IN OUR OPINION

THE NEWSLETTER OF
THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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FROM THE CHAIR

I am pleased to share with you the Spring 2019 issue of In Our Opinion. Jim Fotenos as Editor and I would be grateful for proposals for articles for our upcoming issues. Please bear in mind that articles published in our Newsletter can easily be repurposed and republished in Business Law Today with minimum effort and significant additional exposure. If you have dealt with interesting opinion-related practice issues, please think about penning an article for the Summer issue of In Our Opinion.

After every meeting of our Committee I take some time to organize my notes, make sure the agenda was neither too granular nor too sparse, reflect on which topics were exhausted and which ones were simply teed up for further discussion. As I was doing that following the Section’s Spring 2019 meeting in Vancouver I happened upon an article about simple, common tools to organize thoughts around research and creativity/innovation that work equally well across fields. One such tool is the bell shaped curve: pick the right variables, probe the right data set, establish the right scale and you have a powerful illustration of just about any type of phenomenon. Another such tool is the hourglass shape, which, if laid on its side, in effect is just two specular bell-shaped curves. The hourglass pattern is common to intellectual work in many fields, from pure science to social and economic research: you start with broad foundational principles at one end, you refine the thesis using experience-based analysis, and then distill learning down to behavioral norms or organizing theories; that is followed by new lines of inquiry, which expand through more experience-based analysis and ultimately lead to new foundational principles that can start a whole new line of thought.

Opinion Practice Development: We Have Come Very Far, But We Have Farther to Go. So you are asking yourself: where is this going? Weren’t we talking about the Vancouver Committee meeting? Over the past year a series of important anniversaries in the field of opinion practice have led to illuminating articles about the origins of TriBar and our Committee and the early evolution of guidance on opinion practice. We went back to Jim Fuld’s intuition about the Golden Rule and the debate between California and New York lawyers on the foundation of the remedies opinion. That was the wide end of the hourglass. Work on the concepts of customary diligence and customary usage, the meaning and scope of customary practice, and the first two TriBar reports focused on more practical analysis. And the following decade produced clearer and clearer guidance on the process of requesting and giving legal opinions. The field expanded again with the work of TriBar, a number of state bar groups and our Committee on a host of reports dealing with opinions on alternative entities, practice in the venture capital space, cross-border opinions and much more.

As I was reflecting on our discussions in Vancouver I had this feeling that we are nearing the wide end of the hourglass again. And discussions at the WGLO Spring 2019 Seminar confirmed it: we are starting to develop new broad hypotheses and drawing tentative conclusions that in many cases may lay a foundation for new guidance. We have been debating subjects like the logic of counsel for one party to a contract giving the counterparty a remedies opinion, particularly when the recipient’s counsel has had primary responsibility for drafting the agreement and the recipient itself has greater expertise in the type of transaction. We have been reflecting on the success in updating the ABA Legal Opinion Principles with the Statement of Opinion Practices, which has now been adopted by a large number of bar groups, and what that means for preparers of legal opinions: are we choosing the right balance between expressing qualifications, assumptions and exceptions in the

1 See Arthur Field’s essay commemorating the 20th anniversary of the publication of TriBar’s report on Third-Party “Closing” Opinions, 53 Bus. Law. 591 (1998), appearing in the Summer 2018 (vol. 17, no. 4) issue of the Newsletter.
opinion letter and relying on customary practice as the implied backdrop against which the meaning and coverage of opinions is measured, whether the opinion letter articulates this customary practice or not? We have discussed, both in the domestic and cross-border contexts, the impact of choice of law and forum selection clauses, mandatory arbitration clauses, risk allocation provisions and other “non-core” elements of an agreement on third-party opinions. And finally, we have started to think about practice with respect to opinion givers establishing parameters for their own standards of conduct and exposure to liability: for example, in cross-border opinions is it not reasonable to specify which law governs if an opinion letter becomes the subject of a dispute, which court will decide the issues, and to what extent will the opinion giver have liability to the opinion recipient? These are topics that have been handled one way in the United States and are handled in other ways outside the United States, leading to a natural debate about fairness and predictability when U.S. and non-U.S. lawyers work together at the closing of a cross-border transaction.

Our Role as Opinion Practitioners. In many ways those of us who focus on opinion practice are thought of as the legal equivalent of metaphysicists. We do work with everyday things in corporate transactions, such as covenants and conditions to closing, the enforceability of commercial terms and the limits of legal remedies. But we look at them differently from the empiricists, who battle it out around the negotiating table. Since Jim Fuld’s article we have sought to operate in a regime where requesting and giving third-party opinions is not a negotiation where one side wins and the other loses. The Golden Rule, customary opinion practice and many of the foundations of opinion guidance we develop are a bit abstract, though they have critical applications in the everyday practice of law. In the end, however, we are “theorists” in many ways; some say we are nerds. I for one freely admit to being one. And for me it is exciting that we may be back at the top of another hourglass, where we are called upon to manipulate a new set of broad principles, to flesh them out through experience-based analysis, and to develop new behavioral norms or organizing theories.

Call for Participation. Our Committee has projects underway on cross-border opinion practice and intellectual property opinions that I believe can become their own hourglasses. Each is at the stage where we need broad participation because the critical work to narrow our focus and distill our thoughts is beginning in earnest. That work cannot be done by few: it requires input from all and is powered by the energy of many. The history of our field has proven how powerful those dynamics can be even when at the outset there are deep disagreements and different paths to choose from. The accomplishments of those who gathered at Silverado a long while ago speak for themselves and obligate us to work hard to keep up our game.

Another exciting aspect of today’s opinion practice landscape as compared to the early days is that guidance is developed from a variety of sources. In addition to TriBar and our Committee, many state bar groups are active on opinion issues and the Working Group on Legal Opinions has established itself as a broad-based forum for achieving consensus and consistency at a practical level in key areas. This is both an opportunity and a challenge because coordination and collaboration become more and more important to achieve our common objective of making the giving of opinions more efficient and consistent, thus decreasing both risk and cost. Our Committee can play a critical role in facilitating the coordination and collaboration of these efforts, as illustrated by the work our Committee did in preparing the Statement of Opinion Practices jointly with WGLO and is doing on the cross-border opinion project with the International Bar Association.

Get involved!

- Ettore A. Santucci, Chair
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The Business Law Section held its Spring Meeting in Vancouver, British Columbia on March 28-30, 2019. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Spring Meeting of interest to members of the Committee on Legal Opinions.

**Legal Opinions Committee**

The Legal Opinions Committee met on Friday, March 29, 2019. There follows a summary of the meeting.

The Chair of the Committee, Ettore Santucci, had circulated an agenda for the meeting to the members of the Committee through the Committee’s Listserve on March 21, 2019.

**Task Forces and Programs.** Chair Santucci reported on the meeting of the Task Force on Cross-Border Opinions (“Cross-Border Task Force”) held that morning and the Program on ‘40 Act Opinions presented by the Committee earlier that afternoon. The Chair encouraged those present and their colleagues to participate in the Cross-Border Task Force, as well as on the Task Force on Intellectual Property Opinions (which was scheduled to meet the following day). He also praised the ‘40 Act Opinions Program chaired by Bob Risoleo (Sullivan & Cromwell LLP) and commended the program materials to the members of the Committee, which materials should be available once the
Spring Meeting materials are posted on the Section’s website (accessible here).²

The Committee’s subcommittee that prepared and is supervising the 2019 Survey of Opinion Practices also met that morning. The questionnaire phase of the Survey is scheduled to be completed by the end of April 2019. The questionnaire has been sent to over 750 law firms. Arthur Cohen (Haynes and Boone LLP), Co-Chair of the subcommittee, urged those present at the meeting and participating by phone to encourage their firms to complete the questionnaire if they have not already done so.


While progress is being made on the LLC Update Report, challenging issues have arisen, including:

- Non-Delaware Lawyers and Delaware Contract Law. As with Delaware corporations, non-Delaware lawyers often give status, power and action opinions on Delaware LLCs. In doing so, they typically state that the coverage of their opinion letters as they relate to Delaware law is limited to the Delaware LLC Act, 6 Del. Code § 18-101 et. seq. As TriBar stated in its 2006 LLC Opinions Report, a reference in an opinion letter to coverage of the Delaware LLC Act “should be understood to encompass not only the Delaware statute [the LLC Act] but also relevant reported judicial decisions.” TriBar 2006 LLC Opinions Report, 61 Bus. Law. at 682 (footnote omitted).

TriBar also addressed in its 2006 LLC Report whether a coverage limitation to the Delaware LLC Act excludes from the status, power and action opinions issues of Delaware contract law applicable to those opinions. Noting that the Delaware LLC Act relies heavily on the operating agreement, a contract, for the matters addressed by the status, power and action opinions, TriBar stated its belief that a coverage limitation to the Delaware LLC Act “should not be read to exclude from the coverage of the status, power and action opinions those Delaware contract law issues that are applicable to the matters covered by those opinions.”³

TriBar, in its recent LP Opinions Report, incorporates by reference the discussion in its 2006 LLC Opinions Report’s regarding the scope of a coverage limitation to the Delaware Revised Uniform Limited Partnership Act, stating that opinion letters on Delaware limited partnerships “should be understood to encompass, unless expressly excluded, not only the

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² The URL is https://www.americanbar.org/groups/business_law/resources/materials/.

³ TriBar went on to note, however, that “the contract law issues applicable to those opinions ordinarily will not be difficult and will not vary significantly from state to state.” Id. (footnote omitted.)
Delaware LP Act [6 Del. Code § 17-101 et seq.] but also relevant reported judicial decisions and Delaware contract law issues applicable to the opinions being given.” TriBar LP Opinions Report, 73 Bus. Law. at 1107 n. 2.

Don noted that, in discussing the coverage issue for purposes of the LLC Update Report, some non-Delaware members of TriBar have objected to the inclusion of contract law issues as within the coverage of an opinion letter whose coverage is limited to the Delaware LLC Act. Don noted that the gap between the position of those members and that of members who continue to subscribe to the position TriBar previously had taken was large, and he observed that bridging it represented a major challenge.

- **Dissolution and the Status Opinion.** In its 2006 LLC Opinions Report TriBar took the position that a status opinion on a Delaware LLC confirmed that the LLC’s existence had not terminated and that it was not in dissolution. See, e.g., TriBar 2006 LLC Opinions Report ¶ 2.0, 61 Bus. Law. at 686-687. However, in the LP Opinions Report, TriBar concluded that in Delaware (as in many other states) the dissolution of a limited partnership does not in and of itself terminate the existence of the limited partnership, and accordingly, as long as the limited partnership’s certificate of limited partnership has not been canceled, its dissolution does not in and of itself prevent the giving of a validly existing opinion. TriBar LP Opinions Report, 73 Bus. Law. at 1113. Don anticipated that a similar conclusion will be expressed regarding Delaware LLCs in the LLC Update Report.  

- **Enforceability Opinion.** Occasionally opinion recipients request an enforceability opinion on an LLC operating agreement (or selected portions). See 2006 LLC Opinions Report ¶ 6.0, 61 Bus. Law. at 692-694. TriBar did not address the enforceability opinion in its LP Opinions Report. See 73 Bus. Law. at 1109 n. 8.

In commenting on an update of TriBar’s discussion of the enforceability opinion for the LLC Update Report, Don noted that the 2006 LLC Opinions Report did not discuss (but he commented should have discussed) against whom the LLC agreement was enforceable: Against the manager (if the LLC is manager-managed)? Against all of the members? Against the LLC itself?

**Director Consents.** Directors often act by written consent. They may do so only if the consent is in writing and is unanimous. See, e.g., DGCL § 141(f).

Can directors act by written consent if the number of directors in office constitutes less than a quorum to act at a meeting? Steve Bigler (Richards, Layton & Finger, P.A.) led a discussion of the Vice Chancellor’s recent decision in *Applied Energetics, Inc. v. Farley*, 2019 WL 334426 (Jan. 24, 2019), in which the Vice Chancellor concluded that an action by consent of the directors of a Delaware corporation requires the unanimous written consent of at least a quorum of the members of the board required to act at a meeting in a case in which the number of directors has been reduced

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4 That an LLC is in dissolution would, on the other hand, directly bear on opinions on the LLC’s power and authority to enter into a transaction, since the powers of an LLC in dissolution are limited to those necessary or appropriate to its winding up.
through resignations to a number less than a quorum (the remaining directors can only act to fill the vacancies).

**Effectiveness of Stockholder Written Consents.** Stockholder action by written consent requires, where all stockholders did not consent, that a notice be “promptly” distributed of the action taken to the non-consenting stockholders. See, e.g., DGCL § 228(e). Is the effectiveness of stockholder action by written consent conditional upon the giving of that notice?

Stan Keller (Locke Lord LLP) and Steve Bigler led a discussion of Vice Chancellor Zurn’s decision in *Brown v. Kellar*, 2018 WL 6721263 (Dec. 21, 2018), in which the Vice Chancellor concluded that action by stockholder written consent is effective at the time of delivery of the requisite number of consents to the Company without regard to the giving of notice under Section 228(e) (or the SEC’s Rule 14c-2 applicable to the public companies). In so concluding, the Vice Chancellor noted that, if circumstances justify, such as those described in *Di Loreto v. Tiber Holding Corp.*, 1999 WL 1261450 (Del. Ch. June 29, 1999), the Chancery Court, as a court of equity, may delay the effectiveness of the action, at least until the notice is given.

**Advance Waiver of Appraisal Rights.** Stockholder agreements of issuers controlled by private equity firms, among others, often contain an advance waiver of appraisal rights as part of the drag-along provisions of the agreement. Stan Keller and Steve Bigler led a discussion of Vice Chancellor Glasscock’s decision in *Manti Holdings, LLC v. Authentix Acquisition Co.*, 2018 WL 4698255 (Oct. 1, 2018), in which the Vice Chancellor upheld the validity of a contractual waiver of appraisal rights in a stockholders agreement, concluding that the issuer, in seeking to enforce those provisions, was not in contravention of the DGCL or public policy. Stan and Steve noted, however, that the Vice Chancellor has permitted re-argument on the issue of the validity of the waiver, and his decision on the re-argument is pending.

**UCC-1 Financing Statements: Collateral Descriptions; Name of Debtor.** Steve Weise led a discussion of the Third Circuit’s decision in *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694 (2019), one of many decisions involving the re-adjustment of the indebtedness of the Commonwealth of Puerto Rico, in this case bonds issued by the Employees Retirement System of the Commonwealth (“System”). The bonds were secured by certain property owned by the System, and the bondholders claimed that they had a perfected security interest in that property under Puerto Rico’s version of the UCC.

In the financing statements initially filed (in 2008) to perfect the bondholders’ security interest in the collateral, the collateral was described by reference to the Security Agreement attached as Exhibit A to the financing statement. However, the Security Agreement attached in turn referred to the collateral by reference to an unattached other document. In light of this omission, the Third Circuit had little difficulty concluding that the financing statement did not include an adequate description of the collateral securing the bonds and was therefore ineffective to perfect a security interest in the collateral. 914 F.3d at 709-712.

A financing statement must contain the name of the debtor. UCC § 9-502(a)(1). For a registered organization such as the debtor in this case, a financing statement must include the name of the registered organization “on the public organic record most recently filed with or issued or enacted by the registered organization’s jurisdiction of organization . . . .” 914 F.3d at 714-715. In this case, complications arose because the System’s full name in the

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5 The Court then held that amendments filed to the financing statements in 2015 and 2016 cured the deficiency by including a detailed description of the collateral in exhibits to the financing statements and therefore that the bondholders perfected their security interest in the collateral as of December 17, 2015. See generally, UCC §§ 9-502(a) (sufficiency of a financing statement), 9-504 (indication of collateral), and 9-108 (sufficiency of description of property).
relevant statute (enacted in Spanish) included in the English translation of the statute two variations of the name — “Employees Retirement System of the Government of the Commonwealth of Puerto Rico” and “Retirement System for Employees of the Government of the Commonwealth of Puerto Rico.” After an extended discussion of the complicated history of the statute, the Third Circuit concluded that the “Employees Retirement System” name had been used consistently by the System, including in court filings, and therefore the use of “Employees Retirement System of the Government of the Commonwealth of Puerto Rico” remained a valid name for UCC purposes when the 2015 and 2016 amendments to the financial statements were filed and accordingly met the UCC name requirements for financing statements. 914 F.3d at 714-719.

Local Counsel Opinion Project. Philip Schwartz (Akerman LLP) updated the Committee on the status of the project to prepare a principles-based report on opinions of local counsel. The project, which is a joint endeavor of the Committee and WGLO, is being led by a drafting committee that includes Phil, Frank Garcia (Norton Rose Fulbright US LLP), and Bill Yemc (Richards, Layton and Finger, P.A.). A 17-person steering committee oversees the project. Currently the drafting committee is focusing on the roles of lead counsel and local counsel. The report will be the subject of two breakout sessions at the upcoming (May 6-7, 2019) seminars of WGLO. Phil was hopeful that a draft of the report will be available for broader distribution and review during the summer of 2019.

Statement of Opinion Practices. The Statement of Opinion Practices (the “Statement”) has been approved by its sponsoring organizations (the Legal Opinions Committee and WGLO) and now by 25-30 other bar associations and lawyer groups. It has been posted on the Committee’s website, accessible here, and the Statement and the related Core Opinion Principles were included as annexes to the Fall 2018 issue of In Our Opinion. The Statement is also scheduled to be published in the Summer 2019 issue of The Business Lawyer.

Stan Keller noted that he expected those opinion givers who currently attach to or incorporate by reference the Legal Opinion Principles (53 Bus. Law. 831 (1998)) in their opinion letters will begin referring, instead, to the Core Opinion Principles once the Core Opinion Principles are published in The Business Lawyer.

Next Meeting. The next meeting of the Committee will be held at the Section’s Annual 2019 Meeting in Washington, D.C. on September 12-14, 2019.

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Audit Responses Committee

The Committee met on Saturday, March 30, 2019. The principal discussion points are summarized below.

Experience with New Audit Responses Committee Website. Alan Wilson briefed the Committee on the latest experiences with the new Committee website. He noted that the new structure involves two websites – a public-facing website and an internal, members-only website called ABA Connect. Most notably, the new website structure replaces the Committee’s listserve with a blog on the Committee’s ABA Connect website. The former listserve was not migrated to the new website, and Mr. Wilson noted that he was working to develop a functional archive that could be made available to all members of the Committee through the

6 The URL is https://www.americanbar.org/groups/business_law/migrated/tribar/.
ABA Connect website. Mr. Wilson will follow up with an email to all members of the Committee explaining the various changes to the ABA website.

Discussion of Possible Committee Statement on Timing Issues Under Audit Responses. The Committee discussed an outline of topics that could be treated in a new Committee project answering common questions related to timing considerations in preparing audit response letters. Noël Para circulated a draft outline prior to the meeting, on which members of the Committee commented. In addition to several topics also discussed at prior Committee meetings, the Committee explored common interpretative questions involving the relevant period to be addressed in an audit response letter. Mr. Para offered an explanation for the differences between the time periods specified in the illustrative audit response letter included in 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”), versus the time periods described in the illustrative audit inquiry letter included in the First Report of the Committee on Audit Inquiry Responses Regarding Initial Implementation of the Statement of Policy (1976), reprinted in the Handbook.

Committee members discussed several timing-related scenarios and how firms typically handle them. One involved matters that both arise and are settled or otherwise resolved during the fiscal period covered by the audit inquiry letter. Members of the Committee suggested that such matters technically would not be captured in an audit response letter because there would be no corresponding loss contingency outstanding as of the end of the relevant fiscal period, and the matter likely would not be of concern to an auditor. Committee members also related that some firms modify the language in their audit response letters to clarify the relevant time period covered by the response and that such modifications may be prompted by specific facts relevant to the settlement of matters during the time period of the audit response letter. The Committee also discussed the case of long-running matters where nothing develops with respect to the matter over the course of the relevant fiscal period under audit. Different perspectives emerged, with some members indicating that their firms might not include the matter in their audit response letter for a fiscal period under audit during which nothing develops with respect to the matter because the law firm would not have devoted substantive attention to the matter during such period. Others indicated that their firms may include a sentence in the audit response letter after one or more years of no activity to indicate that the firm does not intend to comment further on the matter.

Separately, the Committee discussed scenarios involving companies engaging in M&A activity, specifically when a client is acquired and the new management group of the client transfers the engagement to a new law firm and instructs the predecessor firm not to communicate further with the client’s auditors. One member’s firm encountered this scenario in the course of the client’s audit after the balance sheet date, and in that instance the firm sent a letter to the auditor stating that the firm had been counsel to the client and that it had been replaced by a new law firm.

Publication Opportunity in The Business Lawyer’s 75th Anniversary Issues. Mr. Para mentioned that The Business Lawyer is gathering articles to include in issues for its 75th anniversary, noting that Stan Keller has suggested an article addressing recent developments in audit response guidance. An initial outline of such an article was circulated to the Committee in advance of the meeting. Members interested in reviewing the outline should contact Stan at stanley.keller@lockelord.com.

Committee Leadership Succession. Mr. Para noted that his term as Committee Chair expires at the end of the Committee’s annual meeting in September 2019. Randy McClanahan will
succeed Mr. Para as Chair, and Mr. Wilson will serve as Vice Chair.

Next Meeting. The Committee’s next meeting is scheduled for the Business Law Section’s Annual Meeting in Washington, D.C., September 12-14, 2019.

- Noël J. Para, Chair
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SUMMARY OF RECENT LISTSERVE ACTIVITY SEPTEMBER 2018 – MARCH 2019 (AUDIT RESPONSES COMMITTEE)

[Editor’s Note: This summary of listserve activity during the period of September 2018 – March 2019 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. Listserve dialogues that formerly appeared under the “listserv” item on the Audit Responses Committee’s web page now appear under “Audit Responses Connect” on the reorganized web page of the Committee.]

Format for Signing Audit Responses. A member of the Committee asked what the most common practice was for signing audit response letters. Responding members generally noted that their practice is to sign audit response letters in the name of the firm by a person authorized to sign for the firm, which serves both to indicate that it is a response by the firm and to identify who is acting on behalf of the firm. Though less common, at least one member’s firm manually signs audit response letters just in the name of the firm without indicating who signed on behalf of the firm. It was noted that if a firm follows the latter approach, the lawyer or lawyers responsible for preparing the response could be indicated by initials or an internal notation. Members generally did not have a strong preference for either approach.

Regulatory Agencies Asking Audit-Response-Style Questions. A member asked if anyone had experience responding to inquiry letters from regulators in connection with regulatory activities requesting information from the law firm as to litigation in which the client is involved in any capacity, including estimates of losses or potential liability, contingent liabilities of the client of which the firm has knowledge, and other matters. The member pointed to prior experiences with the National Futures Association (the “NFA”), a self-regulatory agency, which sent inquiry letters to lawyers as part of its examination process that generally followed the lines of an audit letter request (i.e., requesting information as to pending or threatened claims, confirmation that the firm will consult with the client about possible necessary disclosure under Accounting Standards Codification 450-20, and information as to outstanding legal fees and disbursements). In the context of the NFA examples, the member noted that some firms draft response letters including tailored “as-if” language to incorporate by reference 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”).

One member noted that there are significant differences between the NFA form of request

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7 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.
and those of governmental banking or insurance regulators. The NFA request was patterned on an auditor’s request, while the state regulators asked for targeted information aimed at its regulatory oversight without any reference to accounting rules. The two forms are similar in their request for information about litigation and, without differentiation, contingent liabilities. Another member noted that his firm regularly receives these types of requests from the Missouri Division of Finance, which examines state banks. The firm felt it was important to the client for the firm to provide a response letter and the only safe approach was to respond as others have responded to NFA requests – “as-if” in accordance with the Statement of Policy and subject to the same limitations as accompany audit response letters. The member noted that his firm’s response letters follow the illustrative audit response letter included in the Statement of Policy, cite the Statement of Policy and expressly state that the firm is treating the request as if it were being made in accordance with the Statement of Policy.

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TriBar explains what this opinion means as follows:

“The opinion means that the agreement was approved (or its execution and delivery were authorized), in a manner consistent with the applicable corporation statute and the Company’s charter and by-laws, by the proper body or bodies — e.g., the stockholders, directors (or a board committee) or both — by the required vote at a properly called and held meeting (or by an appropriate written consent).”


Opinion preparers normally focus on procedure in preparing this opinion, e.g., were the agreement(s) to be addressed by the opinion letter duly approved by the board of directors and, if required, the stockholders of the company? But does the corporate action opinion also address substance, i.e., whether the contents of the agreement(s) addressed conform to any applicable requirements contained in the corporation law under which the client corporation is organized?

TriBar’s explanation of the opinion (that the agreement has been approved “in a manner consistent with the applicable corporation statute . . .”) implies that substantive requirements may be addressed, and a recent opinion by Vice Chancellor McCormick of the Delaware Chancery Court in Mehta v. Mobile Posse, Inc., 2019 WL 2025231 (Del. Ch. May 8, 2019) confirms that it does.

The *Mehta* decision involved a challenge by a common stockholder of Mobile Posse, Inc. ("MPI") of a management buy-out of MPI, to be effected by a merger. MPI was closely held, with 20 common stockholders and preferred
stockholders who had invested $25 million in MPI through a series of preferred stock issuances. The board of directors was controlled by representatives of the preferred stockholders. After two unsuccessful banker-led solicitations to sell MPI, management offered to purchase MPI for some $33 million in cash. The amount offered was not sufficient to pay in full the liquidation preferences and accrued but unpaid dividends on the preferred stock. After negotiation with a special committee of the board of directors, management agreed to pay MPI $33.8 million, with a rollover equity feature, but the offered consideration was still insufficient to pay anything to the common stockholders.

MPI’s litany of failures to comply with Delaware’s procedures for the approval of mergers, at least as alleged by plaintiff and summarized by the Vice Chancellor in this decision on defendants’ motion for judgment on the pleadings, verge on the comical: MPI failed to notify the stockholders of their appraisal rights within the timeframe established by DGCL § 262, and when it did notify them of their appraisal rights, it described another state’s appraisal statute; it failed to provide notice of the preferred stockholders’ consent to the merger as required by DGCL § 228; and the agreement of merger that was distributed to the stockholders failed to disclose as the terms of the merger the amount of cash the preferred stockholders would receive for their shares in the merger as required by DGCL § 251.8

8 The Vice Chancellor does, in the course of her decision, resolve a question that has long vexed Delaware practitioners, namely, what is “prompt” notice of corporate action taken without a meeting by less than unanimous written consent. At least in the context of a merger or consolidation providing appraisal rights under DGCL § 262, “prompt” means within 10 days after the effective date of the merger. 2019 WL 2025231 at *10; DGCL § 262(d)(2).

Of interest here is the Vice Chancellor’s treatment of the stockholder approval requirements for a merger agreement set forth in DGCL § 251(c). This subsection requires that the “agreement [of merger and consolidation] required by subsection (b) of this section” be submitted to the stockholders of each constituent corporation for approval. Subsection (b)(5) of § 251 requires that an agreement of merger or consolidation include a statement of the consideration payable to the stockholders of the acquired corporation. The MPI merger agreement did not set out the consideration to be received by MPI’s preferred stockholders upon consummation of the merger. While it referred to a “payment schedule” attached to the merger agreement containing that information, the payment schedule was not attached to the merger agreement furnished to the common stockholders. The defendants argued that these failures were of no moment because the merger agreement stated that the common stockholders would receive no consideration and that the preferred stockholders would receive consideration consistent with the “waterfall” priority provisions set forth in MPI’s certificate of incorporation. However, the certificate of incorporation, which had been amended prior to the consummation of the merger, referred to the merger agreement for a statement of the liquidation payments to be made to the preferred stockholders.

So, as alleged by the plaintiff, and based upon the documentation reviewed by the Vice Chancellor, the merger agreement failed to comply with DGCL § 251(b) and, because § 251(c) requires the stockholders of a Delaware corporation, in considering a merger, to approve the “agreement required by [§ 251(b)]” of the DGCL, the plaintiff, in this motion for judgment

As discussed in the summary of March 29, 2019 meeting of Legal Opinions Committee, included in this issue (at page 6), a recent Delaware Chancery Court decision (Brown v. Kellar, 2018 WL 6721263 (Dec. 21, 2018)) has held that the failure to provide timely notice of stockholder action by written consent, where not all stockholders have consented to the action, does not vitiate the effectiveness of the action taken.
on the pleadings, had adequately plead a violation by MPI of the stockholder approval requirements of § 251(c).

That the corporation action or “duly authorized” opinion on an agreement may contain a “substantive” element (i.e., an opinion that extends beyond compliance with procedure) will come as no surprise to students of opinion practice, as it has long been recognized that the “duly authorized opinion” on capital stock includes such an element. See, e.g., TriBar Opinion Report § 6.2.1, 53 Bus. Law. at 648 (the opinion [duly authorized opinion on stock] covers such matters as whether ... the applicable state corporation law permits shares having the characteristics of the Shares, ...” (emphasis added)); and TriBar Opinion Committee, Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock, 63 Bus. Law. 921, 923-926 (2008); see also the undersigned’s article “Rethinking the Validly Issued Opinion on Equity Interests Issued by Alternative Entities,” In Our Opinion (Winter 2017-2018, vol. 17, no. 2), at 11, 14-17.

While the enforceability of the provisions of an agreement is normally addressed by the enforceability or remedies opinion, a corporate action or duly authorized opinion can also cover whether the agreement’s terms comply with terms required to be included by the applicable state corporation law. Vice Chancellor McCormick’s opinion in Mehta illustrates how this may be so.

- James F. Fotenos
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  & Hennigh LLP
  jfotenos@greeneradovsky.com

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 May 31, 2019.]

A. Published Reports Available From Legal Opinions Resource Center

| 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) | 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  

9 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, https://www.americanbar.org/groups/business_law/migrated/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.

10 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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\(^{11}\) 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 additional bar groups is pending.
Published Reports Available From Legal Opinions Resource Center (continued)

Virginia 2018  Comprehensive Report

Washington 2018  Comprehensive Report

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

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<td>Opinions on LLCs (Update)</td>
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12 See note 10.
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.

RECENT DEVELOPMENTS ON TWITTER
@abalegalopinion

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NEXT NEWSLETTER

We expect the next newsletter to be circulated in the Summer of 2019. Please forward cases, news and items of interest to Ettore Santucci (esantucci@goodwinlaw.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

________________________________________
13 The URL is https://www.americanbar.org/groups/business_law/committees/opinions/.