Annual Review of the Law on Legal Opinions

By the Committee on Legal Opinions, ABA Section of Business Law

INTRODUCTION

This is the Committee on Legal Opinions’ first annual survey of the law. This survey deals with opinions to third parties (i.e., the party on the other side of a transaction), rather than opinions to clients. It deals with closing opinions, since opinions to third parties are seldom given in any other context.

In general, third-party closing opinions are a condition of closing of transactions. The opinion giver is not a party to the transaction agreements and thus is not obligated to deliver an opinion. In many transactions, the failure to deliver an opinion at closing (the opinion is often delivered after the transaction documents are signed) is a failure of a condition of closing but not a default (by the client) under an agreement.

Legal opinions form a part of a broader due diligence effort of the party receiving the opinion. The success of that effort determines whether the transaction will proceed. Opinions may also serve to meet internal and regulatory requirements for the recipient.

Third-party opinions are an anomaly in the practice of law. While representing a client in a transaction, a lawyer (through the third-party opinion) provides advice to a party on the other side of a transaction. Were the concept of third-party opinions first presented today, it might well be rejected because of the potential for conflicts of interest between the third-party opinion giver’s client and the recipient of the third-party opinion. In the United States, however, third-party closing opinions have been in use for more than a century, have come to play an important role in business transactions and are seen as an extension of the work done for the client and thus ethically proper.

BACKGROUND INFORMATION ON LEGAL OPINIONS

Until the 1970s, opinion practice consisted of some combination of folklore, ethics and acceptability to the financial community. Writing on legal opinions was

1. The Reporters for this Annual Review are Past Chairs of the Committee, Arthur Norman Field (who is with Field Consulting Services, LLC in New York) and Donald W. Glazer (who is advisory counsel to Goodwin Procter LLP in Boston).

2. Opinions to clients involve responsibilities different from those to a third party. The language used in opinions to clients is similar to that used in opinions to third parties. However, the responsibility of the opinion giver to its own client is not measured by the opinion itself, as it is in third-party opinions. Thus, in opinions to clients both the ambit of the opinion and the diligence involved may be different from third-party opinions.
extremely limited. In 1973 James J. Fuld published an article that struck a responsive chord in the business law community, bringing home the need for the organized bar to clarify many open questions. Fuld, who was then on the Board of the New York County Lawyers’ Association, suggested that the Association form a committee on legal opinions and that was done. Later, recognizing the need for a single voice on opinion issues in New York, the New York State Bar Association and the Association of the Bar of the City of New York joined with County Lawyers’ to form a joint committee. Dubbed the TriBar Opinion Committee, that joint Committee initially brought together lawyers representing institutional lenders and lawyers representing borrowers. After several years of effort, the Committee issued its first report in 1979. That report generated great interest among business lawyers around the country. For the first time they had a detailed description of opinion practice that represented the judgment of a representative cross section of highly respected New York lawyers. Most readers found the description accurate and helpful. Then, as now, New York law is favored as the governing law for financial transactions nationally. Having completed its report, the Committee saw little more to do and so (except for a brief addendum to acknowledge a new Bankruptcy Act) disbanded and was not heard from again for ten years. In the late 1980s, the Committee published a second addendum to the 1979 Report and started to meet regularly. Since then, it has issued many reports on a broad range of subjects.

While the TriBar 1979 Report did not address liability, Committee members assumed that third party opinion givers would be subject to suit by opinion recipients for professional failures. In time, this position was confirmed by the courts, although in New York the definitive decision did not come until 1992 and in Texas not until 1999.

The only controversial aspect of TriBar’s 1979 Report was the treatment of the remedies opinion. The California Bar Business Law Section was the most notable dissenter, taking the position in a report issued in 1983 that only “material” undertakings were covered by the remedies opinion while TriBar’s position was that the remedies opinion covers all agreement undertakings. The California approach had appeal to those who gave opinions in smaller transactions or who regarded the TriBar approach as too expensive or time consuming.

The differences in approach (reaffirmed by the respective sides in 1989) raised the question whether remedies opinions that read the same (“valid and binding in accordance with its terms”) had different meanings in different states. That question led the ABA Business Law Section to convene a group of lawyers interested in closing opinions from across the country to try to reconcile differences in how the remedies opinion should be interpreted. The meeting it sponsored, held in Silverado, California in 1989, came to be known as the Silverado Conference.

The Silverado Conference and subsequent meetings of the Silverado conferees failed to break the TriBar-California Bar impasse over the meaning of the remedies opinion. However, the Conference focused the attention of lawyers nationally on legal opinions and produced a consensus on many opinion issues, generally endorsing conclusions in the TriBar 1979 Report. The Conference also resulted in the drafting of a novel alternative for opinion giving, a contractually based approach known as the “Accord.” Under the Accord, the opinion giver adopts a complex set of rules (that can be varied by any change specifically described in the opinion letter) and the opinion recipient accepts those rules by accepting the opinion letter. Almost from the date of its publication in 1991, the Accord encountered opposition, both from recipients and from opinion givers (for whom use of the Accord required mastery of a highly technical vocabulary and drafting scheme). The result was that the Accord never achieved wide acceptance, serving, instead, as a landmark “thinkpiece” on opinions. (The Accord did not reflect customary practice, nor did it purport to. Nevertheless, in litigation involving opinions, the Accord is sometimes erroneously cited in briefs and decisions as if it were authoritative.)

The 1991 ABA Third-Party Legal Opinion Report, which included the Accord, invited state bar groups to supplement the Accord. In the years following, many state bar groups published their own reports to guide their members. The approaches taken in those reports were not uniform. Sometimes variations were justified by differences in state law. Often, however, they were not.

In 1998 the American Law Institute’s Restatement of the Law Governing Lawyers brought the local versus national debate more clearly into focus. The Restatement took the position that legal opinion practice was a national practice, thus undermining claims that a local customary practice (unrelated to differences in state laws, regulations or cases) should have application.

During the 1990s the TriBar Opinion Committee sought to reassert its position as spokesman for a national opinion practice both by broadening the expertise of its members and by taking on members from other states (Georgia, Massachusetts, Pennsylvania, Delaware, California, Illinois, Texas, Washington, D.C. and even Canada). With its broadened membership base, the Committee has issued a series of reports. In 1991, it published a Special Report on the Remedies Opinion and a report on “Opinions in the Bankruptcy Context”; in 1992, a Report on “Use of the ABA Accord in Specialized Financing Transactions”; and in 1993, a Report on UCC Security Interest Opinions. In 1998, the Committee updated its 1979

8. Id.

The Committee on Legal Opinions of the ABA Section of Business Law initially consisted of those who attended the Silverado Conference. In 1998, the Committee published the first of its three reports. These relatively brief reports take positions that are consistent with positions taken in the TriBar reports. In that same year a Task Force on Securities Law Opinions created by the Committee on Legal Opinions and the Section of Business Law’s Committee on Federal Regulation of Securities also published two reports, one on Negative Assurance in Securities Offerings and the other on Opinions in SEC filings.

In 2004, the California Bar issued a new Remedies Opinion Report that at long last broke the impasse between the TriBar and California approaches to the Remedies Opinion.

Defining customary practice, both in terms of what opinions mean and the work required to support them, continues to challenge those who write about opinions. It seems fair to say that, with the consistent approach of the TriBar Committee, the ABA Opinions Committee, the Restatement of the Law Governing Lawyers and, more recently, the California Bar, a consensus has emerged on most issues. At the periphery, however, the lines are not always sharply defined.

Other questions not directly relating to customary practice remain. When are requests for closing opinions appropriate? Do recipients, in fact, rely on opinions, or is an opinion merely a checklist item “for the file?” Should a modified remedies opinion involving limited diligence be developed for use in smaller transactions?

**Recent Decisions on Legal Opinions**

Closing opinions are the subject of only about three dozen published decisions. Most of these have been decided since 1990. Four were decided in the last couple of years. A summary of the major cases decided prior to 2002 is provided in the Addendum.

Perhaps the two most important opinion decisions in the past couple of years are the *Dean Foods*\(^{22}\) case, a Massachusetts trial court decision and the *Reich/Adlerstein*\(^{23}\) litigation, conducted in the Delaware and New York courts.

### A. *DEAN FOODS*

The *Dean Foods* case is important because it confirms that, in preparing opinions, opinion givers will be held to the standard established by customary practice. The decision expressly follows the approach taken in the TriBar 1998 Report. That report is the one law firms and departments most often use for educational purposes and is the report that is generally regarded nationally as the most authoritative source of guidance on what constitutes customary practice. The experts on both sides of the case (co-reporters here) served as co-reporters for the TriBar 1998 Report and framed their differing positions based on it.

This case involved an opinion by seller’s counsel to the purchaser of a business that the seller was not the subject of any litigation or investigation not disclosed in a schedule to the purchase and sale agreement. The opinion did not disclose a tax fraud investigation by the U.S. Attorney of a customer of the seller. The customer was alleged to have failed to report as income rebates from the seller. A litigator in the opinion giving firm had been retained by the seller to assist it in providing documents relating to the customer to the U.S. Attorney. At the seller’s request the same litigator had conducted an investigation into the facts. The transactional lawyer (in the same firm) who prepared the opinion spoke to the litigator about the matter but did not attempt to obtain a full picture of what the litigator knew. Instead, he relied on the “guesstimate” of the litigator (given in connection with the question of whether to disclose the matter in a schedule to the agreement) that the investigation had ended (the seller had had no contact with the U.S. Attorney’s office during the previous six months). The litigator’s judgment proved to be wrong: the purchaser received a “target letter” from the U.S. Attorney three months after the opinion was given and eventually paid a $7.2 million fine for aiding a tax fraud. The purchaser then sued the law firm that delivered the opinion, alleging that its failure to disclose the investigation constituted negligent misrepresentation. The judge agreed, finding that under the circumstances the transactional lawyer, in preparing the opinion, had a duty to conduct an appropriate investigation (or withhold the opinion) and that his investigation had fallen short of what was required by customary practice. Asking the litigator, who had not even been advised that the firm was giving an opinion, for his assessment of the matter and relying on his “guesstimate” was, in the judge’s view, insufficient. After release of the trial judge’s decision, the parties settled (and hence the decision will not be appealed).


B. Adlerstein/Reich

The Adlerstein decision (in the Delaware Chancery Court) invalidated an issuance of stock that was intended to transfer control of a company. The two outside directors on a three-person board, acting with the advice of counsel, approved the issuance. At the closing, counsel provided the purchaser of the stock with an opinion that the stock was duly authorized and validly issued. The third director challenged the Board’s action in the Delaware Court of Chancery. The third director (as controlling shareholder) had a right to remove one or both of the other directors but was not given the opportunity to do so. Vice Chancellor Lamb invalidated the issuance despite the fact that the Board’s action technically satisfied the letter of Delaware statutory law and the issuer’s certificate of incorporation and bylaws.24 By not alerting the third director in advance to the action they were proposing to take at the meeting (so that he could remove the other directors if he wished), the outside directors, in the judge’s view, acted with trickery and deceit. The judge found the outside director’s conduct to be unacceptable even though they saw no other way for the Company to obtain the cash required for it to make its next payroll. Following the invalidation of the stock, the purchaser sued the opinion giver in the New York courts for delivering a negligently prepared opinion. The opinion giver filed a motion to dismiss. That motion was denied by the trial judge in Reich Family L.P. v. McDermott.25

Two other cases worthy of note were decided in 2004. They are Hale & Dorr26 and Wafra Leasing.27

C. Hale & Dorr

As in Dean Foods the centerpiece of National Bank of Canada v. Hale & Dorr was a no-litigation opinion. However, unlike in Dean Foods, the case had not yet reached the trial stage but only involved motions to determine if a trial was warranted.

In Hale & Dorr, the firm had given an opinion that to the firm’s knowledge its client was not the subject of any pending litigation that if adversely determined could materially affect the client’s business. The lawyers representing the borrower in a bank loan had delivered the opinion to the lending banks without consulting with litigators in the firm. They were handling litigation for the borrower that challenged the borrower’s use of intellectual property. After the loan was made and the opinion delivered, the case was decided against the borrower. When the banks learned about the case, they sued the opinion giver for negligence, negligent misrepresentation and misrepresentation.

The decision addresses motions by the opinion giver for summary judgment.

The court held that the opinion giver had no duty to the banks. The court reasoned that any such duty would conflict with the opinion giver’s duty to its clients and therefore granted it summary judgment on the negligence and negligent misrepresentation claims. The court’s holding in this regard is out-of-step with those of most other courts. Compare Dean Foods, another Massachusetts case, above. Ordinarily, courts have permitted opinion recipients to bring actions for negligent misrepresentation against third-party opinion givers and have not viewed the opinion as creating a conflicting duty.

On the misrepresentation count, the court denied the opinion giver’s motion and permitted the case to go to trial. The court analyzed the elements of misrepresentation in Massachusetts and concluded that there were triable issues of fact on each element.

The judge viewed the use of the words “to our knowledge” in the opinion and the statement that the firm had reviewed a large number of documents as constituting a representation that the firm possessed superior knowledge and was making the statements with certainty, both of which were, the judge stated, elements of Massachusetts law required to sustain a claim of misrepresentation. Demonstrating the law of unintended consequences, language the firm no doubt viewed as being protective was cited as a basis for supporting an action against it.

D. WAFRA LEASING

In Wafra Leasing Corp. v. Prime Capital Corp., the opinion giver was a Chicago law firm that delivered a closing opinion to plaintiff in connection with a securitization in which plaintiff was investing. A name partner of the firm was a major stockholder of the client and served as chair of the client’s audit committee. The opinion recipient did not allege that any of the opinions of the opinion giving firm were wrong. It did, however, claim that the firm violated Rule 10b-5 and was guilty of negligent misrepresentation by including in the opinion letter a statement that no information had come to the attention of the firm that gave it actual knowledge that any of the certificates on which it was relying were not accurate or complete. An officer’s certificate attached to the opinion stated that the officer was unaware of any material inaccuracies in the disclosures contained in the private placement memo for the securitization. According to the complaint, the firm knew this to be untrue because the lead partner and officer were both aware that the private placement memo failed to disclose that the client was engaged in a fraudulent scheme to divert for its own use and misappropriate securitization assets.

In the first of two published decisions, the federal district court denied the firm’s motion to dismiss. In the second decision (written by a different judge), the court, following development of the facts, granted the firm’s motion for summary judgment. Like the decision in Hale & Dorr, the second Wafra Leasing

decision does not explore legal opinion issues but instead considers whether the plaintiff would be able to prove all the elements required to sustain an action under Rule 10b-5 or a claim of negligent misrepresentation. The court held that the plaintiff could not because the plaintiff had not provided evidence that the law firm partner knew at the time the opinion was delivered that the client was engaged in a fraud.30

Wafra Leasing illustrates how language ancillary to the actual opinions can become a central issue. A opinion that a firm is unaware of inaccuracies in certificates on which it is relying, even if true, may broaden the factual issues before the court and provide a basis for defeating a motion to dismiss that otherwise would likely have been granted.

E. ENRON EXAMINER’S REPORT

The Enron bankruptcy resulted from massive fraud and gave rise to huge losses. The judge appointed an examiner to consider, among other things, whether the bankrupt estate might have a claim against Enron’s lawyers. Enron had engaged in a series of highly complex transactions prior to its collapse. The report states that there was sufficient evidence for a fact-finder to conclude that Enron’s lawyers had committed (1) malpractice (based on Texas Rule 1.12 or negligence) or (2) had aided and abetted breaches of fiduciary duty by Enron’s officers.31 At least in part, these conclusions related to opinions rendered in connection with Enron transactions. The Report is critical of the role of law firms in specific situations. However, the Report does not follow a characteristic customary practice analysis in reaching its conclusions.

ADDENDUM

MAJOR OPINION CASES DECIDED BEFORE 2004

- Ackerman v. Schwartz32 (if found to have been reckless, lawyer who gave opinion on tax shelter will be liable under Rule 10b-5 to investors whose agents received opinion; lawyer had duty under securities laws to update opinion if included in offering circular and it became misleading).
- Crossland Sav. FSB v. Rockwood Ins. Co.33 (opinion giver liable to third party if opinion addressed to third party or expressly authorizes third party to rely).
- In re Enron Corp. Sec., Derivative & Erisa Litig.34 (investors permitted to pursue action under Rule 10b-5 against law firm that delivered opinions allegedly essential to client’s fraudulent transactions while knowing of cli-

30. Id. at *5.
32. 947 F.2d 841 (7th Cir. 1991).
34. 235 F. Supp. 2d 549 (S.D. Tex. 2002).
ent’s ongoing illicit and fraudulent conduct and frequently making public statements about client’s business and financial condition).

- **In re Ethics Advisory Panel Opinion**\(^{35}\) (rendering third-party opinions standard procedure and expressly allowed by Rules of Professional Conduct).
- **First National Bank of Durant v. Trans Terra Corp.**\(^{36}\) (citing intermediate Texas court’s holding and anticipating Texas Supreme Court’s ruling in *McCamish*, federal court holds that in Texas bank recipient of title opinion from counsel for borrower has cause of action against opinion giver for negligent misrepresentation).
- **Fortson v. Winstead, McGuire, Sechrest & Minick**\(^{37}\) (in Texas, opinion giver has no duty to recipient of third-party opinion even when opinion giver knows recipient will rely on opinion—reversed by *McCamish*).
- **Geaslen v. Berkson, Gorov & Levin, Ltd.**\(^{38}\) (opinion giver has no fiduciary duty to recipient of third-party opinion; opinion giver did not challenge holding of lower court that it owed recipient duty of care and would be liable if negligent).
- **Greycas v. Proud**\(^{39}\) (for purposes of claim of negligent misrepresentation, opinion giver owes duty of care to recipient of third-party opinion).
- **Greyhound Leasing & Fin. Corp. v. Norwest Bank**\(^{40}\) (discusses whether opinion giver has duty to go beyond client’s factual representations and to investigate facts for itself—and concludes, incorrectly, that it does).
- **In re Infocure Sec. Litig.**\(^{41}\) (no compelling reason to disregard disclaimers in closing opinions; no litigation opinion governed by Accord only covered threats of litigation made in writing).
- **Kansallis Finance Ltd. v. Fern**\(^{42}\) (discusses when lawyer who signs opinion in his own name may be held to have had authority to bind partnership).
- **Kline v. First Western Government Securities, Inc.**\(^{43}\) (in action brought under Rule 10b-5, disclaimers that tax opinion could be relied on only by recipient and that opinion giver had not investigated assumed facts not given effect because opinion preparers knew others were relying on opinion and that assumed facts were wrong).
- **Mark Twain Kansas City Bank v. Jackson Brouillette, Pohl & Kirkley, P.C.**\(^{44}\) (court gives literal effect to disclaimer that due to typographical error—omitting “update” after “to”—stated that opinion giver “take[s] no responsibilities to . . . opinions contained herein”).

\(^{35}\) 554 A.2d 1033 (R.I. 1989).
\(^{36}\) 142 F.3d 802 (5th Cir. 1998).
\(^{37}\) 961 F.2d 469 (4th Cir. 1992).
\(^{38}\) 613 N.E.2d 702 (Ill. 1993).
\(^{39}\) 826 F.2d 1560 (7th Cir. 1987).
\(^{40}\) 854 F.2d 1122 (8th Cir. 1988).
\(^{42}\) 40 F.3d 476 (1st Cir. 1994).
\(^{43}\) 24 F.3d 480 (3d Cir. 1994).
\(^{44}\) 912 S.W.2d 536 (Mo. Ct. App. W.D. 1995).
• McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests\textsuperscript{45} (reversing Fortson; holding lack of privity does not prevent nonclient from suing lawyer for negligent misrepresentation).

• Massachusetts Asset Fin. Corp. v. Harter, Secrest & Emery, LLP\textsuperscript{46} (in ruling on preliminary motion, judge not persuaded that no breach or default opinion could not be construed to cover loan agreement that parties to transaction were entering into; following development of facts, motion was summarily granted on Jan. 23, 2004 by magistrate judge).

• Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.\textsuperscript{47} (even though not clients of opinion giver, addressees of closing opinion may bring action against opinion giver for negligent misrepresentation but not legal malpractice).

• Mirotznick v. Sensney, Davis & McCormick\textsuperscript{48} (local counsel who gave “duly authorized” opinions addressed to their respective clients that bond counsel relied on, but not expressly, in its opinion lacked relationship with purchasers of bonds sufficient to support suit under Rule 10b-5 and claim of negligent misrepresentation).

• Nolte v. Pearson\textsuperscript{49} (investors could not reasonably have relied on tax opinion that contained more “red flags” than assurances; opinion was not false because it stated it was based on facts provided by client and that opinion giver had not conducted investigation).

• Pioneer Ins. Co. v. Chase Sec.\textsuperscript{50} (denying law firm’s motion to dismiss claim brought under Rule 10b-5 by investors to whom firm had provided negative assurance).

• Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood\textsuperscript{51} (remedies opinion not wrong because it only said agreement was enforceable and not for how much—even though mortgage was for only $93,000 instead of $93 million as a result of typographical error in financing statement).

• Resolution Trust Corp. v. Latham & Watkins\textsuperscript{52} (failure of opinion to address law of state whose law was excluded from opinion by coverage limitation not misleading for purposes of Rule 10b-5 because of explicit choice-of-law disclaimer in opinion and because under choice-of-law rules of that state its substantive law would not have applied and hence was not material).

• Roberts v. Ball, Hunt, Hart, Brown & Baerwit\textsuperscript{53} (opinion giver liable for negligent misrepresentation even though opinion was technically correct

\textsuperscript{45} 991 S.W.2d 787 (Tex. 1999).
\textsuperscript{47} 892 P.2d 230 (Colo. 1995).
\textsuperscript{48} 658 F. Supp. 932 (W.D. Wash. 1986).
\textsuperscript{49} 994 F.2d 1311 (8th Cir. 1993).
\textsuperscript{52} 909 F. Supp. 923 (S.D.N.Y. 1995).
because opinion failed to disclose that several allegedly general partners of partnership that opinion stated was a general partnership were claiming that they were limited partners).

- **Rubin v. Schottenstein, Zox & Dunn**54 (although opinion correct, opinion giver liable under Rule 10b-5 because he represented to recipient who was investing in client that his client had no problems with bank when he knew that transaction would result in default under loan agreement).

- **Savings Bank v. Ward**55 (U.S. Supreme Court holds lawyer who gave erroneous title opinion not liable to bank because opinion was given to client and lawyer did not know client would be providing opinion to bank; dissent states that lawyer should be liable to person who relied on opinion because lawyer knew client would use it for business purpose).

- **SEC v. Spectrum, Ltd.**56 (opinion on resale of securities under Securities Act of 1933).

- **Sierra Fria Corp. v. Donald J. Evans, PC.**57 (lawyers not guarantors of favorable results and not obliged to anticipate remote risks).

- **Stock West Corp. v. Taylor**58 (court did not dismiss complaint, leaving for future proceedings whether lawyer for borrower who gave opinion to bank owed duty to still another party to transaction).

- **United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Asocs.**59 (opinion giver had no duty to addressee of opinion because opinion was not given at client’s request; delivery of opinion was not a closing condition).

- **Vereins-Und Westbank AG v. Carter**60 (addressee of third-party opinion given by opinion giver at client’s request has claim of negligent misrepresentation against opinion giver; assignee of notes also has claim where opinion stated that assignee could rely on it).

- **Voyager Guar. Ins. Co. v. Brown**61 (enforceability opinion not opinion that signature on agreement is genuine or that no defenses are available to parties).

- **Washington Elec. Coop. v. Mass. Mun. Wholesale Elec. Co.**62 (recipient of third-party opinion cannot claim negligence but can claim negligent misrepresentation; opinion is expression of professional judgment and not a

54. 143 F.3d 263 (6th Cir. 1998).
55. 100 U.S. 195 (1879).
56. 489 F.2d 535 (2d Cir. 1973).
57. 127 F.3d 175 (1st Cir. 1997).
58. 942 F.2d 655 (9th Cir. 1991).
61. 631 So. 2d 848 (Ala. 1993).
guarantee; enforceability opinion not erroneous because it contained exception for “judicial discretion”).

- *Westvaco Corp. v. International Paper Co.* 63 (recipient entitled to rely on patent opinion to establish it was not guilty of willful infringement because opinion evidenced adequate foundation and contained detailed analysis of issues).

63. 991 F.2d 735 (Fed. Cir. 1993).