

IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

Volume 18 — Number 1

Fall 2018

James F. Fotenos and Susan Cooper Philpot, Editors

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FROM THE CHAIR

I am pleased to share with you the Fall 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. I want to point your attention to an article by Stan Keller and Steve Weise “*Obtaining National Consensus on Key Opinion Matters: Statement of Opinion Practices*,” which marks the culmination of several years of work by a joint committee of representatives from our Committee and the Working Group on Legal Opinions (“WGLO”) on a project to identify selected aspects of customary practice and other practices applicable to third-party legal opinions that are commonly understood and accepted throughout the United States. This effort to strengthen national opinion practice builds upon the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008), which has been approved by over 30 bar associations and other groups. The project passed a critical milestone in the past couple of months with the Statement of Opinion Practices (the “Statement”) and related Core Opinion Principles (the “Core Principles”), both described in the article, being approved by our Committee and the WGLO Board and distributed to interested bar groups and others for approval. Many groups have already given their approval and others are in the process of doing so. Please join me in thanking Stan and Steve for their leadership. This was a long, at times intense, always thoughtful process that brought together countless opinion experts from many different groups. It is the latest proof that rigorous, respectful collaboration produces results we can all be proud of. This will be important guidance for practicing lawyers across the country for many years. A job well done!

Current Projects. I want to use this note to build some momentum on two important projects our Committee is pursuing. The first is the *Task Force On Cross-Border Opinion Practice*, the second a *Task Force On Intellectual Property Opinions*. Both projects

have now been underway for a couple of years and are progressing well. I expect that both task forces will produce draft documents for consideration by our Committee at the Spring Meeting in Vancouver so that task force leaders can receive feedback from our members before deciding what the product of their work should be. Both projects share a single objective: to expand the work of our Committee into areas in which it can collaborate with groups beyond its traditional constituency. For cross-border opinion practice this means reaching out to non-U.S. lawyers in an effort to build consensus on, and convergence towards, shared opinion principles and practices that will, over time, make the process of negotiating opinions in cross-border transactions more efficient and less contentious. For intellectual property opinion practice this means reaching out to IP lawyers in an effort to make opinions given in financing transactions for IP-rich companies more consistent with the now well-established customary practice and market norms on which we all rely every day when giving “regular” third-party closing opinions in financing transactions.

IBA/ABA Task Force. Back in the Spring, Truman Bidwell and I, as co-chairs of the cross-border opinions task force, sought approval from the ABA for a formal collaboration between our Committee and the Practice Law Division of the International Bar Association (“IBA”). It was granted, and we attended the IBA’s annual meeting in Rome in October to discuss with a select group of IBA leaders a proposal to form a joint IBA/ABA task force (“JTF”) on the giving and receiving of legal opinions in international transactions. The agenda for the meeting included the scope of the project and how to advance it beyond the conceptual stage towards a JTF work-plan. The goal would be for the JTF to promote convergence around balanced, practical international opinion practices to benefit the broadest possible number of lawyers and their clients. The markets we would initially focus on are: (i) loans and debt capital markets transactions with their center of gravity in major

financial centers such as New York and London, (ii) project finance, trade financing and asset-based lending transactions, especially in lesser developed countries, and (iii) common non-debt finance cross-border transactions such as joint ventures and equity capital market transactions. The JTF's first concrete initiative would propose a set of fundamental principles that could be adopted by bar groups, opinion givers and counsel for opinion recipients throughout the world; we have already started to work on a conceptual outline drawn from existing U.S. and non-U.S. guidance and literature.

The JTF would then tackle the preparation of more detailed guidelines for the giving and receiving of legal opinions in cross-border transactions, with an "*international golden rule*" as their lynchpin, including guidance on proper and improper opinion requests. One challenging topic for the JTF will be differences between third-party legal opinions and transactional opinions given to one's own client – the former being the norm in the U.S., the latter the norm outside the U.S. Because in many jurisdictions the policies of opinion givers and the expectations of opinion recipients are largely shaped by "own client" opinions, dealing with third-party opinions without a clear understanding of the landscape on the other side of the fence would leave us flying blind, as it were. Down the road the JTF would seek to develop a grid of opinion issues peculiar to and common across jurisdictions in cross-border transactions. This would allow us to clarify the role of counsel in identifying for their clients legal issues in cross-border transactions rather than deferring them to legal opinion discussions later on.

Another important topic will be defining the role of local counsel in cross-border transactions, particularly in jurisdictions where efficiency may dictate that a single firm be retained jointly by the parties; in such situations a number of questions arise, for example, what will be the responsibilities of local counsel and counsel for the recipient, if any, and what liability attaches to the rendering and receipt of an opinion to multiple participants in the

transaction? Even farther down the road the JTF could consider more practical steps such as (i) creating legal opinion templates for use in markets where precedents are rare or non-existent; (ii) developing a common lexicon to enhance communication and lessen the risk of misunderstanding among transactional lawyers from different jurisdictions; and (iii) reaching consensus on the proper balance between third-party opinions and opinions to one's own counsel to maximize benefits, reduce costs, and manage tension when the inevitable legal uncertainties created by the interplay of the laws of different jurisdictions on a cross-border transaction make reaching opinion-level certainty a challenge.

IP Opinions Task Force. Rick Frasch and I as co-chairs of the Intellectual Property Opinions Task Force have been working with a drafting committee to develop an outline for a possible report. The objectives of the report would be: (i) to educate lawyers who actively participate in the intellectual property component of corporate financing transactions, particularly IPOs, as well as their clients and other interested parties, about prevailing practice with respect to third-party legal opinions and/or negative assurance letters covering IP matters at the closing of those transactions; (ii) to develop consensus on what are appropriate and inappropriate opinion requests in this area, on the customary coverage of, and frequently used language in, IP legal opinions and/or negative assurance letters, and on the customary diligence to be undertaken when issuing them; and (iii) to develop guidance equally suitable to boutique IP firms, the IP departments of general service firms and firms that routinely represent issuers and underwriters in capital markets transactions. The need for such a report arises because technology, life sciences, "brand" and digital media companies have been pursuing IPOs at a blistering pace and their intellectual property assets are where most of their enterprise value is.

The core working group for these transactions ordinarily consists of the company's management (which often includes in-house counsel with deep knowledge of the company's

IP portfolio), investment bankers, the issuer's corporate/securities counsel, the underwriters' counsel, and outside specialty IP counsel. Coordination and collaboration among all groups is critical. With respect to coverage of IP issues and related disclosures in closing opinions, the role of IP counsel needs to be agreed on early on to prevent misunderstandings and a crisis late in the process when underwriters ask IP counsel to provide them an opinion on key patents, registered trademarks, copyrights and/or in/out-licensing. It is not uncommon for IP counsel to be in a separate firm from corporate/securities counsel with responsibility for the transaction as a whole. In addition, it is not uncommon for different IP firms to handle different aspects of the company's IP portfolio. This situation too frequently creates friction and misunderstandings over who is responsible for what, when and how. The friction and misunderstandings often come to a head when the topic of closing opinions comes to the fore, too often late in the transaction when timing is tight and the opportunities for re-engineering the due diligence and disclosure drafting process is essentially nil.

Without input on IP issues from expert IP lawyers at the appropriate stage of the IPO process, counsel for the company as a whole cannot realistically be expected to back-stop the IP due diligence and disclosures to the satisfaction of underwriters and their counsel when the IPO is ready to price and close. These matters must be on the agenda for the core working group early in the transaction to ensure that IP counsel with the requisite technical expertise and direct knowledge of the IP portfolio is ready to assist and prepared to give a closing opinion and/or negative assurance letter covering the IP aspects of the transaction.

Get Involved! I would like both task forces to be able to count on active participation from a larger and more diverse group of our Committee's members as they enter a critical phase in their work. Between now and the Spring Meeting both task forces will undertake a diligent effort to produce draft documents for

consideration by our Committee when we meet in Vancouver in April 2019. This is the time for those who want to have a seat at the table in framing guidance in these important areas to roll up their sleeves and make themselves heard. These projects will take time to come to fruition – that is always the case because we have a track record of producing guidance that is thoughtful, balanced and rigorous. We need your help! Please participate in the task force meetings on Saturday, November 17, 2018 and reach out to me to be included in the task force rosters.

I look forward to seeing you in D.C.

- Ettore A. Santucci, Chair
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FUTURE MEETINGS

**ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 16-17, 2018**

What follows are the presently scheduled times of meetings and programs of the Fall Meeting that may be of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

Friday, November 16, 2018

Committee Meeting:
9:30 a.m. – 11:00 a.m.
Plaza I, Ballroom Level

Program: “The Troublesome Twenty: A Selection of Opinion Issues That Never Seem to Go Away”
2:00 p.m. – 3:30 p.m.
Plaza II, Ballroom Level

Reception:
5:00 p.m. – 6:00 p.m.
Plaza I, Ballroom Level

Saturday, November 17, 2018

Intellectual Property Opinions Joint Task Force:
9:30 a.m. – 10:30 a.m.
Plaza I, Ballroom Level

Cross-Border Opinions Task Force:
10:30 a.m. – 11:30 a.m.
Plaza I, Ballroom Level

Audit Responses Committee

Friday, November 16, 2018

Committee Meeting:
8:30 a.m. – 9:30 a.m.
Washington, Ballroom Level

Law and Accounting Committee

Friday, November 16, 2018

Committee Meeting:
2:00 p.m. – 3:30 p.m.
Washington, Ballroom Level

Program: “Critical Audit Matters: What Lawyers Need to Know About the PCAOB’s New Auditor Reporting Standard”
4:00 p.m. – 5:30 p.m.
Salon II, Ballroom Level

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Saturday, November 17, 2018

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

**ABA Business Law Section
Spring Meeting
Vancouver, British Columbia
Vancouver Convention Center
Fairmont Waterfront
Pan Pacific and
Vancouver Marriott Pinacle
March 28-30, 2019**

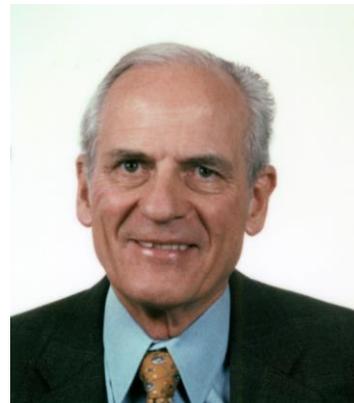
2018 FULD AWARD

The Fuld Award is presented annually by the Working Group on Legal Opinions Foundation to a person or group who has made a significant contribution to the field of legal opinions. The award is sponsored by Proskauer Rose LLP, where Jim Fuld was a partner. The previous recipients were Arthur Field, Donald W. Glazer, Judge Thomas Ambro, Jerome E. Hyman, James J. Fuld, the TriBar Opinion Committee, Stanley Keller, Steven O. Weise and Linda C. Hayman.

At this year's fall meeting of WGLO, held on October 30, 2018 in New York, WGLO gave two Fuld Awards, one to John B. Power and the other posthumously to Robert A. Thompson.

**ABA Business Law Section
Annual Meeting
Washington, D.C.
Marriott Marquis
September 12-14, 2019**

John B. Power



John B. Power had a distinguished career as a partner of O'Melveny & Myers LLP, from which he is now retired. John has been active in the California State Bar for decades, and his accomplishments there are legion. He was the first Chair of the California Legal Opinions Committee, and in that capacity fathered the California Business Law Section's *Report on Third-Party Remedies Opinions* (2005, updated

**ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 22-23, 2019**

2007).¹ John co-authored the California UCC report on opinions in personal property secured transactions (published in 1986 and re-published in 1988), and was one of the co-reporters of a 1992 report of an ad-hoc opinion committee of the California Business Law Section on the ABA Accord.

John has served as Chair of the ABA Legal Opinions Committee, and has been a member of the TriBar Opinion Committee since 2004. Since joining he has been a key contributor to all of the TriBar reports, and also contributed to the ABA's *Report on Cross-Border Opinions of U.S. Counsel* (71 Bus. Law 139 (Winter 2015-2016)). He served as the reporter of the second ABA survey of law firm opinion practices (*Report on the 2010 Survey of Law Firm Opinion Practices* (68 Bus. Law. 785)), and now co-chairs the group working on the third survey.

John has served on the WGLO board since its inception (taking *emeritus* status last year). At WGLO, John is the originator and long-time leader of the "Power Hour", a report given at every meeting on important cases and developments in the field of legal opinions. John has also been a mentor to and role model for many of those who now regularly participate in the activities of WGLO and the wider legal community.

John remains active in the Los Angeles community, currently serving as a Trustee of Occidental College and on the board of directors of the YMCA of Metropolitan Los Angeles.

WGLO was delighted to present a 2018 Fuld Award to one of its finest, most productive and nicest members, John Power.

¹ This Report is available in the "Legal Opinion Resource Center maintained by the ABA Legal Opinions Committee on its website under State and Other Bar Reports/California," accessible at https://www.americanbar.org/groups/business_law/migrated/tribar/.

Robert A. Thompson



At the time of his death in July of last year, Bob Thompson was a partner of Sheppard, Mullin, Richter & Hampton LLP where he had practiced for over 20 years. He was one of the outstanding real estate lawyers in California. The projects in which he acted as counsel during his more than 45-year career included many of the major real estate developments in California, particularly in San Francisco, where he practiced. His work included notable public/private partnerships, including the development of the new UCSF campus in San Francisco's Mission Bay.

His most recognized contribution to legal opinion practice is his treatise, *Real Estate Opinion Letter Practice* (published by the Section of Real Property, Trust & Estate Law of the ABA) first published in 1993 and now in its third edition. He was a faithful adherent to and spokesperson for the business law and real property opinion reports of the California bar. He also worked to promote greater understanding between real estate and commercial lawyers with respect to the opinion practices of each group.

Bob served as chair of the ABA Real Property, Trust & Estate Law Section's Committee on Legal Opinions in Real Estate Transactions, and of the American College of Real Estate Lawyers Attorneys' Opinions Committee. He was also as a member of the College's Board of Governors. He chaired the drafting committee that issued the *Real Estate Opinion Letter Guidelines* (38 Real Prop.

Prob. & Tr. J. 241 (2003)), adapting and supplementing the ABA Business Law Section's *Guidelines for the Preparation of Closing Opinions* (57 Bus. Law. 875 (2002)). Bob appeared on many panels on the subject of opinion practice for the ABA, the American College of Real Estate Lawyers, the American Law Institute, WGLO and others.

Although a busy practitioner, Bob was an excellent teacher and enjoyed helping others work through the intricacies of opinion practice. His door was always open and his guidance, always given in a positive and thoughtful way, is missed. Bob's opinion work reflected his dedication to the law and appreciation of its intellectual rigor, honesty and role in protecting our nation's fundamental values and persons of all means, backgrounds and walks of life. It is a consolation to his friends that Bob left us doing what he liked to do.

It was sad that Bob could not receive the award in person, but WGLO took pride in presenting a 2018 Fuld Award to Robert A. Thompson.

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BUSINESS LAW SECTION 2018 ANNUAL MEETING

The Business Law Section held its Annual Meeting in Austin, Texas on September 13-15, 2018. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Annual Meeting of interest to members of the Committee on Legal Opinions.

Legal Opinions Committee

The Legal Opinions Committee met on Friday, September 14, 2018. The following is a summary of the meeting.

Survey of Law Firm Opinion Practices. John Power and Arthur Cohen (Haynes and Boone LLP) are co-chairs of the Committee's Opinion Practices Survey Subcommittee. The Subcommittee has been meeting for several years to prepare the Committee's third survey of law firm opinion practices, the most recent of which was conducted in 2010 and the results of which were published in 68 Bus. Law. 785 (2013). At the Committee's prior meeting, the Subcommittee had received final approval of its draft of the survey for distribution to the law firm community. John and Arthur explained some final editorial revisions to the survey and reported on their plans for moving to the final phase of the project. The Committee Chair thanked John and Arthur for their hard work in overseeing the process of collecting and analyzing the survey results. The objective of the Subcommittee is to publish a report on the survey in a future issue of *The Business Lawyer*.

Statement of Opinion Practices. Stan Keller and Steve Weise updated the Committee on developments with respect to the Statement of Opinion Practices (the "Statement") since the April 15, 2018 meeting of the Committee in Orlando, Florida. A Joint Committee composed of representatives of the Working Group on Legal Opinions ("WGLO") and members of this Committee has been able to finalize the Statement and related Core Opinion Principles, with input from a number of groups. The Statement has been approved by the Joint Committee and is ready for submission and approval by its sponsors – this Committee and WGLO – with a view to distribution to bar groups and other interested parties for adoption. After discussion and upon motion duly made and seconded, the Committee approved the Statement and authorized its distribution to bar groups and other interested parties for adoption. The Committee Chair thanked Messrs. Keller and Weise and the rest of the Joint Committee for their leadership and hard work over many

years to bring this phase of the project to completion.

Delaware Practice Regarding Remedies Opinions on LLC Operating Agreements. Lou Hering (Morris, Nichols, Arsht & Tunnell LLP) and Elisa Maas (Richards Layton & Finger, PA) led a discussion on opinion practice with respect to remedies opinions on operating agreements of Delaware limited liability companies or the partnership agreements of Delaware limited partnerships (“LLC/LP agreements”). As more and more entities in transactions of all kinds are organized as LLCs or limited partnerships, in many cases with complex LLC/LP agreements with intricate provisions that the parties heavily negotiate, more and more often enforceability opinions are being requested on the LLC/LP agreement as a whole. Lou and Elisa confirmed that Delaware lawyers regularly give “full” (i.e., each and every provision) remedies opinions on LLC/LP agreements and began by noting both the freedom of contract principle under the Delaware LLC and LP statutes and the handful of statutory provisions that cannot be modified by agreement. They took the position that there are no fundamental differences between remedies opinions covering LLC/LP agreements and remedies opinions covering other agreements: just as counsel for the borrower is willing to give an opinion to lenders that a loan agreement is enforceable against its client, the borrower, Delaware lawyers representing the managing member of an LLC or the general partner of a limited partnership are willing to give an opinion to investors that the LLC/LP agreement is enforceable against their client.

In addition to the bankruptcy exception and equitable principles limitation, Lou mentioned that many Delaware lawyers typically take public policy and implied covenant exceptions, as well as specific exceptions or limitations on a case-by-case basis as appropriate. Some of these exceptions and qualifications are grounded in limitations in the Delaware statutes as to what LLC/LP agreements can do as a matter of contract. Don Glazer asked why some of those exceptions are necessary insofar as the opinion only covers enforceability of the LLC/LP agreement against the managing member or

general partner, whereas some of the Delaware statutory provisions cited by Lou and Elisa are outside that narrow context. Lou expressed the view that even though strictly speaking those provisions do not constitute obligations of the managing member or general partner specifically, if they are important provisions of the LLC/LP agreement that the managing member or general partner could be called upon to enforce on behalf of members or limited partners, many Delaware lawyers choose to flag the issue to prevent criticism for not making opinion recipients aware of it.

The discussion continued on several specific exceptions or qualifications that many Delaware lawyers include in their remedies opinions covering LLC/LP agreements, such as those covering distribution provisions (both regular and liquidating), waivers of the right to dissolve and the right of creditors relative to transfer restrictions. One example of particular interest was the common qualification that the enforceability of the LLC/LP agreement may be limited by the implied contractual covenant of good faith and fair dealing. That qualification became common a couple of years ago when the Delaware courts started referring to that doctrine more in their decisions construing provisions of LLC and limited partnership agreements. As a result many Delaware lawyers state it expressly even though many transactional lawyers who give remedies opinions outside the Delaware LLC and LP context do not. Lou stated that the reason for this practice in Delaware is that Delaware courts have relied on those doctrines when deciding to add to or limit the rights or obligations of members and partners as provided in the LLC/LP agreement itself. This may be an area where Delaware lawyers are more cautious that they might need to be under customary practice, but many choose to be cautious because of recent case law.

Lessons from Southpaw. Don Glazer and Stan Keller led a discussion of *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Restaurant Holdings, Inc.*, 2018 WL 658734 (Del. Ch. Feb. 1, 2018), in which the Delaware Chancery Court had to decide whether shares issued in violation of a stockholders agreement

were void.² The court enforced the terms of the agreement and held that the shares were void and therefore that votes later cast by holders of those shares did not count. After commenting on the court's reasoning, Stan stated that *Southpaw* does not mean that opinion practice should change from the standard articulated in the 2008 TriBar report on *Duly Authorized Opinions on Preferred Stock*, which states 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." (63 Bus. Law. 921, 924 n.20 (2008)). Stan explained that *Southpaw* does not increase the level of diligence that an opinion preparer must engage in when giving a duly authorized and validly issued opinion because the agreement in *Southpaw* provided that shares issued in violation of the agreement's terms were void and the *Southpaw* court assumed, without deciding the issue, that the stockholders agreement was a "governing document" and reached its decision based on that assumption. Don concurred that no change to existing opinion practice is warranted as a result of the *Southpaw* decision.

Membership and Twitter Report. Rick Frasch, who represents the Committee on the Section's membership committee, reported on membership trends, and in particular that while the Committee's membership is declining, other committees are experiencing greater declines. The Committee is looking to reverse this trend through a variety of initiatives. The survey process will be an opportunity to communicate with opinion experts nationally at many firms and the Committee will do everything it can to use that process as a catalyst to attract new members. The focus will be particularly on younger lawyers, which are also the target of the

² See Stan Keller's article on the *Southpaw* decision in the Summer 2018 issue of the Newsletter (vol. 17, no. 4), *The Effect of the Southpaw Decision on Opinion Practice*, at 11-14.

Committee's Twitter initiative. Rick reported that the Committee's Twitter handle (@ABALegalOpinion) has an increasing number of followers. While the Committee's Twitter activity is not intended to replace other means of communication by the Committee to its members, including via the Newsletter, the listserve, or otherwise, it is a new, different and easy way to communicate in real time important developments to growing audiences that should begin to gravitate towards active involvement in the Committee's traditional activities. The focus on membership is one of the Committee's principal objectives as our members are not only declining, but also increasing in age.

Mini-Panel on Forum Selection Cases. Steve Weise, Stan Keller and Don Glazer led an open discussion of issues with respect to forum selection clauses, using as jumping-off points cases in California, Massachusetts and New York. This was a high level "issue-spotting" discussion, rather than a detailed analysis of the case law. The take-away was that enforcement of forum selection clauses of different types (mandatory or permissive, inbound or outbound, with or without statutes specifically covering their enforceability) continues to be a very inconsistent and fact-specific and court decisions considering their enforceability are often poorly reasoned, to the point where states like Massachusetts, which have long been seen as proponents of the "modern view" on forum selection, may now be cutting back on the enforceability of forum selection clauses. Don concluded the discussion by pointing out that the case law is leading more and more firms to take an express exception for forum selection provisions in an agreement when they give a "full" remedies opinion. The Committee Chair pointed out that the situation is different in cross-border transactions where U.S. counsel is not giving a remedies opinion on the agreement as a whole, but opinion recipients are very interested in receiving an opinion from U.S. counsel that the forum selection clause itself is enforceable under the law covered by the opinion.

Other. The Committee Chair reported on the program sponsored by the Committee earlier in

the day (“Allocating Risk in Your Legal Opinions for Risk Allocation Clauses”) and on discussions at the meeting of the Cross-Border Opinions Task Force. He also invited members to attend the meeting the following day of the Intellectual Property Opinions Joint Task Force.

Don Glazer reported that the TriBar Opinion Committee’s report on limited partnership opinions is scheduled for publication in the next issue of *The Business Lawyer*.

Next Meeting. The next meeting of the Committee will be held at the Section’s Fall Meeting in Washington, D.C., on November 16, 2018.

- Ettore A. Santucci, Chair
Goodwin Procter LLP
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Audit Responses Committee

The Audit Responses Committee met on Saturday, September 15, 2018. The principal discussion points are summarized below.

Update on Law and Accounting Committee. Jeffrey Rubin provided an overview of the topics discussed during the meeting of the Law and Accounting Committee, which immediately preceded the Audit Responses Committee meeting.

Report on Recent Committee Listserve Activity. Alan Wilson updated the Committee on recent discussion topics on the Committee’s listserve, highlighting the following two topics: (a) client requests to review an audit response letter before outside counsel sends the letter to the auditors, and (b) guidance regarding what constitutes “asserted claims” and “overtly threatened or pending litigation.” A summary of recent activity on the Committee’s listserve is included below.

Update on AS 3101. Thomas White provided an update on the latest developments in the implementation of PCAOB Release 2017-001 (June 1, 2017), which updated the auditor’s reporting model by, among other things,

adopting new PCAOB AS (“Auditing Standard”) 3101 (“*The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*”). As discussed at earlier Committee meetings, the most notable change to the auditor’s reporting model is the disclosure of “critical audit matters” or “CAMs,” which first becomes effective for audits of large accelerated filers for fiscal years ending on or after June 30, 2019. Most recently, the PCAOB updated its previous Staff Guidance for Changes to the Auditor’s Report Effective for Audits of Fiscal Years Ending on or After December 15, 2017 (updated August 23, 2018). The updates, as Mr. White noted, do not provide guidance on CAMs disclosures, but provide additional implementation guidance on aspects of AS 3101 that have already become effective, such as mandatory disclosure of auditor tenure.

Members of the Committee observed that some audit firms and audit committees have begun evaluating CAMs disclosure requirements, with some firms conducting “dry runs” before the disclosure is required to be included in the auditor’s report. Members of the Committee generally considered CAMs disclosures to have little impact on the audit response letter process, but acknowledged the possibility that potential loss contingencies could give rise to CAMs disclosure. To that end, members of the Committee tended to believe that lawyers would be more likely to be involved in tailoring CAMs disclosures than in revising their audit response letters. That said, members of the Committee suggested that attorneys should remain vigilant to possible nonconforming requests in audit inquiry letters as the new CAMs disclosure regime becomes effective.

Looking forward, Mr. White reminded the Committee that he is chairing a panel presentation on CAMs at the Section’s Fall 2018 Meeting in Washington, D.C., which the Committee is co-sponsoring with the Law and Accounting and Federal Regulation of Securities Committees.

Discussion of Special Disclosure Scenarios. Stanley Keller discussed a few scenarios

requiring law firms to give special attention to traditional audit response letter language. The first involved a client involved in mass tort litigation, where the audit inquiry letter was directed to the law firm overseeing all mass tort cases but not litigating any particular case. In essence, the auditors requested aggregated liability information on the mass tort litigation based on claims that had been litigated to date. Mr. Keller suggested that the outside law firm could, with express client consent, produce such aggregated information to auditors via a non-standard audit response letter, which emphasized the outside law firm's oversight role and the fact that the firm was not directly involved in litigating individual cases. Mr. Keller commented anecdotally, that such an approach appeared to have satisfied auditors in at least one instance, where the auditors preferred reliance on aggregated information over undertaking to send audit inquiry requests to possibly hundreds of local counsel handling each individual tort action.

The second scenario involved a partner at an outside law firm serving as part-time general counsel for one of the firm's clients. In the hypothetical, the law firm was actively engaged in a number of matters for the client, and the lawyer worked on such matters, both as a lawyer at the firm and as general counsel for the client. As general counsel for the client, the lawyer also handled other matters for which the outside law firm was not engaged. For purposes of responding to that client's audit inquiry letter, the outside law firm needed to modify its standard audit response letter language to identify the lawyer's role as general counsel and make clear that the law firm's response was provided only with respect to the matters for which the law firm was specifically engaged. Such modifications were intended to distinguish matters where the lawyer was serving on behalf of the firm from matters where the lawyer acted individually in the role as general counsel for the client.

Discussion of Website Updates. Mr. Wilson noted that the Business Law Section is undertaking an initiative to update all Section

committee websites, which subsequently became public in October 2018. The website updates include a new front webpage, along with a completely new webpage accessible only by Committee members. The webpage updates also involve the replacement of the Committee's listserv with a new "discussion posts" and "blog" function accessible via the new members-only webpage. Mr. Wilson noted that he was working with the Section to develop ways to preserve the content on the listserv so that it can be accessed from the new webpage. Further information regarding the new webpages likely will be included in an introductory email to all Business Law Section members that is expected to be sent by the end of 2018.

Next Meeting. The Committee's next meeting is scheduled for the Section's Fall Meeting in Washington, D.C., on November 16, 2018.

- Noël J. Para, Chair³
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Law & Accounting Committee

The Committee met on Saturday, September 15, 2018. The principal discussion points are summarized below.

Update on Critical Audit Matters. In June 2017, the Public Company Accounting Oversight Board ("PCAOB") adopted a new auditing standard, AS 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion* (PCAOB Release No. 2017-001). The new standard will require an auditor (i) to identify in its audit report any critical audit matters, or CAMs, arising from the current period's audit of the financial statements, or (ii)

³ 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.

state that it determined that there are no CAMs.⁴ A critical audit matter is a matter that was communicated or required to be communicated to the audit committee and that: (i) relates to accounts or disclosures that are material to the financial statements, and (ii) involved especially challenging, subjective, or complex auditor judgment. At the Committee meeting, Tom White spoke about recent developments relating to CAMs, including the PCAOB's staff guidance (updated to August 23, 2018), which is available [here](#).⁵

SEC Disclosure Effectiveness Amendments. In August 2018, the SEC adopted amendments to disclosure requirements that have become duplicative, overlapping, or outdated in light of other SEC disclosure requirements, U.S. Generally Accepted Accounting Principles (“GAAP”), or changes in the information environment. Alan Wilson reviewed the amendments that will affect financial reporting, including the elimination of some disclosure requirements that are currently required by GAAP to be included in financial statements.

SEC Proposed Rule on Auditor Independence With Respect to Certain Loans or Debtor-Creditor Relationships. In May 2018, the SEC proposed amendments to its auditor independence rules to re-focus the analysis that must be conducted to determine whether an auditor is independent when the auditor has a lending relationship with shareholders of an audit client. The proposed amendments would focus the analysis solely on beneficial ownership rather than on both record and beneficial

ownership; replace the existing 10% bright-line shareholder ownership test with a “significant influence” test; add a “known through reasonable inquiry” standard with respect to identifying beneficial owners of the audit client’s equity securities; and amend the definition of “audit client” for a fund under audit to exclude funds that otherwise would be considered affiliates of the audit client. Tom White discussed the proposed rule.

PCAOB Strategic Plan. In August 2018, the PCAOB released a draft five-year strategic plan, with a view, among other things, to improving the quality of audit services, ensuring that inspections and standard-setting activities are more responsive to and do not impede technological innovations, and engaging more proactively with investors, audit committees and other stakeholders. Alan Wilson discussed the draft strategic plan.

FASB Developments. During 2018, the Financial Accounting Standards Board (“FASB”) issued several updated standards, including changes to Conceptual Statement No. 8, dealing with notes to financial statements; ASU 2018-13, dealing with fair value measurements; and ASU 2018-14, dealing with defined benefit plans. In addition the FASB proposed improvements to its standards of accounting for lessors. Chair Jeffrey Rubin discussed these developments.

Participants at the meeting also briefly discussed recent SEC staff comments relating to the FASB’s recent revenue recognition standard and other topics of interest to the attendees.

Next Meeting. The Committee’s next meeting is scheduled for the Business Law Section’s Fall Meeting in Washington, D.C., on Friday, November 16, 2018.

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⁴ For former Chair Tom White’s analysis of AS 3101, see “Will the PCAOB’s New Audit Report Standard Affect Audit Letter Practice?” in the Summer 2017 (vol. 16 no. 4) issue of *In Our Opinion* (pgs. 13-16).

⁵ The URL is https://pcaobus.org/Standards/Documents/PCAOB-Auditors-Report-Guidance-8-23-18.pdf?utm_source=PCAOB+Email+Subscriptions&utm_campaign=4e600d8ba9-EMAIL_CAMPAIGN_2018_05_15_COPY_01&utm_medium=email&utm_term=0_c97e2ba223-4e600d8ba9-113314085.

**SUMMARY OF RECENT
LISTSERVE ACTIVITY
APRIL 2018 – AUGUST 2018
(AUDIT RESPONSES
COMMITTEE)**

[Editors' Note: This summary of listserv activity during the period of April 2018 – August 2018 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 ABA has reorganized its website. Listserv dialogues that formerly appeared under the “listserv” item on the Audit Responses Committee’s web page will now appear under “Audit Responses Connect” on the re-organized web page of the Committee. As of the date of the publication of this issue of the Newsletter (November 2018), the web page is currently under construction and the Audit Responses Connect link is inoperative.]

Assertion of a Claim. A member of the Committee asked whether there is any guidance on when a claim is deemed “asserted” for purposes of ASC 450-20, specifically whether a claim should be deemed “asserted” if communicated in something less than a formal “lawyer’s demand letter,” such as a letter simply asserting rights without threatening litigation. The Committee member noted that based on current case law it might not matter where there is a claimant’s manifestation of awareness of a possible claim, unless the company takes the position that the claim is unasserted and the claim does not otherwise satisfy the relevant threshold for disclosure. *See Indiana Public Retirement System v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016) (holding that under ASC 450-20-50-6, where there has been a “manifestation by a potential claimant of an awareness of a possible claim,” the threshold for footnote disclosure — as opposed to accrual — of a claim was whether

an unfavorable outcome was “reasonably possible,” not “probable”); *SEC v. RPM International Inc.*, 282 F.Supp.3d 1 (D.D.C. 2017) (holding with respect to a motion to dismiss that the SEC had plausibly alleged that an “asserted claim” existed where a *qui tam* action had been filed and the company and its general counsel were aware of the complaint and knew that the DOJ was involved in the investigation to determine whether to intervene and that, even if the claim was “unasserted,” the government had manifested an awareness of a possible claim and the “reasonable possibility” standard applied to determine whether disclosure was required); *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 277 F. Supp.3d 500 (S.D.N.Y. 2017) (applying SAIC, holding that the “reasonable possibility” standard instead of the “probability” standard applied and that the complaint adequately alleged that a loss was “reasonably possible,” requiring disclosure of a loss contingency related to potential FCPA violations where defendant officers, although not knowing of actual bribes, (a) were aware of subpoenas from the SEC to the defendant company indicating that the SEC was investigating the company for possible FCPA violations in Africa, and (b) were aware that the defendant company “did business with dodgy partners in Africa”).

In response, another member commented that if the question concerns lawyer responses to audit inquiry letters governed by the ABA *Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information*, 31 BUS. LAW. 1709 (April 1976) (the “Statement of Policy”), reprinted in the ABA BLS Audit Responses Committee, *Auditor’s Letter Handbook* (2d ed. 2013) (the “Handbook”), then the question should be rephrased as to what qualifies as “overtly threatened or pending litigation,” which the responding member viewed as different from (and more difficult for responding lawyers than) what qualifies as an “asserted claim.” Though further discussion did not ensue, this response highlights the differences in the standards auditors must use to analyze a potential loss contingency for purposes of ASC 450-20 from

those lawyers must use in preparing audit response letters under the Statement of Policy.

Some additional guidance concerning the Statement of Policy can be found in the *Second Report of the Committee on Audit Inquiry Responses Regarding Initial Implementation of the Statement of Policy*, 32 Bus. Law. 177 (November 1976), reprinted in the Handbook, which includes guidance on the treatment of pending investigations involving a client when no charges against the client have been overtly threatened. Further, for illustrations involving the applicable accounting standard, ASC 450-20-55 includes some implementation guidance with respect to a few hypothetical scenarios.

Client Review of Audit Letter Requests. A member of the Committee sought input on the appropriateness of an outside counsel policy stating that the client expects its outside law firm to provide the client with “the opportunity to review and approve drafts” of the outside law firm’s audit response letter. The member was unaware whether this client’s audit inquiry letters (which generally are ghost-written by its auditors) will set forth this “client review and approval” procedure or whether the auditors are even aware that the client is asking to review and approve drafts of its counsel’s responses.

Section 1(d) of the Statement of Policy, which addresses provision of information beyond that covered by general disclosure language, states:

[i]n securing the client’s consent to the disclosure of confidences or secrets, or the evaluation of claims, the lawyer may wish to have a draft of his letter reviewed and approved by the client before releasing it to the auditor, in such cases, additional explanation would in all probability be necessary so that the legal consequences of the consent are fully disclosed to the client.

The *First Report of the Committee on Audit Inquiry Responses Regarding Introductory Analysis and Guides to the Statement of Policy*,

31 Bus. Law. 1737, 1742 (April 1976), reprinted in the Handbook, states:

Procedures with Client

...

Inside counsel will often serve as the appropriate person within the client’s organization to contact when outside counsel considers it necessary from time to time to consult on unasserted possible claims. Inside counsel may also be available to discuss with outside counsel specific audit inquiry letter replies which may raise questions of privilege or otherwise present problems of presentation.

One member responded and indicated that he was unaware of any of his firm’s clients insisting or expecting to see drafts of the firm’s audit response letters, although the member’s firm might share a draft with a client in the circumstances described in Section 1(d) of the Statement of Policy. Another member recalled a case in which a law firm shared a draft audit response letter with the client and then changed the text of the letter (at the client’s request/insistence) in a way that, with the benefit of hindsight, may have been misleading. Other Committee members, including some in-house counsel, reported that they have seen client internal policies for outside counsel that require a similar client “review and approval” process.

Some members indicated that their firms have a policy of sharing draft audit responses with clients before sending them to the auditors. Such firms make it clear, however, that it is the firm’s response – not the client’s. Presumably, if a client suggests a change with which the law firm does not agree, the firm would try to work out its disagreement with the client. Members of the Committee generally agreed that the point for law firms is that audit response letters should not be revised in a manner with which the law firm is uncomfortable.

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RECENT DEVELOPMENTS

Obtaining National Consensus on Key Opinion Matters: Statement of Opinion Practices

For several years, the Working Group on Legal Opinions (“WGLO”) and the Legal Opinions Committee of the American Bar Association’s Business Law Section (the “ABA Committee”) have been working jointly on a project to identify selected aspects of customary practice and other practices applicable to third-party legal opinions that are commonly understood and accepted throughout the United States. Third-party legal opinions (or closing opinions) are typically delivered at the closing of a business transaction by counsel for one party to satisfy a condition of the other party’s obligation to close. Closing opinions are relatively concise, highly structured documents that provide professional judgments of the opinion giver regarding legal matters of concern to the recipient of the closing opinion. The project is an effort to foster a national opinion practice with respect to closing opinions that will be widely recognized and endorsed. It is designed to build upon the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008), which has been approved by over 30 bar associations and other groups.

Status of the Project

The project has reached a critical milestone with the *Statement of Opinion Practices* (the “Statement”) and related *Core Opinion Principles* (the “Core Principles”), both described below, having been approved by the ABA Committee and the WGLO Board and distributed to interested bar groups and others for approval (some already have given their approval). Following approvals, the Statement and the Core Principles will be published as

statements of the approving groups. We encourage those groups that have not done so to complete their approval process as soon as possible.

The Statement is attached to this issue of the Newsletter as Annex A and the Core Principles as Annex B.

Background

A committee (the “Project Committee”) that included representatives of various state bar groups and others interested in opinion practice was formed to undertake the project. The Project Committee has more than 25 members and includes both lawyers who give opinions and lawyers who serve as counsel to opinion recipients. The primary practice areas of the members include commercial finance transactions, capital markets and securities, and real estate. The Project Committee held numerous conference calls and meetings and reviewed and discussed countless drafts of the proposed statement, all with an expectation that the bar groups and others would endorse the project’s work product. The Project Committee also examined the existing literature on legal opinions, including various bar reports, and focused on updating and amplifying the *Legal Opinion Principles*, 53 Bus. Law. 831 (1998), (the “1998 Principles”) and the *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law. 875 (2002), (the “Guidelines”).

The Work Product

These efforts resulted in preparation of the *Statement* designed to update the *1998 Principles* and selected provisions of the *Guidelines*. The *Statement* covers such topics as the application of customary practice to third-party opinions, the role of facts and assumptions and the law addressed by opinions, as well as key aspects of the opinion process. By using relatively concise and direct statements, it is designed to be easily understood by judges and juries who may be called upon to interpret opinions. It also is intended to serve as a baseline to which opinion givers and opinion

recipients and their counsel can look to facilitate the opinion process.

In connection with preparation of the *Statement*, the Project Committee also prepared the *Core Principles*, which is a more concise document drawn from the *Statement* that is designed to be incorporated by reference in or attached to an opinion letter by those who wish to do so. The *Statement* and *Core Principles* will be accompanied by an *Explanatory Note* that describes the project, includes a table of sources from the *1998 Principles* and the *Guidelines*, and identifies those provisions of the *Guidelines* that are updated by the *Statement*.⁶

Conclusion

The completion of the *Statement* and *Core Principles* is a significant accomplishment in establishing and harmonizing third-party legal opinion practices. The work of the Project Committee, however, is not yet done because it is now considering whether the *Statement* might be expanded to cover additional topics. Accordingly, we may have more to report in the future.

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Accrual Clause Unenforceable to Extend New York Statute of Limitations

In *Deutsche Bank National Trust Co. v. Flagstar Capital Markets Corp.* (2018 WL 4976777 (Oct. 16, 2018)) the New York Court of Appeals considered whether the parties to a contract governed by New York law could agree to defer the commencement of the running of

⁶ The *Statement*, *Core Principles* and *Explanatory Note* (including the table of sources) are available at <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

New York's six-year statute of limitations from the date of a breach of a representation or warranty to the date the breach was discovered. Holding that they could not as a matter of public policy and therefore finding unenforceable a so-called accrual clause in an agreement for the purchase of mortgage-backed securities, the Court held as time-barred an action brought on behalf of the purchasers of those securities to require the seller of the mortgage loans that backed them to repurchase loans that did not conform to the representations in the contract. The Court dismissed the action even though there was no finding that the breaches could have reasonably been discovered during the six-year statutory period.

The significance of *Deutsche Bank* from an opinion standpoint is that law firms giving opinions on agreements governed by New York law will need to include an exception for provisions that seek to extend the period during which suit can be brought beyond the six-year period permitted by the New York statute of limitations.

Deutsche Bank also is significant from the standpoint of advising purchasers of mortgage-backed securities. Delaware law clearly permits a properly-drafted contractual provision to extend the Delaware statute of limitations to 20 years, and Delaware counsel has indicated that it would give an unqualified opinion on the enforceability of such a provision under Delaware law.⁷ Therefore, as anticipated by a dissent in *Deutsche Bank*, lawyers are now considering advising purchasers of mortgage-backed securities to choose Delaware law in their purchase agreements (assuming some nexus with Delaware) and to include a provision extending the statute of limitations to 20 years. The choice-of-law clause should make clear that it applies to the provision extending the statute of limitations to increase the likelihood that the

⁷ See Lou Hering's and Melissa DiVincenzo's article, "*Opinion Considerations for Agreement Provisions Extending Statutes of Limitations*" in the Spring 2011 (vol. 10, no. 3) issue of the Newsletter, at 3-4.

20-year provision will be enforced in an action brought in a non- Delaware court.

I should note that, if an agreement chooses Massachusetts law (and a nexus exists with Massachusetts), the Massachusetts courts would very likely enforce a provision in the agreement suspending the running of the Massachusetts statute of limitations while the basis for a claim could not reasonably be expected to be discovered. The Massachusetts courts would do so in light of the holding of the Massachusetts Supreme Judicial Court that the discovery rule always applies to Massachusetts contracts. *Creative Playthings Franchising, Corp. v. Reiser*, 978 N.E.2d 765, 770-771 (Mass. 2012). Again, to increase the likelihood that a court in another state would enforce the provision suspending the running of the statute of limitations, the choice-of- law clause in the agreement should specify that it applies to that provision.

- Donald W. Glazer
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RECENT DEVELOPMENTS ON TWITTER

Our Committee has a Twitter account to identify recent developments relevant to opinion practice. Our readers are invited to follow opinion developments on Twitter @ABALegalOpinion. Recent tweets of note have included:

1. On November 1, 2018, an alert was distributed on Twitter and to the Committee's Listserve on the opinion implications of recent Federal legislation mandating in some instances pre-clearance with CFIUS (the Committee on Foreign Investment in the United States) of investments by foreign investors in U.S. real estate near "sensitive government property," in

many tech and life sciences companies, and in other companies with foundational or emerging technologies. The tweet summarized Don Glazer's remarks at the meeting of the Working Group on Legal Opinions in New York on October 30, 2018 concerning recent amendments made by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), signed into law by President Trump on August 13, 2018. FIRRMA expands the scope of covered transactions and mandates in some instances a filing with CFIUS by parties to a covered transaction. For parties involved in covered transactions under FIRRMA, the Act raises issues for the no violation of law, consents, and enforceability opinions. Don cautioned that opinion givers will want to review their exceptions to the law covered by their opinion letters in light of the amendments made by FIRRMA.

2. On October 9, 2018, we circulated a link to a recent Delaware Court of Chancery unpublished decision (*Nuvasive, Inc. v. Miles*, 2018 WL 4677607 (Del. Ch. September 28, 2018)) holding that under Delaware law a covenant not to compete in an employment contract between a Delaware corporation headquartered in California and its former president residing in California may be enforceable if the contract chooses Delaware law as its governing law and the president was represented by counsel. The court so held in denying defendant's motion for partial summary judgment notwithstanding California's public policy that generally voids non-competition covenants in employment agreements.

3. On September 14, 2018, we circulated a link to the SEC's recent announcement of a cease-and-desist proceeding against TokenLot LLC (Release No. 33-10543 (September 11, 2018)), an unregistered broker dealer issuing and trading digital tokens in initial coin offerings involving securities, in violation of Section 15(a) of the Exchange Act and Sections 5(a) and (c) of the Securities Act.

4. On August 18, 2018, we circulated a link to a recent California appellate court decision (*Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co. Ltd.*, 233 Cal. Rptr. 3rd 814 (June 1, 2018)) that invalidated a contractual provision for service of process on a Chinese corporation that conflicted with the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

All of these tweets and more can be accessed on Twitter @ABALegalOpinion.

If you are a novice on Twitter, you can learn all about Twitter by going to the Internet and downloading a podcast at: <https://www.howcast.com/videos/149055-how-to-use-twitter/>. If you are still “challenged” by the technology, please send an email to the undersigned for additional assistance.

- Rick Frasch
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Legal Opinions Committee
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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 October 31, 2018.]

A. Published Reports Available From Legal Opinions Resource Center⁸

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
ABA Real Property Section (and others) ⁹	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	Revised Sample Opinion
	2014	Sample Venture Capital Financing Opinion
	2016	Third-Party Closing Opinions: Limited Liability Companies and Partnerships

⁸ 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.

⁹ 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").

Published Reports Available From Legal Opinions Resource Center (continued)

Florida	2011	Comprehensive Report Update
Georgia	2009	Real Estate Secured Transactions Opinions Report
City of London	2011	Guide
	2017	Guide Update
Maryland	2009	Update to Comprehensive Report
Michigan	2009	Statement
	2010	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	Function and Professional Responsibilities of Bond Counsel
	2013	Model Bond Opinion
	2014	501(c)(3) Opinions
	2017	Update of Model Letter of Underwriters' Counsel
National Venture Capital Association	2013	Model Legal Opinion
New York	2009	Substantive Consolidation – Bar of the City of New York
	2012	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	Supplement Regarding Opinions on Indemnification Provisions
	2009	Supplement Regarding ABA Principles and Guidelines
	2012	Supplement Regarding Entity Status, Power and Authority Opinions
	2013	Supplement Regarding Changes to Good Standing Procedures

Published Reports Available From Legal Opinions Resource Center (continued)

TriBar	2008	Preferred Stock
	2011	Secondary Sales of Securities
	2011	LLC Membership Interests
	2013	Choice of Law
	2017	Opinions on Limited Partnerships

B. Pending Reports

ABA Business Law Section	Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee Updated Survey – Legal Opinions Committee Resale Opinions – Securities Law Opinions Subcommittee Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee & Legal Opinions Committee
ABA Real Property Section (and others) ¹⁰	UCC Opinions in Real Estate Transactions
California	Sample Personal Property Security Interest Opinion Exceptions and Other Qualifications to the Remedies Opinion Third-Party Opinions Comprehensive Report Update
Multiple Bar Associations	Statement of Opinion Practices and related Core Opinion Principles ¹¹ Local Counsel Opinions
Florida	Comprehensive Report Update
Texas	Comprehensive Report Update
TriBar	Opinions on Clauses Shifting Risk Bring Down Opinions Opinions on LLCs (Update)
Washington	Comprehensive Report

¹⁰ See note 9.

¹¹ A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions, each of which has approved the documents, along with some other bar groups; approval by other bar groups is pending.

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](#).¹² 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.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in January or February 2019. 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).

¹² The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

Annex 1
Statement of Opinion Practices

[As approved by the Legal Opinions Committee of the Business Law Section of the American Bar Association on September 14, 2018 and the Board of the Working Group on Legal Opinions Foundation on October 29, 2018, and distributed to other bar groups and interested parties for approval]

STATEMENT OF OPINION PRACTICES¹

1 INTRODUCTION

Third-party legal opinion letters (“closing opinions”)² are delivered at the closing of a business transaction by counsel for one party (the “opinion giver”) to another party (the “opinion recipient”) to satisfy a condition to the opinion recipient’s obligation to close. A closing opinion includes opinions on specific legal matters (“opinions”) and, in so doing, serves as a part of the diligence of the opinion recipient.³

This Statement of Opinion Practices (this “*Statement*”) provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions.⁴

2 CUSTOMARY PRACTICE

Closing opinions and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion

¹ This *Statement* has been published in *The Business Lawyer* [cite]. At the time of its publication, this *Statement* was approved by the bar associations and other lawyer groups identified in **Schedule I** (the “Schedule of Approving Organizations”). A current Schedule of Approving Organizations can be found at [URL]. Approval of this *Statement* by a bar association or other lawyer group does not necessarily represent approval by individual members of that association or group.

² The terms “opinion letters” and “closing opinions” are commonly used to refer to third-party legal opinion letters, defined in this *Statement* as “closing opinions.”

³ References in this *Statement* to an opinion recipient mean the addressee of a closing opinion and any other person the opinion giver expressly authorizes to rely on the closing opinion.

⁴ This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass’n, *Legal Opinion Principles*, 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from omissions from the *Guidelines* in this *Statement*. Each provision of this *Statement* should be read and understood together with the other provisions of this *Statement*.

recipients.⁵ The phrase “customary practice” refers principally to the work lawyers are expected to perform to give opinions (“customary diligence”) and the way certain words and phrases commonly used in closing opinions are understood (“customary usage”). Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.⁶

3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When giving closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.⁷

4 GENERAL

4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite

⁵ See *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008) (the “*Customary Practice Statement*”), which has been approved by the bar associations and other lawyer groups listed at the end of that Statement and by additional groups following publication that can be found at [URL].

⁶ See *infra* Section 10 (*Varying Customary Practice*).

⁷ These include the duties opinion givers have to their own clients. Counsel to opinion recipients also have duties to their clients, including duties relating to closing opinions.

competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion.⁸

4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to presume that the other is acting in good faith with respect to a closing opinion.

5 FACTS AND ASSUMPTIONS

5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the “opinion preparers”) typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

5.2 Reliance on Facts Provided by Others

An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm’s records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasona-

⁸ See the *Customary Practice Statement*. See also *infra* Section 10 (*Varying Customary Practice*).

bly likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.⁹

5.4 Reliance on Representations That Are Legal Conclusions

An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed.¹⁰ Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

5.6 Limited Factual Confirmations and Negative Assurance¹¹

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion prepar-

⁹ References in this *Statement* to a law firm also apply to a law department of an organization.

¹⁰ Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (*No Opinion That Will Mislead Recipient*). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.

¹¹ This *Statement* also applies, when appropriate in the context, to confirmations.

ers.¹² A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. This limitation does not apply to negative assurance regarding disclosures in a prospectus or other disclosure document given to assist a recipient in establishing a due diligence defense or similar defense in connection with a securities offering.

6 LAW

6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly.¹³

7 SCOPE

7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a

¹² A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings against the client.

¹³ See *infra* Section 10 (*Varying Customary Practice*).

matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver's client or the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction and the opinions given can facilitate the opinion process.

8 PROCESS

8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

8.2 Other Counsel's Opinion

Stating in a closing opinion reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion. An opinion giver should not be expected to express concurrence in the substance of an opinion of other counsel.

8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

8.4 Client Consent and Disclosure of Information

If applicable rules of professional conduct require a client's consent to the delivery of a closing opinion, an opinion giver may infer that consent from a provision in the agreement making delivery a condition to closing or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers know the client would not want to be dis-

closed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.

10 VARYING APPLICATION OF CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.¹⁴

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.¹⁵

¹⁴ This section does not address whether anyone else might be permitted to rely as a matter of law. *See also supra* note 3.

¹⁵ An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to misevaluate the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Customary Practice*). Omissions from a closing opinion of information unrelated to the opinions given do not mislead.

Annex 2
Core Opinion Principles

[As approved by the Legal Opinions Committee of the Business Law Section of the American Bar Association on September 14, 2018 and the Board of the Working Group on Legal Opinions Foundation on October 29, 2018, and distributed to other bar groups and interested parties for approval]

CORE OPINION PRINCIPLES

The following *Core Opinion Principles* are drawn from the *Statement of Opinion Practices*, ___ BUS. LAW. ___ () (the “*Statement*”), and are intended to have the same meaning as the provisions of the *Statement* from which they are drawn. The *Statement*, which has been approved by the bar associations and other lawyer groups identified in Schedule I to the *Statement*, provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions. In doing so, it amplifies the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008). The *Core Opinion Principles* are designed for use by opinion givers (both law firms and law departments of organizations) who wish to incorporate or attach to their opinion letters a more concise statement of some of the opinion principles included in the *Statement*.

CORE OPINION PRINCIPLES

1. General

1.1 *Customary Practice.* Third-party legal opinion letters given at the closing of a business transaction (“closing opinions,” and the opinions included in them, “opinions”) by counsel for one party (the “opinion giver”) to another party (the “opinion recipient,” which term includes any other person the opinion giver expressly authorizes to rely on the closing opinion) are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion recipients. The phrase “customary practice” refers principally to the work lawyers are expected to perform to give opinions and the way certain words and phrases commonly used in closing opinions are understood.

1.2 *Varying Application of Customary Practice.* The application of customary practice to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

1.3 *Expression of Professional Judgment.* An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

1.4 *Reliance by Recipients.* An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion (unless varied as provided in §1.2).

1.5 *Good Faith.* An opinion giver and an opinion recipient and its counsel are each entitled to presume that the other is acting in good faith with respect to a closing opinion.

1.6 *Opinion Recipient and Customary Practice.* An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

1.7 *Only Matters Specifically Addressed.* A closing opinion covers only those matters it specifically addresses.

1.8 *Matters Beyond the Expertise of Lawyers.* Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

2. Facts and Assumptions

2.1 *Reliance on Factual Information and Use of Assumptions.* Because the lawyers preparing a closing opinion (the “opinion preparers”) typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

2.2 *Reliance on Facts Provided by Others.* An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

2.3 *Scope of Inquiry Regarding Factual Matters.* Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm’s records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.

2.4 *Reliance on Representations That Are Legal Conclusions.* An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

2.5 *Factual Assumptions.* Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate,

complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

3. Law

3.1 *Covered Law.* When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

3.2 *Applicable Law.* An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly.

4. Miscellaneous

4.1 *Date.* A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.

4.2 *Reliance.* A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.