

IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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Fall 2014

James F. Fotenos and Susan Cooper Philpot, Editors

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FROM THE CHAIR

It is a privilege to share with you the Fall 2014 issue of our Committee's Newsletter, "In Our Opinion." As in the past, without the tireless work of our newsletter editors, Jim Fotenos and Susan Cooper Philpot, we would have no newsletter to read.

There are several items of note in this issue. One of the most significant is the first of two planned articles addressing opinions that relate to series LLCs. As most know, Delaware allows an LLC to have multiple "series" and permits the assets and liabilities of each series (at least under Delaware law) to be kept separate. Series LLC's are used in a number of situations, such as in investment vehicles and in some types of financings, where opinions are requested. Norm Powell has made a significant contribution to opinion literature by describing the manner in which common opinion practices might apply to opinions on series LLCs. When you read this, you will not be able to wait for Part II.

We also are fortunate to continue our recently inaugurated "Litigator's Corner." In this installment John Villa and Craig Singer tackle the difficult question of what opinion preparers can and should do when confronted with a situation in which they are aware of facts that might be material to the recipient or might even suggest that the opinion could facilitate a fraud. The article describes applicable ethics and liability standards and identifies some of the literature concerning misleading opinions. As one might expect from a thoughtful litigation-oriented piece, the authors do not content themselves with stating the obvious (that an opinion giver only has a duty not to "misrepresent, negligently or intentionally, in delivering [an] opinion"), but rather discuss the real world of "grey" facts and uncertainty that we all face, and how to deal with those situations.

Jim Fotenos, not content to carry a large measure of the burden of editing this newsletter, has contributed an article that addresses the recent changes to Circular 230 (the Treasury

regulations known if not loved by all tax practitioners). The revisions discussed by Jim eliminate separate rules for "covered opinions" and, as a result, create a single set of guidelines for providing written tax advice.

I would be remiss if I didn't note another opinion development that is buried in a Committee report. We are fortunate that the Securities Opinions Subcommittee of the Federal Regulation of Securities Committee has circulated a new draft of its updated report on no registration opinions. The changes address the impact on these opinions of the recent revisions to Regulation D mandated by Dodd – Frank and the JOBS Act, and in particular provisions related to the requirement to take reasonable steps to verify that participating investors in Rule 506(c) offerings involving general solicitation are "accredited investors," and the new "bad actor" disqualification provisions. This draft is available on the Legal Opinions Committee website.

Finally, you will find an article that I did ("with a little help from my friends") describing a potential trap involving the new Delaware legislation amending DGCL Section 228(c) relating to stockholder consents, but with a suggested solution.

This newsletter arrives as many of us prepare to attend to the Section's Fall Meeting in Washington, D.C., which follows close on the heels of our Annual Meeting in Chicago. There are several events of interest at the Fall Meeting. We will, of course, have our Committee meeting, which will take place Friday, November 21 from 9:30 AM to 11:00 AM. I will separately send dial-in information for those who cannot attend in person. We will also sponsor a program entitled "Have You Said What You Mean, and Who Decides What You Said: Who Can Exercise Jurisdiction Over Opinion Givers, and What Does That Mean for Opinion Interpretation and Opinion Liability?" which will also take place Friday from 2:00 p.m. – 3:30 p.m. We are fortunate to have Sylvia Chin, Don Glazer and Steve Weise joining this panel (in addition to me), and I look forward to a lively discussion. This will be followed by our

traditional Committee reception Friday
afternoon.

I would like to spend some time at the Fall Committee meeting looking to the future activities of our Committee. In that regard, we will discuss the joint project we have undertaken with WGLO to identify certain common opinion practices. Steve Weise and Stan Keller will lead this discussion, and it will afford the Committee the opportunity to understand in some detail this project while it is still a work in progress. The project should be one of the Committee's more significant contributions to the opinion literature as it has as its goal updating the Legal Opinion Principles and Guidelines for the Preparation of Legal Opinions, which have been a foundation for our opinion practice for fifteen years. The project is ambitious, as it aims to broaden the consensus surrounding customary practice as we understand it.

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FUTURE MEETINGS

**Working Group on Legal Opinions
New York, New York
October 27 and 28, 2014**

**ABA Business Law Section
Fall Meeting
Washington DC
Ritz Carlton
November 21-22, 2014**

Legal Opinions Committee

Friday, November 21, 2014

Committee Meeting:
9:30 a.m. — 11:00 a.m.
Washington Room, Ballroom Level

Program: “Have You Said What You Mean, and
Who Decides What You Said: Who Can
Exercise Jurisdiction Over Opinion Givers, and
What Does That Mean for Opinion
Interpretation and Opinion Liability?”
2:00 p.m. — 3:30 p.m.

Reception: 5:00 p.m. — 6:30 p.m.
Salon III B, Ballroom Level

Law and Accounting Committee

Friday, November 21, 2014

Committee Meeting:
8:00 a.m. — 9:30 a.m.
Washington Room, Ballroom Level

Audit Responses Committee

Friday, November 21, 2014

Committee Meeting:
3:30 p.m. — 4:30 p.m.
Washington Room, Ballroom Level

Professional Responsibility Committee

Saturday, November 22, 2014

Committee Meeting:
8:00 a.m. — 9:30 a.m.
The Boardroom, Ballroom Level

Securities Law Opinions Subcommittee

Saturday, November 22, 2014

Subcommittee Meeting:
10:00 a.m. — 11:00 a.m.
Salon III B, Ballroom Level

BUSINESS LAW SECTION 2014 ANNUAL MEETING

The Business Law Section held its inaugural Annual Meeting in Chicago on September 11-13, 2014. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Annual Meeting of interest to members of the Committee on Legal Opinions.

Legal Opinions Committee

The Committee met on September 13, 2014. The meeting was attended, in person or by phone, by some 50 members of the Committee. There follows a summary of the meeting.

Tribute to Joseph Hinsey IV. Stan Keller opened the meeting with a tribute to Joe Hinsey, who passed away at the age of 82 on June 13. Joe Hinsey was a giant of the corporate bar. After a distinguished career as a partner specializing in corporate and securities law, with an emphasis on corporate governance, with White & Case LLP, New York, he finished his career serving for over a decade on the faculty of the Harvard Business School as the H. Douglas Weaver Professor of Business Law Emeritus. Joe served as Chair (1983-1984) of the Business Law Section and Chair of its Corporate Laws Committee (1984-1988). He also chaired the Committee on Audit Inquiry Responses that produced the ABA's Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (1975), which was included in the *Auditor's Letter Handbook* first issued in 1976. As Chair of the Corporate Laws Committee, Joe was instrumental in the ongoing review and revision of the Model Business Corporation Act. Joe also served as the reporter of the drafting committee that prepared the Legal Opinion Accord (1991). All who worked with Joe Hinsey grew by the experience.

Cross-Border Opinions Project. Ettore Santucci reported on the Committee's six-year project in preparing its report on cross-border legal opinions (*Cross-Border Closing Opinions of U.S. Counsel*). The most recent draft of the report can be found on the Committee's website on the front page under "Working Drafts." Ettore thanked the members of the editorial group, who have toiled long and hard on the project. Besides Ettore, as reporter, the group includes J. Truman Bidwell, Jr., Daniel Bushner, Peter Castellon, Sylvia Fung Chin, Edward H. Fleischman, Richard N. Frasch, Donald W. Glazer, Timothy G. Hoxie, Jerome E. Hyman, Stanley Keller, Noël J. Para, John B. Power, James J. Rosenhauer, and Elizabeth van Schilfgaarde.

While the drafting committee believes it has addressed all issues of substance relevant to the report, some additional work remains to be done in order for the report to be published. The group is still wrestling with the question of whether to recommend that U.S. lawyers include in their cross-border opinion letters an explicit reference to U.S. customary practice or to the ABA Legal Opinion Principles (53 Bus. Law. 831 (1998)) (which make clear that U.S. closing opinions are, as the report provides, subject to U.S. customary practice). Ettore anticipates that the report will be published in *The Business Lawyer* in 2015.

Chair Tim Hoxie paid tribute to the incredible efforts of Ettore and his editorial group. After further discussion, and upon motion duly made and seconded, the Committee unanimously approved the report in substance for publication, subject to further editorial revisions as approved by the editorial group.

Later that day, the Committee presented a program on cross-border legal opinions.

Joint Project on Common Opinion Practices. Steve Weise reported on the status of the joint project undertaken by this Committee and the Working Group on Legal Opinions ("WGLO") in preparing a description of common opinion practices. The project has evolved over the past few months to producing a

statement that is tied more closely to “customary” opinion practices and that would serve as an update to the Legal Opinion Principles. In this regard, the statement would include a section on the role of facts relevant to the preparation of closing opinions, similar to that set forth in the Legal Opinion Principles. Steve indicated that a revised draft of the statement would be circulated among the leadership of the joint project shortly, preliminarily to sharing it with the entire group. The working group includes Steve as its reporter and Pete Ezell and Steve Tarry as co-reporters, Ken Jacobson, Stan Keller and Vladimir Rossman as co-chairs, as well as representatives of this Committee and, through the WGLO, representatives of a number of state bar associations.

Steve pointed out that the joint project has particular relevance in light of the effort being undertaken by the American Law Institute to update the Restatement of Torts to address, among other things, negligent misrepresentation, which will deal with opinion letters. Steve has been in contact with the reporter for the project, Professor Ward Farnsworth, University of Texas School of Law, and has been presenting the perspective of transaction lawyers to the reporter, with an emphasis on the role of customary practice in assessing an opinion giver’s preparation and delivery of a third-party closing opinion.

Model Asset Purchase Agreement. Thomas M. Thompson (Buchanan Ingersoll & Rooney PC, Pittsburgh, Pennsylvania), a member of the Section’s Mergers and Acquisitions Committee, reported that the M&A Committee is in the process of revising its Model Asset Purchase Agreement. As with the 2010 revision of the Model Stock Purchase Agreement, the revised Model Asset Purchase Agreement will include one or more illustrative closing opinion(s). Members of the Legal Opinions Committee participated in the preparation of the 2010 illustrative opinion letters, and Tom reported that the M&A Committee would look again to this Committee for assistance in preparing the illustrative opinion letter(s) to be included with

the revised Model Asset Purchase Agreement. He anticipates the project will take a year.

Survey of Law Firm Opinion Practices. In 2010, the Committee conducted its Survey of Law Firm Opinion Practices, published in 2013 in *The Business Lawyer* (68 Bus. Law. 785). Members of the Committee, including Tim Hoxie, Chair, and John Power, reporter of the 2010 survey subcommittee, met prior to the Committee meeting to discuss whether the Committee should undertake an update of the 2010 survey. While the participants agreed that an update to the survey would be useful, they did not agree on when work on the update should begin. Discussions will continue on this topic.

Administrative Matters. The next issue of the Committee’s quarterly newsletter, “In Our Opinion,” will be published in October 2014. The Chair and Jim Fotenos (by phone), co-editor of the newsletter, encouraged members to contribute articles on opinion topics of interest to them for inclusion in the newsletter. John Villa, with Craig Singer, a colleague at Williams & Connolly LLP, Washington, D.C., discussed their new feature in the newsletter, “Litigator’s Corner,” presenting the perspective of litigators on opinion practice. John and Craig will be contributing articles for future issues of the newsletter.

A question was raised whether the Committee’s popular “Legal Opinion Resource Center” is available to the public and not just to members of the Business Law Section. The Resource Center is intended to be available to the public, but, because of recent malfunctions to the ABA’s website, has not been. Christina Houston, the Committee’s webmaster, is working diligently with the ABA to correct this error.

TriBar Opinion Committee. Dick Howe, co-chair of the TriBar Opinion Committee, reported on the status of TriBar’s report on limited partnership opinions. Dick and Don Glazer, TriBar’s other co-chair, reported on some of the difficulties in preparing this report, including the fact that many issues involving LP opinions are

different from opinions on LLCs and corporations (the focus of the TriBar LP opinions report is on opinions delivered for Delaware limited partnerships). Dick is hopeful that the report will be completed in 2015.

TriBar is also undertaking reports on risk allocation provisions and on '40 Act opinions.

WGLO. In Arthur Field's absence, Chair Tim Hoxie reported that the next WGLO seminar will be held October 27-28, 2014 in New York.

Common Legal Opinion Qualifications. Chair Tim Hoxie reported that a statement of common qualifications in third-party closing opinions will be published in the November 2014 issue of *The Business Lawyer*. The statement has been prepared by a working group headed by Gail Merel of Andrews Kurth LLP. It is not intended as a statement of customary practice but rather as a description of qualifications the members of the working group commonly see in their opinion practice.

Current Developments. Stan Keller reported on the August 2014 report of the National Association of Bond Lawyers on IRC Section 501(c)(3) opinions ("The 501(c)(3) Opinion in Qualified 501(c)(3) Bond Transactions"). Drafts of the report had been shared with Stan, Arthur Field, and Don Glazer for comment, and the final report reflects their input, particularly on the question of reliance by bond counsel upon the 501(c)(3) opinion of borrower's counsel. The NABL report is available on the Committee's Legal Opinion Resource Center (accessible [here](#))¹.

Steve Weise summarized his recent developments note that appeared in the summer 2014 issue of the newsletter ("Recent Developments — Personal Jurisdiction Over Out-of-Forum Opinion Givers"). He supplemented that report with a brief discussion of the decision of the U.S. District Court for

Kansas in *CVR Energy, Inc. v. Wachtell, Lipton, Rosen & Katz*, 2014 WL 4059761 (Aug. 14, 2014), in which the court concluded that the Wachtel firm did not have sufficient contacts in Kansas to support the court's personal jurisdiction over the firm in an action for malpractice brought by the firm's former client (since taken over by an affiliate of Carl Icahn).

Judicial Lament for Opinion Givers. Don Glazer closed the meeting by reading from Justice Jones' concurring opinion in *Taylor v. Riley*, 2014 WL 4401418 (Idaho Sup. Ct., August 27, 2014), in which the Idaho Supreme Court ruled that an opinion giver assumes a duty of care to those whom it expressly permits to rely upon an opinion letter. Harkening to his days in private practice rendering closing opinions to lending institutions that would issue non-negotiable opinion letter demands, Justice Jones expressed sympathy for the position in which opinion givers are put:

Where the client is the party benefitted by the transaction, it does not seem that the attorney under those circumstances should solely bear the consequences of any improvident representations [in its opinion letter]. Generally, the attorney making the representations in the opinion letter may be compensated by his client for the work entailed but, while the client may receive consideration from the other contracting party in the transaction, the attorney is in a position of making representations to that party to facilitate the transaction, while receiving no consideration from that other party. So, where the party may place reliance on representations in the opinion letter, the attorney may incur substantial liability without much to show in the way of compensation for his or her opinions.

2014 WL 4401418 at *18.

¹ The URL is <http://apps.americanbar.org/buslaw/tribar/>.

Next Meeting. The next meeting of the Committee will be held at the Section's Fall Meeting in Washington, D.C. on Friday, November 21, 2014.

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Audit Responses Committee

The Committee met on September 13, 2014. The principal discussion points are summarized below.

Update Project. Most of the meeting was devoted to consideration of the current draft of the proposed Committee Statement on Updates to Audit Response Letters. As previously discussed, the purpose of the proposed Statement is to provide guidance to practitioners and others about the reasons for updates and a framework for lawyers' responses to update requests. Since the Spring 2014 meeting in Los Angeles, there have been several drafts incorporating the input of the drafting committee as well as comments from the AICPA, which was provided with an informal draft. The Committee discussed various points in the draft. The drafting committee will review a revised draft reflecting the points discussed and other comments. It was agreed that the final draft will be circulated to the Committee and deemed approved absent objection.

Disclaimers. The Committee discussed use of disclaimers in responding to requests that go beyond the scope of the Statement of Policy. The question arose in a Committee Listserve discussion of a non-conforming, but not uncommon, request that the lawyer provide "any information about financing statements filed under the Uniform Commercial Code or any other assignment of the company's assets."

Unsurprisingly, no one provides information in response to such a question. Some lawyers state expressly that they are not responding to the inquiry because it is not within the scope of

matters they are required to address under the Statement of Policy. Other lawyers do not expressly respond to the request. Some rely on the limitations in the Statement of Policy. The Committee discussed whether the standard language in the ABA illustrative letter that the response "is limited by, and in accordance with" the Statement of Policy in fact covers a non-conforming request about matters like UCC filings. Arguably, a request relating to matters that do not involve loss contingencies at all is outside the Statement of Policy altogether, and therefore incorporating the limitations of the Statement of Policy does not necessarily exclude matters unrelated to contingencies. However, many firms' letters also contain a statement to the effect, for example, that the letter "does not undertake to respond to or comment on statements or inquiries contained in the Company's audit inquiry letter other than those specifically discussed above and no inference should, therefore, be made that we have responded to any other aspects of the audit inquiry letter." That type of disclaimer would cover an inquiry about UCC filings and other out-of-scope matters.

Next Meeting. The Committee's next meeting will be at the Business Law Section's Fall Meeting in Washington, D.C. on Friday, November 21, 2014.

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Law and Accounting Committee

The Law and Accounting Committee met on September 13, 2014. The principal items of discussion are summarized below.

SEC's Disclosure Effectiveness. The first part of the meeting was devoted to discussion led by Tom White of the Committee's efforts in the Business Law Section's participation in the SEC Division of Corporate Finance's disclosure effectiveness project. Tom is chairing the "Content and Presentation" subcommittee of this

task force. The discussion summarized the meeting of the task force held the prior day and the reports of its four subcommittees. Several members of the Committee are active participants in this project and provided their input and analysis of future steps.

PCAOB. Mike Scanlon discussed several Public Company Accounting Oversight Board (“PCAOB”) projects. Mike discussed PCAOB Auditing Standard No. 18, “Related Parties”, which requires specific audit procedures for the auditor’s identification of, accounting for, and disclosure of transactions and relationships between a company and related parties. Auditing Standard No. 18 requires an auditor to perform specific procedures: (i) to obtain an understanding of the company’s relationship and transactions with related parties, or (ii) if the auditor determines that an undisclosed related-party transaction exists, then the auditors must perform certain specified procedures. The sense of the discussion was that the likely effect of this standard will be that firms will have to revise their audit plans. Subject to SEC approval, this standard will be effective for fiscal years beginning on or after December 15, 2014.

Mike also discussed the PCAOB’s proposed changes to the auditor’s reporting model. Public meetings and advisory group meetings have been held on this project, but the PCAOB has not issued a final standard.

FASB Update. Randy McClanahan then followed with an update of current Financial Accounting Standards Board (“FASB”) pronouncements:

1. **Going Concern** – In August, 2014, the FASB issued Accounting Standards Update 2014-15 regarding disclosures of uncertainties about an entity’s going concern presumption. This update changed the timing for requiring disclosures from that required by the exposure draft issued in 2013. Update 2014-15 provides that management must assess an entity’s potential inability to continue as a going concern at each reporting period. Management must determine whether there is substantial doubt about an entity’s ability to continue as a going

concern. Substantial doubt exists when it is probable that the entity will be unable to meet its obligations as they become due within one year after the date the financial statements are issued. “Probable” is defined as “likely to occur”.

Update 2014-15 includes at least two material changes from the 2013 exposure draft. First, the exposure draft required that disclosures would begin if it were known or probable that an entity would not be able to meet its obligations within the next 24 months. The 24-month period was deemed too distant. Additionally, under the exposure draft, disclosures were to begin when management believed it was “more likely than not” that an entity would be unable to meet its obligations (as opposed to “probable” in the final draft).

2. **Revenue Recognition** – In May 2014, the FASB issued Accounting Standards Update 2014-9, “Revenue Recognition.” The objectives of the update are to: (i) eliminate inconsistencies in current rules; (ii) create a single framework; (iii) standardize revenue recognition practice; (iv) improve usefulness of disclosures; and (v) make financial statements easier to prepare. Update 2014-9 provides that there are five steps that must be applied in analyzing recognition. These are as follows:

- (i) Identify the contract with a customer;
- (ii) Identify the separate performance obligations in the contract;
- (iii) Determine the transaction price;
- (iv) Allocate the transaction price to separate performance obligations; and
- (v) Recognize revenue as the entity satisfies each performance obligation.

One significant change from the exposure draft is that there is no adjustment to the contract price for credit risk.

The implementation will require each entity to review existing contracts. The Committee discussed whether companies have the ability to track the data necessary to analyze all of their contracts. The Committee also concluded that it would be helpful to gain insight from the accounting profession regarding strategies for implementation, and for negotiating contractual provisions following implementation of this standard. The members determined that it would be helpful to obtain a speaker on this topic at a future meeting.

The next meeting of the Law and Accounting Committee will be held at the Fall Meeting in Washington, D.C. on November 21, 2014.

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Professional Responsibility Committee

The Committee met on September 12, 2014. The meeting opened with a presentation by Stephen Gillers, Elihu Root Professor of Law, New York University School of Law, addressing attorney discipline, with a focus on New York. Professor Gillers' presentation was based on his recent article, "*Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*," 17 NYU J. of Legislation & Public Policy 485 (2014). In New York, observed Professor Gillers, there is a lack of consistency in attorney discipline cases due to the independent and uncoordinated administration of discipline proceedings among the four geographically defined intermediate appellate court jurisdictions. Professor Gillers noted the following problems with New York's system:

- A lack of clear articulation of standards (such as burden of proof) for adjudicating disciplinary complaints;

- Excessive delay in the resolution of proceedings (measured in multiple years);
- A lack of transparency, with the public often unable to learn of disciplinary sanctions imposed on a lawyer;
- A lack of consistency as to sanctions imposed; and
- A failure to protect the public when imposing sanctions in disciplinary proceedings.

After Professor Gillers' presentation, the remainder of the meeting was devoted to a discussion of the ongoing project to revise the Model Rules of Professional Conduct and the comments to address technology issues, including those arising under: Rule 1.0(n) (definition of "writing" or "written" and of "signed"); Comment [8] to Rule 1.1 (stating that the duty of competence requires a lawyer to keep abreast of changes in relevant practice technology, including the risks and benefits associated with the use of that technology); Rule 1.6(c) and Comments [18] and [19] thereto (stating that a lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client); and Rule 7.3 and its Comments (prohibiting the solicitation of clients by "real-time electronic contact," a term that is not defined).

The Chair also gave his final report, followed by remarks by Keith Fisher (Ballard Spahr LLP, Washington, D.C.) as incoming Chair.

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Securities Law Opinions Subcommittee Federal Regulation of Securities Committee

The Subcommittee met on September 12, 2014 and continued its work on no-registration opinions, including those delivered in Rule 506 offerings. Most of the meeting was taken up with a discussion of the Subcommittee's 2007 report on "No Registration Opinions", 63 Bus. Law 187 (2007). This topic had been previously discussed on several occasions, and a revised draft of the updated report had been circulated in advance of the September meeting.

As previously noted, the updated report will address, among other things, the impact on opinion practice of the 2013 amendments to Rule 506. At this meeting, most of the discussion focused on the section of the report which addresses opinion givers' reliance on representations, the basis upon which (as an ethical matter) opinion givers may so rely, and the relationship of those matters to the stated assumptions that opinion givers commonly include in opinion letters in connection with no registration opinions.

The sense of the meeting was that, subject to comments offered at the meeting, the draft report is approaching completion. However, there remain pending a further set of proposed amendments to Rule 506 which could, if adopted, raise additional issues for opinion givers similar to those addressed in the current draft report. The sense of the meeting was that the current draft should be finalized, and then posted as a draft but not formally published, pending the outcome of the further Rule 506 rulemaking.

The meeting concluded with a very brief discussion of a possible future project addressing Rule 14e-1 opinions given in connection with debt tender offers. The Subcommittee expects to take this up again at future meetings.

The next meeting of the Subcommittee will be in Washington, D.C. on November 22, 2014.

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PRACTICE CORNER: LLC SERIES OPINIONS: PART I

Limited liability companies ("LLCs") have become the preferred business entity form for many private and some public companies, including many formed to finance commercial real estate. Delaware LLCs are formed under and governed by the Delaware Limited Liability Company Act (the "Delaware LLC Act").² Long a preferred venue for entity formation, Delaware now has about twice as many registered LLCs as corporations.

Since the mid-1990s, the Delaware LLC Act has permitted the formation of LLCs with separate series of members, membership interests or assets ("Series"), and now more than a dozen states permit the formation of LLCs with separate Series. This note addresses Series comprised of separate assets. Where the requisite steps are taken in the establishment and maintenance of a Series, the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to that Series are enforceable only against the assets of that Series, and not against the assets of the LLC generally or of any other Series.³ Though significant issues arise when a Series becomes a

² Del. Code Ann. tit. 6, §§ 18-101 to -1109. Unless otherwise indicated, all citations to § 18-___ are to the Delaware LLC Act.

³ See, e.g., § 18-215(b).

debtor for Uniform Commercial Code Article 9 purposes, and it is doubtful that a Series can be a separate debtor under the Bankruptcy Code, in recent years a small but increasing number of Series have been utilized as borrowers in real estate and other financing transactions.⁴ Opinions regarding LLCs, and their differences from opinions regarding corporations, have been widely considered.⁵ This note focuses on LLC and LLC Series opinions, their differences, and the diligence normally conducted to deliver them.

No Series can exist other than during the existence of the LLC in connection with which it was established. One consequence is that a Series is terminated, and its affairs must be wound up, upon the dissolution of the related LLC.⁶ Despite this dependence, there are significant differences between an LLC and a Series. Default rules in most LLC statutes may be, and often are, overridden by language in the LLC agreement. When opining on an LLC, it is therefore essential to review the LLC agreement, as well as the LLC's certificate of formation, in addition to the governing statute. These concerns are even more salient in the case of a Series.

1. Status Opinion

The following are typical formulations of the status opinion, the first for a Delaware LLC and the second for a Delaware Series of an LLC:

⁴ See Norman M. Powell, *Series LLCs, the UCC, and the Bankruptcy Code – A Series of Unfortunate Events?*, 41 UCC L.J. 103 (2008).

⁵ See Norman M. Powell, *Limiting Your Liability for LLC Opinions*, *The Practical Lawyer*, June 2012, at 29; TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006) ("TriBar LLC Report"); TriBar Opinion Committee, *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011) ("TriBar LLC Membership Interests Report").

⁶ § 18-215(k).

LLC Formulation: The LLC has been duly formed and is validly existing in good standing as a limited liability company under the Delaware LLC Act.

Series Formulation: Series A has been duly established under the Delaware LLC Act and the LLC's Certificate of Formation, LLC Agreement, and Series A Supplement (the "Governance Documents").

The status opinion for an LLC has three discrete components.

- (a) Duly formed — the steps taken to form the LLC satisfied all then-applicable statutory requirements.
- (b) Validly existing — the LLC exists as an LLC under applicable law — that is its existence has not ceased, but continues.
- (c) In good standing — based on a certificate from the Secretary of State, this generally conveys that required reports have been filed and franchise taxes paid, with the consequence that the LLC's status as such has not been revoked or suspended.

See generally TriBar LLC Report ¶ 2.0 ("The Status Opinion: Formation and Existence").

The status opinion for a Series is somewhat narrower.

- (a) Duly established — while the Delaware LLC Act speaks of LLCs being formed, it speaks of Series being established. This difference in nomenclature is fairly common in the jurisdictions that permit Series. The distinction is consistent with the notion that a Series is not, in fact, a separate entity. To opine that a Series has been duly established is to opine that all of the steps necessary to establish the Series have been taken. Depending upon the extent to which the opinion giver has been involved in

the formation of the LLC and the establishment of the Series, the diligence may include —

- (i) Reviewing the LLC’s certificate of formation (as amended through the date of the opinion). It is not necessary in Delaware for the certificate of formation to authorize creation of the Series (although such authorization for the creation of one or more Series with a limitation on liabilities is a condition precedent to a Series having an “internal shield” (meaning that none of the debts, liabilities, obligations and expenses incurred by the LLC generally or by any other Series are enforceable against the assets of the Series). However, the certificate of formation could specify conditions precedent to the establishment of a Series. The certificate of formation therefore is normally reviewed and compliance with any such provisions confirmed.
 - (ii) Reviewing the LLC agreement, which must either establish or provide for the establishment of the Series, and confirming that the specified steps have been taken by the proper parties.
- (b) Validly existing — In the context of a Series, any “validly existing” opinion can rest only on the non-occurrence of termination, whether (i) on a specified date, (ii) on the happening of a specified occurrence, (iii) by the requisite vote of members, or (iv) by court order.⁷ This opinion when

⁷ See, e.g., § 18-215(k). Note also that the shielding characteristic of a Series with asset shielding may be lost if the records for the Series cease to account for its assets separately, pursuant to § 18-215(b).

rendered with respect to LLCs and other entities generally rests, at least to some extent, on a certificate to such effect obtained from the Secretary of State (or similar office) of the jurisdiction under whose law the LLC was formed and exists. Because no filing with the Delaware Secretary of State is necessary to establish a Series, the Secretary of State has no record of the existence of any Series, and so can offer no certificate regarding the valid existence of a Series.

- (c) In good standing — In the context of an LLC, the “good standing” opinion, also based on a certificate from the Secretary of State (or similar office) of the jurisdiction under whose law the LLC was formed and exists, generally conveys that required reports have been filed and franchise taxes paid, with the consequence that the LLC’s status as such has not been revoked or suspended. As mentioned above, the Delaware Secretary of State has no record of the existence of any Series, nor does it require the filing of any reports or the payment of franchise taxes with respect to a Series, with the consequence that it can offer no certificate regarding good standing. The concept is simply inapposite.

2. The Power Opinion

LLC Formulation: The LLC has power and authority under the LLC Act and the Governance Documents to execute and deliver the Transaction Documents and to perform its obligations thereunder.

Series Formulation: Series A has power and authority under the LLC Act and the Governance Documents to execute and deliver the Transaction Documents and to perform its obligations thereunder.

The power opinion for both an LLC and a Series requires a close reading of the

“Governance Documents,” which, for a Series, includes the Series Supplement. This is particularly relevant given that many LLCs are formed as special purpose entities with their purposes and powers limited.

Section 18-215(b) of the Delaware LLC Act specifically addresses the powers afforded a Series to insulate its assets from the debts and liabilities of the LLC generally and of any other Series of that LLC, but is silent on the powers potentially afforded a Series that is not established to insulate its assets. Presumably most, if not all, Series engaged in transactions requiring legal opinions will be of the former type.

3. The Action Opinion

LLC Formulation: The execution and delivery by the LLC of the Transaction Documents, and the performance by the LLC of its obligations thereunder, have been duly authorized by all necessary limited liability company action on the part of the LLC.

Series Formulation: The execution and delivery by Series A of the Transaction Documents, and the performance by Series A of its obligations thereunder, have been duly authorized by all necessary limited liability company action on the part of Series A.

The action opinion provides comfort that the appropriate person or persons, having been vested with the requisite managerial authority to do so, have taken the action required by the LLC statute and LLC agreement (including any Series supplement), in the manner so required, to approve the specified actions on behalf of the LLC or the Series. Depending upon the extent to which the opinion giver has participated in the organization of the LLC and the establishment of the Series, diligence may include:

- Determining the range of governance or management structures permitted by the applicable LLC statute.

- Confirming that the structure adopted by the relevant Series is permitted by the Governance Documents.
- Determining what person(s) are vested with or constitute the bodies vested with the requisite managerial authority to authorize the relevant action by the Governance Documents.
- Confirming that such person(s) or bodies have clearly and unambiguously authorized the relevant action in accordance with all formalities and procedures imposed by the LLC statute and the Governance Documents (including any Series supplement).

A further action opinion is sometimes sought, to the effect that specified documents or agreements have been “duly executed and delivered” by a particular entity. As discussed elsewhere, while there is some question as to whether a given Series is, or will be treated as, an entity, most LLC statutes permit Series, or at least those with internal shields, to contract, unless the governance documents provide otherwise. Notwithstanding the question of whether a given Series is an entity, opinion givers should be able to approach the execution and delivery opinion for a Series in much the way they do for LLCs and corporations, if with somewhat greater emphasis on its contractual requirements.

4. The Enforceability Opinion

LLC Formulation: The LLC agreement is a valid and binding obligation of the Members, and is enforceable against the Members in accordance with its terms.

Series Formulation: The LLC Agreement, including the Series A Supplement, is a valid and binding obligation of the Members associated with Series A, and is enforceable against such Members in accordance with its terms.

The enforceability or “remedies” opinion is generally understood to mean that each specific

remedy provided in the LLC agreement will be enforced, and that whether or not the LLC agreement specifies remedies, other terms of the Governance Documents, such as governance provisions, will be enforced by a court applying applicable law. Standard exceptions include the bankruptcy and equitable principles limitations, whether or not stated. This is the most difficult of the opinions discussed in this note, in large part because it cannot be limited to the relevant LLC statute, but instead involves the entire body of relevant contract law. Enforceability opinions on LLC operating agreements or Series supplements are not unusual in structured finance transactions. Giving such opinions for a Series presents the same challenges as giving such opinions for LLCs generally, see TriBar LLC Report ¶ 6.0 (“Enforceability of Operating Agreement”), but with, of course, greater emphasis on the Series supplement and the relevant Series statutory provisions (i.e., Delaware LLC Act § 18-215).

In Part II of this note, to appear in a forthcoming issue of the Newsletter, we will address the opinions for a Series that are the focus of the TriBar LLC Membership Interests Report — the valid issuance of interests, admission of purchasers of LLC interests as members, the obligation of purchasers to make payments and contributions to the LLC, and the liability of members to third parties, as well as the effectiveness of the internal shield to prevent assets of one Series from being subject to the obligations of other Series.

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THE LITIGATOR’S CORNER

The Opinion Is What the Opinion Says: Understanding So-Called “Duties of Disclosure” to Non-Clients

Opinion preparers occasionally are confronted with the troubling question of whether and when they may have duties of disclosure to a non-client opinion recipient beyond the scope of disclosures in the opinion itself. A lawyer asked to deliver a standard closing opinion to a third party may be confident her opinion is correct but may be aware of adverse facts related to the subject of the opinion, or to the transaction as a whole, that the opinion recipient would want to know. May (or must) these facts be made part of the opinion? The answer requires an in-depth understanding of ethics rules, opinion practice, and to a certain extent tort law. As a practical matter, opinion preparers should also consider litigation risk, because even the technically correct legal path may expose the opinion giver to a risk of suit if unidentified client fraud occurs.

The Ethics Analysis Under the Model Rules

1. The Duty to Maintain Client Confidences and the Duty to Consult with the Client

Ethics rules provide clear answers to some threshold aspects of this problem. First, under Model Rule of Professional Conduct 1.6(a) and its state analogs, a lawyer in general *may not* disclose facts concerning the representation of a client to a non-client without the client’s

informed consent.⁸ Relatedly, the lawyer may well have learned the facts at issue in privileged communications with the client. If so, the lawyer's disclosure of those communications could waive the attorney-client privilege. Once waived, the privilege is forever lost, and the information would be available to non-client parties in any future litigation.

Thus, the opinion preparers in our example do not have the option of unilaterally disclosing facts to the opinion recipient unless one of the exceptions is applicable. The lawyer *does* have the option, and in some circumstances the duty, to consult with the client about whether either the client or the lawyer should disclose facts to third-party opinion recipients to avoid potential claims or sanctions. See Model R. Prof. Cond. 1.4.

2. Permissible Withdrawal and Required Withdrawal to Prevent Involvement in Fraud

In addition, a lawyer is not required to give an opinion she is not comfortable giving. The lawyer is permitted (but not required) to withdraw from the engagement, at least provided that the withdrawal can be achieved without

material adverse effect on the client or one of the other bases is met for permissive withdrawal under Rule 1.16(b). See Model R. Prof. Cond. 1.16(b).

In the extreme case, where the lawyer believes the opinion would assist in a fraud or otherwise mislead the recipient, the lawyer *may not* give the opinion, see Model R. Prof. Cond. 1.2(d), 4.1(a), and may be required to resign. See Model R. Prof. Cond. 1.16(a). The ethics rules in every jurisdiction are unequivocal that a lawyer may not knowingly assist a client's fraud. Thus, if the lawyer believes the client intends to use her opinion to perpetrate a fraud on the recipient, the lawyer is not permitted to give the opinion. At the same time, the opinion itself cannot be intentionally materially false or misleading, or the lawyer is in violation of Model Rule 4.1(a), and the lawyer herself could be committing fraud by delivering the opinion.

The Gray Area: Unproven Suspicion of Fraud

Now comes the hard part: Can the lawyer issue an opinion when she is aware of significant facts about the transaction that have not been disclosed to the opinion recipient but the lawyer does not have sufficient evidence to reach a conclusion that the client is committing fraud? Or, to ask the question a different way, does the opinion giver violate any duties to the non-client opinion recipients when the lawyer has concern about the bona fides of the deal that does not reach the level of believing the client is perpetrating a fraud?

There is, unfortunately, relatively scant law on this subject, but the technically correct answer, we believe, is that as long as the opinion is accurate and not misleading, there is no independent duty of disclosure on the part of the lawyer to the non-client recipient. Indeed, the entire premise of a third-party legal opinion is that it is a statement to a non-client, given by the lawyer at the request of the client for a specific and limited purpose. The lawyer owes no duties to third parties other than the duty not to misrepresent, negligently or intentionally, in delivering the opinion. It follows that the

⁸ Some states' variants of Rule 1.6 permit a lawyer to disclose client confidential information if necessary to prevent the client from committing a crime or a fraud. See, e.g., N.Y. R. Prof. Cond. 1.6(b)(2) ("A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: . . . to prevent the client from committing a crime."); Pa. R. Prof. Cond. 1.6(b)(3) (lawyer may reveal information if necessary "to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used"). As discussed below, if the lawyer believes the client intends to commit fraud through the transaction, she cannot give a legal opinion that would assist the fraud. In addition, the Attorney Conduct Rules adopted by the SEC pursuant to the Sarbanes-Oxley Act of 2002 permit counsel representing an "issuer" (as defined in 17 C.F.R. § 205.2(h)) to report to the SEC violations of the securities laws by the issuer under specified circumstances. See 17 C.F.R. § 205.3(d)(2).

lawyer's duty of care to the recipient is limited to matters stated in the opinion and nothing beyond that.⁹

Opinion preparers and litigators who defend them should oppose adopting any duty of disclosure to non-parties beyond the express limits of the opinion letter in the absence of known fraud. To recognize such a duty would open the door to claims against lawyers for failing to disclose facts in their opinions – when, as a matter of ethics and privilege, they are prohibited from doing so by virtue of their duties of confidentiality to the client. Recognizing duties of disclosure to third parties beyond what the client permits could pose serious conflicts of interests for opinion givers.

Customary Practice

TriBar's 1998 report entitled *Third Party "Closing" Opinions: A Report of the TriBar Opinion Committee* contains a pertinent section entitled "Avoiding Misleading the Opinion Recipient."¹⁰ In essence, it cautions that opinion preparers "must ask themselves whether they

believe that the opinions they intend to render will, under the circumstances, be misleading to the recipient." If the answer is yes, then the opinion "should not be delivered until disclosures are made to cure the problem." (Emphasis omitted.) Despite the reference to "disclosures," the bottom line of the TriBar discussion is that an opinion giver, like any lawyer, cannot intentionally participate in a client's fraud or make a materially misleading statement. It specifically cautions that, "[i]n determining whether an opinion will mislead, the opinion preparers need only consider what the opinion letter (i) states and (ii) omits to state that is relevant to what is stated. Thus, the omission of information not relevant to the opinion given . . . does not mislead." 53 Bus. Law. at 602 (footnotes omitted). Similarly, the ABA's *Guidelines for the Preparation of Closing Opinions* provide that "[a]n opinion giver should not render an opinion that the giver recognizes will mislead the recipient with regard to the matters addressed in the opinions given."¹¹

It follows that the "disclosure" remedy is not intended to encumber the opinion with facts about the transaction, but only to ensure that the actual four corners of the legal opinion are not misleading. On the contrary, opinion preparers should be careful not to import into customary practice a duty to include facts in a standard opinion that would not ordinarily be included. The premise of a third-party legal opinion is that it is a narrow statement to a non-client, given by the lawyer at the request of the client for a specific and limited purpose. If factual disclosures are to be made, therefore, the opinion letter is not the vehicle for those disclosures; the client should make those disclosures separately.

The Practical Concern: Litigation Risk

In an ideal world, the above principles would answer all of the pertinent questions. In the real world, lawyers must also consider the risk of litigation. The lawyer may make the correct analytical decision that (a) despite some

⁹ See Model R. Prof. Cond. 4.1, Comment [1] ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); *Resolution Trust Co. v. Latham & Watkins* 909 F. Supp 923 (S.D.N.Y. 1995) (opinion carefully limited in scope to evaluating "alter ego" theory of liability under Florida law imposed no duty to speak (among other things) about Texas law or about adverse FTC authority in an antitrust matter); *Fortress Credit Corp. v. Dechert LLP*, 934 N.Y.S.2d 119 (NY. App. Div. 2011) (opinion that notes were duly executed did not obligate opinion giver to investigate genuineness of signatures); *Mega Group, Inc. v. Pechenik & Curro, P.C.*, 819 N.Y.S.2d 796 (N.Y. App. Div. 2006) ("no violation of law" opinion did not impose duty to advise recipient about pending claims); *Voyager Guar. Ins. Co. v. Brown*, 631 So. 2d 848 (Ala. 1993) (opinion on enforceability did not speak to genuineness of signatures); *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469 (4th Cir. 1992) (tax opinion giver not liable for failing to disclose facts concerning issuer's financial condition).

¹⁰ 53 Bus. Law. 591, 602-603 (1998).

¹¹ 57 Bus. Law. 875, 876 (2002).

concerns, she does not believe the client is committing fraud and (b) her opinion is correct and not misleading about the matters it addresses. As a matter of ethics and customary practice, we believe that she can give the opinion. If, however, it later transpires that the transaction involves fraud, the opinion giver may well be sued. Plaintiffs' lawyers sometimes attempt to bring claims against law firms – classic “deep pocket” defendants – in these circumstances, claiming that the lawyers knew of the fraud, or were “willfully blind” or “recklessly disregarded” its existence. The cases on legal opinions are few and some, while of questionable applicability to the circumstances discussed here, contain language that has encouraged plaintiffs' lawyers to bring claims.¹²

As a practical matter, therefore, opinion preparers who are aware of suspicious facts about the transaction that have not been disclosed to the opinion recipient should, in addition to the foregoing considerations, weigh the practical risks of giving the opinion. If consultation with the client does not achieve a satisfactory result because the lawyer cannot satisfy herself that there may be important information withheld by the client that relates to the subject matter of the opinion, then the lawyer should consider declining to deliver the opinion, and should consider resigning as a last resort. That is not to say that the lawyer should disregard any prejudice to the client from withdrawing from the representation. See Model R. Prof. Cond. 1.16(b). If the lawyer's withdrawal could prevent the transaction from going forward, the lawyer might face litigation risk from her client if she resigns under the

permissive provisions of 1.16(b), *i.e.*, without a belief that the client is committing a fraud. The lawyer should therefore make every effort to obtain information from the client as necessary to become comfortable with giving the opinion and continuing to represent the client, or to determine that the transaction is fraudulent, as the case may be. If the client refuses to provide the necessary information, the lawyer may well be justified in declining to give the opinion and may well have the requisite cause for withdrawal under Model Rule 1.16(b)(5) or (b)(7). If the lawyer remains fundamentally uncertain about the transaction, then the lawyer must make the difficult decision between disappointing a client and exposing herself to potential litigation. Our experience representing opinion givers and other transactional lawyers would argue for a cautious approach where the risk of fraud is significant.

Conclusion

As a bottom line, we believe opinion practitioners should not adopt any standard, as a matter of customary practice or otherwise, that obligates opinion givers to disclose facts outside the four corners of the opinion. Opinion letters to non-clients have always been a narrow exception to the rule that lawyers' duties run only to their clients. Imposing duties of disclosure would create unacceptable ethical conflicts and would open the door to unnecessary litigation risks for opinion givers. Nonetheless, opinion preparers faced with a circumstance where the client is not disclosing significant information to the opinion recipient should carefully consider the risk of litigation, and should consult with the client, before deciding whether, as a matter of prudent self-protection, to give the opinion.

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¹² See, *e.g.*, *Kline v. First Western Government Securities, Inc.*, 24 F.3d 480 (3d Cir. 1994). We believe *Kline* and other cases are best understood as applications of the rule that a lawyer's opinion cannot affirmatively mislead, see *id.* (tax opinion used by securities issuer to mislead investor-recipients); *Rubin v. Schottenstein Zox & Dunn*, 143 F.3d 263 (6th Cir. 1998) (lawyer's oral statements to investor were affirmatively misleading about their subject matter), but plaintiffs' lawyers have sometimes seized on language in those cases as broader support for claims against opinion givers.

RECENT DEVELOPMENTS

DCGL § 228: Order of Actions Still Important in Delaware Despite Recent Changes to Rules for Written Consents

Effective August 1, 2014, Section 228(c) of the Delaware General Corporation Law (the “DGCL”) has been amended to include the following:

“Any person executing a consent may provide, whether through instruction to an agent or otherwise, that such a consent will be effective at a future time (including a time determined upon the happening of an event), no later than 60 days after such instruction is given or such provision is made, and, for the purposes of this section, if evidence of such instruction or provision is provided to the corporation, such later effective time shall serve as the date of signature. Unless otherwise provided, any such consent shall be revocable prior to its becoming effective.”

Delaware House Bill No. 329 § 5 (147th Gen. Assembly) (effective August 1, 2014).

This language was added as part of the amendments to the DGCL (including an amendment to Section 141(f) (board action by written consent)) to address issues arising when a person that is not a stockholder executes a stockholder consent that is to become effective *after* the signer becomes a stockholder. The amendments were adopted to address questions about the validity of consents executed before the signer becomes a director or stockholder that were raised in *AGR Halifax Fund, Inc. v.*

Fiscina, 743 A.2d 1188 (Del. Ch. 1999) and *U.S. Bank Nat’l Ass’n v. Verizon Communications Inc.*, 479 B.R. 405 (N.D. Tex. 2012) (and discussed by Stan Keller in his article, “Opinion Issues in Current M&A Practice — Due Authorization Defects” in the Spring 2014 (vol. 13, no. 3) issue of the Newsletter).

Under the amended statute, a stockholder (or soon-to-be stockholder) can execute a consent and make it effective at a future time by, for example, placing the consent in escrow and providing that it will be effective (“released from escrow”) at the time or upon fulfillment of the conditions it specifies. The stockholder might also simply deliver a consent that on its face provides that it is effective when it specifies without use of an escrow.

Scope of Pre-Effective Stockholder Consents Under the New Provision

Read literally, one might think that the quoted language would authorize a stockholder consenting to a corporate action (typically a charter amendment or merger agreement) to sign a consent and specify that it will be effective at a later date after board approval of the corporate action. If the later date following board approval was the effective “date of signature,” this would literally comply with the requirement in Sections 242(b) and 251(c) that stockholders approve a charter amendment or adopt a merger agreement that has been previously recommended by the board (and, in the case of a merger, execution of the merger agreement), even though at the time the consent was signed and deposited in escrow the stockholder would not have had the benefit of the board’s recommendation or have received either the board approved charter amendment or merger agreement (or a summary) before signing the consent.

Whether or not this interpretation proves correct (and there is no case law on the point at the time of this note), at least some members of the Delaware bar believe that the literal interpretation may overstate the intended effect of the amendment. Of particular concern to

these lawyers is the development of a practice in which consents are executed at a time when the underlying documents being consented to (*e.g.*, a charter amendment or merger agreement) are not in final form. Because DCGL § 228(a) requires that consents must “[set] forth the action so taken” by consent, they are concerned that, notwithstanding the new language in new Section 228(c), consents that are executed must approve documents that are in final form. In other words, the charter amendment or merger agreement (or other action) must be in final form when the consent is executed or placed in escrow. If the documents are not in final form at that time, the stockholders will have approved an action that is not the same as the final action approved and recommended to stockholders by the board of directors. This change in documents might be a violation of the “sequencing” requirements for charter amendments or mergers (*see, e.g. Tansey v. Tradeshow Networks, Inc.*, 2001 WL 1526306 (Del. Ch. Nov. 27, 2001)), which are intended to ensure that certain fundamental actions approved by stockholders must *first* be approved by the board of directors.

A Recommendation

Accordingly, notwithstanding the amendment to Section 228(c), a prudent practice to follow in cases where stockholder approval is sought before an execution version of a charter amendment or merger agreement is available (perhaps because collection of stockholder signatures or electronic transmissions after that time would be impractical or cause delay) would be to have some or all of the stockholders grant an agent a proxy or power of attorney to cast a vote or sign a consent only *after* the board recommendation and delivery of the amendment or agreement. This is based on the concept that in such a case the decision to approve – even if made by an agent – would be made with the benefit of the board recommendation and the agent would use its power to vote or execute and deliver a written consent that expressly approved the amendment or agreement in the final form approved by the board. A similar concept would support a release of a pre-signed consent from

escrow conditioned on the stockholder’s receiving the final form of amendment or merger agreement and then authorizing the release in some fashion.¹³

Documents That Have “Come to Rest” When the Consent is Signed

Amended Section 228(c) may prove more useful for charter amendments or merger agreements that have “come to rest” and are in final form before the stockholder places the consent in escrow. If the charter amendment or merger agreement is in final form when a stockholder signs a consent and is to be effective following board approval of the charter amendment or execution of the merger agreement, then counsel can get more comfortable that the stockholder consent sets forth “the action so taken.” Also, because the charter amendment or merger agreement will be approved in the same form by the board of directors, the public policy of the “sequencing” requirements will have been satisfied: *i.e.*, the stockholders are only consenting to an action that they know has been or will be approved, in identical form, by the board of directors. Consequently, if properly drafted, the consent itself or the escrow arrangement would provide that the stockholder consent will only be released (or become effective) following board approval of the charter amendment or the merger agreement. In contrast, the use of Section

¹³ Amended Section 228(c) does not directly address this ministerial form of escrow, where a stockholder signs an undated signature page to a consent, but the agent holding the signature page is not authorized to date and deliver the consent until the signer reviews the final form of the underlying documents and authorizes the agent to attach the signature page to the final consent and to date the consent with the date of release from escrow. In this type of arrangement, the escrow is a mere convenience for obtaining an “inked” signature page in advance but does not authorize the agent to take any action without further instruction from the signer. This ministerial form of escrow was a common practice for escrow arrangements prior to amended Section 228(c), and does not violate the sequencing issues mentioned above.

228(c) could be open to question when the stockholders are consenting to an action that is not in final form so that it is unclear whether the stockholder and board consented to exactly the same thing, and, in that case, lawyers should continue to use proxies or powers of attorney to authorize agents to approve the final form of the transaction documents in question.

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Treasury Adopts Revisions to Circular 230

In the Spring 2013 issue of the Newsletter (vol. 12 no. 3) we described the proposed revisions to the Department of Treasury's Circular 230 ("Regulations Governing Practice Before The Internal Revenue Service," 31 C.F.R. pt. 10) and explored the question of whether the Treasury, by the proposed revisions, was acknowledging the role of customary practice in the preparation of tax opinions. Circular 230 sets forth rules that govern the conduct of individuals who practice before the IRS. These rules determine who can engage in such practice, the duties and restrictions relating to such practice, the sanctions for violating the rules, and the procedures to be followed in disciplinary proceedings.

"Practice before" the Internal Revenue Service has a broader meaning than its common reading: it includes "rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion..." 31 C.F.R. § 10.2(a)(4). A lawyer rendering a legal opinion on one or more Federal

tax questions to a third party or to his or her own client is engaged in "practice before" the IRS under Circular 230.

The revisions proposed to Circular 230 primarily focused on the elimination of Circular 230's "covered" opinion rules. These rules, set forth in 31 C.F.R. § 10.35, addressed those opinions the Treasury Department believed could be used in potentially abusive transactions. Acknowledging practitioner dissatisfaction with the difficulty and cost of compliance with the covered opinion rules, the Treasury acknowledged in its September 17, 2012 proposed revisions to Circular 230 that the "covered opinion rules are often burdensome and provide only minimal taxpayer protection," and that the benefit of the rule was "insufficient to justify the additional costs associated with practitioner compliance" with the rule. 77 Fed. Reg. 57055, 57057 (September 17, 2012).

One Set of Rules to Govern Written Tax Advice

The revisions to Circular 230 were adopted June 12, 2014, and became effective on that date. T.D. 9668 (June 12, 2014), 79 Fed. Reg. 33685. By the final revisions, the covered opinion rules have been eliminated from the Circular. Now there are one set of rules for all written tax advice, set forth in Section 10.37 of the Circular, effective for all written tax advice rendered on or after June 12, 2014.

The new Section 10.37 rules governing written tax advice follow, with the changes made by Treasury to the September 2012 proposed rules noted by underlining (additions) and strikeouts (deletions):

"§ 10.37 Requirements for written advice.

(a) Requirements. (1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. . . .

(2) The practitioner must —

~~(i)~~ (i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

~~(ii)~~ (ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

~~(iii)~~ (iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

~~(iv)~~ (iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable; ~~and~~

(v) Relate applicable law and authorities to facts; and

~~(v)~~ (vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.”

Section 10.37 also specifies the standards governing reliance by a practitioner on representations, statements, findings, and agreements, and upon the advice of others:

“[10.37(a)] (3) Reliance ~~on~~ on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect ~~or~~ incomplete, or inconsistent.

(b) Reliance on advice of others. A practitioner may only rely

on the advice of another ~~practitioner~~ person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not ~~reasonable~~ unreasonable when —

~~(1)~~ (1) The practitioner knows or reasonably should know that the opinion of the other ~~practitioner~~ person should not be relied on;

~~(2)~~ (2) The practitioner knows or reasonably should know that the other ~~practitioner~~ person is not competent or lacks the necessary qualifications to provide the advice; or

~~(3)~~ (3) The practitioner knows or reasonably should know that the other ~~practitioner~~ person has a conflict of interest ~~as in violation of~~ the rules described in this part.”

A “Principles-Based” Approach

In adopting the new standards governing written tax advice, the Treasury emphasizes its “principles-based approach”:

“Commenters overwhelmingly supported the rules in proposed § 10.37 as providing practical, flexible rules that are well suited to the issuance of quality written tax advice, provided in an ethical manner, in today’s practice environment. Commenters agreed that the comprehensive, principles-based approach of these amendments is more straightforward, simpler, and can be applied to all written tax advice in a less burdensome manner. Overall, Treasury and the IRS have determined that these written advice rules strike an appropriate balance between allowing flexibility in providing written advice, while at

the same time maintaining standards that require individuals to act ethically and competently.”

79 Fed. Reg. 33685, 33686 - 33687.

Treasury’s Revisions to Proposed Rule 10.37

One of the criticisms of the covered opinion rules in former Section 10.37 was that they required a tax practitioner to describe in his or her written advice *all* relevant facts (including assumptions and representations), detail the application of the law to those facts, and set forth the practitioner’s conclusion with respect to the law and the facts. Under the principles-based approach of new Section 10.37, the “scope” of the engagement and the “type and specificity” of the advice sought by the client, “in addition to all other appropriate facts and circumstances,” are factors that will determine the extent to which the relevant facts, the application of the law to those facts, and the practitioner’s conclusion with respect to the law and facts must be set forth in the written advice. The addition to the final standards (in § 10.37(a)(2)(v)) of a requirement to consider “applicable law and authorities” was added to the final rule, with Treasury explaining that this requirement was “implicit” in the requirement that practitioners base their written advice on reasonable legal and factual assumptions. (§ 10.37(a)(2)(i))

The addition in the final rules (§ 10.37(a)(2)(ii)) that practitioners “reasonably” consider all relevant facts and circumstances was adopted in response to commenters’ request. Treasury again stated that it believed such a requirement was implicit in the standards as proposed, but was included in the final rule to make clear that “practitioners should consider what is reasonable under the facts and circumstances when providing written advice.” 79 Fed. Reg. at 33687.

Practitioner Reliance Upon the Advice of Others

Some commenters objected to Treasury’s proposal that a practitioner may not rely upon the advice of others when the practitioner “knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice...” (§ 10.37(a)(b)(2)) because they read it as imposing a duty on practitioners to inquire into the skills and experience of the person whose advice is being relied upon. In its explanation of the adoption of the final rule, Treasury stated that it and the IRS “do not believe this standard imposes an affirmative duty on a practitioner to inquire into the skills and experience of the other person when the practitioner is already aware of the other person’s background,...” but that “practitioners should consider the skills and experience of a person when they are relying on the advice of that person.” 79 Fed. Reg. at 33689. Conversely, an obligation to inquire about a person’s background is consistent with the practitioner’s obligation of diligence as required in Section 10.22 of Circular 230 “if the practitioner is not familiar with the person’s qualifications to render the advice on which the practitioner will be relying.” *Id.*

Addressing Conflicts of Interest

In response to commenters’ criticism of proposed Section 10.37(b)(3)’s restrictions on reliance on the advice of persons who have a conflict of interest, the Treasury explained that reliance upon the advice of such persons would be permissible if that person’s conflict has been “waived by all affected clients through informed consent,” the representation is not prohibited by law (Treasury gives us an example of the Federal law prohibitions on the representation by a former government lawyer in certain circumstances), and all parties and the practitioner “reasonably believe that the

practitioner with the conflict can provide competent advice.” 79 Fed. Reg. at 33689.¹⁴

Competence

The competence required of practitioners subject to Circular 230 is defined in Section 10.35(a). It provides that:

“Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.”

Commenters noted that this competency standard is nearly identical to Rule 1.1 (“Competence”) of the ABA’s Model Rules of Professional Conduct.¹⁵ The Treasury embraced

the comparison, noting, however, that it applies not only to attorneys but to all individuals subject to Circular 230 (*i.e.*, enrolled agents and CPAs). 79 Fed. Reg. at 33690. Noting that the Model Rules are not binding on the IRS, Treasury and the IRS nevertheless acknowledge that “the comments to Rule 1.1 of the Model Rules of Professional Conduct, State Bar opinions addressing the competence standard, and the American Institute of Certified Public Accountant’s competency standard are generally informative on the standard of competency expected of practitioners under Circular 230.” *Id.*

Treasury’s revision of Circular 230, the elimination of the detailed covered opinion rules, the emphasis on Section 10.37’s “principles-based standards,” and Treasury’s acknowledgement of the influence of the Model Rules and State Bar opinions all point to a closer alignment of the standards governing the preparation of tax opinions with customary practice in the conduct of factual and legal diligence in the preparation of third-party opinions. As noted in our Spring 2013 article on the proposed Circular 230 rules, “[t]his alignment of customary opinion practice should be greeted with favor by tax and non-tax practitioners alike.”

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¹⁴ Circular 230 also has a rule directly addressing conflicting interests in the representation of clients before the IRS, in Section 10.29. A conflict of interest is defined to include the representation of one client who is directly adverse to another client, or where there is a significant risk that the representation of one or more clients will be materially limited by the practitioner’s responsibilities to another client, a former client, or third person, or by a personal interest of the practitioner. Notwithstanding the existence of any such conflict, Section 10.29(b) permits the representation if the practitioner reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; and each affected client waives the conflict of interest by informed consent, confirmed in writing by each affected client. Copies of such written consents must be retained by the practitioner for at least 36 months.

¹⁵ Rule 1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

NOTES FROM THE LISTSERVE

[Editor's Note: Dialogues on the Committee's Listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Members of the Committee may review the comments referred to below by clicking on the "Archives" link under "Listserve" on the Committee's website.]

Legal Opinion Anti-Sandbagging Provisions

John D. Hancock of Foley Hoag LLP triggered a lively dialogue with his request for the Committee members' views on including the following disclaimer in an opinion letter:

"We have assumed that your counsel has not given you any advice that is contrary to any opinion rendered herein and that neither you nor your counsel has any actual knowledge that causes you to reasonably believe that any of the opinions expressed herein are incorrect. If, to your actual knowledge, circumstances are such that our reliance on the assumptions in this paragraph is inappropriate, and you have not informed us thereof in writing prior to our delivery to you of this opinion, any of our opinions included herein that specifically relate to or are affected by such circumstances shall be deemed not to have been so included herein."

The consensus of the responders was that the inclusion of such a disclaimer should be resisted by opinion recipients. Mark I. Duedall of Bryan Cave LLP noted that conduct of the diligence to provide a legal opinion is the

obligation of the opinion giver, and the opinion giver should not be given a "free pass" based upon the recipient's investigation. Mark also expressed concern that such a disclaimer might allow the opinion giver to access privileged communications between the recipient and its counsel, and could shift the burden in litigation, with the recipient forced to prove the absence of any reason it had to believe the opinion wrong.

Several responders observed, with Pete Ezell of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, that, given that the most likely claim on an incorrect opinion letter by a recipient is negligent misrepresentation, the disclaimer is unnecessary because, as noted by Pete, "[i]f an opinion recipient or its counsel knows that an opinion is incorrect, then the opinion recipient's reliance on the opinion would not have been reasonable."

Robert A. Grauman of Baker & McKenzie and Edward L. Wender of Venable LLP noted that, under the golden rule, if counsel for a recipient of a legal opinion believes that one or more assumptions stated by the opinion giver are incorrect or questionable, counsel brings the matter to the opinion giver's attention in order to resolve the inaccuracy.

Stan Keller and Arthur Field pointed to Section 1.6 of the TriBar Report, which states that "the opinion recipient has no right to rely on an opinion if reliance is unreasonable under the circumstances or the opinion is known by the opinion recipient to be false." *Third-Party "Closing" Opinions*, 53 Bus. Law. 591, 604 (1998). Stan also pointed to paragraph I(F) of the Legal Opinion Principles (53 Bus. Law. 831 (1998)) that both opinion preparers and opinion recipients and their counsel "are each entitled to assume that the others are acting in good faith with respect to the opinion letter."

Stan also objected to the disclaimer as not properly reflecting the role of express assumptions, "which do not necessarily have to be correct so long as they are not misleading ..." giving, as examples, express assumptions in opinions on upstream guaranties that the subsidiary guarantor has received reasonably

equivalent value, and an express assumption that a board of directors in a down round VC financing has fulfilled its fiduciary duties.

On the other hand, Jack Burton of Rodey, Dickason, Sloan, Akin & Robb, P.A. wrote that he routinely includes in his firm's opinions the first sentence of the disclaimer – “we have assumed that your counsel has not given you any advice that is contrary to any opinion rendered herein,” and that the disclaimer is accepted without objection by the opinion recipients he has dealt with. Responders objected even to Jack's disclaimer, for the reasons stated, but Jack replied that he needed this type of disclaimer “because I practice in a jurisdiction where many commercial lawyers have never heard of TriBar and at least some judges would expect you to say what you mean in opinion letters and not leave such matters to implication ...” or might “apportion fault between the opinion giver and the opinion recipient under a comparative fault theory, absent such a disclaimer.”

Client Indemnification of Opinion Giver for Certificate of Facts

Robert J. Gordon of Jaffe Raitt Heuer & Weiss, P.C., Southfield, Michigan, triggered 19 responses with his October 23, 2014 request on the appropriateness of including an indemnity for certificates of fact relied upon by the opinion giver. Another law firm was preparing an opinion for Rob's client and requested a certificate of relevant facts from the client in support of the opinion, which included a “personal indemnification” by the client of the law firm. The other firm insisted to Rob that including such an indemnification was “common practice” and that the firm required it in connection with opinions they rendered.

The uniform response was that the request for indemnification was both inappropriate and unnecessary. No responder recalled seeing it in domestic practice, although two commenters (Rose Landa, Commercial Counsel, Cable & Wireless Communications, Inc., and Patrick Daugherty, Foley & Lardner LLP) noted that foreign counsel sometimes require such

protection. As noted by several responders, an indemnification is unnecessary given that typically opinion givers assume the accuracy of the facts set forth in certificates of fact upon which they rely (Peter S. Munoz, Reed Smith LLP; Kerem TURUNC (Istanbul); Karl Ege, Perkins Coie LLP). Jon S. Cohen (Snell & Wilmer) added that if the factual representations made by the client to the attorney are false, then the client may have potential liability for the misstatements. Richard L. Goldfarb of Stoel Rives LLP emphasized the element of reliance: the question is whether the opinion giver's reliance upon the certificate is reasonable or not, and not whether in fact the certificate was false.

Stan Keller and others raised the ethical concern of a lawyer obtaining an indemnity from its own client (Norman M. Powell, Young Conaway Stargatt & Taylor, LLP and Steven C. Drapekan, Lewis, Rice & Fingersh, L.C.). Stan pointed to the 2013 opinion of the Professional Ethics Committee of the New York State Bar Association (Opinion 969, 2013 WL 3854558 (June 12, 2013)) concluding that a lawyer in New York may ethically ask a client to indemnify the lawyer against potential malpractice or other claims *by a third party* who is also an addressee of the opinion letter, but noted that the question is a matter of applicable state law and raises obvious ethical issues. (See Arthur Norman Field's note on Opinion 969 in the Fall 2013 issue of the Newsletter (vol. 13, no. 1), at page 19.)

Brad H. Hamilton of Jones & Keller, P.C., Denver, also raised the concern that the SEC might not accept an opinion from issuer's counsel if the issuer were indemnifying counsel with respect to the opinion, adding that he had never seen such an indemnity in his third-party closing opinion practice or in an opinion to a rating agency.

Henry Sill Bryans, Senior Consultant, Aon Risk Solutions, agreed that, in his experience, client indemnification is rare to nonexistent, but referred the participants to his paper on the topic entitled “Lawyers' Liability to Third Parties — Reflections on Client Indemnification,” which Henry attached to his response (and which is

available in the archive section of the Committee's Listserve).

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

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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 October 15, 2014.]

A. Recently Published Reports¹⁶

ABA Business Law Section	2007	No Registration Opinions –Securities Law Opinions Subcommittee
	2009	Effect of FIN 48 – Audit Responses Committee
	2009	Negative Assurance – Securities Law Opinions Subcommittee
	2010	Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
	2011	Diligence Memoranda – Task Force on Diligence Memoranda
	2013	Survey of Office Practices –Legal Opinions Committee
		Legal Opinions in SEC Filings (Update) –Securities Law Opinions Subcommittee
		Revised Handbook – Audit Responses Committee
ABA Real Property Section (and others) ¹⁷		
	2012	Real Estate Finance Opinion Report of 2012
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report Update
	2007	Comprehensive Report Update
	2009	Venture Capital Opinions
	2010	Sample Opinion
Florida	2011	Comprehensive Report Update
Georgia	2009	Real Estate Secured Transactions Opinions Report
City of London	2011	Guide
Maryland	2007	Comprehensive Report
	2009	Supplement to Comprehensive Report

¹⁶ 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/>.

¹⁷ 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)

Michigan	2009	Statement
	2010	Report
National Ass'n of Bond Lawyers	2003	Model Bond Opinion
	2009	Bond Opinions for Direct Payment Build America Bonds
	2011	Function and Professional Responsibilities of Bond Counsel
	2014	501(c)(3) Opinions
National Venture Capital Ass'n	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
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
Multiple Bar Associations	2008	Customary Practice Statement

B. Pending Reports

ABA Business Law Section	Outbound Cross-Border Opinions – Legal Opinions Committee Update of Audit Response Letters – Audit Responses Committee No-Registration Opinions (Update) – Securities Law Opinions Subcommittee Illustrative Asset Purchase Transaction Opinions – Merger and Acquisitions Committee
California	Sample Venture Capital Financing Opinion Opinions on Partnerships & LLCs Sample Personal Property Security Interest Opinion
Florida	Supplement to Comprehensive Report
Real Estate Opinions Committees ¹⁸	Local Counsel Opinions
South Carolina	Comprehensive Report
Texas	Comprehensive Report Update
TriBar	Limited Partnership Opinions Opinions on Clauses Shifting Risk
Washington	Comprehensive Report
Multiple Bar Associations	Commonly Accepted Opinion Practices

¹⁸ See note 17.

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](#).¹⁹ 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@vwlawfirm.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in January 2015. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

¹⁹ The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.