

**2017 FALL LEGAL OPINION SEMINAR
OCTOBER 31, 2017, NEW YORK**

Program Co-Chairs: Andrew M. Kaufman and Reade H. Ryan, Jr.
Vice Chairs: Arthur Norman Field
Gail Merel (Editor)
John B. Power

AGENDA

Monday Evening, October 30, 2017

6:00 – 7:00 p.m. Welcome Reception

7:00 – 9:30 p.m. Dinner and Discussion with Randy J. Curato, ALAS, Inc., of “Outside Counsel Guidelines”

Large corporate clients have long promulgated guidelines for their outside counsel. Municipalities and smaller clients are now doing so as well. Many of those guidelines raise concerns in various respects—sometimes in the definition of who the “client” is or what constitutes a conflict, sometimes in the billing guidelines, and sometimes in indemnity provisions. Some of these provisions are simply problematic—firms can agree to them if they choose, but need to be aware of the sweeping obligations they are undertaking. Other provisions, especially the indemnity clauses, pose a more serious threat. Given these concerns, all firms should be wary of outside counsel guidelines (OCGs), adopt a procedure on handling them, and ensure that all lawyers forward OCGs and other client-tendered engagement letters to the firm’s general counsel or other designated lawyer for review. At a minimum, firms need to know what they have agreed to; in other cases, firms will want to negotiate or reject certain terms. This program will address OCGs and highlight the terms of concern, explain why those terms cause concern, and offer suggestions on how to handle them.

Tuesday, October 31, 2017

8:00 – 8:45 a.m. Registration and Continental Breakfast

8:45 – 8:50 a.m. Welcome and Introductory Remarks

Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago

8:50 – 9:00 a.m. In Memoriam: A Tribute to Robert A. Thompson

William B. Dunn, Clark Hill PLC, Grand Rapids

David L. Miller, Pillsbury Winthrop Shaw Pittman, McLean

Lydia C. Stefanowicz, Greenbaum, Rowe, Smith & Davis LLP, Woodbridge

Morning Plenary

Current Issues and Practices Related to Basic Legal Opinions

9:00 – 9:50 a.m.

Back to Basics: No Breach, No Violation and All Approvals Opinions

Chair: *Stanley Keller, Locke Lord LLP, Boston*

Panel: *Arthur Norman Field, New York*
Donald W. Glazer, Newton
Gail Merel, Andrews Kurth Kenyon LLP, Houston

This panel will revisit the basic second-tier opinions that often are given in connection with transactions but that have not received as much attention as the primary enforceability opinion. The focus will be on the typical “No Breach or Default Opinion,” “No Violation of Law Opinion” and “All Consents and Approvals Obtained Opinion.” The panel will address issues surrounding the meaning and coverage of these opinions and ways in which the opinion language can be sharpened.

9:50 – 10:40 a.m.

Discussion of the TriBar Opinion Committee’s Report on Opinions Covering Limited Partnerships

Chair: *Richard R. Howe, Sullivan & Cromwell LLP, New York*

Panel: *James G. Leyden, Jr., Richards, Layton & Finger, P.A., Wilmington*
Robert S. Risoleo, Sullivan & Cromwell LLP, Washington, D.C.

This panel will discuss the forthcoming report of the TriBar Opinion Committee on Third-Party Closing Opinions on limited partnerships. The opinions typically given on a limited partnership cover its: (i) formation and existence; (ii) power to enter into and perform its obligations under the transaction documents; and (iii) authorization, execution and delivery of those documents. In addition, purchasers of interests in a limited partnership (“LP Interests”) sometimes request opinions covering: (i) the issuance of their LP Interests; (ii) their admission as limited partners of the limited partnership; (iii) their obligation to make payments for their LP Interests; and (iv) their liability as limited partners for obligations of the limited partnership. The report addresses these opinions. The report is similar to the two TriBar reports on limited liability companies (see 61 Bus. Law. 679 (2006) and 66 Bus. Law. 1065 (2011)) but reflects the many substantive differences between limited partnerships and limited liability companies.

10:40 – 12:10 p.m.

Concurrent Sessions I

(1) Current Practice on Opinions Relating to the Hague Securities Convention

Co-Chairs: *Sandra M. Rocks, Cleary Gottlieb Steen & Hamilton LLP, New York*
Edwin E. Smith, Morgan, Lewis & Bockius LLP, Boston and New York

Reporter: *Mario J. Ippolito, Paul Hastings LLP, New York*

Participants in this session will discuss how firms have been addressing the effectiveness of The Hague Securities Convention in their opinions in commercial finance and secondary sale transactions. The principles outlined in the various TriBar Opinion Committee Reports that address choice of law issues, including the Remedies Report (1998), the Report on Security Interests under the UCC (2003), the Report on Common Qualifications (2004), the Report on Secondary Sale Opinions (2011) and the Report on Choice of Law opinions (2013) will frame the discussion.

(Concurrent Sessions I continued next page)

10:40 – 12:10 p.m.

Concurrent Sessions I (cont'd)

(2) **Electronic Signatures and Records – Impacts on Opinion Practice**

Co-Chairs: *James A. Smith, Foley Hoag LLP, Boston*
Robert A. Wittie, K&L Gates LLP, Washington, D.C.

Reporter: *Sung Pak, O'Melveny & Myers LLP, New York*

Electronic signatures, from faxes and scanned copies of manually signed documents to emails and commercial products such as *DocuSign*[®], are becoming a primary way that contracts and corporate authorizations are executed; and the contracts and authorizations themselves, as well as prospectuses and other related deliverables, are often electronic records. This session will discuss the impact of statutes governing E-Signatures and E-Records on due authorization, due execution and delivery and other opinions, including consideration of the following:

- Statutes Governing E-Signatures, including
 - Uniform Electronic Transactions Act (UETA)
 - Federal Electronic Signatures in Global and National Commerce Act (E-SIGN)
 - New York State Electronic Signatures and Records Act (ESRA)
 - Delaware General Corporate Law Sections 141, 228 and 232 relating to the written consent of directors and shareholders and the definition of electronic signatures
- When are E-Signatures and E-Records just like paper and ink signatures and records and when are they not?
 - The requirement that parties consent to the use of E-Signatures
- Requirements when other law requires documents to be “in writing”
- Diligence required to assure that an E-Signature is genuine
- Practical practice problems associated with email consents
- Special Delaware provisions for E-Signature consents of Shareholders

Participants are urged to raise specific issues or scenarios they have encountered for discussion.

(3) **Impact of New Auditing Standards on Disclosure of Legal Contingencies**

Co-Chairs: *Noël J. Para, Alston & Bird LLP, New York*
Thomas W. White, Wilmer Cutler Pickering Hale and Dorr LLP,
Washington D.C.

Reporter: *Linda L. Curtis, Gibson, Dunn & Crutcher LLP, Los Angeles*

AS 3101, a new Public Company Accounting Oversight Board auditing standard now pending before the SEC, requires auditors to discuss “critical audit matters” (CAMs) in their reports on a reporting company’s financials. In some circumstances, CAMs could involve auditor disclosures about litigation and claim loss contingencies. This session will consider key aspects of the standard and how CAMs might implicate a client’s litigation position and applicable privileges under the auditor’s report and in connection with audit responses. The PCAOB’s proposal regarding use of specialists and its possible effect on legal opinions will also be considered.

12:10 – 12:20 p.m.

Break To Pick Up Lunch

12:20 – 1:20 p.m.

Recent Opinion Developments

Moderator: *John B. Power, O’Melveny & Myers, LLP, Los Angeles*

With:

Donald W. Glazer, Newton

Stanley Keller, Locke Lord LLP, Boston

Thomas J. Kim, Sidley Austin LLP, Washington, D.C.

Peter S. Szurley, McGuireWoods LLP, San Francisco

This panel will consider the impact of recent developments on opinion practice, including the following bar reports:

- ABA Federal Securities Law Opinions Subcommittee Report on Exchange Act Rule 14e for Debt Tender Offers
- Sample California Third Party Legal Opinion Letter for Personal Property Secured Financing Transaction

Panelists will also summarize recent cases, including:

- *Gemcap Lending, LLP vs. Quarles & Brady, LLP*, in which a federal district court in California granted a law firm’s motion for summary judgment in an action on its legal opinion
- *Nguyen v. View, Inc.*, in which the Delaware Chancery Court held that a corporate action deliberately rejected by a shareholder was not subject to ratification under Section 204 of the Delaware General Corporation Law
- *Oakland Police & Fire Retirement System v. Mayer Brown, LLP*, a 7th Circuit case discussing various theories of lawyer duty to third parties.

1:20 – 1:30 p.m.

Presentation of 2017 Fuld Award

Co-Chairs, Fuld Committee: *Julie M. Allen, Proskauer Rose LLP, New York*
J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York

1:30 – 2:20 p.m.

Opinion Issues Relating to Syndicated Loans Involving Blockchain

Chair: *Stephen J. Obie, Jones Day, New York/Washington, D.C.*

Panel: *Lewis R. Cohen, Hogan Lovells US LLP, New York*
Bridgett Marsh, Loan Syndications and Trading Association
John Mark Zeberkiewicz, Richards, Layton & Finger, P.A., Wilmington, D.C.

The panelists will discuss the following:

- What is blockchain technology and what is its potential impact on loan syndications and trading?
- What opinion issues are raised by blockchain technology for loan syndications and trading?
- Does blockchain technology for loan syndications and trading require any special limitations on opinions?

Concurrent Sessions II

- (1) **Opinion Issues Relating to the Difference between Amendments and Novations. See *Bash v. Textron Fin. Corp. (In re Fair Fin. Co.)*, 834 F.3d 651 (6th Cir. 2016)**

Co-Chairs: *Elizabeth A. Orelup, Quarles & Brady LLP, Milwaukee*
Lawrence Safran, Latham & Watkins LLP, New York

Reporter: *Hector E. Llorens Jr., King & Spalding LLP, Atlanta*

In the Fair Finance case, the Sixth Circuit vacated the district court decision that a fairly routine amendment and restatement of a loan agreement did not constitute a novation and remanded for further proceedings. Among the factors cited by the court as potentially leading to a novation were fairly routine contractual provisions included in most loan documents.

The session will focus on whether and how opinion practice has changed or should change in light of this decision. Are lien reaffirmation opinions still appropriate? Is additional language in the transaction documents appropriate or required in order to give such opinions? Would the case have come out the same way under NY law?

- (2) **Reverse Veil Piercing: Discussion of its Effect on Opinions Covering No Liability of Members of LLCs and LPs and Non-consolidation Opinions. See *Curci Investments, LLC v. Baldwin*, G052764 (Ct. App. CA. August 10, 2017)**

Co-Chairs: *Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, Wilmington*
Steven O. Weise, Proskauer Rose LLP, Los Angeles

Reporter: *Craig A. Adoor, Husch Blackwell LLP, Clayton (MO)*

The recent *Curci* decision on reverse veil piercing has drawn attention to the possible effect of *alter ego* theories on opinions concerning the potential personal liability of members of an LLC and limited partners of a limited partnership and non-consolidation opinions. This session will explore whether *alter ego* theories are, as a matter of customary practice, excluded from these opinions or whether opinion givers should consider additional opinion language to address this possible issue.

- (3) **Opinions Rendered in Connection with Cross-Border Financings**

Co-Chairs: *J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York*
Ettore A. Santucci, Goodwin Procter, LLP, Boston

Reporter: *Thomas P. Giblin, Jr., Morgan, Lewis & Bockius LLP, New York*

Requests for legal opinions in international lending transactions on agreements and collateral documents that may be governed by US or foreign law often raise different legal issues from similar domestic transactions. This session will consider particular opinions in cross-border transactions, including requests for enforceability opinions on contracts governed by foreign law, choice of law, forum selection, no violation of law, no breach or default, as well as related assumptions, exceptions and qualifications. Participants will discuss how to handle recurring opinion issues based on the jurisdictions whose law may be applicable in whole or in part (*e.g.*, the entire transaction vs. security interests or subsidiary guarantees). The discussion will identify opinion requests which might be rooted in widely accepted LSTA/LMA forms of agreements, but reflect practices in foreign jurisdictions that poorly align with U.S. customary opinion practice. The goal will be to identify recurring misunderstandings and reasonable solutions, or unbridgeable gaps.

3:50 – 4:50 p.m.

Current Ethics Issues Relating to Opinions

Co-Chairs: *William T. Burke, Williams & Connolly LLP, Washington, D.C.*
Craig D. Singer, Williams & Connolly LLP, Washington, D.C.

This panel will address legal ethics rules as they apply to opinion practitioners. The panelists will use a hypothetical posing difficult ethics questions concerning legal opinions, including the extent of a lawyer’s duty, if any, to disclose information in an opinion. The hypothetical will be “progressive,” meaning that it will advance a narrative posing ethics issues and then, after a discussion of those issues, the narrative will continue in a way that creates different and additional ethics issues. All participants will be encouraged to discuss the best resolution of these scenarios in light of ethics rules and opinion practice.

4:50 – 5:30 p.m.

Closing and Cocktails

Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago
Reade H. Ryan, Jr., Shearman & Sterling LLP, New York

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