

# IN OUR OPINION

## THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

Volume 16 — Number 2

Winter 2016 – 2017

James F. Fotenos and Susan Cooper Philpot, Editors

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## *FROM THE CHAIR*

I am pleased to share with you the Winter 2016-2017 issue of *In Our Opinion*. As I watched it come together over the holidays and the past few weeks, I was reminded of the incredible dedication of our editors, Jim Fotenos and Susan Cooper Philpot. Four times a year, without fail, they gather a wealth of content to share, curate it, and generally herd a large number of cats for the benefit of all members of our Committee. Pure clockwork — they make it look easy, but it is hard work. We owe them a huge debt of gratitude.

*The Williams Case: Failure to Deliver a Closing Opinion.* We welcome the return of The Litigator's Corner with a note by John Villa and Craig Singer on the risks lawyers face when delivery of their closing opinion is a condition to consummating a transaction and they conclude that they cannot give the opinion. Those risks were brought into sharp focus by *The Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, which was the subject of an article in the Summer 2016 issue of this Newsletter. The law firm was not sued in *Williams* and the Chancery Court dismissed the breach of contract claim, finding, among other things, that the law firm had acted in good faith in refusing to give the opinion that was a condition to closing because of its reasonable analysis of the tax laws. The decision is on appeal to the Delaware Supreme Court. The *Williams* context, however, highlights that there is risk both in refusing to give an opinion that is expected to be given and in giving an opinion that the opinion giver is not comfortable with. The greatest risk usually comes from actions that hurt the client, as opposed to a third party, because the client is in privity with the lawyer and can sue for malpractice. The third party recipient, however, also has privity when the lawyer gives an opinion and can sue if it relies to its detriment on an erroneous opinion that was not prepared with reasonable care. In addition, if the third party sues the client and the client loses, the client may then seek indemnity or contribution from the lawyer. The article offers helpful advice on how lawyers can assess and manage these risks.

*Fall 2016 WGLO Seminar.* This issue includes the semi-annual Addendum containing summaries of the programs at the Fall Seminar of the Working Group on Legal Opinions Foundation. These summaries have been edited by Gail Merel, with assistance and input from Jim, Susan and others. It was the usual team effort, with content that continues to get more impressive with every WGLO seminar.

*Fall 2016 Meeting of the Committee.* We had a successful Fall Meeting in Washington, D.C., in November, including a well-attended and highly substantive program, which our Committee co-sponsored with the Subcommittee on Securities Law Opinions of the ABA Committee on Federal Regulation of Securities, titled "*Exchange Act Rule 14e-1 Debt Tender Offers: Legal Opinions and Practice Issues.*" The panel, which included seasoned practitioners and a senior member of the SEC's Staff, covered a host of practice topics for structuring these highly technical transactions, as well as the key points of a forthcoming report on legal opinions delivered to dealer-managers in debt tender offers.

At our Committee's meeting we discussed the progress of the joint project of our Committee and WGLO on the Statement of Opinion Practices (the "Statement") and approved for distribution to bar and other opinion groups the Core Opinion Principles (Working Draft, dated October 4, 2016) (the "Core Principles"), a concise statement of key opinion principles drawn from the Statement that is designed to be attached to or incorporated by reference in opinion letters (as some firms do now with the Legal Opinion Principles). Both the Statement and the Core Principles are accessible from the front page of our Committee's website under "Discussion Documents."

*Spring 2017 Meeting of Committee.* Speaking of meetings, please do not forget to register for the Spring Meeting in New Orleans on April 6-8, 2017. As usual, meetings and programs of likely interest to most members of our Committee are highlighted in this issue of the Newsletter. Just the idea of New Orleans in the Spring warms the heart of those of us in the North. For those from warmer climates the prospect of seeing your favorite friends and colleagues will have to do. Whatever it is, please join us in New Orleans.

*Future Committee Projects.* This issue of the Newsletter marks the likely end of whatever honeymoon period I have as incoming chair of our Committee, so I am going to take the opportunity to share my thoughts on what I see as our Committee's agenda for my term. The world of legal opinions has been getting both simpler and more complex as we focus on issues at broader and deeper levels. Let me illustrate the point by listing some of the projects currently underway: (1) after publication of our Committee's report on cross-border opinions (*Cross-Border Closing Opinions of U.S. Counsel*, 71 *Bus. Law.* 139 (Winter 2015-2016)), we approved at the 2016 Fall Meeting a joint effort with interested opinion groups in other countries to promote some measure of convergence in cross-border opinion practice, with an initial focus on establishing a common understanding of core opinion principles and usage; (2) we also have in the works a report on opinions of local counsel; (3) our Committee and WGLO are working hard on completing the Statement and the Core Principles to update our Committee's *Legal Opinion Principles* (53 *Bus. Law.* 831 (1998)) in their entirety and selected provisions of the *Guidelines for the Preparation of Closing Opinions* (57 *Bus. Law.* 875 (2002)); (4) the TriBar Opinion Committee is nearing completion of a report on opinions on limited partnerships and is well into its work on a report on opinions on the enforceability of contract provisions allocating risk to the opinion giver's client; and (5) the Securities Law Opinions Subcommittee is nearing completion of a report on opinions in debt tender offers. This is an extraordinary amount of guidance on topics as

varied and important to large swaths of practicing lawyers as at any time that I am aware of, benefitting from the experience of a high number of talented practitioners.

Those who know me expect me to use improbable analogies to make my points, and I will not disappoint. Civilization began with somebody's idea of selecting seeds for repeat planting and harvesting by settled communities, rather than hunting and gathering, as a way of life. That eventually allowed some to devote time and energy to work other than what was needed to keep themselves alive — things like social norms, art and ethics. Add the power of specialization and collaboration and in due course you go from Hammurabi to Aristotle, Galileo and Einstein, and now to Watson. What does that have to do with legal opinions? I think of the 1989 gathering in Silverado as our equivalent of the decision to settle down and farm. That decision allowed some lawyers to specialize in the area of closing opinions, and decades later we have wonderful collaboration among groups of opinion specialists who collectively produce a wealth of guidance on which many more practicing lawyers rely.

*The Cross-Border Opinions Convergence Project.* Now what? Most human efforts struggle with the law of diminishing returns. Countering it requires reliance on specialization and collaboration to push the peak of the curve upward and to the right. Our Committee, WGLO, state bar opinion committees, TriBar and the Securities Law Opinions Subcommittee must work together to do so. I believe that the projects for which our Committee has taken the lead — cross-border opinion practice and, jointly with WGLO, updating the principles of customary opinion practice -- are the ones for which our Committee is the logical leader. I am particularly excited about our Committee's efforts to promote convergence in cross-jurisdictional opinion practice. With the ABA's imprimatur, we are the best-positioned bar group to reach outward to bar groups outside the United States, broadening our mission to serve practicing lawyers in an increasingly global marketplace. But this will be a slow-moving

project, likely one that faces significant hurdles in developing the right “charter” and a vision for the right work product – we may end up with more of an ongoing discussion than a traditional “project.” We’ll see. Therefore, as chair of our Committee I would like to outline another project that is more typical of the kind of work our Committee has undertaken in the past. I plan for this to be a topic for discussion at our meeting in New Orleans.

*Intellectual Property Opinions.* I would like our Committee to undertake work on a new report that would improve, rationalize and standardize practice for giving third-party closing opinions covering intellectual property issues in financing or acquisition transactions. The U.S. economy has evolved in such a way that intangibles like patents, trademarks and copyrights are often the most valuable assets of enterprises seeking access to capital, both private and public, or pursuing business combinations to grow in a competitive market. That is the case not only in the life sciences and pharmaceuticals sectors, but also in technology of all types, from hardware and software to fin-tech and health-tech, and even in financial services, where branded products and proprietary algorithms are increasingly determinants of success in the marketplace.

We no longer operate in a market where “IP opinions” are the province of a niche crowd of practitioners with deep, but narrow, technical expertise in one branch of science or technology. Those lawyers continue to be critical, of course, but increasingly operate within “general practice” firms as part of transactional teams that also include capital markets, leveraged finance and M&A lawyers. Too often, however, the playbook that these integrated teams pull out when it comes to third-party opinions dealing with IP issues is both dated and incomplete. I personally have witnessed deep disconnects, if not outright nasty fights, when underwriters serve up draft IP opinions in IPOs that are full of requests my firm and others stopped giving a decade ago. Unfortunately, when counsel for the opinion recipient says “*this is how it has always been done, show me where it says you*

*should not do it the same way here,*” opinion givers have little, if any, guidance from bar groups to back up their position.

I believe that, consistent with the collaboration/specialization imperative, our Committee should be the one to undertake a report in this area. Our Committee has core expertise on third-party opinion practice where financial institutions, investors and acquirers are the recipients, whereas substantive committees dealing with intellectual property may not have it because they typically deliver opinions to their own client. We can join forces with committees that have the necessary domain expertise, particularly in IP and M&A. We can also join forces with the Securities Law Opinions Subcommittee on the difficult topic of substantive IP opinions and negative assurance letters delivered by IP lawyers acting as special counsel in capital markets transactions, where current guidance does not exist or in the case of negative assurance letters generally does not go into great detail, although market practice has evolved significantly. This project fits squarely within our core mission of assisting practicing lawyers across practice areas, leveraging the broad reach of the ABA Business Law Section. It would also offer an opportunity for lawyers who have not been actively involved in our Committee to be exposed to our work.

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I cannot find better words to capture why I believe in the wisdom of undertaking this project than those of my co-pilot, Tim Hoxie, from the Summer 2016 issue of this Newsletter: “*Our Committee focuses on practice which, properly understood, represents the highest aspirations of our profession: to bring thoughtful professional judgment to important questions posed by our clients and other parties with whom they transact. The legal opinion practice, while but an aspect of what we all do for our clients, demands a great deal of us, both in terms of learning, teamwork, care and, perhaps most importantly, awareness and understanding of what we are asked to do and the circumstances in which we are asked to do it.*”

I am sure there are other projects that also could make sense for our Committee to undertake. I would ask you to think about my IP opinions proposal and come to New Orleans with your ideas and any other projects you think we should consider.

- Ettore A. Santucci, Chair  
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## FUTURE MEETINGS

**ABA Business Law Section  
Spring Meeting  
New Orleans, LA  
Hyatt Regency New Orleans  
April 6-8, 2017**

What follows are the presently scheduled times of meetings and programs of the Spring Meeting that may be of interest to members of the Legal Opinions Committee. For updated information on meeting times and places, check [here](#).<sup>1</sup>

### Legal Opinions Committee

#### Friday, April 7, 2017

Subcommittee Meeting  
(Survey of Opinion Practices):  
8:00 a.m. – 10:00 a.m.

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

Reception: 5:00 p.m. – 6:00 p.m.

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<sup>1</sup> The URL is  
[http://www.americanbar.org/groups/business\\_law/events/cle/spring\\_2017/schedule.html](http://www.americanbar.org/groups/business_law/events/cle/spring_2017/schedule.html)

### Law and Accounting Committee

#### Thursday, April 6, 2017

Program: “What Attorneys Need to Know  
About the New Revenue Recognition Rules”  
9:00 a.m. – 10:00 a.m.

#### Saturday, April 8, 2017

Committee Meeting:  
8:30 a.m. – 10:00 a.m.

### Professional Responsibility Committee

#### Thursday, April 6, 2017

Program: “Ethics in Negotiating and Preserving  
Privilege in M&A Transactions”  
8:00 a.m. – 10:00 a.m.

#### Friday, April 7, 2017

Program: “Beyond Conflicts: Advance Waivers  
and Other Engagement Letter Topics”  
8:00 a.m. – 10:00 a.m.

Committee Meeting:  
10:30 a.m. – 12:00 p.m.

### Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

#### Friday, April 7, 2017

Committee Meeting:  
2:00 p.m. – 3:00 p.m.

### Audit Responses Committee

#### Saturday, April 8, 2017

Committee Meeting:  
10:00 a.m. – 11:00 a.m.

**Working Group on  
Legal Opinions Foundation  
New York, New York  
May 8-9, 2017**

**ABA Business Law Section  
Annual Meeting  
Chicago, IL  
Sheraton Chicago Hotel & Towers  
The Gleacher Center  
September 14-16, 2017**

**ABA Business Law Section  
Fall Meeting  
Washington, D.C.  
The Ritz-Carlton Hotel  
November 17-18, 2017**

## BUSINESS LAW SECTION 2016 FALL MEETING

The Business Law Section held its Fall Meeting in Washington, D.C. on November 18-19, 2016. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Fall Meeting of interest to members of the Legal Opinions Committee.

### Legal Opinions Committee

The Legal Opinions Committee met on Friday, November 18, 2016. The following is a summary of the meeting.

*Statement of Opinion Practices.* Stan Keller updated the Committee on the status of the Statement of Opinion Practices (Exposure Draft, dated March 31, 2016) (the “Statement”). The Statement is a joint project of the Committee and the Working Group on Legal Opinions (“WGLO”). The purpose of the Statement is to update the Committee’s *Legal Opinion Principles* (53 Bus. Law. 831 (1998)) in its entirety and selected provisions of the Committee’s *Guidelines for the Preparation of Closing Opinions* (57 Bus. Law. 875 (2002)). The working group for the project consists of Stan and Ken Jacobson as co-chairs, Steve Weise as reporter, and Pete Ezell and Steve Tarry as co-reporters, as well as representatives of the Committee and representatives of a number of state bar associations.

The Statement has been circulated to interested opinion groups, including numerous bar associations. The Working Group is reviewing comments received to date. Separately, the Working Group has developed the Core Principles (Working Draft, dated October 4, 2016) (the “Core Principles”), a concise statement of key opinion principles, drawn from the Statement, that is designed for use by law firms that wish to incorporate them

by reference or attach them to opinion letters (as some firms now do with the existing *Legal Opinion Principles*). The Core Principles have been approved by the Board of Directors of WGLO for distribution to the same interested opinion groups that received the Statement. After discussion, the Committee approved the Core Principles for distribution. Both the Statement and the Core Principles are available for review on the Committee’s website under “Discussion Documents.”<sup>2</sup>

Stan concluded by noting that the Working Group plans to consider in the future possibly expanding the Statement to cover additional topics, but that such plans will not interfere with the effort to secure approval of the Statement in its current form.

*Future Committee Projects.* Chair Ettore Santucci presented his thoughts on future projects for the Committee. Ettore, who served as the reporter for the Committee’s report on cross-border opinions (*Cross-Border Closing Opinions of U.S. Counsel*, 71 Bus. Law. 139 (Winter 2015-2016)), proposed that the Committee explore putting together a working group from the U.S. and other countries to consider whether common ground exists for reaching agreement on basic principles applicable to closing opinions delivered in cross-border transactions. A wide-ranging discussion followed on the scope of such a project. The consensus of the Committee was that the project was worth pursuing, initially by a small group of lawyers from countries (such as England, France, Germany, The Netherlands, Italy, and the U.S.) whose companies and financial institutions are active in cross-border transactions, particularly in international financial markets. Because of the many differences, both procedural and substantive, among these countries’ practices, the focus should be on identifying core opinion principles that, if followed, could facilitate the giving of

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<sup>2</sup> The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

opinions in cross-border transactions. Points made during the discussion included:

- The distinctions between opinions to one's own client, opinions to one's client's counterparty, and "hybrid" transactional opinions (e.g. opinions by counsel to its own bank client for regulatory compliance/internal policy reasons). Third-party opinions are not as common in foreign jurisdictions as they are in the U.S., although the practice of delivering "closing opinions" is becoming more common, driven by U.S. banks and investment firms. To the extent that different types of closing opinions cover similar matters, the working group could explore whether covering more than pure "U.S.-style" third-party closing opinions might be worthwhile.
- U.S. customary opinion practice is having broad influence abroad, as evidenced by Jan Marten van Dijk's recent book "On Opinions," a 2016 publication discussing closing opinions under Dutch law.
- The importance of involving key opinion standard setters in foreign countries and also of including in the working group counsel from major international banks, whose input, and ultimately buy-in, will be a prerequisite for success.

The Chair asked Committee members to send him suggestions of individuals and groups that could be asked to participate in the project.

*Recent Developments.* Don Glazer discussed the SEC's enforcement action against an opinion giver (decided in the SEC's favor by the District Court for the Southern District of New York and affirmed by the Court of Appeals for the Second Circuit (see *SEC v.*

*Sourlis*, \_\_ F.3d \_\_, 2016 WL 7093927 (Dec. 6, 2016)), in which the Commission asserted, and the courts found, that an opinion giver violated Section 5 of the Securities Act of 1933 by giving an incorrect opinion that unregistered shares could be freely resold without registration and violated Rule 10b-5 under the Securities Exchange Act of 1934 by failing to conduct the investigation described in her opinion letter to support that opinion. The consensus of Don and others who commented at the meeting was that the decision is another example of the special care that must be taken in giving opinions addressing resales of unregistered securities.

*Local Counsel Opinion Project.* Philip Schwartz (of Akerman LLP) updated the Committee by telephone on this project. The intent of the drafting committee (which includes Phil, Frank Garcia (of Norton Rose Fulbright US LLP) and Bill Yemc (of Richards, Layton & Finger, P.A.) is to prepare a concise principles-based report that focuses on issues of particular relevance to opinions given by local counsel. The steering committee overseeing the project consists of some 17 members. The current focus of the drafting committee is on those issues typically addressed by local counsel. The drafting committee hopes to circulate a third draft of its report to the steering committee by the end of 2016 and to circulate a discussion draft more widely for comment by the spring of 2017.

*Next Meeting.* The next meeting of the Committee will be held at the Section's Spring Meeting in New Orleans, April 6-8, 2017.

- James F. Fotenos  
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Hennigh LLP  
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## Audit Responses Committee

The Committee met on Friday, November 18, 2016. The principal discussion points are summarized below.

*Confirmation.com.* The Committee continued its discussion from prior meetings regarding communications with Confirmation.com and the efforts of a working group of the Committee. Specifically, the Committee discussed a proposed Committee Statement and short-form user agreement regarding Confirmation.com that was circulated to the Committee in advance of the meeting. Thomas White and Alan Wilson reported that Confirmation.com had accepted comments provided by the Committee with respect to the short-form user agreement and that Confirmation.com would begin using such agreement for all law firm responders using the Confirmation.com platform. It was also reported that Confirmation.com had indicated that it had undertaken changes to its user interface following engagement with members of the Committee and with several law firms. As in prior meetings, it was emphasized that the Committee takes no position with respect to whether law firms should or should not use electronic audit letter platforms, including Confirmation.com. The Committee noted that each individual law firm should make its own evaluation and determination regarding such platforms.

Noël Para moved and Mr. White seconded a motion that the proposed Committee Statement be adopted as a statement of the Committee, subject to the addition of clarifying sentences reflecting that the guidance contained in the Statement would generally apply to other electronic audit letter platforms and that the Committee would be willing to engage in discussions with such other providers if appropriate. The Committee approved the motion, and Mr. White and Mr. Wilson noted that they would coordinate the final draft of the Statement, which would then be circulated to the Committee and posted to the Committee's

website with the short-form user agreement attached thereto.

*Reporting Government Investigations in Audit Response Letters.* The Committee next discussed the disclosure of government investigations in audit response letters in light of the precedents discussed at the Committee's April 9, 2016 and September 10, 2016 meetings. Stan Keller discussed his recent article, "Dealing with Government Investigations in Audit Responses," which appeared in the Fall 2016 issue of *In Our Opinion*, the quarterly newsletter of the Legal Opinions Committee. Members of the Committee supplemented the discussion with personal experiences involving the ever-evolving nature of government investigations. The Committee discussed three common difficult scenarios involving government investigations – (1) pending investigations when no charges against the clients have been overtly threatened, (2) *qui tam* proceedings, and (3) SEC enforcement and Wells notices.

In discussing pending government investigations, Mr. Keller referenced the Second Report of the Committee on Audit Inquiry Responses Regarding Initial Implementation and noted the Second Report's conclusion that "[w]here no charges have been made against the client or with respect to its conduct, such situations do not involve overtly threatened litigation, since there has not been manifested to the client an awareness of and present intention to assert a possible claim or assessment as contemplated by Paragraph 5(c) of the ABA Statement of Policy . . . ." Members noted the Second Circuit's holding in *Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016), which suggests, by contrast, that in certain circumstances where a claimant has knowledge of sufficient facts that could give rise to a claim, there may have been manifested to the client an awareness of a possible claim or assessment (although it would appear that the "present intention to assert" prong might not be satisfied in such case). For instance, the receipt of a subpoena often would not constitute the manifestation of awareness of a possible claim, though awareness of additional facts should be

considered, which may alter the outcome of the applicable disclosure analysis.

More broadly, Mr. Keller suggested that disclosure by lawyers and clients in the context of government investigations often requires the lawyer to anticipate how an investigation will unfold. With respect to unasserted claims in the government investigations context, particularly, lawyers should engage with their clients to help assess whether an investigating government agency has manifested an awareness of a possible claim or assessment, including whether such claim is likely to ripen. In determining the probability of assertion of an unasserted claim and in making this determination, consideration should be given to the particular agency involved, the underlying facts known by the client, and the overall circumstances of the investigation, including the procedural posture. Mr. Keller commented that this evaluation should take a future-oriented view and project the likely outcome of such matters. Members of the Committee remarked that the ultimate question regarding outside counsel's disclosure obligations in the context of unasserted claims typically depends on the client and whether the client discloses the matter in its financial statements.

The Committee next discussed the unique disclosure obstacles that clients face when dealing with *qui tam* proceedings. In this regard, members of the Committee remarked that lawyers and their clients commonly engage with the Department of Justice to coordinate an agreeable form of disclosure without jeopardizing the confidential nature of the *qui tam* proceedings. In the context of SEC investigations and Wells notices, several members of the Committee observed that lawyers often advise clients, as a practical matter, to provide financial statement disclosure following the receipt of a Wells notice. Notwithstanding, members of the Committee referenced discussions in previous meetings of *In re Lions Gate Entertainment Corp. Securities Litigation*, 165 F. Supp. 3d 1 (S.D.N.Y. 2016), which held that receipt of a Wells Notice regarding an SEC investigation did not amount

to a pending proceeding or a proceeding “‘known to be contemplated by governmental authorities’ under Item 103” of Regulation S-K; nor did the Wells Notice constitute “pending or threatened litigation” for purposes of ASC 450.

*Future Committee Projects.* The Committee next discussed ideas for future Committee projects. It was suggested that the Committee prepare a statement containing guidance regarding disclosure considerations when dealing with government investigations. Mr. Keller and Mr. Para agreed to further discuss the potential scope of such a project and to report back to the Committee.

*Next Meeting.* The Committee's next meeting is scheduled for the Business Law Section's Spring Meeting in New Orleans, LA, on Saturday, April 8, at 10:00 a.m. CDT.

- Noël J. Para, Chair<sup>3</sup>  
Alston & Bird LLP  
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## Law and Accounting Committee

The Law and Accounting Committee met on November 18, 2016. The principal items of discussion are summarized below.

*PCAOB Discussion.* Karen C. Wiedemann, Associate Counsel to Chief Auditor, Office of the Chief Auditor of the Public Company Accounting Oversight Board, attended the meeting. Karen discussed current PCAOB projects, including: (i) the Standard Setting Agenda; (ii) Accounting Estimates; (iii) Supervision of Lead Auditor; and (iv) Quality Control Standards.

*FASB Discussion.* Marie M. Kish, Partner, Professional Practice - Auditing of Ernst & Young, LLP also attended the meeting in person. Ms. Kish provided a 2016 year-end

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<sup>3</sup> Alan 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.

corporate accounting reporting update. Ms. Kish's discussion focused on corporate clients' preparing for the implementation of the following standards: (i) revenue recognition; (ii) leases; and (iii) credit losses. Ms. Kish also discussed the possible impact of Brexit on potential accounting issues.

*FASB Update.* Randy McClanahan gave an update of current FASB developments, including a discussion of the Committee leadership's telephone conference with James L. Kroeker, Vice Chairman of the FASB.

*Next Meeting.* The next meeting of the Committee will be held at the Section's Spring Meeting in New Orleans, Louisiana on Saturday, April 8, 2017.

- Randall D. McClanahan, Chair  
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## THE LITIGATOR'S CORNER

### Just Say No? Managing the Litigation Risk of Refusing to Give an Opinion

Lawyers often are retained to work on transactions for which they are expected to deliver one or more closing opinions. The closing opinion may be a condition to one or more parties' obligation to proceed with the transaction. What should a lawyer do when, after agreeing to undertake a representation that contemplates an opinion, she concludes that she cannot give the opinion?

The recent case of *The Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, brings this issue

into focus.<sup>4</sup> To simplify the complex facts, The Williams Cos. ("Williams") and Energy Transfer Equity (the "Partnership") entered into a multibillion-dollar merger agreement that contemplated, as one leg of the transaction, a contribution of Williams's assets to the Partnership. As a condition of both the Partnership's and Williams's obligation to close, one of the Partnership's outside law firms was to deliver a tax opinion to the effect that the contribution "should" be treated as a tax-free exchange under Section 721(a) of the Internal Revenue Code. The law firm believed, at the time the merger agreement was signed, that it could give that "should" opinion, and it so indicated to the parties. After the agreement was signed, but before the transaction was scheduled to close, the economic landscape changed and the transaction became financially unattractive to the Partnership, the law firm's client. The law firm subsequently concluded that it had overlooked the significance of a decline in the market value of the Partnership's outstanding units on the potential tax consequences of the transaction and that, as a result of that decline, the firm could not give the "should" opinion that was a condition of the transaction.

Williams sued the Partnership (not the law firm, which did not represent Williams) for failing to use commercially reasonable efforts to cause the law firm to give the opinion. The Chancery Court dismissed the claim, finding, among other things, that the law firm had acted in good faith in refusing to give the opinion because of its reasonable analysis of the tax laws.

#### *Litigation Risks*

Though the law firm in the *Williams* case was not sued, the situation provides context to consider the litigation risk to a lawyer of refusing to give an opinion that is expected to be given, and the corresponding risk of giving one

<sup>4</sup> 2016 WL 3576682 (Del. Ch. June 24, 2016). For a note on the *Williams* case, see "Recent Developments" in the Summer 2016 (vol. 15, no. 4) issue of the newsletter at 10-15.

that the opinion giver is not comfortable delivering. The risks of either course are palpable. If the lawyer does not deliver the expected opinion, someone's ox may be gored – the client or the counterparty, or both, depending on the economic circumstances. That someone may well seek recourse from the lawyer or the lawyer's client. On the other hand, if the lawyer gives the opinion, then the lawyer risks a malpractice or negligent misrepresentation claim if the opinion turns out to be wrong. Because the opinion would be given to the counterparty, the lawyer may be exposed to suit by the counterparty or the client if either suffers resulting injury. In addition, even if the lawyer were tempted to give the opinion to help close the transaction, she may be constrained by the ethics rules, which prohibit a lawyer from knowingly making a false statement of fact or law to a third party.<sup>5</sup>

Authorities on the question of refusing to give closing opinions are sparse, and we are aware of no case or ethics opinion that specifically discusses the scenario presented in this article. A 1974 ABA Formal Opinion observed, in the context of an opinion that certain securities need not be registered under the Securities Act of 1933, that “[w]here the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the relevant facts, or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion.”<sup>6</sup> The ABA opinion may be of limited relevance, as it is expressly limited to the securities context and focuses primarily on the extent of a lawyer's duty to investigate the facts before opining that a transaction is exempt from registration under the 1933 Act. It does confirm, however, that there are circumstances where a lawyer who is asked to deliver an opinion as part of her engagement can appropriately refuse to deliver the requested opinion.

According to the ABA Legal Opinions Committee's *Guidelines for the Preparation of Closing Opinions*, which, among other things, seeks to describe how lawyers giving and receiving opinions should behave toward each other as a matter of general opinion practice, “an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these *Guidelines* and the opinion-giver has the requisite expertise and in its professional judgment is able to render the opinion.”<sup>7</sup> This Guideline, which appears under the heading “Golden Rule,” does not address the circumstance where, as in *Williams*, an opinion is a condition of a transaction for which the lawyer already has undertaken to serve as counsel and the parties have agreed that the lawyer's opinion is a condition of closing. And, of course, the Guidelines do not purport to state mandatory rules of law.

### *Suggested Course of Action*

Considering general principles of ethics and opinion practice, and the competing litigation risks, we suggest the following broad-stroke ground rules. In doing so, we do not mean to express any opinion about the conduct of the lawyers in *Williams* or any other specific case.

First, when a lawyer is asked to accept an engagement that anticipates her delivery of an opinion as a condition of closing a transaction, she is well advised to think hard about the opinion before expressing confidence that she can give it.

Second, as a general matter, having accepted the assignment, the lawyer should deliver the opinion if she thinks it is correct and the transaction is legitimate, and if the client approves delivery of the opinion. This will be

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<sup>5</sup> See ABA Model R. Prof. Cond. 4.1(a), 8.4(c).

<sup>6</sup> ABA Formal Op. 335 (1974).

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<sup>7</sup> Committee on Legal Opinions, ABA Business Law Section, *Guidelines for the Preparation of Closing Opinions* ¶3.1, 57 Bus. Law. 875, 878 (2002).

the baseline expectation of the client and the counterparty, assuming they are acting in good faith. Even if the client for some reason now prefers that the lawyer *not* give the opinion, declining to give the opinion under false pretenses would be risky (and perhaps unethical).<sup>8</sup>

Third, if the lawyer is uncomfortable with the substance of the opinion – if the lawyer thinks the opinion is wrong or does not have confidence that it is right – then the lawyer should not give the opinion. This sometimes happens even after a lawyer has accepted an engagement that contemplates a closing opinion. The *Williams* facts are unusual because the lawyers initially believed that they could give the opinion and later concluded that they had been mistaken, in part because they did not contemplate the impact of changed circumstances. In most cases, the lawyer’s initial analysis will match her final analysis. But even when the lawyer’s initial instinct was accurate based on the information available at the time, additional facts or changed circumstances may affect the basis for the opinion. When that happens, giving an opinion that the lawyer is not confident is correct may be a recipe for meritorious litigation against the lawyer.

A lawyer contemplating whether to refuse to give an opinion should also consider Model Rule 1.16. That ethics rule concerns when a lawyer may, or must, withdraw from an engagement. While refusing to give an opinion need not be tantamount to a withdrawal, in some circumstances it might be. In jurisdictions following the ABA Model Rules, withdrawal is

mandatory when continued representation would violate a rule of professional conduct – for example, the prohibition on making false statements.<sup>9</sup> Withdrawal is permissible when (among other more specific bases) “good cause” exists.<sup>10</sup> In our view, even where refusal to give an opinion would amount to withdrawing from a representation, Rule 1.16 should provide ample basis for the lawyer to refuse to give an opinion that she considers unsound. Litigation risk still exists, however, if the injured party can claim that the lawyer’s concern about the opinion is a pretext for some other motivation on the lawyer’s part.

The lawyer who is considering refusing to give an opinion should also consider the risk of litigation emanating from the non-client counterparty, assuming that (as in *Williams*) the counterparty expects the lawyer to deliver the opinion so that the transaction will close. Typically, non-clients do not have standing to sue lawyers for malpractice, and if the lawyer does not provide advice (i.e., an opinion) or make representations on the lawyer’s behalf directly to the counterparty with the intent to provide guidance to the counterparty, who justifiably relies on the advice, then at least in most jurisdictions the counterparty should have no basis for a direct claim for negligence or breach of contract against the lawyer.<sup>11</sup> As in *Williams*, however, the counterparty could sue the client, and the client might then have a claim over against the lawyer seeking to recover some or all of the damages the client may be required to pay to the counterparty. Whether such a claim over would be meritorious will depend on the facts and the law of the jurisdiction, but it is a risk the prospective opinion giver (or refuser) should keep in mind.

Fourth, as a practical matter, when the lawyer has qualms about the opinion, the lawyer ordinarily should discuss it with the client and

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<sup>8</sup> We do not here deal with a circumstance where the client actually instructs the lawyer *not* to give the opinion notwithstanding the client’s contractual promise to the counterparty. In that circumstance, which we have not encountered in any reported cases, the lawyer’s ethical duties to the client likely would preclude delivering the opinion, and it is difficult to envision the counterparty successfully suing the lawyer for the consequence of complying with her ethical duties absent some improper conduct by the lawyer.

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<sup>9</sup> ABA Model R. Prof. Cond. 1.16(a)(1).

<sup>10</sup> ABA Model R. Prof. Cond. 1.16(b)(7).

<sup>11</sup> Of course, the rules of privity and standing may vary by jurisdiction and the facts of a particular case.

consider alternatives. Depending on the circumstances and the nature of the contemplated opinion, it may be possible to give a modified opinion that the lawyer is comfortable with and that the client and counterparty will accept. Most of the time (although not in *Williams*) both parties to the transaction will be motivated to close the transaction successfully, and all will be incentivized to find a solution.

If consultation does not lead to a solution, there is litigation risk for the lawyer in any course. The greatest risk usually comes from actions that hurt the client as opposed to a third party because the client is in privity with the lawyer and can sue for malpractice. As noted above, however, that can change when the lawyer gives an opinion to a third party because then the recipient has privity and can sue if it relies to its detriment on an erroneous opinion that falls below the standard of reasonable care. And the calculus can change when the third party sues the client, as the client may then try to shift the damages to the lawyer. Lawyers should carefully balance the risks in each case. In doubtful cases, the lawyer should seek advice from the firm's general counsel or from outside counsel.

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## LEGAL OPINION REPORTS

(See Chart of Published and Pending Reports on following page.)

## Chart of Published and Pending Reports

**[Editors' Note:** The chart of published and pending legal opinion reports below has been prepared by John Power, O' Melveny & Myers LLP, Los Angeles, and is current through December 31, 2016.]

### A. Recently Published Reports<sup>12</sup>

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|                                                      |      |                                                                                                                                                                                        |
|------------------------------------------------------|------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ABA Business Law Section                             | 2009 | Effect of FIN 48 – Audit Responses Committee<br>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<br>Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee<br>Revised Handbook – Audit Responses Committee |
|                                                      | 2014 | Updates to Audit Response Letters – Audit Responses Committee                                                                                                                          |
|                                                      | 2015 | No Registration Opinions (Update) – Securities Law Opinions Subcommittee<br>Cross-Border Closing Opinions of U.S. Counsel                                                              |
|                                                      | 2016 | Report on Use of Confirmation.com – Audit Responses Committee                                                                                                                          |
|                                                      |      |                                                                                                                                                                                        |
|                                                      |      |                                                                                                                                                                                        |
|                                                      |      |                                                                                                                                                                                        |
| ABA Real Property Section (and others) <sup>13</sup> | 2012 | Real Estate Finance Opinion Report of 2012                                                                                                                                             |
| Arizona                                              | 2004 | Comprehensive Report                                                                                                                                                                   |
| California                                           | 2007 | Remedies Opinion Report Update<br>Comprehensive Report Update                                                                                                                          |
|                                                      | 2009 | Venture Capital Opinions                                                                                                                                                               |
|                                                      | 2014 | Sample Venture Capital Financing Opinion                                                                                                                                               |
|                                                      | 2015 | Revised Sample Opinion                                                                                                                                                                 |
|                                                      |      |                                                                                                                                                                                        |
| Florida                                              | 2011 | Comprehensive Report Update                                                                                                                                                            |
| Georgia                                              | 2009 | Real Estate Secured Transactions Opinions Report                                                                                                                                       |

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<sup>12</sup> These reports are available (or soon will be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, <http://apps.americanbar.org/buslaw/tribar/>. Reports marked with an asterisk have been added to this Chart since the publication of the Chart in the last quarterly issue of this Newsletter.

<sup>13</sup> This Report is 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").

## Recently Published Reports (continued)

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|                                      |      |                                                                                   |
|--------------------------------------|------|-----------------------------------------------------------------------------------|
| City of London                       | 2011 | Guide                                                                             |
| Maryland                             | 2009 | Update to Comprehensive Report                                                    |
| Michigan                             | 2009 | Statement                                                                         |
|                                      | 2010 | Report                                                                            |
| Multiple Bar Associations            | 2008 | Customary Practice Statement                                                      |
| Multiple Law Firms                   | 2016 | White Paper- Trust Indenture Act §316(b)                                          |
| National Association of Bond Lawyers | 2011 | Function and Professional Responsibilities of Bond Counsel                        |
|                                      | 2013 | Model Bond Opinion                                                                |
|                                      | 2014 | 501(c)(3) Opinions                                                                |
| National Venture Capital Association | 2013 | Model Legal Opinion                                                               |
| New York                             | 2009 | Substantive Consolidation – Bar of the City of New York                           |
|                                      | 2012 | Tax Opinions in Registered Offerings – New York State Bar Association Tax Section |
| North Carolina                       | 2009 | Supplement to Comprehensive Report                                                |
| Pennsylvania                         | 2007 | Update                                                                            |
| South Carolina                       | 2014 | Comprehensive Report                                                              |
| Tennessee                            | 2011 | Report                                                                            |
| Texas                                | 2006 | Supplement Regarding Opinions on Indemnification Provisions                       |
|                                      | 2009 | Supplement Regarding ABA Principles and Guidelines                                |
|                                      | 2012 | Supplement Regarding Entity Status, Power and Authority Opinions                  |
|                                      | 2013 | Supplement Regarding Changes to Good Standing Procedures                          |
| TriBar                               | 2008 | Preferred Stock                                                                   |
|                                      | 2011 | Secondary Sales of Securities                                                     |
|                                      | 2011 | LLC Membership Interests                                                          |
|                                      | 2013 | Choice of Law                                                                     |

## B. Pending Reports

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|                                               |                                                                                                                                                                                                                                                                                                                                                                              |
|-----------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ABA Business Law Section                      | Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee<br>Updated Survey – Legal Opinions Committee<br>Debt Tender Offers – Securities Law Opinions Subcommittee<br>Resale Opinions – Securities Law Opinions Subcommittee<br>Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee & Legal Opinions Committee |
| California                                    | Opinions on LLCs & Partnerships<br>Sample Personal Property Security Interest Opinion<br>Exceptions and Other Qualifications to the Remedies Opinion                                                                                                                                                                                                                         |
| Multiple Bar Associations                     | Statement of Opinion Practices<br>Core Opinion Principles<br>Local Counsel Opinions <sup>14</sup>                                                                                                                                                                                                                                                                            |
| National Association of Bond Lawyers          | Update of Model Letter of Underwriters' Counsel                                                                                                                                                                                                                                                                                                                              |
| Real Estate Opinions Committees <sup>15</sup> | Local Counsel Opinions                                                                                                                                                                                                                                                                                                                                                       |
| Texas                                         | Comprehensive Report Update                                                                                                                                                                                                                                                                                                                                                  |
| TriBar                                        | Limited Partnership Opinions<br>Opinions on Clauses Shifting Risk<br>Bring Down Opinions                                                                                                                                                                                                                                                                                     |
| Washington                                    | Comprehensive Report                                                                                                                                                                                                                                                                                                                                                         |

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<sup>14</sup> A joint project of the ABA Legal Opinions Committee, the Working Group on Legal Opinions, and other bar groups.

<sup>15</sup> See note 13.

## 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](#).<sup>16</sup> 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](mailto:amills@wcsr.com).

## NEXT NEWSLETTER

We expect the next newsletter to be circulated in April 2017. Please forward cases, news and items of interest to Ettore Santucci ([esantucci@goodwinprocter.com](mailto:esantucci@goodwinprocter.com)), Jim Fotenos ([jfotenos@greeneradovsky.com](mailto:jfotenos@greeneradovsky.com)), or Susan Cooper Philpot ([philpotsc@cooley.com](mailto:philpotsc@cooley.com))

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<sup>16</sup> The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

**Addendum**

**Working Group on Legal Opinions Foundation**

**Fall 2016 Legal Opinion Seminar Summaries**

**Addendum**  
**Working Group on Legal Opinions Foundation**  
**Fall 2016 Legal Opinion Seminar Summaries**

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**WORKING GROUP ON LEGAL OPINIONS FOUNDATION  
FALL 2016 OPINION SEMINAR SUMMARIES**

The following summaries have been prepared to provide an overview of the subjects covered at the panel sessions and concurrent discussion sessions held in New York on October 31 and November 1, 2016. Editorial oversight and input was provided by Gail Merel of Andrews Kurth Kenyon LLP, WGLO's Editor-in-Chief, with, for purposes of inclusion in this Addendum, input from the editors of the ABA Legal Opinions Committee's Newsletter (Jim Fotenos and Susan Cooper Philpot). The next WGLO seminar is scheduled to be held on May 8-9, 2017 in New York.

The summaries do not necessarily reflect the views of the chairs, co-chairs, panelists or reporters of any particular session, nor do they constitute statements of the views of any of their respective law firms, or of WGLO or any other organization.

**DINNER SESSIONS:**

Four Separate Sessions Considered the Same Topic: How Can Law Firms Establish a Legal Opinion System that (a) Educates, (b) Prevents Costly Mistakes, and (c) Identifies "Red Flags"?

**1. How Can Law Firms Establish a Legal Opinion System that (a) Educates, (b) Prevents Costly Mistakes and (c) Identifies "Red Flags"?**

*Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair*

*Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair and Reporter*

This dinner discussion focused on what a law firm could do to (a) manage the giving of legal opinions and mitigate the attendant risks, and (b) educate and train its partners and associates in the giving, and receiving, of legal opinions.

With regard to managing the giving of legal opinions and mitigating the attendant risks, the dinner group made these suggestions:

- A law firm might require that each legal opinion rendered by the firm be reviewed by a member of the opinion committee or by two partners, with the copy of such legal opinion reflecting the names or initials of such reviewing partner or partners.
- A law firm might require or suggest that, if the firm is giving any legal opinion covering a specialized subject (like taxes, intellectual property, or the Investment Company Act), a partner who specializes in such subject review the opinion.
- A law firm might require or suggest the use of forms of legal opinions, and:
  - a. If the firm uses forms of opinions, it would be helpful for a partner periodically to check that the forms are properly used.
  - b. A law firm might have different forms for different practices (like a bank finance form and a capital markets form), though preferably not so different that the same issue is covered differently.

- c. Opinions from the same firm that use different words for the same issue may create problems.
- A law firm might have the opinion committee, or selected members of the opinion committee – or the firm’s opinion expert – actually read and review selected opinions periodically to see if such opinions were properly prepared. Alternatively, a law firm might have an annual “opinion audit” to check whether or not the firm’s opinions are following the firm’s opinion policies.
- A law firm might require or suggest that if a partner is preparing a legal opinion covering a subject with which the partner is not familiar, such partner should consult with another partner, or an outside lawyer, who specializes in the subject matter (*e.g.* an opinion covering Delaware law).
- A law firm might require or suggest a back-up supporting memorandum to cover the items, or selected items (such as a UCC Article 9 opinion), set forth in the legal opinion.
- A law firm might regularly make known to its lawyers the availability of various firm lawyers, or outside lawyers, who have specialties that might be useful.
- A law firm might require or arrange for cooperation between its opinion committee and its risk management/conflicts/ethics committee.

With respect to educating and training partners and associates in the giving, and receiving, of legal opinions, the discussion group made these suggestions:

- A law firm might have different education and training programs for different levels or kinds of attorneys, such as:
  - a. First-to-third year associates;
  - b. Fourth-to-seventh year associates;
  - c. Beginning-to-middle level partners;
  - d. Older partners;
  - e. Lateral partners; and
  - f. Rainmaker partners.

However, education or training programs need to be scheduled so as to avoid getting in the way of doing deals.

- A law firm might make opinion resources readily available to all lawyers.
- A law firm’s expert opinion partner might send to each lawyer in the firm a weekly, or periodic, “opinion tip”, opinion reminder or update on recent developments affecting opinion practice.

- A law firm might have an “opinion blog” to inform its lawyers concerning opinion developments.
- A law firm might require or suggest that each lawyer view a video by an opinion expert, who would spell out the risks and precautions of giving, and receiving, legal opinions or would discuss factors to consider in giving opinions covering a specified area (such as Delaware law).

## 2. **How Can Law Firms Establish a Legal Opinion System that (a) Educates, (b) Prevents Costly Mistakes and (c) Identifies “Red Flags”?**

*E. Carolan Berkley, Stradley Ronon Stevens & Young LLP, Philadelphia, Co-Chair*

*James A. Smith, Foley, Hoag LLP, Boston, Co-Chair*

*Elihu F. Robertson, Milbank, Tweed, Hadley & McCloy LLP, New York, Reporter*

The discussion began with the question of how law firms represented in the room are addressing “Education and Training”. Initial attention focused on how frequently opinion committees meet and how they disseminate developments relative to opinion practice to the firm. One participant described a relatively rigorously adhered to schedule of in-person meetings of the firm’s full opinion committee at least twice monthly. However, except for at least one meeting annually, there was no common approach as to frequency of meetings, with some committees only meeting occasionally and then possibly only by email. The participants’ committees use various means in addition to meetings to update lawyers in the firm, including newsletters (typically on-line) and case law updates. The discussion turned to the use of forms of opinion and databases (of outbound and inbound opinions) as ways of keeping current. Nevertheless, many of the firms represented at the session are not keeping a centralized file of inbound opinions. There was consensus that an important role of an opinion committee is to address and resolve inbound opinion issues promptly and effectively.

Junior partner and associate training was discussed briefly. Most of the participants’ firms seem to rely on some combination of forms and programs to train lawyers (both partners and associates) in opinion practice. Several attendees suggested including “younger” lawyers in WGLO programs and referred to the previous “boot camp” sponsored by WGLO. Others noted space limitations and other challenges that increasing the number of attendees at WGLO semi-annual events would present.

Substantial attention focused on lateral partners and what opinion committees are doing to cause these partners to observe firm norms on opinion practice. Most of the represented firms seem to have a “one on one” session with each lateral partner to acquaint him or her with firm opinion policies and procedures. There was a general sense of unease with the effectiveness of integration and acculturation of laterals. One observer noted that even though, overall, approximately one-half of lateral moves have proved unsuccessful for the receiving firm, it appears that firms generally monitor or affirmatively work at integrating laterals for only a few months, suggesting a longer term, more institutionalized approach to lateral integration may be worth considering. Second partner review requirements and mandating involvement of “legacy” partners may also be useful measures. Several commenters suggested the role “legacy” associates could play in preparing marked versions of proposed opinions against a firm’s forms. It was noted that while problems regarding opinion practice and lateral partners are relatively rare, they can be very severe when they arise.

The discussion digressed into some related topics, including quality control (and the preservation of attorney-client privilege) for providing letters of advice to one’s own client, in contrast to formal third-party closing opinions, and creating and preserving opinion backup. Particular problems were noted in

situations in which the opinion called for is narrowly limited in scope in relation to the subject transaction taken as a whole (for example, when counsel (sometimes called “local counsel”) is retained to opine on legal considerations under the law of a particular jurisdiction that is viewed by the principals and others involved in the transaction as ancillary to the transaction as a whole).

Considerable comment was made about backup certificates and enforcing compliance with firm requirements. It was noted that “smaller” transactions often create greater challenges in this regard. In some areas, such as venture financing, opinions are becoming less common. To some extent the decline in the use of opinions may stem from cost concerns. There was general consensus that opinions should not be required when expense or other constraints are such that opining counsel cannot reasonably perform the necessary work responsibly to deliver the requested opinions.

### **3. How Can Law Firms Establish a Legal Opinion System that (a) Educates, (b) Prevents Costly Mistakes and (c) Identifies “Red Flags”?**

*A. Mark Adcock, Moore & Van Allen PLLC, Charlotte, Co-Chair*

*Linda C. Hayman, Skadden, Arps, Slate, Meagher & Flom LLP, New York, Co-Chair*

*Erik W. Hepler, Kirkland & Ellis LLP, New York, Reporter*

The discussion began with the observation that process can often drive substance. With that in mind, the starting point was a poll of the attendees about the existence of legal opinion committees at their respective firms, and the process used in each firm with respect to the issuance of opinions.

While all firms represented in the group have some sort of legal opinion process, the review process for opinions differed from firm to firm.

Most firms (but not all) have some form of mandatory review process. The most common is a requirement for second partner review. Those that responded to the question indicated that the second partner reviewers in their firm are required not to be involved in the transaction in question. In some firms, the reviewing partner is required to be a member of the opinion committee, but in many firms it can be any partner.

The pluses and minuses of each approach were discussed. Allowance of partner review by non-committee members could lead to gamesmanship (as it is easier to pick a second partner who might not give the necessary diligence to such review), although the possibility of gamesmanship where the second partner is required to be a committee member is also present. The requirement that all review be done by committee members can put too much work onto the committee members, and lead to delay in processing opinions.

The level of review performed also varies from firm to firm (and sometimes may vary from partner to partner in the same firm). Some reviewers see the review process as merely examining the form of the opinion, and not checking the substance specific to the transaction in question. Other reviewers take a more hands-on approach, with the reviewer examining the substance of the opinion in relation to the specific transaction.

Some noted that the amount of review can vary depending upon the type of opinion being given. For example, a “reasoned” opinion may receive a more intensive review than an ordinary course opinion. One attendee stated that his firm has a special process for review of reasoned opinions.

The use of databases for opinions (both given and received) was also discussed. While many firms have some form of database for given opinions, the ability to insure that every opinion rendered by the firm is actually contained in the database differs greatly from firm to firm (in some instances depending upon the type and rigor of the review process). The number of firms that have databases of received opinions is much smaller.

One attendee discussed a computer program being developed for his firm that would ask questions about the transaction and after receiving the answers could produce an initial draft of the opinion (based on the firm forms). There were differing viewpoints about the desirability of such a program, but general interest in seeing in the future how it would work.

The diligence process for opinions was also discussed. Most attendees observed that it is difficult for an opinion committee to determine whether the proper diligence is correctly done on any individual opinion. Different firms use different general methods. The diligence checklist appeared to be the most common, although a minority of firms require a diligence memo be done in connection with each opinion. Back-up certificates are also very common.

Training issues were also discussed. While training for associates is relatively common, the bigger issues often involve training for lateral partners. Only some of the firms represented have formal procedures in place for informing new lateral partners of their opinion requirements. In some firms it has proven difficult to convert lateral partners from the opinion procedures or forms used at their prior firm to the procedures and forms at their new firm. In certain instances, firms have adopted some of the forms used by the lateral partner's previous firm where it was tied into client expectations.

The attendees also discussed distinctions between third-party opinions, and opinions to clients. Opinion committees for most attendees were concerned only with third-party opinions, and not client opinions (except in certain circumstances, such as tax).

This also led to a discussion of the relationship between opinion committees and firm general counsels (for those firms that have general counsels). It was the view of some attendees that the involvement of general counsels in many opinion issues should be considered imperative.

A discussion of "red flags" that might lead to heightened review and concern identified examples of areas of particular concern: tax and *Marblegate* issues.<sup>1</sup> In addition, a recent case involving permitted resale of stock that resulted in liability for the opinion giver was also discussed.<sup>2</sup>

The final topic considered was whether time spent on opinion review should be billed to the client in question, or should be billed to the firm. Attendees were split on how this issue was approached at their firms. Some argued that billing to the firm (rather than the client) could give greater protection to

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<sup>1</sup> See *Marblegate Asset Management v. Education Management Corp.*, 75 F. Supp. 3d 592 (S.D.N.Y. 2014); *Marblegate Asset Management v. Education Management Corp.*, 111 F. Supp. 3d 542 (S.D.N.Y. 2015); "Opinion White Paper § 316(b), Trust Indenture Act", *In Our Opinion* (Spring 2016, vol. 15, no. 3) at 28, and Opinion White Paper (TIA § 316(b)) (April 25, 2016) attached as an Addendum to the Spring 2016 issue. [Editors' Note: The judgment of the District Court finding that the restructuring of the debt violated the Trust Indenture Act was reversed by the Second Circuit on January 17, 2017. *Marblegate Asset Management, LLC v. Education Management Finance Corp.*, \_\_\_ F.3d \_\_\_, 2017 WL 164318 (2d Cir. Jan. 17, 2017).]

<sup>2</sup> *SEC v. Surlis*, \_\_\_ F.3d \_\_\_, 2016 WL 7093927 (2d Cir. Dec. 6, 2016).

the firm in any subsequent litigation over the opinion (by showing that the opinion process was independent of the client).

With respect to how the existence of WGLO has affected opinion practice, many attendees reported that they had either referred opinions to, or been referred opinions by, lawyers they knew through WGLO.

**4. How Can Law Firms Establish a Legal Opinion System that (a) Educates, (b) Prevents Costly Mistakes and (c) Identifies “Red Flags”?**

*Timothy G. Hoxie, Jones Day, San Francisco, Co-Chair*

*Anna S. Mills, Womble Carlyle Sandridge & Rice LLP, Charlotte, Co-Chair*

*John K. Lawrence, Dickinson Wright PLLC, Detroit, Reporter*

This concurrent session considered how a law firm’s opinion committee can help the law firm to manage risk, improve quality, and educate and train its attorneys. After identifying issues for discussion, co-chair Tim Hoxie suggested that the size and nature of a law firm would have a significant impact on its approach.

A large, multi-office, and multi-national law firm may have a very large committee, in order to ensure the availability of committee members admitted and resident in each jurisdiction, and having a representative mix of practice area expertise. Having a very large committee makes it difficult, however, to hold frequent meetings or conference calls attended by all its members. For such firms and committees, although electronic communication is significant, the emphasis tends to shift to process.

A smaller law firm, operating from a single office and having a strong firm culture, may have no opinion committee at all (and may not require second partner review of opinions). In one such firm represented in the session, the forms of opinion used in standard transactions have been refined over time in each practice area and are used by the attorneys in that practice area for the vast majority of transactions. The focus in preparing such opinions is on the elements of due diligence supporting the opinion. In that firm’s experience, only in transactions presenting non-standard issues are second member reviews required, and practice department heads are usually consulted in such non-standard cases.

Most of the law firms represented in the session, however, do have an opinion committee. In a few instances, firms have more than one committee; for example, for different nations in which the firm operates, or for specific practice areas. There was significant variation among law firms regarding details of their required opinion procedures.

Most firms represented in the session require review of an opinion by a second member prior to issuance. In some firms, the selection of the reviewing member is left to the member responsible for the transaction, with a requirement that the reviewing member have expertise in the subject matter of the opinion. Other firms require that the selection of the reviewing member be made by the opinion committee or the practice department head. Some require that each opinion reviewer be a member of the firm’s opinion committee.

The scope of the reviewing member’s role also varies. Virtually all agreed that the reviewing member should read the opinion and discuss it with the transaction member. Some require more, such as review of a formal diligence memorandum supporting the opinion. For opinions involving issues governed by the law of a jurisdiction other than that of the office where the transaction member is

resident, some firms require review by a member admitted *and* resident in that other jurisdiction (not simply one admitted in that other jurisdiction).

The represented firms generally make the membership of their opinion committee reflective of the practice areas involved in their opinion practices, as well as of the jurisdictions in which the firms' members practice. Communication among the members of the committee is generally encouraged. The committee in some firms holds monthly or quarterly conference calls, with a formal agenda. In some firms, each committee member (and, in other firms, each attorney in the opinion-giving transactional practice areas) is routinely sent the ABA's *In Our Opinion* newsletter and WGLO seminar materials.

Opinion committees in the firms represented perform their education and training functions in different ways. If firms have opinion forms, in most cases, the opinion committees are responsible for the preparation, distribution, and maintenance of forms of opinion for standard types of transactions. Many committees also conduct periodic training sessions on opinion issues for their transactional attorneys, although some participants noted difficulty in ensuring attendance at such meetings. The opinion "boot camp" conducted by WGLO some years ago was mentioned and commented upon favorably.

The issue of compliance with law firm opinion procedures was also discussed, including the possibility of a post-issuance file review of randomly selected opinions to assess compliance with policies. Some firms have policies requiring completion by the transaction member of a closing cover sheet that identifies specific details regarding the transaction, the opinion, and diligence matters. The cover sheet is placed in the file.

The opinion committees represented often play a role in the law firm's audit letter response process. This may include preparation of the firm's form of audit inquiry response letter, as well as serving as a source of advice regarding the ABA/AICPA "treaty". In other firms, audit inquiry responses are centralized in one or more attorneys and legal assistants.

Opinion committees as such are not generally responsible for client intake risk management. Some have identified "red flags", however, which have been incorporated in their firm's intake systems. For example, a new client whose first matter request is the issuance of a transactional opinion where the firm was not engaged for the transaction itself is noted by some firms as such a "red flag". Participants observed that ALAS (Attorneys' Liability Assurance Society Ltd.) has identified the "bad" client as the source of a large percentage of law firm liability.

ALAS has further identified basic diligence items for the issuance of legal opinions, such as, in some instances, review of corporate records and preparation of UCC financing statements, as sources of potential exposure regarding opinions. Many of those issues can be addressed through the use of checklists for standard transactions. It was suggested that opinion committees may wish to consider expanded use of such checklists as a quality control measure.

Many of the firms represented routinely act for opinion recipients, in addition to rendering opinions on behalf of their clients. The opinion committee often acts as a source of information and judgment for the firm in advising clients on the acceptability of opinions the clients are to receive. In doing so, it was observed that members of the opinion committee should try to be guided by customary practice, as embodied in opinion reports, as well as the "Golden Rule".<sup>3</sup>

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<sup>3</sup> TriBar Opinion Committee, "Third Party 'Closing' Opinions," 53 Bus. Law. 591, 600 (1998).

## **PANEL SESSIONS I:**

### **1. Opinions Covering Security Interests under UCC Article 9 – Traps for the Unwary**

*Steven O. Weise, Proskauer Rose LLP, Los Angeles, Chair*  
*Willis R. Buck, Sidley Austin LLP, Chicago*  
*Sandra M. Rocks, Cleary Gottlieb Steen & Hamilton LLP, New York*  
*Lawrence Safran, Latham & Watkins LLP, New York*  
*Stephen C. Tarry, Vinson & Elkins LLP, Houston*  
*Kenneth Chin, Kramer Levin Naftalis & Frankel LLP, New York, Reporter*

This panel addressed traps for the unwary in both standard opinions and unusual opinions relating to UCC Articles 8 and 9.

Form of Financing Statement Appropriate for Filing Opinions. These opinions are becoming less common. When given, they are usually based on the uniform form of financing statement. Note, however, that New York does not use the uniform form, and § 9-516 of the New York UCC requires additional information such as the type of debtor and the jurisdiction of the debtor.

As to electronic filings, six states now permit electronic filings and Delaware actually requires electronic filings. Some states will “re-key” the collateral description and information shown on the physical financing statement submitted for filing; as a result some opinion givers choose to take an express assumption that the electronically-filed financing statement is identical to the physical form of the financing statement submitted for filing and attached to the opinion letter. However, it is reasonable to assume (without saying so) that the filing office did not make any mistakes in re-keying the collateral description.

Where debtors are foreign entities, opinion givers often take assumptions relating to the debtors’ names and locations. See the discussion below on Foreign Debtors.

Perfection by Filing Opinions. While some firms will opine that the filing is being made in the correct state, most firms opine only that the filing is made in the correct filing office of the state in which the financing statement is filed. Most firms will also opine that the collateral description is sufficient. The diligence required for a sufficiency opinion involves comparing the collateral description in the security agreement with the collateral indication in the financing statement to ensure that the financing statement indication is at least as broad as that found in the security agreement. This is easiest in an “all asset transaction” where the financing statement description can cover “all assets.” Additionally, if the collateral description is other than “all assets” (or the equivalent), it must be objectively determinable from the language in the financing statement (including any addendum).

Definitions in Security Agreement. Beware of the colloquial use of terms which may have different meanings under UCC Article 9. While the term “accounts” often colloquially refers to deposit accounts or securities accounts, the term refers to receivables under the UCC. The term “contract rights” from pre-1972 is often still included in collateral descriptions in security agreements, but it is now covered by the terms “accounts,” “general intangibles” and “payment intangibles” depending on the nature of the contract rights. The term “secured party” colloquially refers to the members of the lending group, but many security agreements grant the security interest solely to the collateral agent for the benefit of the lending group. In such instances, many opinion givers, in their opinions, use the phrase “in favor of the collateral agent for the benefit of the secured parties”, as well as the UCC definitions for the collateral.

Collateral Descriptions and Indications of Collateral. Generally, for security agreements, § 9-108 provides that supergeneric descriptions are not sufficient but it is sufficient to describe collateral by UCC categories. One exception is in the case of a commercial tort claim where the description is required to have more particularity. Referring to an actual litigation with a complaint number would satisfy the requirement, but even a more generic description such as “tort claims arising out of the explosion at debtor’s plant” should also suffice. Unfortunately, some decisions make mistakes in applying § 9-108, such as the *Monticello* (unpublished) decision in the Sixth Circuit, which incorrectly held that the safe harbor for describing investment property in § 9-108(d) was instead a shoal if the safe harbor language was not used.<sup>4</sup>

When a security agreement has both generic (“all asset”) and more specific collateral descriptions, the TriBar opinion reports state it is not necessary to point out that the generic description in the security agreement is insufficient where the description also more specifically lists every other type of collateral.<sup>5</sup> If the actual collateral is not covered by the UCC, some opinion givers choose to flag this point in the opinion letter to make sure the opinion recipient understands the limits of the opinion being rendered.

“Priority” and “Take Free” Opinions on Negotiable Collateral. These types of opinions are currently less common. Filing priority opinions are extremely rare, except in rated deals.

Investment Property. In order to give either opinion, the opinion giver needs to establish or assume the status of collateral as a “security” (§ 8-102) or “security entitlement” (§ 8-502). If the collateral is an interest in a partnership or limited liability company, the opinion giver needs to consider whether there is a sufficient opt-in to Article 8 (§ 8-103). A “priority” opinion under Article 9 would be given based on § 9-328. A “take free” opinion is an opinion under Article 8 and is based on the secured party being a protected purchaser (or the equivalent for a security entitlement) (§§ 8-303(b), 8-502, and 9-331(a)). The opinion should be worded to correspond to the way “take free” or “priority” status is worded in the relevant provision of the UCC. Attention also needs to be paid, among other things, to the choice of law rules in § 8-110(a) and (b) and § 9-305.

Instruments. For holder in due course opinions under §§ 3-302 and 9-331(a), the opinion giver needs to establish or assume (i) that the note is an Article 3 “instrument” (§ 3-104), (ii) the secured party’s possession of the instrument (§ 1-201(b)(21)(A)) and (iii) the other elements required by § 3-302. Attention also needs to be paid to the applicable choice of law rules.

For Article 9 priority opinions under § 9-330(d), the opinion giver needs to establish or assume (i) that the note is an Article 9 “instrument” under § 9-102(a)(47), (ii) the secured party’s possession of the instrument (§ 9-313) and (iii) the other elements required by § 9-330(d). Again, attention needs to be paid to the choice of law rules under § 9-301(2).

Chattel Paper. Under § 9-330(a), (b), and (c), the opinion giver needs to establish or assume the collateral’s status as chattel paper or electronic chattel paper, as appropriate under §§ 9-102(a)(11) or (31). For tangible chattel paper (§ 9-102(a)(79)), the opinion giver needs to establish or

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<sup>4</sup> See *In re Alexander*, 429 B.R. 876, 879-880 (W.D. Ken. 2010), *aff’d*, 2011 WL 9961118 (6th Cir. December 14, 2011).

<sup>5</sup> See, e.g., TriBar Opinion Committee, “U.C.C. Security Interest Opinions — Revised Article 9,” 59 Bus. Law. 1483, 1466, n. 78 (2004).

assume possession, and for electronic chattel paper, the opinion giver needs to address whether the requirements for “control” set out in § 9-105 are met. Again, attention needs to be paid to the choice of law rules under § 9-301(1) and, in that regard, note that New York has a non-uniform definition of “control” of electronic chattel paper.

Deposit Accounts. To render a perfection opinion based on a control agreement, the bank must have agreed that it will comply with instructions originated by the secured party without further consent by the debtor. The opinion giver needs to beware of control agreements that only authorize (but do not require) the bank to follow the secured party’s instructions.

Both Delaware and New York have adopted non-standard versions of § 9-104 which, among other things, provide certain additional methods for achieving control and also expressly state in the statute what is already in the Comments – that conditions to the bank’s compliance with the secured party’s instructions (other than further consent by the debtor) will not affect perfection by control.

Ideally, a control agreement should (i) contain the bank’s representations that it is a “bank” (as defined in the UCC) and that the account is a “deposit account” (although these issues are sometimes covered by representations from the borrower in the security agreement and may also be assumed in a perfection opinion), and (ii) address what happens to the funds if the account is terminated (*e.g.*, the secured party has the right to direct, or at least approve, transfer of funds to a new depository). With respect to the choice-of-law provision in a control agreement, an opinion giver needs to be aware that under § 9-304 the law of the chosen jurisdiction will also typically govern perfection.

Fixtures and Transmitting Utilities. As to rendering a perfection opinion on fixtures, note that a security interest in fixtures may be perfected by filing a “regular” financing statement in the central filing office (or its equivalent) in the jurisdiction of the location of the debtor (typically its state of organization), but a mortgage covering fixtures (even if filed later in time than the financing statement) will prime a regular financing statement.

A UCC-1 financing statement filed as a fixture filing must contain a description of the real property on which the fixtures are located and must typically be filed in the real property records in which a mortgage would be filed; the boxes on the standard form financing statement addendum should be checked indicating that the financing statement is to be filed in the real estate records and is being filed as a fixture filing. A mortgage may also serve as a fixture filing. An opinion on a fixture filing would ordinarily assume or otherwise not cover the status of the goods as “fixtures”, the description of the real property, and the proper recording of the fixture filing.

If the debtor is a transmitting utility (*e.g.*, a company transporting goods by pipeline), a financing statement covering fixtures must be filed in the central filing office (or its equivalent) in each jurisdiction in which the fixtures are located; a description of the real property is unnecessary and should not be attached. The box stating that the debtor is a transmitting utility should be checked, but the boxes on the financing statement addendum about filing in the real estate records and filing as a fixture filing should not be checked. If there is any doubt about whether the debtor is a transmitting utility, both transmitting utility and non-transmitting utility financing statements should be filed. Transmitting utility filings (if done properly) do not need to be continued and are effective until terminated under § 9-515(d). A central filing in the jurisdiction of organization of the debtor will also cover non-fixture collateral of the transmitting utility.

Foreign Debtors. If the name of the debtor on the financing statement is not comprised of letters and characters in our alphabet, then troublesome issues can arise. Delaware has a published rule on this

subject. However, the District of Columbia, where filings on foreign debtors are most likely to be made, has no published rules. At least one filing office (the Recorder of Deeds of the District of Columbia) would delete the entire character if the character is “é.” Because so many filings regarding foreign debtors are made in the District of Columbia, this deserves particular attention. If the debtor is a foreign debtor with its chief executive office in a specific state of the U.S., then the filing should be in that state, although some file as well as the District of Columbia (although in that fact pattern, the D.C. filing is not necessary).

## **2. Opinions Covering Security Interests in Property Subject to U.S. Statutes and Treaties**

*Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Chair*

*Cynthia A. Baker, Chapman & Cutler LLP, Chicago*

*Neal J. Kling, Sher Garner Cahill Richter Klein & Hilbert, L.L.C., New Orleans*

*John F. Pritchard, Holland & Knight LLP, New York*

*Gilbert D. Porter, Hayes and Boone, LLP, New York, Reporter*

This plenary session considered the issues posed in analyzing and opining on security interests that are covered, in whole or in part, by U.S. federal statutes and international treaties – specifically, with regard to vessels, intellectual property, railcars and aircraft.

### **Vessels**

Neal Kling addressed security interests in U.S. flag vessels (vessels in excess of five net tons documented under the laws of the United States) and the practice for opinions under U.S. law on opinions on the form of mortgage, and recordation and perfection of the security interest. Opinions on these issues are generally a matter for specialty counsel, with certain matters being covered by UCC opinions as explained below.

Documentation for such vessels is filed with the National Vessel Documentation Center in Falling Waters, West Virginia. U.S. vessels are subject to stringent citizenship requirements with respect to owners and operators.

Mortgages establishing a security interest in U.S. flag vessels (styled as “preferred mortgages”) must be filed with the National Vessel Documentation Center. Maritime liens and claims other than mortgages are not required to be filed. In addition, security interests on charter hires are perfected under the UCC.

Priority of mortgage claims on a vessel rank in the priority of filing date. However, such mortgage claims are subject to certain preferred maritime claims, including employment wages, salvage, prior contract claims and maritime port claims. (NOTE: A more complete list of such preferred claims was included in the materials for this session). Non-mortgage maritime claims generally rank in accordance with the “inverse order” rule, i.e., the most recent claim takes priority.

Seizure (foreclosure) of a vessel is governed by the laws of the jurisdiction where the vessel may be found, not by the laws of its registration. Determining where to effect seizure is important for an exercise of rights, but is not covered by closing opinions.

Opinions provided by specialists in this area typically include opinions as to the form of the mortgage and the recordation and perfection of the mortgage. Opinions as to priority of the mortgage are not typically rendered, but in some cases the opinion giver may include a statement along the following

lines: “I have read the abstract of title for the vessel and, based solely on that, there is no claim of record ahead of the mortgage.” Opinions as to compliance with relevant citizenship requirements for the vessel are typically not given.

### *Intellectual Property*

Cynthia Baker discussed opinions on security interests in intellectual property.

Basically, the UCC covers creation and perfection except to the extent preempted by statute. Federal intellectual property law generally does not address the issues of creation or attachment of security interests. Therefore, opinions on creation of security interests in intellectual property (copyrights, patents and trademarks, whether federally registered or not) are generally covered by the typical UCC opinions on the valid grant of a security interest (because the collateral is of a type governed by the UCC), unless explicitly carved out from the opinion.

In transactions where the registered patents, trademarks or copyrights are not material in relation to the entire collateral package, a carveout in the legal opinion for intellectual property may not be objectionable. Where intellectual property is material to the transaction as, for example, where the security agreement covers assets of a technology or media company, the opinion recipient may want to insist that carveouts be limited “to the extent the grant of security is preempted by federal law” or words of similar import.

The recordation provisions of federal law on patents and trademarks do not cover security interests and, therefore, do not govern perfection. This can be confusing since federal law does permit the filing of a “mortgage” interest on patents and trademarks, which interest would take priority over an interest perfected under the UCC; however, the federal statute treats such a mortgage filing as a form of assignment, and most lenders choose not to make this filing because of the potential risk that they would potentially have the liability of an owner under such laws. Accordingly, opinions on perfection are typically given and covered under the ordinary UCC perfection opinion, with a carveout (if any) limited “to the extent perfection is governed by the UCC” or “to the extent federal law preempts the UCC” (or other words to such effect).

Case law indicates perfection of security interests in copyrights is preempted from the UCC, since the Copyright Act defines transfers of copyright ownership to include mortgages and hypothecations. However, filings under the copyright laws are cumbersome, because filings in the Copyright Office require a listing of each registered copyright. A secured lender must make separate filings for each individual copyright. It was noted that opinions on such filings, and related opinions, are most often requested when dealing with copyrights of significant value, such as in the case of movie or book financings.

Attention to the facts of the specific transaction can be important. The panelist commented on her experience in one problematic instance where the lenders were insisting on an opinion as to copyrights, but the schedule of copyrights was blank. Without the specific filing information for each copyright, filings against such copyrights could not be done and opinions as to perfection could not be rendered. Lenders in that transaction were also requesting an opinion that filing of the IP Security Agreement in the federal patent and trademark offices was sufficient to perfect against all patents and trademarks of the debtor, but, as discussed above, such perfection is not governed by federal laws (and if a “mortgage interest” were desired, that would require a different form).

### Railcars

Cynthia Baker also addressed opinions on security interests in railcars (also referred to as “rolling stock”).

Federal law, 49 USC § 11301(e), preempts the UCC as to perfection (but not creation) of a security interest in railcars. Filings with the Surface Transportation Board (“STB”) are required to perfect. Unlike the UCC, assignments of any such security interest must also be filed with the STB. The filings and perfection opinions on such security interests are a specialist practice.

Creation of a security interest in railcars is not preempted and is covered by the UCC and, therefore, can be addressed by a typical UCC opinion. The specialist opinion would then cover both filing and priority. While lenders used to request that lead counsel provide a “wrap” opinion, that occurs less frequently now.

If the debtor is a railroad, there are special rules for leases under Section 1168 of the Bankruptcy Code. Opinions are often requested and given addressing the applicability of such Section for such lease transactions. The WGLO program materials included sample opinions.

### Aircraft

John Pritchard provided a summary of state and U.S. federal law (including international treaties) regarding security interests in and leases and sales of aircraft. For this purpose, he referenced the Federal Aviation Act of 1958, which applies to U.S. registered aircraft, and the 2001 “Cape Town Convention” (which came into effect along with the Aircraft Protocol in the U.S. in 2006 as one of the first eight countries and applies in the U.S. to domestic as well as international transactions), all of which are codified or otherwise recognized under U.S. federal law as part of the U.S. Transportation Code. Also discussed was the 1948 “Geneva Convention”, which applies to recognition of U.S. state law mortgages on foreign registered aircraft to the extent not superseded by the Cape Town Convention.

Under the Federal Aviation Act, the “owner” of an aircraft must meet specified citizenship requirements (or use a special trust arrangement designed to satisfy citizenship requirements) in order to register that aircraft and record security interests and leases thereof, while for engines and spare parts there is no such requirement.

The UCC governs the creation of a security interest in or lease of an aircraft, but the perfection is preempted by the Federal Aviation Act. Once perfected by FAA filings, the priority of the security interest (as against lien creditors, etc.) is determined by state law, except to the extent of the secured creditor’s actual knowledge of another interest. Recordation with the FAA is necessary to perfect security interests in and leases of U.S. registered aircraft and of engines and propellers of certain sizes as well as spare parts maintained by a U.S. air carrier. Filings of all interests with the FAA (and the rendering of related perfection opinions) are handled by specialist FAA counsel operating out of Oklahoma City. Sometimes filings are handled by title companies.

Since aircraft are mobile assets, parties seeking a security interest in aircraft and aircraft engines benefit from the adherence by the U.S. to the Cape Town Convention, which applies in the U.S. to domestic transactions and in over 65 countries to provide for creation, perfection, priority and enforcement of interests covered within its scope. The Cape Town Convention, whose principles mirror those of UCC Article 9 in many respects, creates a new interest called an “international interest” in an airframe of eight occupants or more – including pilots – (helicopters five occupants) and in aircraft

engines, which is constituted by a security agreement, a lease or a conditional sale agreement, where the debtor is located in a participating country; if the debtor is not located in a participating country, the Cape Town Convention still covers airframes that are registered in a participating country (but not engines). Holders of security agreements, conditional sales and leases in U.S. registered aircraft or in engines, and purchasers of aircraft and engines, in addition to filing with the FAA, must register their “international interest” in such aircraft and any sale under the Cape Town Convention at the International Registry, using their FAA filing code for identification, in order to perfect their interests in a U.S. registered aircraft. All such registrations are not unilateral and require implementation by both parties. So, the ability to register on the International Registry must be planned well in advance with specialist counsel and each of the parties. Priority under the Cape Town Convention is determined on a first in time, first in right basis without regard to knowledge of any other interest.

For detailed guidance on Cape Town Convention legal opinions and practice, please see [www.awg.aero](http://www.awg.aero) and under Cape Town Convention Contract Practices there is a Practitioner’s Guide containing, in Annex E, a detailed annotated set of optional legal opinion forms. It should be noted that the Guide is currently being revised.

With regard to opinions on security interests in aircraft, the following practice points were mentioned:

- Creation under the UCC: Since creation of a security interest in U.S. aircraft is not preempted by statute, opinions on creation can be rendered as part of the UCC opinion.
- Creation under Cape Town: If the transaction also includes registrations under the Cape Town Convention, counsel opining on the creation of a security interest often also provides an opinion on creation of the “international interest”.
- FAA Registrations and Perfection: Specialist FAA counsel can render filing and perfection opinions on such security interests on the basis of filings made with the FAA. Priority opinions are limited to on-line registry records at the FAA.
- Cape Town Registrations and Perfection: If registrations are to be made under the Cape Town Convention, specialist FAA counsel would typically also provide an opinion as to what registrations are needed for perfection. Cape Town perfection and priority opinions are generally limited to on-line registry records. Exceptions are generally taken for: (i) rights or interests that pre-existed the effective date of the Convention and (ii) non-consensual rights or interests in the U.S. with priority over equivalent interests under U.S. law.
- Bankruptcy: Where a U.S. air carrier is a debtor or lessee, it is typical for a legal opinion to be rendered to the effect that the secured party or the lessor is entitled to the benefits of Section 1110 of the U.S. Bankruptcy Code.

## **CONCURRENT BREAKOUT SESSIONS I:**

### **1. Opinion Issues in Connection with Client “Outside Counsel Guidelines”**

*Sarah M. Ward, Skadden, Aps, Slate, Meagher & Flom LLP, New York, Co-Chair*

*Ronald S. Gross, Jones Day, New York, Co-Chair*

*David M. Johansen, White & Case LLP, New York, Reporter*

This session discussed the effect of outside Counsel Guidelines (“OCGs”) on third-party legal opinions rendered by outside counsel.

Participants shared that the delivery of legal opinions can place stress on the billing and budgeting requirements of Outside Counsel Guidelines because legal opinions often require the assistance of attorneys other than those on the core team. For example:

- OCGs may restrict adding timekeepers or require all timekeepers to be identified in advance.
- Many opinions require the involvement of special regulatory counsel or other counsel with special expertise because of the complexity of the opinions being requested.

During the discussion, a range of observations was shared:

- OCGs can require pre-approval of vendors. Clients have legitimate reasons for these restrictions, but these limitations can make it difficult to conduct opinion diligence.
- OCGs can over-expand the duty of confidentiality. This can restrict discussions with specialists within law firms and members of the firms’ legal opinion committees.
- Ordinarily, opinion givers are concerned about potential liability to third-party addressees of their opinions. But OCGs can state that the law firm stands behind the performance of the parties to the agreement and law firms need to guard against broadly drafted indemnity clauses.
- One common problem in some OCGs is the provision for client review of work product. With respect to a law firm’s legal opinions, it may be helpful to convey that the client cannot dictate the legal conclusions to be reached by a law firm.

A large part of the discussion focused on negotiating Outside Counsel Guidelines and the following views were shared:

- One problem is that those at the law firm who negotiate the OCGs may not be those in the best position to spot legal opinion issues.
- Large clients that engage hundreds of law firms use OCGs to impose limitations across those law firms and across multiple jurisdictions, making negotiation of special arrangements difficult.
- Clients are often unresponsive to comments to the OCGs. Further, while clients send “one way” OCGs that do not require signatures from the law firms, law firms typically respond by sending correspondence back stating that certain issues remain unresolved. As a result, some

engagements move ahead, in the context of a “battle of the forms”, without the law firm’s concerns having ever been addressed.

- While clients have legitimate concerns about information security, this should not limit the law firm opinion practices on access to precedents, including for training purposes.
- OCGs are challenging to comply with because it is impractical for all of the lawyers who work on a given matter to know the contents of the OCGs. It is the purview of the lead partner to know the OCGs because most of the content of the OCGs relate to billing. Because the OCGs are often voluminous and law firms increasingly rely on large teams of specialists, it would require hundreds of hours for those teams to become familiar with all relevant OCGs.
- OCGs are also frequently unclear.

Participants in this session also considered whether a short form of common addendum to OCGs regarding legal opinion issues might be developed to address some of these concerns. For example, an addendum might in just a few sentences clarify:

- Work product belongs to the law firm.
- If an opinion is to be delivered, internal review is required by a number of lawyers.
- The OCG does not govern limitations on reliance in legal opinions.
- Confidentiality provisions do not restrict consultations with members of the firm’s legal opinion committee.
- The OCG does not pre-determine the law firm’s opinion practice in future matters where the firm is representing other clients.
- The law firm is not a guarantor of performance by other parties to their agreements.

No conclusions were reached in this session as to the practicality of such a project.

## **2. Issues Related to Declining to Render an Opinion Provided for in an Agreement**

*Arthur Norman Field, New York, Co-Chair*

*Craig D. Singer, Williams & Connolly LLP, Washington, Co-Chair*

*John K. Villa, Williams & Connolly LLP, Washington, Co-Chair*

*Robert H. Saunders, Thompson & Knight LLP, New York, Reporter*

This session was suggested by the Delaware Chancery case, *The Williams Companies Inc. v Energy Transfer Equity L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016). In that case, Williams had agreed to be acquired by ETE. Soon thereafter the oil and gas markets deteriorated badly. ETE was required to raise \$2 billion to be distributed to the shareholders of Williams and as a result had little enthusiasm for completing the transaction. Among the closing conditions for the acquisition was the delivery of a tax opinion to both Williams and ETE by Latham & Watkins, LLP, tax counsel for ETE. While initially Latham (hereinafter “counsel”) believed that it could provide the opinion, it later concluded that, because of the changed economic conditions, which it had not taken into account, it could

not give the opinion. Williams sued ETE (but not counsel, with whom it had no contractual relationship) for injunctive relief to force completion of the transaction. The Chancery court declined to provide any relief to Williams. It concluded that, since counsel's determination not to give the opinion was made in good faith, ETE had no contractual duty to close.

The *Williams* case was a contract case, dealing only with the agreement between Williams and ETE. Moving beyond the actual facts of the *Williams* case, this session considered a series of related hypotheticals to examine whether there are circumstances in which a lawyer could face legal liability or ethics violations for declining to render a closing opinion. More specifically, the session examined (A) hypothetical claims that might have been made by a client or potential opinion recipient against counsel and (B) the possibility of opinion giver liability for declining to give an opinion for reasons having nothing to do with the difficulties of rendering the opinion letter itself. The hypotheticals considered were not based on any facts in the *Williams* case; the *Williams* facts were used solely as background for the additional hypothetical facts.

#### *Hypothetical Claims by Both a Client and a Non-Client*

The group considered first the hypothetical where, although no formal opinion letter is ever delivered, counsel might have made a representation (to either or both of the client and the counterparty) during the period before the scheduled closing that it would deliver the opinion requested (or that the opinion to be given was then correct) and whether such a representation could be a basis for a claim in certain circumstances. The third-party opinion claim is commonly made in the form of a negligent misrepresentation claim, with the opinion letter as the representation, but this may depend on state law. The group considered whether a less formal statement might also amount to a representation for the purpose of asserting a claim. The group next addressed the possibility that a representation might be made in a formal plan delivered to both the client and the counterparty setting forth a tax plan and the opinion to be given. Participants also considered the possibility that a less formal oral presentation made by counsel to both parties might form the basis for a claim by either or both parties.

Several participants voiced the sentiment that pre-closing discussions are not to be relied upon by non-clients (or even regarded as a representation) except in extraordinary circumstances. But little has been said or written about how pre-agreement and pre-closing discussions of attorneys are to be regarded.

Pre-closing discussions with a client are more difficult to categorize. Reliance by clients on advice of counsel without a formal written opinion is the norm. However, when a formal opinion is to be delivered to the client, any advice preceding it may be seen as tentative (rather than a representation) prior to delivery of the opinion.

A question was raised as to whether there are circumstances in which the actions of a lawyer may be seen as giving advice to all sides in a transaction, making the lawyer liable as the attorney for all parties. For example, would presenting a formal tax plan to all parties create a lawyer-client relationship if the claim is that the tax advice was offered and taken?

Several participants suggested that the central question is reasonable reliance under the circumstances. This can be a highly fact intensive inquiry and the inquiry is better avoided. Many considerations were suggested. Among them, it was suggested that a presentation by counsel for one party of a formal plan to all parties would best be accompanied by some statement indicating that (a) the plan is being submitted on the basis that the non-clients will seek advice from their own counsel and that (b) the plan does not constitute an undertaking to provide an opinion at a future date. As to less formal presentations, it was suggested that such discussions are not ordinarily to be seen as representations; any

other rule would tend to impede the negotiation/closing process. But it might be difficult to exclude the possibility entirely in some circumstances.

The participants also discussed the possibility of opinion giver liability for participating in drafting an agreement calling for an opinion that the opinion giver knows cannot be given. The participants also discussed whether such cases might fit into aiding and abetting a client's fraudulent activity.

*Declining to Render a Correct Opinion for Reasons Unrelated to the Difficulty of Rendering the Opinion Itself*

The group then considered the possibility that a lawyer opts not to give an opinion required by an agreement even though the opinion, if given, would be correct. This may happen when an opinion giver becomes suspicious of the conduct or lack of communication with the client. The opinion giver may be concerned, for example, with becoming involved in some activity that is illegal or repugnant but has no proof of that activity, just a suspicion.

The discussion focus shifted to Model Rule 1.16 (Declining or Terminating Representation) that deals with withdrawal. There are situations in which withdrawal is mandatory. Relevant to the various hypotheticals considered in this session, one such situation is when the representation would violate the law or the Rules of Professional Conduct. In the hypothetical set out in the preceding paragraph, the lawyer does not know that there is a violation of law; there is only suspicion. Thus any withdrawal is at the election of the lawyer. There is a tension between the potential damage to the client from the withdrawal and the lawyer's concern that he or she will become involved in a transaction that is a crime or is repugnant to the lawyer. Ideally, the lawyer will discuss the concerns with the client. But if the client rebuffs attempts to discuss the concerns, the lawyer may in effect be forced to withdraw.

There are few if any cases imposing liability on lawyers in a withdrawal situation. However, one can envision circumstances where the client may be in a position to allege damages based on the withdrawal and may bring a suit against a withdrawing lawyer as a way to explain and defend its own conduct.

A discussion followed on the appropriate course of conduct of a lawyer considering withdrawal. Model Rule 1.16 requires the protection of client interests on any withdrawal to the extent reasonably practicable. Consultation with a litigator conversant with such problems is advisable.

When faced with a withdrawal situation, the lawyer should consider how best to document the circumstances that show the reasonableness of his or her action, whether withdrawing or remaining.

### **3. Discussion of Proposed Statement of Opinion Practices**

*Kenneth M. Jacobsen, Katten Muchin Rosenman LLP, Chicago, Co-Chair*  
*Stanley Keller, Locke Lord LLP, Boston, Co-Chair*  
*Lawrence S. Goldberg, Schulte Roth & Zabel LLP, New York, Reporter*

This session focused on the draft "*Statement of Opinion Practices (March 31, 2016 Exposure Draft)*" (the "Statement"). The Statement is the result of a joint project of the Working Group on Legal Opinions ("WGLO") and the Legal Opinions Committee of the American Bar Association's Business Law Section (the "ABA Committee"). The goal has been to identify selected aspects of customary and other opinion practice applicable to third-party legal opinions that are commonly understood and accepted

throughout the United States. The Statement builds upon the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008), which has been approved by over 30 bar associations and other groups.

### Overview

Stanley Keller and Kenneth M. Jacobson, co-chairs of the committee that developed the Statement (the "Project Committee"), and Steven Weise, the reporter of the Project Committee, provided an overview of the Statement and its evolution. The Project Committee has been at work on the Statement for six years. The Statement has been through numerous drafts. The Board of Directors of WGLO and the ABA Committee have approved the exposure draft of the Statement for distribution to other interested opinion groups.

The Project Committee intends that the Statement be self-contained. It is meant to be accessible to attorneys and others who are not necessarily experts in the custom and practice of opinion giving. It is short and succinct. The Project Committee has tried to draft the Statement in plain English so that a judge or jury that is called upon to interpret or evaluate an opinion letter will be able to understand the contents of the Statement. Accordingly, the Statement contains few footnotes, definitions, citations or cross-references.

The Statement has been circulated to interested opinion groups, including numerous bar associations. The steering group of the Project Committee is reviewing comments received to date from various bar groups and other sources.

### Know and Recognize

The Statement uses both "knows" and "recognizes". The difference between the two and when each is appropriate was the focus of much discussion during the breakout session. The Statement does not define what these terms mean. Generally, "knows" is intended to refer to actual knowledge, typically of a fact, while "recognize" is more subjective, akin to conscious awareness, and would encompass conclusions actually drawn from the relevant facts. For example, Section 5.2 provides that opinion preparers may rely on factual information obtained from others "unless they **know** that information to be false or unreliable" (emphasis added here and below). Here, the use of "know" is intended to refer to the actual knowledge of the relevant information. Section 5.3 of the Statement refers to both terms: "Opinion preparers are not expected to conduct a factual inquiry of the other lawyers in their law firm or a review of the firm's records, except to the extent the opinion preparers **recognize** that a particular attorney has or a particular record contains information not otherwise **known** to the opinion preparers that they need to give an opinion." Again, the reference to "known" is in the context of specific information, while "recognize" refers to the conscious awareness of the opinion preparers that they need specific information in order to render an opinion.

Similarly, the final section of the Statement (Section 12) addresses misleading opinions: "An opinion giver should not give an opinion that the opinion preparers **recognize** will mislead the opinion recipient with regard to the matters addressed by that opinion." This section is drawn from the TriBar Opinion Committee's *"Third-Party 'Closing' Opinions"*, 53 Bus. Law. 591, 602-03 (1998).

Participants discussed whether these terms should be defined, and whether all references should be to one of these terms (and the other eliminated). The co-chairs suggested that the context in which these words are used makes the intended meaning clear. Again, the goal is not to apply a technical interpretation to these terms but rather a normal, understandable meaning.

### Reliance

Section 11 of the Statement provides that "A closing opinion may be relied on only by its addressee and any other person expressly authorized to rely." One participant suggested that this be clarified to provide that an assignee may have no greater rights than its assignor. The co-chairs responded that this would not be consistent with the role of the Statement, which is intended to summarize basic practices generally followed in the giving and receiving of closing opinions in the United States as distinguished from making legal pronouncements.

### Fraudulent Transfer Law

Section 6.2 provides that a closing opinion "does not cover some laws (for example, securities, tax and insolvency laws) . . . ." A comment received asked that fraudulent transfer law be added to the exclusion. The parenthetical, however, is intended to be illustrative only. In addition, fraudulent transfer laws are commonly considered to be included within insolvency laws; although, as pointed out, that understanding may not be universal. Some firms often expressly include a lengthy paragraph listing excluded laws. The Statement, at this stage, is not intended to be the definitive list of laws not covered by a closing opinion.

### Core Opinion Principles

Separately, the Project Committee has developed a more concise statement of key opinion principles (entitled "Core Opinion Principles") drawn from the Statement to facilitate incorporation by reference or attachment by those firms that wish to do so, similar to use by some firms of the existing *Legal Opinion Principles*, 53 Bus. Law. 831 (1998). The Core Opinion Principles (the "Core Principles") is a shorter, more tailored statement of the principles covered in the Statement. The Project Committee thought that a firm might more readily incorporate by reference into or attach the Core Principles to its opinion letters. The co-chairs of the session advised that the Core Principles (Working Draft dated October 4, 2016) has been approved by the Board of Directors of WGLO for distribution to interested opinion groups, to be considered along with the Statement, subject to similar approval by the ABA Committee.<sup>6</sup>

### Looking Ahead

The Project Committee plans to consider possible expansion of the Statement to cover additional topics, but this effort will not interfere with proceeding with the existing Statement. Included in the materials for this session was an "Outline of Possible Expanded Statement of Opinion Practices," to illustrate what such an expansion might cover. It is not clear whether the existing Statement would be replaced or supplemented. This is an ongoing effort.

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<sup>6</sup> At its meeting on November 18, 2016, the ABA Committee similarly approved the Core Principles for distribution.

## **PANEL SESSIONS II:**

### **1. Recent Opinion Developments**

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

*Donald W. Glazer, Newton*

*Stanley Keller, Locke Lord LLP, Boston*

*Steven O. Weise, Proskauer Rose LLP, Los Angeles*

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

The panelists in this session discussed the following:

Joint Project on Statement of Opinion Practices. The Working Group on Legal Opinions and the Legal Opinions Committee of the ABA's Business Law Section (the "ABA BLS") have been working on a Statement of Opinion Practices that would update and replace the Legal Opinion Principles and selected provisions of the Guidelines. A draft, included in the handbook materials for this session, together with a more concise statement of Core Opinion Principles, has been circulated to various groups around the country for consideration. The Core Opinion Principles, which are drawn from the Statement of Opinion Practices, are intended for use by those who would like to refer to them in their opinions as some do now with the Legal Opinion Principles.

Bar Opinion Report Developments. The ABA BLS Securities Law Opinions Subcommittee is finalizing its Report on Exchange Act Rule 14e-1 Opinions for Debt Tender Offers, which is expected to be published in 2017. The ABA BLS Securitization and Structured Finance Committee and Legal Opinions Committee are working on a White Paper on Risk Retention Rules. The National Association of Bond Lawyers is working on an update of its Model Letter of Underwriters' Counsel regarding Negative Assurance Confirmations. The TriBar Opinion Committee is working on reports on Opinions on Risk Shifting Contractual Provisions (e.g., indemnification provisions) and Limited Partnership Opinions.

Wilmington Savings Fund Society, FSB v. Cash America International, Inc. (2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016)). An indenture had (i) a clause permitting redemption of the notes at the option of the obligor with the payment of a make-whole premium and (ii) a clause permitting acceleration by the trustee of principal, interest and premium, if any, upon a default that was not exclusive of other remedies the trustee could pursue after default. Citing Sharon Steel,<sup>7</sup> the court held that the obligor was required to pay the make-whole premium when redeeming the notes after acceleration following a covenant default the obligor had voluntarily caused. Panelists noted that the decision did not directly raise an opinion issue.

The Williams Companies, Inc. v. Energy Transfer Equity, L.P. (2016 WL 3576682 (Del. Ch. June 24, 2016)) The transaction documents required a tax opinion from counsel to the purchaser as a condition to both parties' obligation to close. Before closing, however, energy markets worsened, the purchaser wanted to exit the transaction and the seller wanted to proceed with the transaction. When the agreement was signed, purchaser's counsel believed it could give the opinion but, conceding that it had not correctly analyzed the effect of changed economic conditions on its ability to give the opinion, later concluded it could not give the opinion. In this action, the court found that purchaser's counsel acted in good faith in declining to give the opinion and, because the closing condition that the opinion be received

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<sup>7</sup> *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F. 2d 1039 (2d Cir. 1982).

was not satisfied, the purchaser was under no obligation to close. Although the issue was not directly addressed by the decision (which is on appeal), the facts of the case raise a question regarding a law firm's responsibility when it indicates it expects to provide a closing opinion but then does not.

Macquarie Capital (USA), Inc. v. Morrison Foerster LLP. (2016 WL 3927648 (N.Y. Sup. Ct. July 14, 2016)). Macquarie acted as underwriter in a U.S. public offering for Puda Coal, Inc., which, as described in the prospectus, conducted its major operations in China through a Chinese subsidiary. Macquarie retained Morrison as its counsel, among other things, to assist with due diligence. Macquarie also hired Kroll to conduct an investigation. Kroll issued a report that disclosed the existence of a public record indicating that Puda had transferred its interest in the subsidiary to its CEO and an institutional investor. Kroll provided the report to an associate at Macquarie, who emailed the report to other members of the Macquarie deal team and to Morrison with a cover email indicating "no red flags were identified." Morrison later delivered a negative assurance letter to Macquarie stating that "nothing has come to our attention" that caused Morrison to believe that the offering documents contained false or misleading statements. When the fraud was discovered, Macquarie was sued in a securities class action and by the SEC and eventually settled. Macquarie then sued Morrison claiming legal malpractice. The court dismissed the complaint for lack of proximate cause because Macquarie was in possession of the same critical factual information as Morrison. The decision did not address whether the court would have come out differently had the information been such that Macquarie was not in the same position as its counsel to assess its significance.

SEC v. Sourlis. (\_\_\_ F.3d\_\_\_, 2016 WL 7093927 (2d Cir. Dec. 6, 2016)). An outside lawyer gave an opinion that a legend restricting public sales without '33 Act registration was not necessary on stock certificates for shares represented to the lawyer to have been issued upon conversion of convertible notes purportedly issued several years earlier. The convertible notes turned out never to have been issued and thus the holding period for the exemption under Rule 144 for public resales of the shares without registration had not run. In the opinion letter, the lawyer stated that she was relying on "information and representations furnished by the Original Note Holders" and "I have been informed by the Original Note Holders" that none were affiliates of the issuer and had owned the notes for at least two years. In an enforcement action brought by the SEC, the court characterized the statements in the opinion letter as representations that the lawyer had spoken to the noteholders, which she could not have done because the notes never existed, and held that the lawyer had violated the securities laws by giving the opinion on the basis of untrue representations in her opinion letter. The decision highlights the potential peril for a lawyer giving this type of securities law opinion when she is not personally familiar with the facts and comfortable with the situation.

Consumer Financial Protection Bureau v. CashCall, Inc. (2016 WL 4820635 (C.D. Cal. Aug. 31, 2016)). CashCall is a payday lender licensed in California. CashCall entered into an arrangement with a member of the Cheyenne River Sioux Tribe that was intended to avoid usury laws by having an LLC doing business on the reservation make payday loans governed by the law of the Tribe (which did not prohibit usurious rates) and immediately sell the loans to CashCall. The court found that CashCall was the "true" lender and applied the usury laws of the borrowers' states rather than the law of the Tribe. The significance of the decision for opinion practice is that opinion preparers need to be mindful of the substance of a transaction in determining whether they can give an opinion.

SEC v. RPM Int'l Inc. (Case No. 16-cv-01803 (D.D.C. filed Sept. 9, 2016), SEC Litig. Rel. No. 23639). In an SEC enforcement action against RPM and its general counsel, the SEC alleges that the general counsel failed to disclose material facts regarding a Department of Justice ("DOJ") investigation of a confidential qui tam complaint filed by a former employee to RPM's CEO, CFO, Audit Committee and independent auditors and, as a result, the material facts were not disclosed in RPM's periodic reports.

The SEC claims that the DOJ investigation was a loss contingency the general counsel was required to disclose to RPM's auditors and, because the amount of the loss was both probable and reasonably estimable, RPM was required both to disclose and to accrue a liability for the potential loss under ASC 450-20 (formerly FAS 5).

Confirmation.com User Agreement. Confirmation.com is an online, audit response letter website service. Its website used to require those using the service to accept a problematic user agreement, but the ABA BLS Audit Responses Committee has worked with Confirmation.com to produce a user agreement more suitable for law firms that choose to use the service for audit responses. The Committee, however, has made no recommendation regarding use of the service by individual law firms.

## **2. Opinions on Real Property Liens**

*Kenneth P. (Pete) Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, Co-Chair*

*David L. Miller, Pillsbury Winthrop Shaw Pittman LLP, McLean, Co-Chair*

*Robert J. Krapf, Richards, Layton & Finger, P.A., Wilmington*

*Sterling Scott Willis, Fishman Haygood, L.L.P., New Orleans*

*Charles L. Menges, McGuireWoods LLP, Richmond, Reporter*

This panel addressed opinions on real estate liens and, in particular, how those opinions differ from customary opinions in non-real estate transactions. As a frame of reference for and resource on the subject, the panelists referred to two joint reports (referred to herein as the “Real Estate Reports”) of the ABA Section of Real Property, Trust and Estate Law Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers Attorneys’ Opinions Committee and the American College of Mortgage Attorneys Opinions Committee: *Real Estate Finance Opinion Report of 2012*, published at 47 Real. Prop. Tr. & Est. J. 213 (2012) (referred to herein as the “2012 Real Estate Finance Opinion Report”), and *Local Counsel Opinion Letters in Real Estate Finance Transactions*, published at 51 Real Prop. Tr. & Est. J. 167 (2016).

Initially, it was noted that real estate liens are created by a mortgage, a deed of trust or a deed to secure debt, depending on the state in which the real property is located. The specifics of the law, the form of lien documents and the custom and practice in transactions involving real estate liens vary widely by state, and much of the law is not statutory. Variations include the method of enforcement or foreclosure of a real estate lien, whether by judicial foreclosure (mortgage), non-judicial trustee sale (deed of trust) or other non-judicial power of sale. For convenience, the term “mortgage” as hereafter used in this summary refers to any of the types of documents described above that create a real estate lien.

A real estate lien opinion sometimes is requested that states, in effect, that the mortgage creates a valid lien on the real property collateral. Initially, it should be noted that this opinion is not implied in an enforceability opinion (just as a UCC lien creation opinion is generally not considered to be covered by an enforceability opinion in a non-real estate financing). Equally important, although such an opinion may seem to the non-real estate lawyer to be an entirely appropriate and even critical opinion, the Real Estate Reports note (Paragraph 3.6 of each) that it is not customary practice to provide a “valid lien” opinion and such an opinion is actually unnecessary if a lender’s policy of title insurance is being provided with regard to the real estate lien in question. A lender’s policy of title insurance specifically insures that the insured mortgage constitutes a valid lien on the real property. An opinion on the subject, on the other hand, usually states only that the *form* of the mortgage is adequate to grant a lien (see Paragraph 3.6 of the Illustrative Opinion Letter attached to the 2012 Real Estate Finance Opinion Report), which necessarily omits, for example, whether the mortgagor actually owns the real property and has the

authority to grant a lien on it, whether the correct real property is properly described in the mortgage, etc.—all of which a policy of title insurance does in fact cover. It was also noted that, in some states, a mortgage may not cover after-acquired real property unless the mortgage is modified to do so or a new mortgage is granted when the additional real property is acquired, and an opinion giver may need to qualify an opinion as to the validity of a mortgage lien accordingly.

A similar “valid lien” opinion is sometimes requested as to assignments of leases and rents, whether such an assignment is included in a mortgage or in a separate instrument. Because of uncertainty as to whether an assignment of leases and rents should be regarded as equivalent to a mortgage lien, some lawyers avoid the term “lien” in such an opinion and instead opine as to a valid “assignment” but such an assignment would usually not be an absolute assignment. Assignments of leases and rents typically include language appearing to state that they constitute an absolute assignment rather than just a collateral assignment, even though the parties recognize (and the instrument itself expressly provides) that the assignment is a collateral assignment and the assignee may not exercise any rights until a loan default occurs. Therefore, some opinion givers prefer to clarify in an opinion as to the validity of an assignment of leases and rents that no opinion is given as to the enforceability of any provision that characterizes the assignment as absolute rather than as collateral security.

Other sometimes requested real estate lien opinions are to the effect that the mortgage is in proper form to be recorded in the applicable land records and that, upon recordation, the lien of the mortgage will be “perfected.” From the perspective of the real estate lawyer, opining as to whether a mortgage is in recordable form may require a consideration not only of the state recordation statutes but also of rules, often unpublished, of a local recording office. In most states, the term “perfection” is not used with regard to real estate liens or in opinions regarding real estate liens; instead, the issue is whether the mortgage has been recorded in the appropriate office to provide “constructive notice” to third parties or, as suggested by the 2012 Real Estate Finance Opinion Report, “to establish of record the rights of the parties under the Mortgage in real property.” Like the issue of whether a mortgage constitutes a “valid lien,” a lender’s policy of title insurance provides assurances as to these matters as well, making an opinion on the subject less important.

The priority of a real estate lien is seldom the subject of a real estate financing opinion, primarily because of the complexity of determining relative priorities of interests in real estate, including, for example, mechanics’ liens, and because the lawyer issuing a real estate opinion in a financing transaction in most cases does not actually examine title to the property. The priority of future advances of a loan is sometimes addressed in an opinion letter, but, if such an opinion can be given, it is highly dependent on each state’s law. Again, title insurance is generally the principal and preferred vehicle for providing assurance to lenders as to the priority of a mortgage. It was noted that an opinion giver should not be requested to render an opinion as to the status of title, the validity of a mortgage lien or the priority of a mortgage in reliance upon a policy of title insurance, as such an opinion is merely a “conduit” opinion that provides little value to the opinion recipient and may imply that the opinion giver has some liability with respect to matters reported by the title policy.

The enforceability opinion as to real estate liens is usually made subject to the customary qualifications found in other opinions in financing transactions, including bankruptcy and equitable principles. However, the generic enforceability qualification (*i.e.*, certain unspecified provisions in the loan documents may not be enforceable) found in real estate opinions may not contain the accompanying assurance language that non-real estate lawyers might traditionally have expected—namely, that such provisions will not preclude the “practical realization of the principal benefits” intended to be provided by the loan documents. Instead, the 2012 Real Estate Finance Opinion Report recommends that the assurance should be limited to (1) judicial enforcement of specified payment obligations, (2) acceleration

of the debt upon specified material defaults and (3) foreclosure in accordance with applicable law of the lien of the mortgage upon maturity or such acceleration.

Finally, the panelists discussed the choice of law provisions in mortgages. In multi-state financing transactions, it is common for a mortgage to provide that New York law governs the mortgage except as to matters relating to the creation, enforcement and perfection of real estate liens, which are to be governed by the laws of the state in which the real property is located. A lien on real property “anchors” the choice of law, at least to some extent, to the state in which the real property is located, and the exact line between where local law should govern and where New York law should govern is not always clear. There may be no case law in the state as to the issue. Often, the lender would be better served by choosing the local law for all purposes rather than bifurcating the choice of law between New York and the law of the state in which the real property is located. For these reasons, real estate lawyers often exclude choice of law from their opinion letters.

## **CONCURRENT BREAKOUT SESSIONS II:**

### **1. Opinions on Business Trusts and Other Trusts, Both Statutory and Common Law**

*James Gadsden, Carter Ledyard & Milburn LLP, New York, Co-Chair*

*Louis G. Hering, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Co-Chair*

*James A. McDaniel, Choate, Hall & Stewart LLP, Boston, Co-Chair*

*Mark H. Burnett, Goodwin Procter LLP, Boston, Reporter*

Participants in this breakout session discussed issues in giving opinions on Massachusetts business trusts, New York common law trusts and Delaware statutory trusts, all of which continue to be used for a broad range of purposes and transactions. The group noted at the outset that concepts from corporate and limited liability company opinions are not necessarily portable to opinions regarding trusts. Throughout the discussion, participants highlighted that the particularities of each type of trust dictate the substance and wording of the applicable opinions.

#### **Massachusetts Business Trusts**

Under Massachusetts law, a “business trust” is a voluntary association or trust operating under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares. While the Massachusetts statute requires filing and reporting by a business trust with transferable shares, a business trust may be created and exist under non-statutory law without any filing. Although not an entity apart from its trustee(s), a Massachusetts business trust is recognized as a type of business organization similar to a corporation in many respects (including matters of status, power and shareholder rights) but not in others. Regarding liability of trust shareholders, a Massachusetts business trust is treated more like a traditional trust (or even a general partnership). If shareholders exercise too much control over trust management, the trust runs the risk of being treated as a general partnership and its shareholders can be liable for the obligations of the trust. To minimize possible shareholder liability, Massachusetts business trusts typically (1) include provisions in their declarations of trust limiting shareholder liability and granting indemnification out of the trust assets and (2) include on their stationery and in their contracts a statement that the obligations of the trust are binding only on the trust property and not on the shareholders.

Opinions regarding the status and power of a Massachusetts business trust often closely resemble comparable opinions for corporations. Practitioners may opine that the trust is validly existing as a business trust under Massachusetts law pursuant to its declaration of trust (typically relying on a good

standing certificate from the Massachusetts Secretary of State for trusts that have filed a trust certificate). While historically a concern, rule against perpetuity issues are less so today, and trust instruments now usually recite that they have perpetual existence. Power and authority opinions often state that the trust has the requisite power, “acting through its trustee,” to execute, deliver and perform the specified transaction agreements. To do so, opinion givers must ascertain the trust’s power and authority, and the procedures that must be followed to authorize action, from the trust’s declaration of trust (not any statute).

Opinions regarding the non-assessability of shares of a Massachusetts business trust can be more problematic than their counterparts for corporations. For a trust that is not an investment company and provides only basic shareholder voting rights, unqualified opinions that the shares, when issued, will be validly issued, fully paid and non-assessable are common. When the declaration of trust includes voting rights mandated by the Investment Company Act of 1940, opinion givers often choose to note that shareholders could, under certain circumstances, be held personally liable for the obligations of the trust. As with limited liability companies, the question arises as to whether “non-assessability” is the right term to be used in these opinions, which question was noted as a worthy topic for future consideration.

### New York Common Law Trusts

New York common law trusts continue to be used for large transactions, including collateral trusts for a variety of investment vehicles. Under New York law, a New York common law trust is a “relationship.” The four essential elements of a valid New York common law trust are: (1) a designated beneficiary, (2) a designated trustee who is not the beneficiary, (3) a fund or other identifiable property, and (4) the delivery of the fund or other property to the trustee with the intention of passing legal title to the property to the trustee to hold in trust for the beneficiary. A New York common law trust is not a separate legal entity. The trustees (which may be individuals or institutions) hold the trust property and enter into contracts, in their capacities as trustees, regarding trust property. While trustees typically insist on contract provisions limiting their liability to the trust property, the trustees are personally liable. No written instrument or public filing is necessary to create a common law trust.

As a result, opinions focus on the status and authority of the trustee, not the trust. For example, key opinion issues include: (1) whether a trust had been created (particularly if not set forth in a written instrument), (2) establishing the authority of the trustee to act, (3) establishing compliance with the formalities required for the trustee to act, including attention to permissible activities of a trust under applicable law and the trust instrument, and to whether there is a need for beneficiary approval (*e.g.*, for self-dealing transactions by the trustee), and (4) application of New York’s Estates, Powers and Trusts Law, General Associations Law, statute of frauds and rule against perpetuities. It was also noted that grantor trusts are presumptively fraudulent as to the grantor’s creditors under New York law.<sup>8</sup>

### Delaware Statutory Trusts

Delaware statutory trusts are used in a variety of transactions, including closed-end and open-end mutual funds. These trusts are formed under the Delaware Statutory Trust Act (“DSTA”) (12 Del. Code § 3801 *et seq.*) by entering into a written governing instrument and filing a certificate of trust with the Delaware Secretary of State. They may have entity or non-entity status and may have multiple designated series of beneficial interests. Under the DSTA, unless otherwise provided in the trust’s governing instrument, beneficial owners are entitled to the same limitation on personal liability extended to

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<sup>8</sup> **[Editors’ Note:** For a further discussion of common law trusts, see J. Gadsden, “*Closing Opinions for Common Law Trusts*,” *In Our Opinion* at 5-10 (Summer 2016, vol. 15, no. 4).]

corporate shareholders. Governing instruments for mutual funds organized as Delaware statutory trusts typically include provisions that trust shares, when issued in accordance with the governing instrument, will be validly issued, fully paid and non-assessable (which enables the opinion giver to provide a similar opinion).

The DSTA makes giving opinions on these statutory trusts easier than giving opinions on common law trusts formed under New York and Massachusetts law. Substantive opinions tend to be worded like comparable opinions for corporations. For example, the status opinion typically states that the trust (not the trustee) is validly existing and in good standing under Delaware law (typically relying on a good standing certificate from the Delaware Secretary of State). In contrast to the wording used for Massachusetts business trusts and New York common law trusts, opinions for these trusts typically state that an agreement has been duly authorized, executed and delivered by the trust, without reference to the trustee. Delaware practitioners at the session, however, noted that they are generally reluctant to give opinions regarding non-statutory trusts.

#### Secured Transactions Not Addressed

The participants noted that opinions for trusts entering into secured lending transactions implicate many issues, but those were not addressed in this session.

## **2. Selected Issues Related to the Report on Third-Party Closing Opinions of Local Counsel**

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*Philip B. Schwartz, Akerman LLP, Fort Lauderdale, Co-Chair*

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*Richard N. Frasch, San Francisco, Reporter*

A principles-based report on third-party closing opinions of local counsel is currently being drafted by a joint committee of WGLO and the Legal Opinions Committee of the ABA Business Law Section. This breakout session considered the below-captioned topics relating to local counsel opinion practice.

#### Potential Conflicts of Interest

Model Rule 1.7(a)(1) of the ABA Model Rules provides, in part, that a lawyer cannot represent a client if the representation will be “directly adverse” to another client of the lawyer’s law firm.<sup>9</sup> In addressing the “directly adverse” standard of Model Rule 1.7(a)(1), the leaders of the breakout session noted that local counsel generally does not (i) advise the client on transaction terms, (ii) advocate the client’s interests or positions in the transaction with the opinion recipient, or (iii) draft or negotiate substantive terms of the transaction documents. However, several participants noted that the commentary

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<sup>9</sup> Model Rule 1.7(a)(2) also provides an additional rule for addressing a concurrent conflict of interest: a concurrent conflict exists if “... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”. Jurisdictions that have adopted the Model Rules may formulate Model Rule 1.7(a)(1) and Model Rule 1.7(a)(2) slightly differently. Jurisdictions that have not adopted the Model Rules use concurrent conflict of interest standards that differ from the standards addressed in Model Rule 1.7. As a result, local counsel should review the rules of professional conduct in its jurisdiction.

to Model Rule 1.7(a)(1) provides an example of a strict application of the “directly adverse” standard in a transactional matter.<sup>10</sup>

Focusing the discussion on the “directly adverse” standard of Model Rule 1.7(a), the breakout session leaders posed the following question: Do/should the foregoing rules apply to local counsel in the same manner as they do to lead counsel, and, if applied differently to local counsel, why and, generally, how so? In response, participants provided the following commentary and observations:

- in the context of a syndicated loan:
  - participants questioned whether consents from all banks in a syndicated loan generally need to be obtained;
  - some participants stated that their firms only obtain a consent from the agent bank, and not from any of the syndicate lenders;
  - one participant noted that if all syndicate lenders are required to consent to local counsel rendering and delivering its opinion, then the closing of a transaction would have to be delayed until all lenders were finally identified and a consent obtained from each of them;
  - another participant stated that his firm often includes a paragraph in its local counsel opinion letters to the effect that the acceptance of the opinion letter is deemed to be consent by a recipient to any conflicting representation involving the local counsel;
  - another participant stated that his firm only addresses a local counsel opinion to the agent bank, and then the agent bank distributes copies to the syndicate lenders (however, other participants questioned whether this suggestion is market or practical);
- one participant raised the following issue: whether a local counsel’s activities be considered in determining whether it is “representing” a client “against” an opinion recipient (*e.g.*, if local counsel adds a borrower-favorable provision to a local real estate instrument, which provision may or may not be customary in local counsel’s jurisdiction);
- another participant suggested that the nature of the underlying transaction often determines whether “direct adversity” may exist (*e.g.*, in a loan transaction, local counsel may not be deemed adverse to syndicate lenders; however, in an M&A transaction, local counsel may be deemed adverse to the acquiring company);
- a participant suggested that – in order to address these types of issues – term sheets used in such transactions (particularly, in syndicated loan transactions where a term sheet is distributed to all potential lenders) could not only identify the agent bank’s counsel but also identify the borrower’s counsel, and include a statement that each recipient who participates in the transaction consents to such respective representation and waives any conflicts of interest that may exist; and

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<sup>10</sup> “[I]f a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.” Model Rule 1.7, COMMENT, *Identifying Conflicts of Interest: Directly Adverse* ¶ [7].

- a participant noted her view that lead counsel and local counsel share many of the same issues with regard to Model Rule 1.7(a), while other participants felt that the burden should be less stringent for local counsel than it is for lead counsel.

No consensus was reached by the participants on whether local counsel representation constitutes, or could ever constitute, *per se*, a “directly adverse” representation, or on how uniformly to address this issue.

### Inappropriate Opinions Requested of Local Counsel

The breakout session leaders then addressed the following five (5) opinion request subjects that, in light of the circumstances, may be inappropriate to ask local counsel to render and asked for the reaction of the participants to such requests of local counsel:

#### 1. No Breach of Agreement

*Execution, delivery and performance of transaction documents, to which client is a party, do not breach, or result in a default under, all material agreements of the client.*

Participants, as a group, viewed such an opinion request as inappropriate because local counsel rarely has knowledge of, or familiarity with, agreements of the client. Due to its relationship to the client, it was generally believed that lead counsel should satisfy such an opinion request (and not local counsel). It was suggested that a “no breach of agreement” request could be considered by local counsel in the following circumstance: (i) a material agreement of the client is significant to the transaction and is governed by the law of local counsel’s covered jurisdiction; and (ii) the scope of local counsel’s review of such document in relation to relevant transaction documents is specifically designated.

#### 2. Performance by Client

*Performance of the client’s obligations under the transaction documents – as distinguished from performance of discrete obligations under specified transaction documents – (i) are within the corporate power and authority of, and duly authorized by, the client that is organized under the laws of the local counsel’s covered jurisdiction, (ii) do not violate related governance documents and applicable laws of the local counsel’s covered jurisdiction, and (iii) do not require governmental consents, etc. under the laws of the local counsel’s covered jurisdiction.*

In the context of such opinions, several participants commented that referring to “performance of all obligations” – as distinguished from performance of discretely described obligations (*e.g.*, payment of amounts required to be paid under the transaction documents or creation of a lien required by a transaction document) – is generally not appropriate for local counsel opinions; and that if “performance” is addressed, such opinions are often limited to performance of discrete client obligations under the transaction documents. On the other hand, a comparable number of participants commented that, in the context of such opinions, the use of the broader “performance of all obligations” reference is acceptable local counsel opinion practice. Regarding the “no violation of laws” opinion, participants generally agreed that federal laws should not be covered in local counsel opinions, and that the relationship between client and its lead counsel or its special regulatory counsel should place the responsibility for any such coverage on client’s lead or special regulatory counsel.

### 3. Usury

*Usury under local counsel's covered jurisdiction (where the transaction documents are governed by a jurisdiction other than local counsel's covered jurisdiction).*

One participant noted that a “no violation of laws” opinion rendered by local counsel with regard to a client generally applies only to laws of the local counsel’s jurisdiction which are violated by the client; it would seem, therefore, to follow – since usury laws generally apply to non-clients (*e.g.*, lenders) and not to a client (*e.g.*, borrowers) – that such “no violation of laws” opinion rendered by local counsel should not be deemed to include usury laws. On the other hand, another participant commented that a remedies opinion rendered with regard to a client is generally interpreted to cover usury laws because (i) a violation of usury laws provides the client with a defense to its repayment obligations under its agreements and (ii) such defense effectively prevents the opinion recipient from enforcing those repayment obligations against the client. In light of such defenses, it was suggested that some form of usury opinion by local counsel (in relation to the client) may be appropriate if the client has significant assets or a significant presence in the jurisdiction covered by the local counsel opinion.

### 4. Choice of Law Opinion

Some participants thought that a choice of law opinion is only appropriate when the client has significant assets in the jurisdiction covered by the local counsel opinion or local counsel is guided by a specific and comprehensive statute of its covered jurisdiction. Other participants were of the view that, when there are significant assets to justify the work, an “as if” opinion (*i.e.*, assuming the laws of the local counsel’s covered jurisdiction were applied to the designated transaction document, rather than the contractually chosen laws) may be a better approach than a costly and wordy choice of law opinion.

### 5. Negative Assurance

The participants uniformly objected to this type of confirmation being appropriate for delivery by local counsel.

#### Who prepares the first draft of local counsel’s opinion?

Participants were asked to show, by raising their hands, who prepares the first draft of their local counsel opinion letters: local counsel, lead counsel or recipient’s counsel. While it was unscientific, there was a clear belief that local counsel generally prepares the initial draft of its own opinion letter based on discussions with, or based on receipt of a list of opinions requested by, the recipient’s counsel.

### 3. Opinion Issues Relating to the EU, Including EU Bail-In Provisions in Financing Agreements and Anticipating Brexit

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The principal focus of this session was developing practice regarding the impact of the European Union’s “bail-in” regulations on opinions delivered in connection with the closing of financing transactions. This discussion session was intended to provide an update on an earlier panel presentation on the subject made at the WGLO Spring 2016 Seminar.

The EU's bail-in regulations, which were implemented effective January 1, 2016, enable regulators, as part of their tools for restoring a troubled EU financial institution's capital position without resorting to taxpayer funded bail-outs, to write down or convert into equity the liabilities of the financial institution and to vary the terms of those liabilities. In order to reduce the risk that non-EU courts applying non-European law governing those liabilities would refuse to give effect to the regulator's write-down and conversion powers, the bail-in regulations require EU financial institutions which enter into contracts governed by non-European law to include in those contracts a provision whereby the counterparties agree to be bound by any write-down, conversion or modification of liabilities resulting from a bail-in proceeding. While we don't usually think of borrowers as creditors of their lenders, credit agreements contain obligations of lenders to borrowers, including commitments of lenders to make loans and extend other credit accommodations to borrowers, as well as possibly other "counterparty arrangements" with lenders or affiliates of lenders, and those obligations are liabilities covered by the bail-in regulations. Accordingly, bail-in recognition provisions are now being included in most credit agreements for syndicated loan transactions in which EU financial institutions are, or may in the future become, lenders, and also increasingly in all kinds of other agreements with financial institutions.

The discussion at the session initially centered on correcting certain misconceptions regarding the authority of regulators pursuant to the bail-in regulations. It was pointed out that, under the bail-in regulations, no creditor could ever be worse off as a result of the bail-in of the liabilities of an EU financial institution than they would have been in an insolvency proceeding in respect of the financial institution in its home jurisdiction, that regulators are not permitted to alter the existing priority of creditors in bail-in actions or to discriminate between creditors of the same ranking (except in very limited circumstances), and that any exercise of bail-in powers by regulators would have to be in the public interest. Where a creditor is found to be worse off than it would have been in an insolvency proceeding, it will be entitled to compensation. It was also noted that bail-ins are in substance (though expressly not as a matter of European law or regulation) administrative bankruptcy proceedings designed to stabilize financial institutions and avoid liquidation. The requirement to include bail-in recognition language in non-EU law governed contracts is intended to put foreign creditors on the same footing as EU creditors and is not intended to benefit EU creditors to the detriment of other creditors of the same ranking. Finally, the view was expressed that, since the goal of the bail-in regulations is to keep EU financial institutions operating and afloat, one might take some practical comfort from the fact that damaging a bank's borrowers by refusing to lend to them on the terms agreed on by the parties likely would not be the most effective way of accomplishing that goal.

The discussion then turned to how lawyers should deal with the bail-in regulations when issuing closing opinions. It was pointed out that there are four possible approaches an opinion giver might take when addressing bail-in issues. First, the opinion giver could expressly exclude the bail-in recognition provision from the ambit of his or her remedies opinion. Under that approach, the opinion giver would provide no comfort that a court would give effect to the borrower's agreement to be bound by a write down, conversion or modification of the liabilities of an EU lender under the credit agreement, but would need to conclude that the inclusion of the bail-in recognition provision would not adversely affect the enforceability of the other terms of the credit agreement were an EU lender to become subject to a bail-in procedure. Second, the opinion giver could both exclude the bail-in recognition provision from the scope of the remedies opinion and include a disclaimer in the opinion letter to the effect that no opinion is being given as to the impact of any future bail-in of the liabilities of a lender under the credit agreement on the enforceability of the borrower's other obligations under the credit agreement. Third, the opinion giver could rely on the general bankruptcy exception contained in the opinion letter, on the theory that bail-in actions are similar to bankruptcy proceedings. Fourth, the opinion giver could rely on the general equitable principles exception contained in the opinion letter, on the theory that, if a court were to excuse

a borrower from its agreement to be bound by any bail-in proceeding or its other obligations under a credit agreement in the event an EU lender were to become subject to a bail-in proceeding, it would likely do so on equitable grounds.

Participants in the session expressed little appetite for relying on general bankruptcy or equitable principles exceptions to address opinion issues arising out of the bail-in regulations. With respect to the former, the concern was expressed that the bankruptcy exception is typically thought of as applying to the opinion giver's client (*i.e.*, the borrower) and its obligations, and might not be read broadly enough to sweep in the lenders and their obligations. It was also noted that the legislative history of the bail-in regulations indicates that the regulations were put in place specifically to avoid forcing financial institutions into insolvency proceedings and that, as a result, bail-in actions might not be viewed as falling within an exception designed to deal with those proceedings. In the end, the consensus of participants appeared to be that, while perhaps not necessary, an express exception for bail-in issues is preferable, particularly since lenders are generally well aware of those issues and also generally are not expecting borrower's counsel to provide a legal opinion on the subject.

Discussion then ensued among participants as to the preferred scope of that express exception. A show of hands indicated that the vast majority of participants are adding an express exception to their remedies opinions for the enforceability of bail-in recognition provisions. In addition, most participants thought that opinion givers are also justified in expressly excluding the impact of a future bail-in of the liabilities of a lender on the enforceability of the borrower's other obligations under the credit agreement, and most indicated that they are either regularly including such a qualification in their opinions or planning to do so going forward. Whether that qualification should exclude any effect on the obligations of the borrower to the bailed-in lender or to all lenders was left unaddressed. While a few participants expressed concern that trying to carve out the impact of future bail-in actions on the general enforceability of the borrower's obligations might meet with resistance from lenders, most believed that it would be unreasonable of lenders to expect borrower's counsel to give them comfort on that score and most indicated they had not encountered push back from lenders when including the broader qualification.

The session ended with a brief discussion by one of the co-chairs of the status of Brexit and the effect of Brexit on English law, including the view of that co-chair that English contract law would be largely unaffected by Brexit and that the effect of Brexit on choice of law and enforceability of judgment opinions under English law would be limited.<sup>11</sup>

### **PANEL SESSION III:**

#### **1. Current Ethics Issues Relating to Opinions**

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*John K. Villa, Williams & Connolly LLP, Washington, D.C., Co-Chair*

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

The discussion at this session opened with consideration of a hypothetical relating to the role of counsel in a financing transaction, including the ethical duties of local counsel engaged to provide an

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<sup>11</sup> **[Editors' Note:** For an article on the EU bail-in regulations, see A. Dodson et al., "*Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States*" in the Spring 2016 issue of *In Our Opinion* (vol. 15, no. 3) at 11-16, and the commentaries thereon by Don Glazer, Tim Hoxie, and Richard R. Howe at pages 16-22 of the same issue.]

opinion on a narrow specified issue and the potential impact of “business” conflicts on attorney ethical issues. The hypothetical was progressive, meaning it advanced a narrative posing ethics issues and then, after a discussion of those issues, the narrative continued in a way that raised different and additional ethics issues.

The group first worked through a basic set of facts under which local counsel is hired to give an opinion on a discrete issue but, in reviewing the transaction documents, uncovers another potential issue not within the scope of the requested opinion. The local counsel’s engagement letter with the client specifically limits the scope of the engagement. The group focused on ABA Model Rule 1.2, under which a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent. Does it matter if the potential issue arises under the local counsel’s jurisdiction or under the laws of a different jurisdiction? Where, as is often the case, the local counsel has been brought into the transaction by another law firm, should the local counsel first raise the new issue with the other law firm before going to the client? If so, and the other law firm does not appear to be willing to raise the issue with the client, what are the duties of the local counsel at that point? Is the other law firm the “agent” of the client in any meaningful way in this analysis? How far does counsel need to go in ensuring that the client’s consent to the scope limitation is “informed”?

In the hypothetical, the particular issue identified by local counsel – the possible practical insufficiency of a 15-day cure period for certain potential defaults in light of developments in the petroleum market in Texas – was based in part on local counsel’s specific knowledge of the relevant market. In other words, it wasn’t a drafting mistake or a purely legal matter, but was arguably instead more of a business judgment. The group discussed how one might distinguish between “business” and “legal” advice in this context. Lawyers are not business consultants, but a recent case has questioned whether there is a “bright line” between business advice and legal advice. See *Peterson v. Katten Muchin Rosenman LLP*, 792 F.3d 789 (7th Cir. 2015).<sup>12</sup> The attendees also discussed whether it might be advisable to include a disclaimer of any obligation to provide “business” advice in engagement letters, or whether such a disclaimer is already generally understood.

The group also discussed the implications of this scenario under ABA Model Rule 1.4 under which a lawyer shall reasonably consult with the client about the means by which the client’s objectives are to be accomplished. Some session attendees pointed out that a transaction may present a variety of business and legal issues, and local counsel may have a narrow role. The group discussed whether having local counsel raise issues outside of the agreed scope of its representation would be contrary to the client’s expectations – including expectations as to cost. Again, it was noted that the situation can be complicated by the role of general transaction counsel serving as an intermediary between the client and local counsel, as well as the common practice of bringing in local counsel only at a very late stage in a transaction.

Building on the original hypothetical, the group then considered the issues arising if the same local counsel finds out that his firm is also handling a matter for another client that is adverse to the client in the local counsel matter. What are the implications under ABA Model Rule 1.6 concerning confidentiality where information obtained on behalf of one client may have implications for another

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<sup>12</sup> In the *Katten* case, the Seventh Circuit reversed the district court’s dismissal of a malpractice claim for failure to state a claim. The district court had held that the client knowingly took a risk in investing in a business that turned out to be a Ponzi scheme and could not blame the law firm for failing to give business advice; the Seventh Circuit, although noting that lawyers are not “business consultants,” questioned whether there is a “bright line” between business advice and legal advice.

client? Some session attendees noted that there may be a tension between client confidentiality obligations and ABA Model Rule 1.7 as it relates to concurrent conflicts of interest in such a situation, because obtaining “informed” consent from one client may necessitate the disclosure of confidential information from the other client. The group discussed whether, in such a situation, counsel might be required to withdraw from either or both representations under ABA Model Rule 1.16. Attendees noted that, as a practical matter, in some circumstances, withdrawal from a matter on the eve of a transaction closing might be highly prejudicial to the client.