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FROM THE CHAIR

So here we are: it’s been three years since my dear friend Tim Hoxie introduced me as his successor, and I am now introducing my dear friend Rick Frasch as mine. As a good omen Italians say “in bocca al lupo,” which is sort of odd: wishing somebody to end up in the jaws of a wolf? But it makes sense (at least to me), because the proper answer is “crepi il lupo!” (may the wolf end up dead!), so in fact it amounts to wishing one well at the start of a challenging endeavor.

I hope you have found the nine meetings of our Committee that I have had the privilege of organizing useful. I have enjoyed every one of them. In the process I have grown to appreciate ever more what a special group we have: intellectually deep while practically minded; analytically rigorous while willing to engage with each other’s views; always respectful while never meek; and always, always devoted to the betterment of our profession and service to our members. I only wish the same were true for other collective bodies in our nation’s public square, but that is a tangent . . .

I want to start my last letter as Chair with what I have failed to accomplish: the most active members of our Committee are largely the same today as they were at the start of my term. As gifted and devoted as they are, we are not getting any younger. Many of us started practicing law at a time when I, a white Caucasian male with lots of vowels in my first and last names and a peculiar accent, was considered wildly diverse. Today that would be laughable. About a year ago I urged each one of our seasoned members to choose an “apprentice” and work diligently to bring him or her to our meetings, introduce him or her to the wonderful work our Committee does and the wonderful people who do it. I had no doubt then, or now, that ANY such apprentice would immediately form a bond and become an enthusiastic member of our Committee. And all of them together would be the next generation of active members and future leaders. But I personally have no such apprentice, and I believe too few of us do. That is a shame and I consider it a failure of my leadership.

And now I would like to take a little credit for a couple of think I believe I have done right. Our Committee has two projects that are entering a pivotal phase:

Cross-Border Opinion Practice. The Task Force on Cross-Border Opinion Practice, which I co-chair with Truman Bidwell, has initiated a collaboration with the International Bar Association’s Law Practice Division (the analog to the ABA Business Law Section) to bring together international transactional lawyers with expertise in opinion practice across jurisdictions. Our first goal is to build a consensus around “common issues” and identify “common challenges” among those who give closing opinions in cross-border transactions. Closing opinions outside the U.S. tend to be far more often opinions to one’s own client, whereas our Committee deals almost exclusively with third-party opinions, an important distinction, but one that, I believe, need not stand in the way of a collaborative process towards smoother closings of cross-border financings. A second goal is to develop guidance at the highest level — “principles,” similar to what our Committee did decades ago with the ABA Legal Opinion Principles and has recently done with the Statement on Opinion Practices and companion Core Opinion Principles.

A third goal is to facilitate the development of guidance focused on either particular types of opinions or particular types of transactions, possibly even specific jurisdictions which feature prominently in cross-border corporate transactions, so as to do internationally what our Committee, TriBar, WGLO and many other bar groups have done so well domestically. At our Annual Meeting in D.C. we will discuss these issues. I posted with the agenda for the meeting materials to tee up that discussion, which include a “mock debate” to highlight concerns expressed by some of our members that the goals of this task force may be ill conceived. I urge everybody who is interested in cross-border
opinions to join us, so this project can be steered in the right direction to help make the process of closing cross-border transactions smoother, less fractious and more efficient for all.

Task Force on Intellectual Property Opinions in Securities Offerings. The Task Force on Intellectual Property Opinions in Securities Offerings, which I co-chair with Rick Frasch, has moved to preparation of a proposed report. Over the years many of us who practice in this area have identified significant challenges when lawyers with expertise in intellectual property issues are asked to give “specialized” opinions for the kind of companies that today account for most of the IPO activity: life sciences companies, technology and digital media companies, “brand” companies and the like. There is still too much uncertainty as to what “accepted practice” is for these opinions and too often discussions that in standard third-party closing opinions were concluded years ago with a consensus as to what is or is not appropriate still occur regularly in this segment of opinion practice. A drafting committee on which all key constituencies are represented has identified key issues for our discussion in D.C. at the Annual Meeting, which I posted with the agenda for the meeting. Again, I urge everybody who is interested in this area to join us so that the drafting of our report proceeds with input from a wide group of our members.

I hope that Rick will allow me to continue to lead these projects, assuming I do not get shouted down at the upcoming meetings. Speaking of Rick, I am excited that he brings to leadership of our Committee a different set of professional experiences and a worldview that has been shaped by deep exposure to the business side and a decades-long involvement with international business. His unique style and many strengths will bring new energy to the work of our Committee and I look forward to seeing his agenda. Lawyers’ professional roles have changed dramatically over the last decade and Rick’s experience will resonate with younger lawyers.

It is bittersweet to come to the end of my term as Chair, but after three years I think I have put on the table all the ideas I can muster. It is time for new ideas, new energy, and a new style. It has been an honor to serve. Our Committee is known for continuity in that former Chairs join a chorus that backs up the current Chair in important ways. I look forward to doing so. I can tell Rick that for me the former Chairs collectively have always provided wisdom, counsel and an example to follow, for which I want to thank them again. I look forward to continuing to be active in our Committee’s good and important works.

In bocca al lupo, Rick!

- Ettore A. Santucci, Chair
Goodwin Procter LLP
esantucci@goodwinlaw.com
What follows are the presently scheduled times of meetings and programs of the Annual Meeting that may be of interest to members of the Legal Opinions Committee. To confirm information on meeting times and rooms, check here.¹

Legal Opinions Committee

Friday, September 13, 2019

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

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

Program: Cutting Edge Opinion Issues and Lessons Learned from Recent Reports 2:00 p.m. – 3:30 p.m.

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

Reception: 5:00 p.m. – 6:00 p.m.

Legal Opinions Committee (continued)

Saturday, September 14, 2019

Intellectual Property Opinions Joint Task Force: 12:00 p.m. – 1:30 p.m.

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Friday, September 13, 2019

Subcommittee Meeting: 1:00 p.m. – 2:00 p.m.

Law and Accounting Committee

Saturday, September 14, 2019

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

Audit Responses Committee

Saturday, September 14, 2019

Committee Meeting: 11:00 a.m. – 12:00 p.m.

¹ The URL is https://www.americanbar.org/content/dam/aba/events/business_law/2019/09/annual/alpha_schedule.pdf.
Publication of Statement of Opinion Practices and Related Material

The publication of the Statement of Opinion Practices (the “Statement”) and its related materials in The Business Lawyer (74 BUS. LAW. 801 (2019)) represents the completion of the joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions to achieve a national consensus on key aspects of third-party legal opinion practice. The purpose of the joint project was to foster a national opinion practice that is widely recognized and endorsed, building upon the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (63 BUS. LAW. 1277 (2008)).

The Statement of Opinion Practices, which appears at pages 807-812, updates the Legal Opinion Principles (53 BUS. LAW. 831 (1998)) and selected provisions of the Guidelines for the Preparation of Closing Opinions (57 BUS. LAW. 875 (2002)). It 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 those who may be called upon to interpret opinions, as well as to create a common understanding for opinion givers and opinion recipients and their counsel in order to facilitate the opinion process. The Statement has been approved by numerous bar associations and other opinion groups, as shown on the Schedule of Approving Organization that appears at pages 813-814.

In connection with the preparation of the Statement, the Core Opinion Principles was also prepared. It is a more concise document drawn from the Statement designed to be incorporated by reference in or attached to an opinion letter by those who wish to do so. It appears at pages 815-817. The Statement and Core Opinion Principles are accompanied by an Explanatory Note at pages 803-806, which includes a table of sources from the Legal Opinion Principles and the Guidelines and identifies those provisions of the Guidelines that are updated by the Statement.

With their publication in The Business Lawyer, lawyers are now able to readily refer to the Statement as identifying key aspects of opinion practice and, if they choose, incorporate or attach the Core Opinion Principles to their opinion letters. In this way, the Statement should serve its purpose of facilitating third-party legal opinion practice.

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NOTES FROM THE LISTSERVE

[Editor’s Note: Dialogues on the Committee’s Listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers (and not their respective law firms) on opinion topics of current interest. Members of the Committee may review the comments referred

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2 The Statement and related materials, including Word versions of the Statement and Core Opinion Principles, also can be found in the Legal Opinion Resource Center at https://www.americanbar.org/groups/business_law/migrated/tribar/.

In Our Opinion 4 Summer 2019 Vol. 18 ~ No. 4
Opinion Letters in Early-Stage Equity Financings

On August 20, 2019, a member of the Committee who wished to remain anonymous inquired about current practice in providing opinion letters in early-stage venture equity financings. The member works in house at a venture capital firm that generally invests in early-stage financings (seed through series B financings) with investments from $100,000 to $3.5 million. His firm generally utilizes documents following the templates of the National Venture Capital Association (“NVCA”) (available [here](https://nvca.org/resources/model-legal-documents/)).

Because the NVCA form of Stock Purchase Agreement calls for an opinion letter from issuer’s counsel, the member’s firm typically insists upon an opinion letter. Issuers and their counsel often argue that the opinion letter adds cost and delay and “doesn’t mean much anyway.” The member has been told that some firms that invest in early stage financings such as the member’s firm no longer require closing opinion letters, and asked for the ListServe’s experience on this question.

John A. Eckstein of Fairfield and Woods, P.C., Denver, and Michael Halloran of Halloran Farkas + Kittila, LLP, Menlo Park, California, articulated the perspective of investors. John related that his firm’s more established and sophisticated venture capital clients typically invest in series A and series B rounds and expect to do receive closing opinions from issuer’s counsel in every case; in the absence of an opinion letter, the clients will not invest. On the other hand, two of the firm’s newer venture capital firm clients invest in seed and startup rounds of new tech companies, but do not take the lead. They conduct extensive diligence and they themselves are quite experienced in startup issues, and do not ask for legal opinions. John believes that these clients’ rationale is that the legal risks addressed in an NVCA-type legal opinion letter is slight compared with the business and technology risks of the investment decision, and that most legal problems which an opinion process would identify and correct can be cleared up in later rounds.

John also observed that one of the overlooked aspects of requesting and receiving a legal opinion from issuer’s counsel is the investors’ and their counsel’s ability to evaluate the quality and competence of the lawyers advising the issuer. John’s conclusion was that, notwithstanding the trend away from insisting on legal opinions in early-stage rounds, “there is a lot to be learned from always requiring legal opinions.”

Mike Halloran likewise observed that providing legal opinions is a normal incident to venture financings, and “a good way to make sure everything is in fact up to snuff in the corporation or LLC.” Mike noted that opinion rendering is not a strict liability exercise, but is “still covered by the negligence standard” and presumably counsel has liability insurance. Mike expressed his opposition to the increasing trend of law firms resisting the giving of legitimate closing opinions.

Len Essig of LewisRice, St. Louis, Missouri, noted that his firm is typically involved on the issuer’s side of venture financings, and does agree to provide an opinion letter for venture financings, particularly if his firm has been involved with the issuer from its formation. His firm does strongly resist, however, giving opinions on capitalization (i.e., the number of shares issued and outstanding, and their due authorization and valid issuance). While a capitalization opinion is part of the NVCA form of opinion letter, Len observed, as have many others, that the opinion addresses a factual matter that should be resolved in diligence.

Richard Millard of Nantucket, Massachusetts, noted that most opinion issues arise from “improper and over-broad” requests
from investors and their counsel, and that requests for legal opinions should be limited to legal issues and to matters that the issuer’s counsel can verify by documentary and other diligence. Richard emphasized that in most transactions in which an opinion letter is requested, the “investors will be represented by experienced and sophisticated counsel.” Investors’ counsel will have performed extensive diligence regarding the issuer, thus obviating the need for an opinion letter from issuer’s counsel.

While Richard conceded that competent issuer’s counsel should be willing to stand behind the work they have done for its client, he noted that it is “equally true that a competent investor counsel should be willing to stand behind the results of the diligence investigation [it has conducted], and should not need an opinion from issuer’s counsel . . . .”

Paul Wehrmann of Paul Wehrmann, P.C., Dallas, Texas, observed that from his experience as investors’ counsel asking for a legal opinion for early-round financings is impracticable and should not be done. In working on such transactions for investor clients, and after conferring with his clients, he has “never asked” for an opinion letter nor have his clients pushed for one. When confronted with issuers with significant diligence issues, his clients will either not invest or will pay Paul to work with issuer’s counsel to clean up the issues to the extent possible.

On the other hand, with investments of $10 million or more, the “practicalities” change and he and his clients always push for an opinion letter from issuer’s counsel. This would also apply if the client is co-investing smaller amounts when the total round is $10 million or more.

Stan Keller of Locke Lord LLP, Boston, summed up by noting that proper legal opinions in the right circumstances “serve a legitimate purpose in bringing a measure of discipline to the transactional process.” He noted that applying a cost/benefit analysis is appropriate, which will often lead to dispensing with legal opinions in startup and smaller follow-on rounds, but having them in more formal rounds with institutional investors. Stan noted that the scope and coverage of the opinions requested should be consistent with customary practice.

Providing an Opinion Letter for Purchasers of Interest Rate Swaps

By his inquiry of August 29, 2019, Michael M. Sherman of Cozen O’Connor, Philadelphia, Pennsylvania, stated that his understanding is that it is not currently market practice for a provider of an interest rate swap to require an opinion letter on the enforceability of the swap documents from counsel to the purchaser of the swap. Swap documents typically consist of master agreements and their associated schedules on forms prepared by ISDA (International Swaps & Derivatives Association, Inc.). Michael noted that occasionally he had been asked to give an opinion letter on behalf of a purchaser of an interest rate swap, but in those few instances he resisted and the swap issuer then withdrew the request.

The five Legal Committee members who responded noted that market practice is for counsel to swap purchasers not to give enforceability opinions to the swap provider (Penelope L. Christophorou, Cleary Gottlieb Steen & Hamilton LLP, New York; Stephen C. Tarry, Vinson & Elkins LLP, Houston; John L. Whitlock, Locke Lord LLP, Boston; and Robert M. McLaughlin, Fried, Frank, Harris, Shriver & Jacobson LLP, New York). Steve Tarry observed that his firm, when an ISDA schedule requires a legal opinion, deletes that requirement and almost never gets push back. In the rare instances when a swap provider insists on a legal opinion, the only opinions his firm will give are valid existence and good standing, entity power and authority, and due execution and delivery. John Whitlock agreed with Steve, and noted, when his firm gives such an opinion letter, that it also insists that the counterparty deliver a similar opinion letter to the purchaser of the swap (which typically will be provided by in-house counsel).
Robert McLaughlin noted that before the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), swap opinion practice frequently devolved into pointless discussions over theoretical enforceability concerns, and that such disputes often led to compromises permitting deletion of the enforceability opinion from counsel’s opinion letter. While Robert noted it may be easier to give an enforceability opinion post-Dodd Frank, given the cost of preparing and supporting such opinions, the opinion is not justified in terms of providing protection to the counterparty beyond what is already provided in the transaction document representations.

Joseph A. Heyison (Daiwa Capital Markets, Stamford, Connecticut), noted that most enforceability questions on the standard text of the ISDA master agreement and credit support annex/deed are addressed by legal opinions given by law firms to ISDA members. If a party requesting an opinion or its parent is a member of ISDA, then they can access these ISDA opinions on the ISDA website and rely on them. Accordingly, Joseph noted that there “should be no compelling need for an enforceability opinion and market practice is never to ask for any legal opinion.”

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

- James F. Fotenos
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  & Hennigh LLP
  jfotenos@greeneradovsky.com
## 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 August 31, 2019.]

### A. Published Reports Available From Legal Opinions Resource Center

<table>
<thead>
<tr>
<th>Organization</th>
<th>Year</th>
<th>Report Title</th>
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<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>2009</td>
<td>Effect of FIN 48 – Audit Responses Committee</td>
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<td>Negative Assurance – Securities Law Opinions Subcommittee</td>
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<td></td>
<td>2010</td>
<td>Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee</td>
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<td></td>
<td>2011</td>
<td>Diligence Memoranda – Task Force on Diligence Memoranda</td>
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<td>2013</td>
<td>Survey of Office Practices – Legal Opinions Committee</td>
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<td>Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee</td>
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<td>Revised Handbook – Audit Responses Committee</td>
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<td></td>
<td>2014</td>
<td>Updates to Audit Response Letters – Audit Responses Committee</td>
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<td></td>
<td>2015</td>
<td>No Registration Opinions (Update) – Securities Law Opinions Subcomittee</td>
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<td>Cross-Border Closing Opinions of U.S. Counsel</td>
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<td></td>
<td>2016</td>
<td>Report on the Use of confirmation.com – Audit Responses Committee</td>
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<td></td>
<td>2017</td>
<td>Opinions on Debt Tender Offers — Securities Law Opinions Subcomittee</td>
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<tr>
<td>ABA Real Property Section (and others)</td>
<td>2012</td>
<td>Real Estate Finance Opinion Report of 2012</td>
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<td></td>
<td>2016</td>
<td>Local Counsel Opinion Letters in Real Estate Financing Transactions</td>
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<td>Arizona</td>
<td>2004</td>
<td>Comprehensive Report</td>
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<td>California</td>
<td>2007</td>
<td>Remedies Opinion Report</td>
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<td>Comprehensive Report</td>
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<td>2009</td>
<td>Venture Capital Opinions</td>
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<td>2014</td>
<td>Revised Sample Opinion</td>
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<td>2014</td>
<td>Sample Venture Capital Financing Opinion</td>
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<td></td>
<td>2016</td>
<td>Third-Party Closing Opinions; Limited Liability Companies and Partnerships</td>
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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/](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.

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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5 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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<th>Area</th>
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<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
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<td>Georgia</td>
<td>2009</td>
<td>Real Estate Secured Transactions Opinions Report</td>
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<td>City of London</td>
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<td>2017</td>
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<td>2010</td>
<td>Report</td>
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<td>Customary Practice Statement</td>
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<td>Multiple Law Firms</td>
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<td>White Paper – Trust Indenture Act §316(b)</td>
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<td>National Association of</td>
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<td>Function and Professional Responsibilities of Bond Counsel</td>
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<td>Bond Lawyers</td>
<td>2013</td>
<td>Model Bond Opinion</td>
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<td>2014</td>
<td>501(c)(3) Opinions</td>
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<td>2017</td>
<td>Update of Model Letter of Underwriters’ Counsel</td>
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<td>National Venture Capital</td>
<td>2013</td>
<td>Model Legal Opinion</td>
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<td>Association</td>
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<td>New York</td>
<td>2009</td>
<td>Substantive Consolidation – Bar of the City of New York</td>
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<td>2012</td>
<td>Tax Opinions in Registered Offerings – New York State Bar</td>
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<td>Association Tax Section</td>
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<td>North Carolina</td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
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<td>Pennsylvania</td>
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<td>Update</td>
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<td>South Carolina</td>
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<td>Tennessee</td>
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<td>2006</td>
<td>Supplement Regarding Opinions on Indemnification Provisions</td>
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<td>Supplement Regarding ABA Principles and Guidelines</td>
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<td>Supplement Regarding Entity Status, Power and Authority Opinions</td>
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<td>2013</td>
<td>Supplement Regarding Changes to Good Standing Procedures</td>
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6 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 many other bar and lawyer 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

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
UCC Opinions in Real Estate Transactions
(and others)7

California
Sample Personal Property Security Interest Opinion
Exceptions and Other Qualifications to the Remedies Opinion
Third-Party Opinions
Comprehensive Report Update

Multiple Bar Associations
Local Counsel Opinions

Florida
Comprehensive Report Update

Texas
Comprehensive Report Update

TriBar
Opinions on Provisions Allocating Risk
Bring Down Opinions
Opinions on LLCs (Update)

7 See note 5.
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 Committee Chair Rick Frasch at rnfrasch@gmail.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in the Fall of 2019. Please forward cases, news and items of interest to Rick Frasch (rnfrasch@gmail.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

RECENT DEVELOPMENTS
ON TWITTER
@abalegalopinion

Stay current on legal opinion developments @ABALegalOpinion. If you are a novice on Twitter, you can learn all about Twitter and join and follow our tweets by going to the Internet and downloading a podcast at: https://www.howcast.com/videos/149055-how-to-use-twitter/.

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