But none of these new issues involve the alteration of duties to a client or opinion recipient or the basic ethical or litigation framework for opinion practice. The resolution of new opinion issues has taken place within the context of TriBar II.

TriBar began work on replacing TriBar I only 13 years after it was published. There are no current plans to replace TriBar II. Even at age 20, it remains the single most important bar report on legal opinions. Were TriBar II to be rewritten today it might read quite differently, but there are no expectations that TriBar II will be rewritten any time soon. Thus it is likely to remain a vital opinion practice resource for years to come.

- Arthur Norman Field
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**RECENT DEVELOPMENTS**

The Effect of the Southpaw Decision on Opinion Practice

In its 2008 report on *Duly Authorized Opinions on Preferred Stock*, the TriBar Opinion Committee stated in note 20 that: “A duly authorized opinion on preferred stock does not address provisions relating to the preferred stock that are contained in a separate agreement between the parties but that are not set forth in the charter, even if those provisions could have been included in the charter.”

In *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Restaurant Holdings, Inc.* the Delaware Chancery Court recently had to decide whether shares issued in violation of a stockholders agreement were void. For reasons I will explain, the court enforced the terms of the agreement and held that the shares were void and therefore that votes cast by holders of those shares did not count. This decision raises the question whether the TriBar statement is correct or whether a different approach should be taken when giving

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In Our Opinion

The Southpaw Decision

In Southpaw, the court dealt with a battle over control of the board of directors of Roma Restaurant Holdings, Inc. (the “Company”). The plaintiffs were two investment funds that had acquired enough additional shares from another stockholder to own a majority of the shares. The defendants were the directors of the Company who had been designated by another investment fund and who, in response to plaintiffs’ obtaining a majority of the shares, authorized the issuance to several key employees of enough shares of restricted stock to reduce the plaintiffs’ ownership to less than a majority and thus permit the other investment fund to maintain control of the board. A stockholders agreement was in place to which all stockholders and apparently the Company were parties. That agreement prohibited the Company from issuing shares to anyone not a party to the agreement unless that person agreed in writing to be bound by the agreement. The agreement further provided that shares issued to a person who failed to satisfy this condition were “null and void ab initio.” After learning about the issuance of the restricted stock, the plaintiffs delivered a written consent of stockholders to remove the defendant directors and appoint their own directors. The Company refused to honor the consent and the plaintiffs brought an action under §225 of the Delaware General Corporation Law (the “DGCL”).

Inasmuch as the parties did not dispute that the issuance of the restricted stock to the employees was invalid, the question before the court was whether the stock was void, in which event it would not be treated as outstanding, or whether it was just voidable, in which event it would not be void automatically and the court could consider equitable matters in fashioning a remedy, including treating the stock as outstanding. This in turn required the court to determine the effect of the stockholders agreement on the stock issuance. The court observed that a corporate action that violates a statute or governing instrument (such as the certificate of incorporation or bylaws) is void, while action taken in violation of equitable principles is voidable and susceptible to equitable defenses. For the court, the question then was whether the stockholders agreement was a “governing instrument.” Because the defendants did not contest that the stockholders agreement was a governing instrument, the court treated it as if it were, noting that it was not analyzing “whether stock issued in violation of contractual obligations is void or voidable under Delaware case law.” The court went on to enforce the agreement as written, finding that the stock issuance violated the agreement because the recipients did not agree to be bound by it and then, applying the contractually mandated remedy, held that the stock was void and thus could not be considered in a vote to determine the composition of the Company’s board.

Relevance for Opinions

The court in Southpaw made clear that an issuance of shares in violation of the DGCL or a corporation’s governing instruments is void as a matter of Delaware law and that the certificate of incorporation and bylaws are governing instruments. Thus, as discussed in the TriBar Preferred Stock Report, a duly authorized and validly issued opinion cannot be given on shares that a corporation did not have the power to issue under the DGCL (for example, an issuance of preferred stock that was not part of the corporation’s authorized capital) or that the corporation issued in violation of a provision of its certificate of incorporation or bylaws (for example, an issuance of shares without the approval of a class of stock required by the

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6 This article addresses only opinions on the issuance of shares of a corporation. It does not address opinions on the issuance of interests in a limited liability company or a limited partnership.

7 Id. at *6 n.72.

8 The court also found that this remedy was not inequitable under the circumstances. 2018 WL 658734 at *7.
certificate of incorporation or without the special approving vote of directors required by the bylaws).\(^9\)

As noted above, the court in *Southpaw* did not decide whether a stockholders agreement is a governing instrument. Instead, it assumed that it was because the defendants did not contest that issue and, based on that assumption, it held that the restricted stock issued in violation of the agreement was, as the agreement provided, void. The question is whether the *Southpaw* decision requires a change in opinion practice when giving a duly authorized and validly issued opinion on shares of a Delaware corporation. For the reasons discussed below, I do not believe that it does.

At the outset, I note that if a stockholders agreement is in place and either the opinion preparers or the recipient are aware that the issuance would violate the agreement, the violation most likely will be dealt with before the opinion is given. The opinion preparers will be unwilling to give an opinion, and the recipient will be unwilling to close, knowing of an issue that is likely to give rise to a problem later. What if, however, the opinion preparers are unaware that a stockholders agreement exists or are aware of one but determining whether the issuance violates its terms would require a review of the agreement? Do the opinion preparers have any obligation under those circumstances?

In many transactions this question will not be present because the opinion preparers already will be making that determination when doing the work required to give a no breach opinion – i.e., an opinion that the issuance will not breach the terms of other agreements, including stockholders agreements. But what if the duly authorized and validly issued opinion is not accompanied by a no breach opinion? In those circumstances, the answer should be that opinion preparers are not responsible for inquiring whether a stockholders agreement exists that might be violated by the issuance because requiring them to do so would turn the duly authorized and validly issued opinion into a back door no breach opinion, causing it to cover a matter that under existing Delaware law does not render shares when issued void.\(^10\) As Delaware law now stands, shares issued in violation of an agreement, like shares issued in violation of a board’s fiduciary duty, are not void even though they may be invalidated by a court using its equitable powers.\(^11\) The violation of agreements is covered by the no breach opinion, and if an opinion recipient is concerned about violations of an agreement, it should request that opinion.\(^12\)

If not requested, opinion preparers giving a duly authorized and validly issued opinion should not accompanied by a no breach opinion? In those circumstances, the answer should be that opinion preparers are not responsible for inquiring whether a stockholders agreement exists that might be violated by the issuance because requiring them to do so would turn the duly authorized and validly issued opinion into a back door no breach opinion, causing it to cover a matter that under existing Delaware law does not render shares when issued void.\(^10\) As Delaware law now stands, shares issued in violation of an agreement, like shares issued in violation of a board’s fiduciary duty, are not void even though they may be invalidated by a court using its equitable powers.\(^11\) The violation of agreements is covered by the no breach opinion, and if an opinion recipient is concerned about violations of an agreement, it should request that opinion.\(^12\)

If not requested, opinion preparers giving a duly authorized and validly issued opinion should not

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\(^9\) To the extent the TriBar Preferred Stock Report referred only to the certificate of incorporation, it likely should be read to include the bylaws. That report dealt with the duly authorized portion of the opinion, but the same considerations apply to the validly issued portion of the opinion.

\(^10\) Different considerations might apply if the corporation is organized in a state under whose laws the stockholders agreement is a governing instrument.


\(^12\) The TriBar Opinion Committee states in *Third-Party “Closing” Opinions*, 53 Bus. Law. 592 (1998), § 6.2.2 at 649:

> Shares may, however, be validly issued even though their issuance resulted in a breach of or default under another contract to which the Company is a party. The absence of such breaches and defaults is customarily the subject of a separate opinion [cross-reference omitted].
be required to do the work required to give the no breach opinion.  

Conclusion

The Southpaw decision does not establish a new legal rule. Rather, it offers a reminder that stockholders agreements may contain provisions relating to the issuance of shares and that a violation of those provisions could have consequences. Opinion preparers will want to be alert to the existence of any such agreement. However, opinion preparers should not have to determine whether such a stockholders agreement exists to give a duly authorized and validly issued opinion.

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NOTES FROM THE LISTSERVE
(LEGAL OPINIONS COMMITTEE)

[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 Listserve archive under “Listserve” on the Committee’s website.]

13 Opinion preparers, of course, even if not required to do so, may choose to inquire into the existence of stockholders agreements that might affect the issuance of shares. For example, when a company is venture-backed, the existence of a stockholders agreement is common. See, for example, the National Venture Capital Association sample forms at https://nvca.org/resources/model-legal-documents/.

The Relevance of Letterhead to Opinion Letters

Charlie Menges of McGuireWoods LLP, Richmond, Virginia, raised an interesting opinion practice question by his inquiry to the Listserve of July 14, 2018: “Do law firms that have multiple offices in multiple states need to use letterhead for an opinion letter that identifies a particular office?” Charlie noted that, for firms with multiple offices in multiple jurisdictions, the office location(s) identified on the firm’s letterhead may not correspond to the jurisdiction(s) in which the opinion preparers are licensed or to the jurisdiction of the law covered by the opinion letter. Where several opinion letters are being delivered with respect to the laws of multiple states, one or more lawyers coordinating the issuance of the opinion letters may not actually practice in the jurisdictions whose covered law governs the opinion letters. In such situations, lawyers with the appropriate expertise in the relevant jurisdictions always review the opinion letter(s). While his firm typically tries to employ the firm’s letterhead of an office in at least one of the relevant jurisdictions, sometimes that is not practicable and Charlie wondered whether it is even necessary. Charlie asked whether firms employ letterhead that merely identifies the name of the firm without a specific office, or includes the name of the firm and a list of the cities in which the firm has offices, and asked the Listserve whether other firms use “office-neutral” letterhead and whether they have encountered any problems in doing so.

Stan Keller (Locke Lord LLP) responded that his firm uses office-neutral letterhead when appropriate, which can be customized when desired. He did not perceive a problem in not identifying a particular office, but noted that such a practice might leave open the question of jurisdiction over the opinion giver in the event of any dispute concerning the opinion letter. Of course, the “presence” of the opinion giver for jurisdictional purposes would be a question of fact, but identifying the location of the office of the firm that prepared the opinion letter could help or hurt, depending upon one’s point of

Ettore Santucci (Goodwin Procter LLP) commented that his firm uses neutral letterhead for opinion letters except for its London office (which is a separate legal entity).

The ABA’s Model Rules of Professional Conduct address letterhead in its Model Rule 7.5, which proscribes the use of a firm name, letterhead or other professional designation that violates Model Rule 7.1, which prohibits the use of false or misleading communications about a lawyer or his or her services. Law firms with offices in more than one jurisdiction may use the same name in each jurisdiction, but if lawyers are identified on the letterhead, then the identification is to indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office identified on the letterhead is located. Rule 7.5(b).

As Justin Klimko (Butzel Long, Detroit), Norm Powell (Young Conaway Stargatt & Taylor, Wilmington), Lucian Pera (Adams and Reese LLP, Memphis), and Richard Goldfarb (Stoel Rives LLP, Seattle) noted, competence to express the opinions included in an opinion letter is the central issue, and not whether the opinion giver maintains an office in the jurisdiction whose laws are addressed by the opinion letter or even whether the opinion givers are admitted to practice in that jurisdiction. As noted in the Restatement (Third) of the Law Governing Lawyers § 3, cmt. e (2000):

“... a lawyer conducting activities in a lawyer’s home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.”

In this connection, Stan Keller noted that most opinion givers include an express statement of the law covered by their opinion letters (e.g., “we express no opinion as to the laws of any jurisdiction other than the laws of [New York] and the federal laws of the United States of America”) (the “covered” law), thereby removing any ambiguity as to which jurisdiction’s laws are addressed by the opinion letter. This is different than the question of where an opinion giver may be sued in the event of a dispute over its opinion letter.

Marshall Grodner of McGlinchey Stafford PLLC, Baton Rouge, commented that his firm not only includes an express covered law limitation but also includes a forum selection clause with the choice-of-law provision in their opinion letters that governs the jurisdiction applicable to their professional responsibility in preparing and delivering the opinion letter. Marshall observed that his firm “rarely [has] had pushback on this choice of law provision.” With such a provision, Marshall noted that there would be no need to be concerned about which office’s letterhead is used, although he concurred in the observation that the use of office-neutral letterhead is sensible.

Notwithstanding Marshall’s observation, both Stan Keller and Jim Melville of Kaplan, Strangis and Kaplan, P.A., Minneapolis, cautioned that they are aware of lenders whose opinion policies do not accept forum selection provisions for the resolution of any dispute concerning opinion letters.
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 July 31, 2018.]

### A. Published Reports Available From Legal Opinions Resource Center\(^\text{14}\)

<table>
<thead>
<tr>
<th>Source</th>
<th>Year</th>
<th>Report Title</th>
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| 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 the Use of confirmation.com – Audit Responses Committee |
| | 2017 | Opinions on Debt Tender Offers — Securities Law Opinions Subcommittee |
| ABA Real Property Section (and others)\(^\text{15}\) | 2012 | Real Estate Finance Opinion Report of 2012 |
| | 2016 | Local Counsel Opinion Letters in Real Estate Financing Transactions |
| Arizona | 2004 | Comprehensive Report |
| California | 2007 | Remedies Opinion Report  
Comprehensive Report |
| | 2009 | Venture Capital Opinions |
| | 2014 | Sample Venture Capital Financing Opinion |
| | 2014 | Revised Sample Opinion |
| | 2016 | Third-Party Closing Opinions: Limited Liability Companies and Partnerships |

\(^{14}\) 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/). 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.

\(^{15}\) 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”).
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B. Pending Reports

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Washington Comprehensive Report Update

Florida Comprehensive Report Update

Texas Comprehensive Report Update

TriBar Opinions on Clauses Shifting Risk

Bring Down Opinions

Washington Comprehensive Report

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16 See note 15.

17 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. 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@wcsr.com.

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

**Next Newsletter**

We expect the next newsletter to be circulated in October 2018. Please forward cases, news and items of interest to Ettore Santucci (esantucci@goodwinprocter.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotscooley.com).