

IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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James F. Fotenos and Susan Cooper Philpot, Editors

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FROM THE CHAIR

It is a privilege to share with you the Summer 2014 issue of our Committee's newsletter, "In Our Opinion." This issue contains, as is our custom, an addendum of summaries of the substantive panels and break-out sessions that took place this past May at the Spring Meeting of the Working Group on Legal Opinions. 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. And the same can be said of Gail Merel, without whose editorial efforts we would not have the addendum.

We have a new feature in this edition of the newsletter called the "Litigator's Corner." We owe a thank you to John Villa for conceiving of this section. Many of you know John from his many appearances at meetings of WGLO, where he has shared with us his experiences from the trenches of opinion-related litigation. John has undertaken to launch the Litigator's Corner with an excellent piece on the pros and cons of spelling out with specificity the limitations and qualifications to which our opinions are subject. John and his Williams & Connelly colleague Craig Singer provide a concise look at the manner in which exceptions and qualifications are addressed, and the implications of choices made in the unfortunate event of subsequent litigation, where the decision maker(s) (judges, arbitrators or jurors) are very likely not steeped in the nuances of customary opinion practice. The idea of the Litigator's Corner will be to provide a perspective on opinion issues from litigators who are actively involved in cases where opinions are at issue. We hope that this column will become a regular feature of the newsletter.

Litigation (or the possibility of it) rears its head in another article in this issue. Steve Weise has prepared a summary of two recent cases – reaching arguably inconsistent results – that address when an opinion giver practicing in one jurisdiction might find itself involved in litigation relating to the opinion in another jurisdiction (and in particular, in the recipient's

jurisdiction). While all of us prefer our opinions to reflect a level of professional competence that would pass muster in any jurisdiction, and accordingly we appropriately spend more time on the quality of our work than on worrying about where it might be questioned, it is not, at least for those in smaller firms or practicing alone, a trivial issue to consider where one might be exposed to suit by rendering an opinion to a recipient in another jurisdiction. Steve considers the cases in light of the recent decision of the U.S. Supreme Court in *Walden v. Fiore*, 134 S.Ct. 1115 (February 25, 2014) and what it has to say about personal jurisdiction (remember "minimum contacts" from civil procedure?). As the Supreme Court states, jurisdiction depends not on the plaintiff's contacts to the chosen forum, but on those of the defendants. That said, is "mailing" (or emailing) an opinion into a jurisdiction enough to support jurisdiction? Does it take more? As is usually the case with our chosen profession, the cases leave this question without a clear answer.

As some of you know, the Business Law Section is embarking on a new Annual Meeting format this year. Instead of meeting at the same time and place as the full ABA in August, the Section will instead have its Annual Meeting separately at the Hyatt Regency in Chicago September 11 - 13, 2014 (Thursday through Saturday). As you will see from the calendar of meetings that follows, our Committee's activities will take place Friday afternoon, September 12, when we sponsor our traditional reception from 5:30 to 6:30 p.m., courtesy of DLA Piper, where our Website Chair Christina Houston is a partner, and Saturday, September 13, when we will hold our Committee meeting from 9:30 to 11:00 a.m. and our program on the pending Report on Cross-Border Closing Opinions of U.S. Counsel (the "Cross-Border Report") from 2:30 to 4:00 p.m.

As will surprise few, the main agenda item of our September Committee meeting will be to review and hopefully approve the Cross-Border Report. We reviewed a discussion draft of the Report at our meeting in Los Angeles this past April, and Ettore Santucci, our Vice Chair and

the Reporter for this significant project, is hard at work with the drafting committee preparing what we hope to be the final version of the Report for review at the meeting. My expectation is that this version of the Report will be available for review two to three weeks prior to our September meeting. I will circulate it by email to members of the Committee as I did the discussion draft, as well as post the Report on our Committee's website.

I want to take a moment to remind members of the Committee about the existence of the Committee's listserve. One of the benefits of membership on the Committee is the ability to propose matters for circulation on the listserve, which is monitored by the Committee's leadership. This has traditionally been an excellent forum for members to pose questions or raise issues that they have encountered in their practices, and to hear what other Committee members have to say about them, albeit informally. You can propose material for the listserve by visiting our Committee's web page, accessible through this link: <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

I look forward to seeing as many of you in Chicago as can make it. As in the past, we will make an audio connection available for our Committee meeting so that those who cannot make it in person can still participate.

- Timothy Hoxie, Chair
Jones Day
tghoxie@jonesday.com

FUTURE MEETINGS

**ABA Business Law Section
Annual Meeting
Chicago
Hyatt Regency
September 11-13, 2014**

Legal Opinions Committee

Friday, September 12, 2014

Reception: 5:30 p.m. — 6:30 p.m.

Saturday, September 13, 2014

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

Program: “Why Are Cross-Border Opinions Different: Introducing the Report on Cross-Border Closing Opinions of U.S. Counsel”
2:30 p.m. — 4:00 p.m.

Securities Law Opinions Subcommittee

Friday, September 12, 2014

Subcommittee Meeting:
4:30 p.m. — 5:30 p.m.

Law and Accounting Committee

Saturday, September 13, 2014

Committee Meeting:
8:00 a.m. — 9:00 a.m.

Professional Responsibility Committee

Friday, September 12, 2014

Committee Meeting:
9:00 a.m. — 10:30 a.m.

Program: “The Road to Abilene, Temporary Blindness, Slippery Slopes, and Other Hazards to Ethical Behavior by Lawyers”
2:30 p.m. — 4:30 p.m.

Saturday, September 13, 2014

Program: “Who Do You Trust? – The Ethics of Lawyers As Gatekeepers”
8:30 a.m. — 10:00 a.m.

Audit Responses Committee

Saturday, September 13, 2014

Committee Meeting:
11:00 a.m. — Noon

**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**

SPRING 2014 MEETING OF ABA BUSINESS LAW SECTION

The Business Law Section held its Spring Meeting in Los Angeles on April 10-12, 2014. The following are reports on meetings and programs of the Spring Meeting of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Legal Opinions Committee met on April 11, 2014. The meeting was attended, in person or by phone, by some 50 members of the Committee. There follows a summary of the meeting.

TriBar Opinion Committee. Dick Howe, co-chair of the TriBar Opinion Committee, reported that TriBar is preparing a report on opinions on contractual clauses allocating risk among parties, such as indemnification and contribution clauses. A conceptual outline and initial drafts of portions of the report have been prepared. The reporter for the project is Steve Weise. Continued progress is also being made on TriBar's report on third-party closing opinions on limited partnerships.

Joint Project on Common Opinion Practices. Steve Weise reported on the status of the joint project undertaken by the Legal Opinions Committee and the Working Group on Legal Opinions ("WGLO") in preparing a description of common opinion practices. Steve is hopeful that the group is close to completion of an exposure draft of the description. Two issues still being addressed are the use of "laundry lists" of opinion exceptions and qualifications and the treatment of misleading opinions. The group working on the project 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, a number of state bar associations.

Working Group on Legal Opinions. Arthur Field reported via conference call that WGLO will hold a "boot camp" training course for members of the opinion committees of WGLO member firms on April 28-29, 2014 and its Spring program May 12-13, 2014 in New York. Reorganization of WGLO is now complete, with the Working Group on Legal Opinions Foundation having been organized. Arthur also reported that the Spring 2013 "Fuld@40" seminar papers are scheduled to be published in the May 2014 issue of *The Business Lawyer*.

Delaware GCL §§ 204, 205. Delaware GCL §§ 204 and 205, which became effective April 1, 2014, provide Delaware corporations procedures to ratify stock whose issuance did not satisfy statutory requirements ("Section 204 stock"). Don Glazer discussed his article that was published in the Committee's Spring 2014 newsletter (vol. 13, no. 3, at pages 9-11) on Section 204 stock and the basis for his conclusion that opinions on the due authorization and valid issuance of Section 204 stock should not be worded differently from opinions on stock issuances generally or otherwise hedged.¹ Don's article has been reviewed by Delaware lawyers, and his approach is being followed by major Delaware law firms.

Cross-Border Project. The bulk of the meeting was devoted to a review of the Committee's cross-border legal opinions report ("Cross-Border Closing Opinions of U.S. Counsel"). Ettore Santucci, the reporter, reviewed the history and scope of the report. Begun in 2008, the report is intended to provide guidance on U.S. cross-border opinions both to U.S. opinion givers and to foreign recipients. As

¹ The Spring 2014 issue of the newsletter is accessible at http://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL510000/full-issue-201404.authcheckdam.pdf.

the editorial group explored the topic of cross-border opinions, the scope of its efforts grew, and the report has undergone over 100 drafts. Ettore outlined the report's major themes, focusing on the principal opinions foreign recipients expect to receive from U.S. counsel on agreements governed by foreign law. These include the choice-of-law opinion (opining that the parties' choice of a foreign law to govern their agreement will be given effect under the choice-of-law rules of the state whose law is addressed by the U.S. opinion giver (the "covered law") (e.g., New York)); the enforceability under the covered law of the parties' choice of arbitration to resolve disputes; the enforceability under the covered law of the parties' selection of a particular judicial forum to resolve disputes; and the enforceability under the covered law of a foreign judgment or a foreign arbitral award.

Following Ettore's presentation, members of the Committee raised for discussion aspects of the report, including whether the "omnibus cross-border assumption" (i.e., that the agreements addressed by a U.S. cross-border opinion are enforceable under the law chosen to govern the agreements, under both the substantive and choice-of-law principles of the chosen law) needs to be stated expressly (the report recommends that the assumption be stated expressly but takes the position that the assumption should be understood to apply even if it is not stated expressly); and the advisability of giving "as if" remedies opinions in the cross-border context (the report discourages the giving of an "as if" remedies opinion in the cross-border context where the relevant agreement is governed by non-U.S. law).

Chair Tim Hoxie and the members of the Committee uniformly praised the efforts and work product of the editorial group and particularly of Ettore as reporter. Tim circulated to the entire membership of the Committee via the Committee's Listserv the current draft of the

report on March 21, 2014.² He asked that any additional comments on the draft be submitted to Ettore by May 15, 2014. The schedule is to submit the exposure draft for comment by various interested parties, including to WGLO members at its May 2014 seminar, and to seek final approval of the report by the Committee at the Business Law Section's annual meeting to be held in Chicago on September 11-13, 2014.

The members of the editorial group preparing the cross-border legal opinion report, besides Ettore, include 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.

Program Seminars. Chair Tim Hoxie reviewed for the Committee the programs to be presented the following day by the Committee, the first by Don Glazer, Steve Weise, and Carolan Berkley entitled "How Is the Supreme Court Messing Around With Third-Party Legal Opinions?" and the second, jointly with the Young Lawyers, entitled "It's Midnight and the Closing Is Tomorrow: What Do I Need to Know to Give the Opinion the Other Party (and My Team) Have Asked Me to Prepare?", to include Tim, Anna Mills, the Committee's membership chair, and Jerry Grossman, a member of the Committee and of the California bar.

Drexel Students. The Chair recognized the attendance at the meeting of three students from the Drexel University School of Law. Tim expressed the Committee's appreciation for their participation, noting it as an example of the kind of outreach the Committee would like to see more of in the future.

Anna Mills. Kenny Green, a fellow North Carolinian and co-chair of the North Carolina

² The March 21, 2014 discussion draft of the report is accessible at http://meetings.abanet.org/webupload/commupload/CL510000/relatedresources/201403_draft.pdf.

Bar's opinions committee, reported to the Committee that Anna Mills, the Committee's membership chair, has been appointed Vice-Chair of the North Carolina Bar's Business Law Section and that, following her term as Vice-Chair, Anna will assume the position of Chair of North Carolina's BLS, the first woman to occupy that position.

- James F. Fotenos
Greene Radovsky Maloney Share &
Hennigh LLP
jfotenos@greeneradovsky.com

Securities Law Opinions Subcommittee Federal Regulation of Securities Committee

The Subcommittee met on April 11, 2014 and continued its work on no-registration opinions, including those delivered in Rule 506 offerings.

The first half of the meeting was taken up with a discussion, led by Subcommittee Vice Chair Tom Kim, of developing practice with respect to "verification" of accredited investor status in Rule 506(c) offerings. The discussion focused on the draft of a paper prepared for the Securities Industry and Financial Markets Association on this topic, which Tom helped draft and which had been previously circulated to the Subcommittee.

For the balance of meeting, the Subcommittee discussed the proposed update 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 April meeting.

As previously noted, the updated report will address, among other things, the impact on opinion practice of the recently adopted amendments to Rule 506. Discussion to date has focused particular attention on two aspects of the amended Rule:

- the requirement that in a Rule 506(c) offering, involving "general solicitation," the issuer must take reasonable steps to verify that all purchasers are "accredited investors;" and
- the Rule 506(d) "bad actor" disqualification provisions applicable to offerings under both Rule 506(b) and Rule 506(c).

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 the SEC has indicated it intends to finalize in 2014. Some of these proposed changes—particularly the proposed change to Rule 507, to add a disqualification on the ability to use Rule 506 for having failed to file a Form D in a previous offering—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 next meeting of the Subcommittee will be in Chicago on September 12, 2014.

- Robert E. Buckholz, Chair
Sullivan & Cromwell LLP
buckholzr@sullcrom.com

Audit Responses Committee

The Committee met on April 12, 2014. The principal discussion points are summarized below.

Update Project. Most of the meeting was devoted to consideration of a draft of a proposed 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. The draft was generally well received, and the drafting committee will work on a revised Statement for consideration and approval at the Committee's next meeting in Chicago on September 13, 2014. Members of the Committee also recommended outreach to the accounting profession to advise them about the Committee's project and hopefully get useful feedback.

Recent Court Decision. The Committee discussed the recent decision in *In re SAIC, Inc. Securities Litigation*, 2014 WL 407050 (S.D.N.Y. Jan. 30, 2014). The case grew out of an alleged overbilling scheme to defraud the City of New York, then an SAIC client, by former SAIC employees and others. Plaintiffs brought Section 10(b) claims based on SAIC's alleged failure to disclose a government investigation and internal investigation of the scheme in its 2010 annual report on Form 10-K.

The court initially dismissed the Section 10(b) claims, except for a claim based on alleged violations of Generally Accepted Accounting Principles. The court held that plaintiffs had made out a plausible claim that defendants had violated Statement of Financial Accounting Standards No. 5 (now Accounting Standards Codification Topic 450-20) (FAS 5) by failing to disclose the investigations. The court held that the allegations were also sufficient to state a claim of violation of Regulation S-K, Item 303, the SEC's MD&A regulation. *In re SAIC, Inc. Securities Litigation*, 2013 WL 5462289 (S.D.N.Y. Sept. 30, 2013).

On a motion for reconsideration, the court reversed its ruling. The basis for the reversal was the court's acknowledgement that it had incorrectly applied the disclosure standard of FAS 5. The court originally had found that disclosure was required if the company knew or should have known that a loss contingency was "reasonably possible." 2013 WL 5462289 at *10. On reconsideration, the court noted that FAS 5 only requires disclosure of an unasserted claim when the company considers that it is "probable"—not "reasonably possible"—that a

claim will be asserted and there is a "reasonable possibility" that the outcome will be unfavorable. 2014 WL 407050 at *3.

Applying the accounting standard correctly, the court held that plaintiffs could not state a claim. The court reviewed the plaintiff's allegations regarding facts known to the company at the time of the filing of the 2010 10-K (in March 2011). It noted that in March 2011, the company had not uncovered any employee wrongdoing and had not been made aware that it was the focus of the government's criminal investigation. "The Government's commencing and prosecuting criminal cases against actors who were not employed by SAIC, and the company's launching of an internal investigation, without more, is not enough to make out a securities fraud claim." 2014 WL 407050 at *3. Accordingly, the court concluded that SAIC's belief that, as of the March 2011 filing, assertion of a claim was not probable was within the range of its professional judgment under GAAP and therefore not actionable under Section 10(b). The court also found that plaintiffs' Item 303 claim failed. The facts alleged were not enough to establish that, at the time of disclosure, SAIC had knowledge that the company could be implicated in the fraud or could have predicted a material impact on the company. 2014 WL 407050 at *4.

Listserve Activity. A summary of recent activity on the Committee's listserve is found in this issue of the Newsletter under "Summary of Recent Listserve Activity (Audit Responses Committee)."

Next Meeting. The Committee's next meeting will be at the Business Law Section Annual Meeting in Chicago, on Saturday, September 13, 2014, at 11 a.m. to 12 noon CDT.

- Thomas W. White, Chair
Wilmer Cutler Pickering Hale and Dorr LLP
thomas.white@wilmerhale.com

SPRING 2014 MEETING OF THE WORKING GROUP ON LEGAL OPINIONS

On May 12-13, 2014, the Working Group on Legal Opinions (“WGLO”) held its semi-annual seminar in New York, featuring dinner meetings, panel discussions, and breakout sessions on current opinion practice issues. Summaries of the dinner discussions, panel sessions, and breakout groups are included as an addendum to this issue of the Newsletter.

Financing agreements often include a representation as to the company’s status as an investment company under the Investment Company Act of 1940, and sometimes require an opinion on that issue. The addendum contains a particularly useful summary of the WGLO panel session, conducted by Dick Howe, Nora Jordan, and Rich Lincer, on ’40 Act status opinions. The panel addressed why it matters whether the company is an investment company, how to determine whether the company is an investment company, and what an opinion addressing the ’40 Act typically says, including sample opinion language. The summary can be found at pages 10-13 of the addendum.

The next WGLO seminar is scheduled for October 27-28, 2014, in New York.

LITIGATOR’S CORNER

Say What You Mean and Mean What You Say: How Explicit Language or Incorporation by Reference in Legal Opinions Can Affect Litigation Risk

Opinion letters are subject to interpretive limitations, conditions and definitions that are well-accepted, at least among opinion practitioners. But even among opinion practitioners themselves, there is a lively debate over whether it is preferable to spell out such terms explicitly in opinion letters (or by reference to authoritative pronouncements) or leave them unstated, to be provided by customary practice. No one suggests that there are only two approaches, and most opinions are a blend of these two paradigms. What is open to debate is where to strike the balance, and what are the costs of doing so? While some opinion practitioners may prefer the simplicity and elegance of an uncluttered opinion, their litigation partners might see things differently.

The Setting

The level of detail in an opinion letter will of course be guided by practical considerations, not the least of which is the opinion recipient’s willingness to accept the letter. The following analysis presupposes some flexibility in choosing an approach. To the extent there is flexibility, from a litigation perspective there are advantages to spelling out known limitations, conditions and definitions, either in the letter itself or by reference to authoritative written pronouncements of opinion practice. In any litigation proceeding involving an opinion letter, where the meaning of the letter becomes an issue, the opinion giver will want to persuade the court at the motion-to-dismiss stage that the letter has the meaning that the opinion giver intended. While some judges are knowledgeable about the meaning of opinion letters, most are

not. This fact, coupled with the rule that judges in deciding motions to dismiss ordinarily do not consider facts outside of the complaint (unless contained in documents referenced in the complaint), can limit the defense lawyer's ability to persuade a judge to accept even well-accepted interpretations of opinion letters at an early stage of the case.

If the motion to dismiss is denied, the cost and burdens of discovery and the resulting liability exposure can make the defense of the firm significantly more painful. When the court cannot conclude from the face of an opinion letter (as with any document) what it means with respect to the matter in dispute, the court ordinarily will not dispose of the litigation solely on the basis of the text of the letter. Instead, the court may require further proceedings, including allowing full fact discovery and possibly expert testimony, to inform the judge or the jury what the letter means. The litigation now takes on a new level of risk for the defendant: when the court makes the decision that the text is not clear, the letter's meaning may be interpreted in various ways—a universe limited only by the willingness and imagination of a plaintiff's expert. A concept one believes to be universally understood can be portrayed quite differently in court, when a large judgment is at stake and when experts testify on both sides of the case. For these reasons, while opinion practitioners sometimes argue that a less detailed opinion letter gives the opinion giver more flexibility to argue that the letter should be understood as including limitations based on customary practice, whether or not stated in the opinion letter, those unstated limitations are unlikely to persuade a court to resolve litigation at an early stage.

Case Examples

Several decisions involving legal opinions illustrate the above concerns. The problem is exemplified by *Pioneer Ins. Co. v. Chase Securities*, in which the court denied a motion to dismiss a complaint predicated on a negative assurance letter and alleging Exchange Act § 10(b) liability and related state law claims, where the attorneys were alleged to have

“recklessly” failed to uncover their client's fraud. 2002 U.S. Dist. LEXIS 7562 (N.D. Okla. 2002) (district court's order adopting magistrate judge's report and recommendation, dated December 21, 2001). The magistrate judge declined to construe the language of the opinion letter as limiting the lawyers' representation to their subjective beliefs. The magistrate concluded that, “[w]hether or not an independent investigation has been conducted, a professional must disclose facts that have come to his actual attention which he knows, or should know, that those facts cast doubt on his statements of belief.” Report and Recommendation at 13. See also *Greyhound Leasing & Financial Corp. v. Norwest Bank of Jamestown, N.W.*, 854 F.2d 1122, 1124-1126 (8th Cir. 1988) (questioning whether attorney had a duty to investigate before delivering a letter stating that attorney was unaware of any liens or encumbrances on the property, but concluding that plaintiff was barred from recovery under North Dakota law (the applicable law) where its contributory negligence was greater than any negligence of the defendant).

The *Pioneer* decision caused some consternation in the opinion community, and was addressed in an ABA Task Force report which clarified the meaning of negative assurance letters, “*Negative Assurance in Securities Offerings*,” Special Report of the Task Force on Securities Law Opinions, ABA Section of Business Law, 59 Bus. Law. 1513 (2004); see also 64 Bus. Law. 395 (2009) (2008 revision). The ABA report was critical of the *Pioneer* decision and explained what many opinion practitioners had long understood about negative assurance letters: “Counsel is not an insurer of the adequacy of the disclosure in the offering document or a ‘reputational intermediary,’ and a statement of negative assurance expresses only the subjective belief (i.e., conscious awareness) of those lawyers in the firm who have actively participated in the preparation of the offering document.” 59 Bus. Law. at 1516-16 (footnote omitted.) While the Report may have clarified the interpretation of the language addressed in *Pioneer*, other issues continue to arise.

Courts' reluctance to interpret disputed language in opinion letters at the motion-to-dismiss stage is an example of a more general principle of litigation that disfavors dismissing a complaint on the basis of a written instrument unless the document's plain meaning establishes that the plaintiff cannot prevail. See, e.g., *Bayerische Landesbank, New York Branch v. Aladdin Capital Management LLC*, 692 F.3d 42, 52-58 (2d Cir. 2012). When the court finds that the language it is interpreting is a term of art, it may apply the technical meaning of the term rather than its ordinary English language meaning. See *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *13 (Del. Ch. Apr. 2, 2007). But the court may not be able to ascertain the technical meaning of language on the basis of the pleadings unless (i) the document, or (ii) a clearly applicable authoritative source, defines the term.

The most direct means of addressing the problem, of course, is to include the express condition, definition or limitation in the opinion letter. Several cases demonstrate the virtues of that approach. See *Fortress Credit Corp. v. Dechert LLP*, 934 N.Y.S.2d 119, 122 (App. Div. 2011) (reversing trial court's refusal to dismiss the complaint because Fortress had failed to allege facts sufficient to establish that Dechert had breached any duty of care to Fortress and because, in addition, "[t]he opinion, by its very terms, provided only legal conclusions upon which plaintiffs could rely," and "was clearly and unequivocally circumscribed by" explicit qualifications); *Mark Twain Kansas City Bank v. Jackson Brouillette, Pohl & Kirley, P.C.*, 912 S.W.2d 536 (Mo. Ct. App. W.D. 1995) (dismissing claim based on the literal language of disclaimer in opinion letter).

Another effective means of making clear the meaning of a term with precision is incorporating a definition of the term by reference. For example, in two separate cases, courts dismissed claims against law firms because the firms' "no violation of law" opinions incorporated the Legal Opinion Accord (1991) of the ABA's Section of Business Law, which expressly provides that a "no violation of

law" opinion does not address violations of securities laws. *In re National Century Financial Enterprises Inc. Inv. Litig.*, 2008 WL 1995216, at *5-*7 (S.D. Ohio May 5, 2008); *In re Infocure Sec. Litig.*, 210 F. Supp. 2d 1331, 1356 (N.D. Ga. 2002). This limitation also appears in the ABA's commonly-referenced Legal Opinion Principles II(D), 53 Bus. Law. 831 (1998) ("Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly."). See also Donald W. Glazer and Stanley Keller, *A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles*, 61 Bus. Law. 389 (2005) (noting that the Accord has not gained wide acceptance because of its complexity and discussing the possibility of incorporating the ABA Legal Opinion Principles by reference).

In *Infocure*, disappointed investors in Infocure stock sued the issuer's counsel, which had delivered a "no violation of law" opinion in connection with the stock issuance. Plaintiffs claimed that the law firm was liable for securities fraud because its opinion letter stated that the Infocure transaction would not result in any "[v]iolation of any existing federal or state constitution, statute, regulation, rule, order, or law" when, in fact, Infocure was misrepresenting its financial condition in violation of the securities laws. *Id.* at 1356. The district court granted summary judgment in favor of the law firm. The court concluded that, as a matter of law, the legal opinion did not speak to whether the transaction violated the securities laws. While the actual language of the opinion appeared broad, the opinion explicitly incorporated the ABA Accord which, in turn, provided that "an Opinion does not address any of the following legal issues unless the Opinion Giver has explicitly addressed the specific legal issue in the Opinion Letter: (a) Federal securities laws and regulations . . . [and] state 'Blue Sky' laws and regulations." *Id.* at 1358 (quoting ABA Accord, § 19 at 39).

Similarly, in *National Century*, the court followed *Infocure* and dismissed a similar lawsuit against a law firm by a stock purchaser, Pharos Capital Partners. This time, the dismissal occurred on a Rule 12(b)(6) motion—the earliest stage of litigation—and was based purely on the face of Pharos’s complaint. As in *Infocure*, the law firm had given a “no violation of law” opinion that explicitly incorporated the Accord. Thanks to that express incorporation, the district court found that the opinion did not cover the alleged fraud in National Century’s offering materials for which the plaintiff sought to hold the lawyers responsible. 2008 WL 1995216, at *5-*7. Even had the firm not referred to the Accord, the court found that the scope of the opinion did not extend to the accuracy of the issuer’s offering materials: “Simply put, [the firm’s] opinion letter did not undertake to speak on the veracity of the offering materials [plaintiff] received” 2008 WL 1995216, at *7.

This discussion presumes of course that opinion practitioners agree on the meaning of certain aspects of opinion letters. If that is the case, then there should be no harm in stating those terms in the opinion letter so that plaintiffs and their experts cannot mischaracterize the scope of the opinions delivered.

- John K. Villa
jvilla@wc.com
Williams & Connolly LLP
- Craig D. Singer
csinger@wc.com
Williams & Connolly LLP

SUMMARY OF RECENT LISTSERVE ACTIVITY (AUDIT RESPONSES COMMITTEE)

[Editors’ Note: This summary of Listserve activity among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response letters practice, but rather reflects views of individual members of the Committee on current practice topics. The comments referred to below may be viewed by clicking on the “Listserve” item on the Audit Responses Committee’s web page.]

Audit response for former client. The question was asked whether a lawyer owes a duty to a former client to respond to an audit request for a period during which the person or entity was a client. This elicited a range of comments, including:

- Several firms said that they provide a substantive response if the former client was a client during the periods covered by the response. Otherwise they respond that they did not represent the client during the covered period. Others indicated that if they do not represent the company on the requested response date for the letter, they send a short letter stating that as of the date of the letter they no longer represent the client.
- This issue may be affected by the period covered by the response. Historically, many requests and related responses covered the period from the beginning of the fiscal year under audit through the response date. Today, it is more common for the response to address matters as to which the lawyer provided representation or substantive attention

“at” the last date of the fiscal year or the date of the response. They do not cover matters that may have ended during the fiscal year. If the letter speaks only as of the end of the prior fiscal year, then it would be unnecessary to cover matters where the firm ceased representing the client during the year.

- There was also discussion whether a lawyer in fact has a professional duty to respond to audit letter requests from former clients. One commenter reviewed relevant Model Rules and did not find such a duty, though as a matter of professionalism a lawyer might choose to do so.

Pre-suit settlement offer. A question was raised about a situation in which a client is being investigated by DOJ for a False Claims Act matter. DOJ has offered to settle the matter in pre-suit context for \$X million. Client has thus far rejected the offer and has continued to engage in settlement discussions with DOJ. Client represents to the law firm that it has discussed the matter in detail with the auditors, including the amount of the settlement offer. The question was whether in the audit response the law firm should disclose the amount offered by the DOJ. The consensus of the responding practitioners was no. DOJ's settlement position on FCA cases often does not bear much relationship to either the practical settlement value of a case or to the (frequently astronomical) arithmetic result of calculating all the penalties, treble damages, etc. that the defendant would be exposed to if a case were litigated to judgment. The settlement offer may be high, as a negotiating position, or it may be low, if DOJ wants a quick settlement to set an example for other similarly situated defendants.

GASB. Practitioners continue to ask about requests in connection with audits of government entities that follow the standard request form, but refer to GASB No. 62, paragraph 100, instead of ASC 450-20. As noted at the Audit Responses Committee's November 2013 meeting, the recommended

response is to refer to ASC 450-20. An alternative approach would be to state that the lawyer is responding in accordance with GASB No. 62, paragraph 100 (et seq.) on the basis that it is consistent with ASC 450-20.³ Lawyers who respond to these requests should understand the context in which the inquiry is being made, and consider whether the government agency recipient understands the limitations on the scope and use of the response.

Pending investigation. An inquiry noted that the Second Report refers to pending government investigations and the option to disclose them.⁴ The inquirer stated that it would seem logical that if the government investigation has resulted in a citation, which the client intends to appeal, the firm would be required (no option) to disclose the citation. The inquirer asked if anyone thought differently, and no one did. This does assume that the citation was effectively an assertion of a claim or a threat to bring such a claim.

UK standards for audit responses. There was an inquiry as to the relevant guidance for audit letter responses in England. The standards are described in a 2000 publication of the Law Society of England and Wales entitled “Auditors’ Enquiry Letters.”⁵

³ Paragraph 100 of GASB No. 62 in fact is just the definition of loss contingency. Other paragraphs cover other aspects of the GASB loss contingency standard, including the disclosure requirements. Thus, to be strictly correct, a response that refers to the GASB standard should probably also reference the succeeding paragraphs.

⁴ “*Second Report of the Committee on Audit Inquiry Responses Regarding Initial Implementation of the Statement of Policy*,” 32 Bus. Law. 177, 185 (1976) reprinted in Auditor’s Letter Handbook 39, 47 (2d ed. 2013).

⁵ This publication is accessible at <http://www.lawgazette.co.uk/news/auditors-enquiry-letters/21176.article>). The Law Society provided additional guidance in a 2002 FAQ, accessible at <http://www.lawgazette.co.uk/news/how-to-avoid-liability-amid-auditors-probe/37339.article>).

Vendor receivable confirmations. Law firms sometimes receive requests to confirm to an auditor the accuracy of invoices from a vendor to the law firm. These are a standard part of auditing accounts receivable, and do not implicate the audit letter process. That does not change if the vendor happens also to be a client of the law firm in unrelated matters. However, where the vendor provides litigation support or similar services, the firm should confirm with the relevant lawyers that they do not have any issues with the bills.

- Thomas W. White, Chair
Wilmer Cutler Pickering Hale and Dorr LLP
thomas.white@wilmerhale.com

RECENT DEVELOPMENTS

Personal Jurisdiction Over Out-of-Forum Opinion Givers

The ability of law firms to be sued on opinion letters in jurisdictions not of their choosing has been a matter of concern to opinion givers. Two recent decisions address the question of personal jurisdiction over a law firm that has provided an opinion letter, and in doing so apply the Supreme Court's personal jurisdiction jurisprudence. Although one of the decisions came out shortly before a recent United States Supreme Court decision on personal jurisdiction, that earlier decision was based on the Supreme Court's earlier decisions, which remain unaffected by the Supreme Court's recent decision.

The Supreme Court. In *Walden v. Fiore*, 134 S.Ct. 1115 (February 25, 2014) the Court considered whether a Nevada court had personal jurisdiction over a Georgia police officer who had seized Nevada-resident plaintiffs' cash in Georgia. The plaintiffs argued that they had

suffered injury from a delayed return of the money. The plaintiffs further argued that the officer "knew" that his actions would "affect" persons in Nevada and therefore Nevada could constitutionally assert personal jurisdiction over the Georgia officer.

The Court applied its minimum contacts analysis, based on *International Shoe* (326 U.S. 310 (1945)), to determine if the Nevada court had "specific" jurisdiction relating to the controversy. The Court held that for specific jurisdiction to exist the "defendant himself" must create contacts with the forum and that any contacts with the forum based on the plaintiff's status may not be "decisive" in the analysis. Thus, the "unilateral" activity of a plaintiff that creates contacts with the forum is not sufficient to support personal jurisdiction over the defendant. Further, the defendant must have had contacts with the "forum state itself," not just persons who "reside" there.

The Court gave an example of the application of these general rules: "... physical entry into the State – either by the defendant in person or through an agent, goods, *mail*, or some other means – is certainly a relevant contact." 134 S.Ct. at 1122 (emphasis added). Applying those rules to the facts before it, the Court held that no personal jurisdiction could be asserted against the Georgia police officer, including because the officer "never traveled to, conducted activities within, contacted anyone in, or *sent anything* or anyone to Nevada." *Id.* at 1124 (emphasis added).

Supreme Court of Arizona. Approximately one month before the U.S. Supreme Court's decision in *Walden*, the Supreme Court of Arizona considered whether that state could constitutionally assert personal jurisdiction over a Connecticut law firm and Connecticut member of the firm who had provided an opinion letter to a client residing in Arizona. *Beverage v. Pullman & Comley, LLC*, 316 P.3d 590 (Ariz. January 24, 2014). The Court noted that Arizona's personal jurisdiction statute provides that the Arizona courts have personal jurisdiction over parties to the "maximum extent permitted by . . . the Constitution of the United

States.” Finding personal jurisdiction in Arizona, the Court emphasized that the defendant law firm had engaged in “Arizona client-specific contacts” (emphasis in original).

The Tenth Circuit. Approximately six weeks after the U.S. Supreme Court’s decision in *Walden*, the Tenth Circuit applied *Walden* in *Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178 (10th Cir. May 6, 2014) in an opinion letter context. There a borrower’s New Hampshire law firm provided a closing opinion to a Utah lender to the borrower. The opinion letter was addressed to the lender in Utah. Applying *Walden*, the Tenth Circuit held that the lender’s connections with and presence in Utah did not suffice to establish grounds for personal jurisdiction over the out-of-state law firm in Utah. The Tenth Circuit also held that addressing the opinion to a recipient in Utah and sending the letter there did not suffice to establish personal jurisdiction.

Conclusion. The Arizona decision can be distinguished from the Tenth Circuit decision because in the Arizona case the law firm knowingly established an attorney-client relationship with a client in the forum state and chose to provide advice to that client. It remains to be seen whether that distinction will hold up in view of the U.S. Supreme Court’s decision in *Walden*. Indeed, it remains to be seen whether other courts will follow the Tenth Circuit and hold that sending a third-party opinion to a recipient in another state of itself is insufficient to establish personal jurisdiction over the opinion giver in that other state.

- Steven O. Weise
Proskauer Rose LLP
sweise@proskauer.com

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 May 31, 2014.]

A. Recently Published Reports⁶

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) ⁷	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	Update of Comprehensive Report
	2009	Supplement to Comprehensive Report

⁶ 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/>.

⁷ 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	2011	Function and Professional Responsibilities of Bond Counsel
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
	Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee

Pending Reports (continued)

California	Sample Venture Capital Financing Opinion Opinions on Partnerships & LLCs Sample Personal Property Security Interest Opinion
Real Estate Opinions Committees ⁸	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

⁸ See note 7.

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](#).⁹ 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 October 2014. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

⁹ The URL is <http://apps.americanbar.org/dch/committee.cfm?com=CL510000>.

Addendum
Working Group on Legal Opinions
Spring 2014 Opinion Seminar Summaries

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**WORKING GROUP ON LEGAL OPINIONS
SPRING 2014 OPINION SEMINAR SUMMARIES**

The following summaries have been prepared to provide an overview of the subjects covered at the dinner meetings and discussions, panel sessions, and at the concurrent discussions and breakout groups, all held in New York on May 12 and 13, 2014. The summaries were prepared by panelists, leaders of the concurrent sessions, or by members of the audience. The next WGLO seminar is scheduled to be held on) October 27-28, 2014 in New York.

We extend a special thanks for assisting in editing the summaries to Gail Merel of Andrews Kurth LLP (gailmerel@andrewskurth.com), who is the editor of the WGLO seminar handbooks.

PANEL SESSIONS I:

1. Current Trends in Opinion Risk Evaluation, Underwriting and Management
(Summarized by Julie M. Allen)

Julie M. Allen, Proskauer Rose LLP, New York, Chair
Robert L. Denby, Attorneys' Liability Assurance Society, Inc., Chicago
Philip H. Schaeffer, White & Case LLP, New York
John K. Villa, Williams & Connolly LLP, Washington, D.C.

This panel discussed trends in opinion risk evaluation, underwriting and management. The panel was comprised of an underwriter representative (from ALAS), a law firm general counsel and a litigator specializing in the representation of lawyers in claims against them by clients and third parties.

First, the panel discussed whether there are certain substantive areas that give rise to more claims against lawyers than others. The consensus of the panel was that securities and tax opinions pose the greatest risk to the opinion giver, although for different reasons. The tax cases, principally in the tax shelter area, largely involve a mistaken conclusion of law whereas the securities cases typically involve a mistaken or unknown fact. The panel observed that the securities cases generally arise in private financing transactions (no registration opinions) and often include aiding and abetting fraud claims relating to the transaction.

Next the panel discussed risks inherent in informal writings to one's own client. While all agreed that this is a broad category, the panel has observed an increasing number of claims involving these informal writings. The panel and the audience discussed the practical limitations of monitoring these informal writings, but the panel acknowledged that in particular areas (e.g., ERISA, tax and other regulated arenas) where the lawyer is predicting a regulatory or litigation outcome, prudence might suggest some heightened vigilance. The panel noted the impact of the accelerating pace of practice and other competitive factors that negatively impact the lawyer's ability to devote more time and exercise greater diligence that might reduce risk. The panel also discussed the importance and impact of client intake procedures, firm culture and firm compensation systems on risk mitigation.

Finally, the panel discussed the efficacy of including express definitions, qualifications or assumptions in an opinion, or incorporating external sources, or referencing customary practice. The panel agreed that one's view of the efficacy of referencing customary practice may differ depending on one's perspective—e.g., from the perspective of a transactional lawyer working to get a deal done as opposed to the litigator trying to win a case on a motion to dismiss.

2. **Current Opinion-Related Ethical Issues**
(Summarized by Susan Cooper Philpot)

Robert H. Mundheim, Shearman & Sterling LLP, New York, Chair
Arthur Norman Field, Field Consulting LLC, New York
Barbara Gillers, New York University School of Law, New York
Donald W. Glazer, Newton, Massachusetts

This panel explored through a series of hypotheticals the complex issue of “who is the client?” in various transactional contexts.

In The Syndicated Loan Context. The lead attorney for a bank lending syndicate traditionally views as his client only the lead bank or agent for the syndicate. The lead attorney uses the agent bank’s form documents and regularly counsels the agent bank on relevant legal issues as they arise during the transaction. Periodically, there may be large conference calls with the lead attorney and all or most lenders in the syndicate, during which calls the legal advice of the lead attorney may be shared with the group as a whole. The entire syndicate may also either receive directly, or be granted the right to rely upon, the lead attorney’s opinion at closing. Most lead attorneys assume that the other banks in the syndicate are being represented exclusively by their own in-house counsel, but typically no express acknowledgment by those other banks to that effect is included in any of the transaction documentation. Note that a U.S. District Court in Massachusetts ruled in 2010, in a case involving the prosecution of patents with multiple co-owners, that an attorney-client relationship existed between the lead attorney for one co-owner and another co-owner (who was independently represented in the transaction by its own counsel) where the lead attorney shared confidential information and legal advice with the co-owner group as a whole.¹

The lesson for a syndicated loan may be that the lead attorney’s engagement letter and the syndicate’s agency agreement provide an excellent opportunity to specifically disclaim any attorney-client relationship between the lead attorney and the non-agent banks in the syndicate, and that the lead attorney ought to act consistent with that position throughout the transaction.

In The Securities Syndicate Context. The attorney-client relationship in the underwritten securities offering syndicate stands in direct contrast to the loan syndicate. Here, traditionally the attorney for the lead underwriter is viewed as counsel for each of the members of the underwriting syndicate. But the practical dynamics of the attorney’s relationship to the syndicate members is not unlike that of the syndicated loan. The attorney is hired by the lead underwriter, works off the lead underwriter’s forms and regularly counsels the lead underwriter on the legal issues as they arise during the transaction. Again, there may be conference calls with the attorney and the other syndicate members. But, as in the case of loan syndications, often the lead attorney will not know for sure who is participating on those calls for each of the non-lead underwriters, and typically the substance of such calls does not address the myriad of issues that have been discussed and resolved between the attorney and the lead underwriter during the course of the transaction or provide the attorney’s individualized advice and counsel to the non-lead underwriters. To further complicate matters, underwriters are often added to the syndicate throughout the transaction, including at the last minute, and the attorney may never actually speak to those late-added underwriters whom the attorney is representing, all of which potentially can raise ethical issues.

¹ *Max-Planck – Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Woofgreenfield & Sacks, PC*, 736 F. Supp. 2d 353, 359-362 (D. Mass. 2010).

Since there is no “custom and practice” exception to the ethical rules, it was suggested that the implied delegation by the non-lead underwriters to the lead underwriter of the responsibility to manage and direct the legal matters on behalf of all members of the syndicate might be expressly documented. Law firm conflict procedures also deserve attention. Under the ethical rules, these non-lead underwriters may be clients. The law firm may need to record these clients in its conflict system and ensure that it is not adverse to these clients in other matters. A law firm might consider whether advance waivers of future conflicts can be built into engagement letters to partially address these issues. Unfortunately, the case law on the efficacy of advance waivers is not entirely clear and is largely situation dependent. Many law firms that have substantial practices in the securities underwriting field have an internal rule that they will not be adverse to investment banks at all, so as to minimize the possibility of a conflict in this context.

In The Local or Specialty Counsel Context. When an attorney or a law firm seeks the advice of local or specialty counsel, is the specialty counsel’s client the requesting attorney or the requesting attorney’s client? Sometimes this is difficult to determine and the answers may fall along a spectrum. On one end of the spectrum is advice for purely internal use in drafting the requesting law firm’s standard forms and agreements, and on the other end of the spectrum is advice that is intended to be funneled directly to a specific client on a specific transaction. Largely it is a question of whether the requesting attorney is passing the advice through to his client or using the information as part of his own research to inform his own advice to the client. Some local or specialty counsel on the receiving end of questions from other attorneys inquire about the facts and circumstances that have prompted the question to decide if they need to run a conflicts check on the requesting attorney’s client, if there is a specific client and transaction prompting the question.

CONCURRENT BREAKOUT SESSIONS I:

1. Discussion with Recipients about Third-Party Closing Opinions III – Capital Market Opinions

(Summarized by E. Carolan Berkley)

Dina J. Moskowitz, Standard & Poor's Ratings Services, New York, Co-Chair

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

E. Carolan Berkley, Stradley Ronon Stevens & Young, LLP, Philadelphia, Reporter

This session focused on the concerns and expectations of opinion recipients in connection with third-party closing opinions given in capital markets transactions. Adam Greene, a lawyer in Goldman Sachs’ Investment Banking Division, and Priya Velamoor, a lawyer in Bank of America’s Investment Banking Division, also participated on the panel.

Topics covered included the role of third-party closing opinions in the view of recipient institutions; recipient’s view of customary practice; and who was better positioned to render certain capital market opinions, internal or external counsel.

The recipient’s view of the role of an opinion in a capital markets transaction is to buttress the due diligence defense available to underwriters. Rather than viewing the process as adversarial, recipients would prefer to think of the process as working towards a common goal of adequate due diligence to support the issuer, the transaction and the due diligence defense.

Participants asked why the process could not begin with a more reasonable opinion request, closer to what would ultimately be acceptable. The view was expressed that recipients often believe that if they start with a broad opinion request and winnow it down through a discussion with issuers and inside and outside counsel, underwriters will be less likely to miss relevant issues or facts. Recipients recognize that internal counsel may be in a better position to cover certain opinions.

A suggestion was made for opinion givers to keep a data base of opinions given to different underwriters. However, the panel and participants acknowledged that precedents could become outdated, not only as customary practice evolves, but also from the perspective of whether the precedent would be relevant to the next transaction with a particular underwriter.

Two hot button issues for underwriter's counsel and recipients are: expanding the statistical data carve-outs to include all statistical data, rather than just the statistical data derived from the financial statements, and the inclusion of a knowledge qualifier that is limited to the deal team. The consensus of the panel was that a knowledge qualifier limited to the deal team is too narrow for an underwriting, but suggested a compromise that includes the deal team after consultation with others in the firm whom the deal team deems necessary to consult.

Discussion also ensued regarding whether including a statement in the opinion that the opinion is subject to customary practice or incorporating by reference one or more opinion reports was acceptable. The consensus of the panel was that most opinion reports are not written to be incorporated into an opinion and it was felt that incorporation could lead to an ambiguity. Furthermore, in the view of the panelists, underwriters do not see customary practice as being well-defined and question what such a reference would mean to a judge, a jury, or a regulator. There was also a discussion of whether incorporating the ABA Legal Opinion Principles (53 Bus. Law. 831 (1998)) creates ambiguity.

Those speaking for underwriters at this session made clear that underwriters want as much clarity as possible within the four corners of the opinion itself and prefer that all assumptions and exceptions be stated within the opinion even where this practice increases the length of the opinion.

2. Educating the Opinion Committee—Lessons Learned and Looking Forward (Summarized by Erik W. Hepler)

Cynthia A. Baker, Chapman and Cutler LLP, Chicago, Co-Chair
Timothy G. Hoxie, Jones Day, San Francisco, Co-Chair
Erik W. Hepler, Kirkland & Ellis LLP, New York, Reporter

This session focused on the WGLO “bootcamp” training course for opinion committee members held in Chicago in April 2014, as well as additional or alternative ways that WGLO might further education about opinion practice at its member firms.

The discussion began with a summary of the bootcamp. The bootcamp was designed to give a basic overview of issues involved in opinion practice faced by members of opinion committees, primarily for newer opinion committee members (or potential members). It was purposely limited to 35 attendees (representing 25 different firms of various sizes), in order to foster interaction among participants and faculty.

The bootcamp was well received by those who participated. But its reach was limited (both by design as noted, and because a number of member firms declined to send participants to the program). Representatives from firms that did not participate discussed various reasons why, including expense,

inconvenience of sending people to another city for two days, ability to conduct such training on an in-house basis, inability to involve a significant number of committee members (at least for firms with larger committees) and not having appropriate candidates for participation.

A number of alternative educational initiatives were discussed. The possibility of shorter programs, perhaps focused on individual topics, was viewed by many as a positive, as not everyone would be interested in all the subject matter covered by the bootcamp. Making programs web-based (or recording them) to accommodate more participants was also considered. But several noted that such programs, while reaching many more member firm lawyers, would not be able to recreate the stimulating interaction of the bootcamp. Having a more modular presentation that could be taken on the road, either regionally or to member firms (and perhaps given by member firms themselves) was suggested as it could allow people who did not have the time to travel to another city to receive training, and it could preserve the interactive element that was a positive feature of the bootcamp. Many thought the ability to share the materials used in the original bootcamp program (or any future programs) in some form with non-participants would be helpful. Posting of the bootcamp materials either through the collaborative sharing software used at the bootcamp or to a WGLO website was seen as a possible means of wider distribution.

Even if the bootcamp were to continue in its current form, next steps are unclear. Whether the same type of program should be repeated (on some sort of regular basis) for new participants, whether a different format (web, modular, or other) should be used, and/or whether the prior participants should be targeted for further education or networking was discussed. How many resources could be devoted to these programs (both by WGLO and by member firms) was recognized as an issue. The importance of being able to offer CLE credit to attorneys in various states for these programs was considered.

Finally, the discussion addressed the content that people felt should be covered in this type of program. Among the topics discussed were: (i) introduction to the law regarding opinions and causes of action that may arise if opinions are alleged to be deficient in some manner; (ii) a review of opinion literature and customary practice; (iii) closing confirmations requested by clients; (iv) whether to use or accept laundry list exceptions; (v) a look at opinion issues from a litigator's perspective; (vi) firm management issues as they relate to opinion issues (including business intake, management of opinions committees and their relation to other risk management activities); (vii) the differences between third-party opinions and opinions to one's own client; (viii) the use of forms; and (ix) a discussion of what should be considered to constitute an opinion. It was agreed that these topics could be presented in any one of several formats and, while the bootcamp was successful in some ways and perhaps should be repeated, alternative methods of addressing the desired universe of topics, perhaps to reach a broader audience, should be considered.

3. Opinion Committee Operations and Dilemmas

(Summarized by Willis R. Buck)

Lawrence S. Goldberg, Schulte Roth & Zabel LLP, Co-Chair
Kenneth Chin, Kramer Levin Naftalis & Frankel LLP, Co-Chair
Sylvia Fung Chin, White & Case LLP, Co-Chair
Willis R. Buck, Sidley Austin LLP, Reporter

This breakout session explored procedures established by law firms to help maintain the integrity and quality of their opinion practice and to help manage the risk associated with the rendering of legal opinions. Participants represented firms of various sizes and included representatives of bar associations, malpractice insurers and academia.

The discussion focused on the most widely used opinion oversight method: the requirement that an opinion be reviewed and approved by at least two partners—generally a partner involved in the transaction and another firm partner. Most firms represented at the discussion require second partner review prior to issuing an opinion, and in many cases, that consulting partner is required to be a member of the opinion committee. Some firms, in lieu of or as part of an opinion committee review, further require that the consulting partner have familiarity with the legal and other issues raised by the opinion letter by virtue of his or her involvement in the same or in a similar area of practice.

There was more variation in the expected scope of the consulting partner's review. In a few cases, there was an expectation that the consulting partner review the transaction documents and analyze the opinion as though he or she were the lawyer drafting the opinion in the first place. In some cases, the opinion preparers were required to provide a supporting memo summarizing the diligence that had been done and the other bases for the conclusions reached in the opinion. At the other end of the spectrum were cases where the reviewing partner was expected to review for form and adherence to firm policy, but without delving into the substance of the underlying transaction. The first approach, admirable for its thoroughness and depth, can strain firm resources insofar as it takes time away from the consulting partner's own practice. Moreover, it results in additional expense for the firm's client and weighs on the overall efficiency of the transaction process. The latter approach, though more efficient, can miss failures of analysis and/or diligence and drafting errors in the structuring, management and documentation of the underlying transaction that can give rise to liability. The group considered the possibility of a more tailored approach, taking into account factors such as the identity of the lawyers preparing the opinion, the nature of the underlying transaction and the scope of the opinions to be rendered. This approach could then help establish a standard of consulting review appropriate to the opinion. Clearly, that standard could vary from opinion to opinion. Such a flexible approach would also have the advantage of not establishing a prescribed standard that might be used against a firm in a proceeding challenging the opinion where it turns out the standard has not been followed.

It is one thing for a firm to establish opinion procedures, but quite another to foster and monitor adherence to those procedures. The consensus here seemed to be that the effectiveness of third-party opinion procedures over the long term is a function of the willingness of the firm's lawyers to follow them, and that such willingness is best fostered by an ongoing program of education, communication and encouragement. Clear and relatively frequent articulation of the procedures to be followed coupled with strong and relatively frequent endorsement of compliance from firm leadership can be helpful, as can education regarding the ways that a failure to follow process can give rise to firm and individual lawyer liability. For some firms, the establishment of more robust opinion procedures and strong internal efforts to encourage adherence were a reaction to a particular case in which an opinion problem gave rise to liability or other adverse consequences. It can also be helpful to note to firm partners that effective opinion procedures can result in lower malpractice insurance costs over time. Finally, developing readily available guidelines, checklists, forms and the like can be helpful in facilitating compliance and helping to improve the quality of the opinion letter drafts submitted to a consulting partner or an opinion committee for review.

Specialist opinions—*e.g.*, tax opinions, opinions under the Investment Company Act of 1940, etc.—can present unique issues and may require special procedures. Tax opinions have historically been prepared by specialists and often have unique review requirements. Some firms require that all '40 Act opinions, in whatever context they arise, be cleared with one or two identified specialists. At least one firm represented at the session, recognizing the potential for errors and substantial liability, has established a UCC committee and requires that all financing statements and associated opinions be submitted to that committee for review, in addition to any other opinion committee review that may be required.

Several WGLO affiliated lawyers have been working on a paper discussing their experience with respect to qualifications to the remedies opinion often taken in the domestic loan context. The free exchange of experience and practice and the responsiveness of the participants at this session suggest that a paper or other pooling of the experience of various lawyers with respect to opinion practices often adopted by firms, possibly including illustrative forms and checklists, would be well received by the WGLO membership and the legal community generally.

PANEL SESSIONS II:

1. Recent Opinion Developments

(Summarized by John B. Power)

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

Richard N. Frasch, San Francisco

Donald W. Glazer, Newton, Massachusetts

Stanley Keller, Edwards Wildman Palmer LLP, Boston

Steven O. Weise, Proskauer Rose LLP, Los Angeles

I. Statutes

Opinions on Stock Ratified Under Section 204 of the Delaware General Corporation Law. Don Glazer discussed opinions on the validity of stock of Delaware corporations that has been ratified under Delaware GCL § 204 (effective April 1, 2014), concluding that the opinions should be worded the same as opinions on any other stock of a Delaware corporation. For a further discussion, see Don's article on § 204 stock in the Spring 2014 issue of the Newsletter (vol. 13, no. 3), "Opinions on DGCL Section 204 Stock: A Rose is a Rose is a Rose."

Delaware General Corporation Law: Pending Legislation Permitting "Springing" Director Consents and Extension of Statute of Limitations. John Power reported, with support from Lou Hering from the audience, that legislation is pending in Delaware that would permit director consents signed by individuals before they become directors to spring into effect later upon release from escrow after the individual becomes a director of the corporation. Other pending Delaware legislation would permit the extension by agreement of the parties of the statute of limitations for a contract breach for up to 20 years in contracts in excess of \$100,000.

II. Cases

Red Flags: Nomura Appellate Decision. Steve Weise reported on the February 13, 2014 decision of the Appellate Division of the New York State Supreme Court affirming, as modified, the trial court's dismissal of Cadwalader's motion for summary judgment on Nomura's claims of malpractice. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 980 N.Y.S. 2d 95.² In this case Nomura challenged the opinion given to it by its own law firm on the status of a pool of mortgage loans as a REMIC trust for federal income tax purposes. Nomura alleged that it had given contractual warranties relying on the opinion, and then settled a claim alleging breach of those warranties.

A major issue in the case was whether the firm had failed to perform necessary diligence for its opinion because it did not read the appraisal of certain relevant real property, which might have shown

² The trial court's decision can be found at 212 WL 1647308 (January 11, 2012).

that a critical REMIC test was not met. The trial court found that the firm had “established that reviewing the appraisals for each loan in a [REMIC] trust was not warranted nor the common practice of the several securitization attorneys issuing REMIC tax opinions in 1997 and not part of the normal scope of [the firm’s] duties.” 2012 WL 1647308 at *16. (The Appellate Division rejected Nomura’s due diligence claim “to the extent it asserts that [the firm] had a generalized duty to review all of the appraisals ...” 980 N.Y.S. 2d at 103.) Even though the firm was told by one or more client representatives not to read the appraisals and to rely on client representations addressing the REMIC requirement, and expert affidavits established that those giving opinions in this area customarily do not examine appraisals, the Appellate Division nevertheless affirmed the dismissal of the motion for summary judgment on this issue, on the basis that the firm had received a fax that might have raised a “red flag” about whether the loans satisfied the REMIC test.

The Appellate Division also concluded that language in the firm’s opinion letter that it was relying on client representations as to facts material to the opinion that were not known to the firm did not resolve the factual question of what the firm in fact knew or insulate the firm from the alleged malpractice on a summary judgment motion.³

LLC Operating Agreement Prohibition of Bankruptcy Filing: In re Bay Club Partners - 472, LLC. Steve Weise also reported on the May 6, 2014 *Bay Club Partners* bankruptcy court case, in which the manager of a manger-managed Oregon limited liability company, with broad management authority, filed a petition in bankruptcy on behalf of the LLC.⁴ The operating agreement of the LLC contained a provision prohibiting the LLC from instituting a bankruptcy proceeding until identified indebtedness was repaid. A holder of the debt moved to dismiss the bankruptcy proceeding. The court denied the motion to dismiss, finding the anti-filing provision unenforceable as a matter of federal public policy. Separately, the court held that under the language of the LLC’s operating agreement the manager had the authority to file the petition without the consent of the members (he had attempted, without success, to obtain unanimous member consent to the filing).

Opinions on Usurious Notes: Manganello. John Power mentioned (thanks to Lynn Soukup) *Manganello v. Park Slope Advanced Medical PLLC*, in which a New York judge refused to enforce the payment of principal of or interest on a promissory that violated the New York criminal usury law, finding the note null and void from its inception.⁵

III. Bar Opinion Reports

Bar Opinion Report Chart. John Power noted the following changes in the chart of published and pending bar reports as of March 31, 2014 from the September 30, 2013 chart discussed at the Fall 2013 WGLO seminar.⁶ The revised handbook of the ABA Committee on Audit Responses has moved from the “pending” category to “recently published.”⁷ The March 31, 2014 chart adds to the “pending” category a comprehensive South Carolina report, a report by the “Real Estate Opinion Committees” (identified in note 7 under “Chart of Published and Pending Reports” in this issue of the newsletter) on

³ See the note on the *Nomura* decision in the Spring 2014 issue of the newsletter at pages 11-12.

⁴ *In re Bay Club Partners - 472, LLC*, 2014 WL 1796688 (Bankr. D. Or. May 6, 2014).

⁵ 984 N.Y.S. 2d 632, 2014 WL 503575 (Feb. 7, 2014).

⁶ See “Chart of Published and Pending Reports” in the main body of this issue of the newsletter.

⁷ The revised handbook can be purchased by going to the Audit Responses Committee’s website, accessible at <http://apps.americanbar.org/dch/committee.cfm?com=CL965000>.)

local counsel opinions, and a TriBar report on opinions on clauses shifting risk. (See discussion of the pending TriBar report below.)

Proposed No Registration Opinion Report of the ABA Subcommittee on Securities Law Opinions. Stan Keller reported that the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee is working on a report that updates its 2007 report on no registration opinions to reflect the 2013 amendments to Rules 144A and 506 under the Securities Act of 1933. Below are some of the issues touched on by Stan to be discussed in the report. A draft of the report was included in the seminar materials.

The report will address the extent to which opinion givers may rely on assumptions and representations in giving no registration opinions based on these exemptions. For example, in a purchase of stock from the issuer in reliance on Rule 506(b), the opinion preparers ordinarily may rely on a representation of the issuer regarding the absence of general solicitation or may expressly assume such absence.

New Rule 506(c) permits general solicitation if all purchasers are accredited investors and the issuer has taken reasonable steps to verify that they are accredited investors. The Rule provides safe harbors for verifying a purchaser's accredited investor status, one of which is to rely on a written verification by a registered broker-dealer or investment advisor. In that situation, the opinion preparers may rely on that third-party's confirmation that it has verified that the purchaser is an accredited investor. In general, when a safe harbor is not available, opinion preparers need to be satisfied as to the basis on which the issuer has determined that the accredited investor verification requirement has been met.

The report also will address the "bad actor" disqualification provisions added in 2013 to Rule 506. Opinion preparers ordinarily may rely on representations of the issuer and any placement agent regarding the absence of such disqualifications or may assume expressly in the opinion letter the absence of such disqualifications.

California Sample Venture Capital Financing Opinion ("VSCO"). Rick Frasch announced that the California Business Law Section's Executive Committee has approved the VSCO, and it will be submitted to *The Business Lawyer* for publication.⁸ Among the final issues resolved were the formulation and coverage of the opinions on due authorization, no breach or default, and no consent requirements, as they relate to performance by the company after the closing of its obligations under the documents that are the subject of the opinion letter. The report concludes that the due authorization opinion does not cover authorization of the performance of contractual obligations to be performed after the closing when that authorization can only occur at some future date (for example, the authorization of the issuance of shares for a price based on their market price at a future date), although it does cover authorization of the execution and delivery of the contract that gives rise to those obligations. The VCSO's no violation of law and consents opinions are not drafted to address performance of the relevant agreements after the closing. The California Opinions Committee observes that those opinions that cover performance after the closing of the transaction can be very difficult and expensive to give, and, at least in venture capital transactions in which legal budgets are limited, the opinion recipients often do not require them.

ABA Report on Cross-Border Opinions of U.S. Counsel. John Power reported that Ettore Santucci, the reporter for this report, presented a complete draft of the report to the ABA Committee on

⁸ After the seminar, the sample opinion was accepted for publication and will appear in the November 2014 issue of *The Business Lawyer*.

Legal Opinions for discussion at its Spring 2014 meeting in Los Angeles. The draft was included in the WGLO seminar materials and is posted on the Committee's website (accessible [here](#) (ctrl + click)).⁹ Comments and suggestions are welcome but must be provided quickly, since the report is scheduled to be presented to the Legal Opinions Committee at its Fall 2014 meeting for final approval.

TriBar: Risk Allocation Clauses. Steve Weise reported that he is the reporter for a proposed TriBar Opinion Committee report that will address opinions on agreements that include certain risk allocation provisions, for example non-reliance clauses, disclaimers, and indemnities. The report will review the applicable law as well as possible exceptions that an opinion letter might include in appropriate circumstances.

2. **Investment Company Act Status Opinions** (Summarized by Richard R. Howe)

Richard R. Howe, Sullivan & Cromwell LLP, New York, Chair
Nora M. Jordan, Davis Polk & Wardwell LLP, New York
Richard S. Lincer, Cleary Gottlieb Steen & Hamilton LLP, New York

Investment Company Act of 1940 (“40 Act” or Act”) opinions typically deal with whether the issuer of securities being sold in a public or private offering, or the borrower under a loan agreement, is an investment company or is required to register as an investment company under the '40 Act. Historically, these opinions were not given expressly but were assumed to be covered by standard closing opinions to the effect that equity securities were validly issued or debt securities were valid and binding or that the transaction did not violate Federal law, which could not be given if the issuer were required to register under the '40 Act, unless the issuer was registered. Today, however, most of these opinions address expressly the issuer's status under the Act. This change has come about because, in third-party opinions, there is a concern that opinions limited to certain “covered laws” would not include coverage of the '40 Act, and some literature on “customary practice” says that “securities laws”—a term which some people think would include in this context the '40 Act—are not covered in standard closing opinions.

The program addressed three broad themes: why it matters whether the company is an “investment company”; how to determine whether the company is an “investment company”; and what an opinion addressing the '40 Act typically says.

Why It Matters. Rich Lincer began with a brief discussion of why it matters whether the company is an “investment company.” In the case of a domestic issuer, Section 7(a) of the '40 Act prohibits an unregistered investment company from *engaging in any business in interstate commerce, controlling any company engaged in business in interstate commerce or offering, selling, redeeming or acquiring any security involving a public offering.*

Even if the company does not hold itself out as an investment company, the '40 Act's definitions of “security” and “public offering” are read expansively, and it is easy to become a so-called “inadvertent investment company.” For example, loans by a subsidiary to its parent or sister companies are considered securities, as are guarantees. Thus, where subsidiaries guarantee their parent's obligations under a loan agreement, the validity of the guarantees will depend on whether the subsidiaries are “investment companies,” at least in domestic transactions. Loans held in a bank's portfolio are also considered securities. The practical consequences of being an unregistered investment company include the inability

⁹ The URL is http://meetings.abanet.org/webupload/commupload/CL510000/relatedresources/201403_draft.pdf.

to register securities under the Securities Act (*e.g.*, credit default swap issuers), assertion of alleged '40 Act status as a defense in hostile takeover transactions and being subject to SEC cease and desist orders compelling liquidation of a company.

Domestic issuers that are not “true” investment companies find that registration under the '40 Act is simply not practical given the substantive regulatory strictures of the '40 Act – limitations on leverage, affiliate transaction restrictions, asset custody requirements, etc.

In the case of a foreign issuer, Section 7(a) is not applicable and Section 7(d) of the Act only bars a foreign investment company from offering, selling or delivering its securities in a “public offering” in the U.S., which, for purposes of the '40 Act, is read much more broadly than under the Securities Act or the Exchange Act.

Under Section 47 of the '40 Act, any contract made or whose performance involves a violation of the Act is unenforceable by either party (or by a non-party who acquired an interest with knowledge of the facts by reason of which the contract violated the Act), unless a court finds that enforcement would produce a more equitable result than non-enforcement and would be not be inconsistent with the purposes of the Act.

If an opinion letter is silent on the '40 Act and it is not clear from the context whether it is being addressed, it may nevertheless be implicit that the '40 Act has been addressed by an opinion giver in a securities or financing transaction since, for the reasons summarized above, any public offering of securities by a domestic or foreign issuer implies that the issuer is not an investment company, and any issuance of debt securities or a loan financing by a domestic issuer implies that the issuer is not an investment company or else the securities or the loan would not be enforceable.

Determining Whether a Company is an Investment Company. Dick Howe addressed how lawyers can determine whether a company is an investment company.

Broadly speaking, the '40 Act defines “investment company” as an issuer that meets either of two tests: (i) a subjective test—the issuer holds itself out as being engaged *primarily* in the business of investing, reinvesting or trading in securities—or (ii) an objective test—the issuer is engaged in the business of investing, reinvesting, owning, holding or trading in securities and owns “investment securities” with a value of more than 40% of the value of its total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Various statutory provisions and exemptive rules exclude issuers subject to alternative regulation (*e.g.*, banks, broker-dealers), or engaged in certain businesses (*e.g.*, REITs, guaranteed finance subsidiaries, oil and gas), or which are non-business entities (*e.g.*, voting trusts). In addition, the SEC staff has issued many no-action letters. The most common exemptions are '40 Act Sections 3(c)(1) (less than 100 holders, as defined) and 3(c)(7) (all securities held by “qualified purchasers”).

The objective test contains a number of key terms. “Investment securities” exclude securities issued by majority-owned subsidiaries that are not themselves investment companies and do not rely on Sections 3(c)(1) or 3(c)(7), which requires an analysis of whether the subsidiaries are investment companies. Whether a subsidiary is “majority-owned” is based on ownership of securities having the present right to vote for directors, 50% being a “majority” for this purpose. “Investment securities” also exclude Government securities (defined as issued or guaranteed as to principal and interest by the United States or an instrumentality thereof). “Value” is based on readily available market quotations or, if not available, as determined in good faith by the board of the company. “Total assets (exclusive of Government securities and cash items) on an unconsolidated basis” is an artificial concept requiring effort

to calculate. It includes assets whether or not reflected on a GAAP balance sheet, excludes Government securities and “cash items,” and is determined on an unconsolidated basis. Once the figure is calculated, if “investment securities” are less than 40% of it, the test is passed. The opinion is often supported by a detailed factual certificate. The opinion giver must be able to read financial statements and perform elementary mathematical calculations.

'40 Act Opinions. Nora Jordan then briefly discussed the language typically used in '40 Act status opinions.

A common formulation of the '40 Act opinion states: “On the date hereof, the Company is not, and after giving effect to the offering and sale of the [securities] and the application of the proceeds thereof as described in the [prospectus] would not be, required to register as an ‘investment company’ under the Investment Company Act of 1940.” Another common form of opinion states: “On the date hereof, the Company is not, and after giving effect to the offering and sale of the [securities] and the application of the proceeds thereof as described in the [prospectus], would not be, an ‘investment company’ as defined in the Investment Company Act of 1940.” The second opinion states the company is *not an investment company* as opposed to saying *it is not required to register* as an investment company.

Both formulations work for U.S. issuers. The first, however, works for both U.S. and foreign issuers and is therefore favored by some law firms. The second, which states that the issuer “is not an investment company,” does not work for non-U.S. issuers that fall within the '40 Act definition, as some do, but are not required to register because, for example, they have not offered securities to the public in the U.S. If both U.S. and non-U.S. issuers (or guarantors) are participating in the same transaction, the first formulation can be used for both opinions. In addition, certain funds (*e.g.*, those that rely on Sections 3(c)(1) and 3(c)(7)) are investment companies for certain purposes under the '40 Act (*e.g.*, Section 12(d)).

Nora then went through some of the language in the form of opinion letter. The words “*after giving effect to the offering and sale of securities*” and “*and the application of the proceeds thereof*” make clear that the company would not be an investment company immediately or shortly after the closing, which would likely be a disclosure point in the prospectus. The words “*as described in the prospectus*” can be included or not. If the use of proceeds section of the prospectus is specific, the disclosure can be helpful to the opinion giver, but if not (*e.g.*, “general corporate purposes”), the opinion giver may either do due diligence on the use of proceeds or assume the worst (*i.e.*, that all the proceeds will be invested in investment securities). Opinions given in revolving credit loan transactions customarily do not address the use of proceeds. Opinions given in Rule 144A/Regulation S offerings that rely on Section 3(c)(7) require that the offer and sale of the securities be made in accordance with procedures described in the prospectus, which generally require the holders of the securities to be “qualified institutional buyers” (QIBs) in perpetuity.

Although the standard form of opinion does not state the basis for the opinion, there can be circumstances where the basis of the opinion needs to be included. Under the Volcker Rule, 12 U.S.C. § 1851, for example, a bank cannot engage in certain activities with a company that relies on Section 3(c)(1) or Section 3(c)(7) of the Act, and accordingly it can be important that a bank know that those exemptions are not being used, either because the company is not an investment company in the first place or because it can rely on another exemption. The following opinion language can be used: “The exemptions provided by Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940 were not relied on in connection with our opinion in paragraph ____.” If it is unclear that another exemption is available, then the following formulation can be used: “In light of the foregoing, we believe that [there would be a reasonable, good faith position] [it is more likely than not] that the [issuer] would not need to rely on Section 3(c)(1) or 3(c)(7) in order not to be an investment company [as defined in] the 1940 Act.”

The opinion might go on to explicitly cover the Volcker Rule: “and therefore [the issuer] is not a covered fund under the Volcker Rule or its implementing regulations.”

Certain exemptions are sometimes inappropriately relied on where their use is doubtful. Section 3(b)(1) of the '40 Act states that an issuer is not an investment company if it is primarily engaged, directly or through wholly-owned subsidiaries, in a business other than investing, reinvesting, owning, holding or trading in securities. Since that definition mimics the actual definition of “investment company,” it could be read as saying an issuer “is not an investment company if it is not an investment company.” Some practitioners have used this provision without analyzing the issuer at all, while others have relied on it when, after exhaustive analysis, they cannot base the opinion on another available exemption. Nora cautioned practitioners on using Section 3(b)(1) in either of these cases. There are many no-action letters, exemptive orders and cases interpreting Section 3(b)(1) that make clear that the exemption should be used only where (1) the company’s historical development, (2) its public representations of policy, (3) the activities of its officers and directors, (4) the nature of its assets and (5) the sources of its income demonstrate that it is primarily engaged in a business other than an investment company business.

Some law firms rely on '40 Act Rule 3a-2, the “transient investment company rule,” which is meant for situations where a company inadvertently finds itself flunking the '40 Act tests—*e.g.*, an issuer sells assets, receives cash, and invests the cash in securities pending a different use. The rule requires the issuer to have a bona fide intent to be engaged primarily, as soon as reasonably possible and in any event within one year, in a business other than investing, reinvesting, owning, holding or trading in securities, such intent to be evidenced by, among other things, a board resolution and supported by contemporaneously recorded documents. The rule, however, can be relied upon by an issuer only once every three years. Reliance on Rule 3a-2 for every IPO is inappropriate, as no-action letters make clear that the rule is for exceptional circumstances where an issuer finds itself with unplanned cash. In addition, the exception is for one year, raising the question of what the analysis would be after the year and whether the disclosure was adequate.

Finally, Nora discussed certain problematic opinion practices. First, she referred to qualifications based on who owns stock of the issuer (*e.g.*, “[w]e have assumed that none of the Company’s stockholders would be deemed an ‘investment company’ within the meaning of the Investment Company Act.”). This is not relevant to the opinion on the issuer’s '40 Act status. Many companies have stockholders that are investment companies. Next, she indicated that some law firms state that they have relied on an officer’s certificate and have conducted no further investigation. Such a statement may be considered too limiting since recipients ordinarily will expect law firms to make appropriate inquiries as to relevant matters and in some circumstances to review the issuer’s financial statements. A more acceptable approach would be to give the customary opinion as described above and state that in giving the opinion the law firm has relied on certificates of officers, without the statement about no further investigation. It is, of course, acceptable to rely on a certificate, but it should not necessarily be the sole basis of the opinion. Also, refusing to discuss the basis of the opinion is problematic because it is important that both sides understand the basis of the '40 Act opinion.

CONCURRENT BREAKOUT SESSIONS II:

1. Local Counsel – It's Time for Our Own Report

(Summarized by Kenneth P. (Pete) Ezell, Jr.)

Frank T. Garcia, Fulbright & Jaworski LLP, Houston, Co-Chair

Philip B. Schwartz, Akerman LLP, Miami, Co-Chair

William A. Yemc, Richards Layton & Finger, P.A., Wilmington, Co-Chair

*Kenneth P. (Pete) Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC,
Nashville, Tennessee, Reporter*

This session was a continuation of discussions that began at the Spring 2013 WGLO meeting and continued at one of the concurrent dinner sessions at the Fall 2013 WGLO Meeting. The focus of these sessions has been the special issues faced by lawyers serving as “local counsel” and issuing third-party legal opinions in that capacity.

Local Counsel Opinion Report. The participants first considered and discussed the need for the organized third-party legal opinions bar to produce a report on customary practice with respect to local counsel opinions that would provide guidance to lawyers on the issues faced when serving as local counsel and delivering third-party legal opinions in that role. There was a broad consensus that there is a need for such a report, as most state bar reports do not devote much attention to local counsel opinion practice. The exception is Florida, which has a section in its report dedicated to the topic. See “Special Issues to Consider When Acting as Local Counsel,” Report on Third-Party Legal Opinion Customary Practice in Florida 176-184 (December 3, 2011), available in the Legal Opinion Resource Center on the Legal Opinions Committee’s website, accessible [here](#) (ctrl + click).¹⁰

Real Property Local Counsel Opinion Report. It was reported that a joint committee composed of members of the opinion committees of the ABA Real Property, Trust and Estate Section, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys is currently working on a local counsel opinion report (the “RE LoCo Report”). Although the RE LoCo Report will use a secured real estate financing transaction as its model, it is expected that it will also address non-real estate opinions, including corporate predicate opinions and perfection by filing opinions under the UCC. It was further reported that the RE LoCo Report will be distributed to WGLO and other interested participants in the organized legal opinion community for comment prior to its public release, and that the RE LoCo Report is expected to be publicly released in mid-to-late 2015.

“Local” v. “Special” Counsel; Or is it “Non-Lead” Counsel? The discussion then turned to whether attorneys who issue opinions on matters of state law in a multistate transaction should be designated as “special” counsel or “local” counsel. The consensus of the participants on this question was that “special counsel” connotes expertise in a specialized area of law, such as tax, securities or intellectual property, while “local counsel” suggests a geographical limitation on the lawyer’s engagement. In either role, it was generally thought the best practice for such counsel’s opinion letters is to describe expressly the nature and scope of the engagement and, as applicable, the related due diligence performed.

Since counsel may act or be designated as local, special or other “limited role” counsel, the discussion continued by recognizing that each of these limited role counsel share the characteristic that they are not the lead transaction counsel and suggesting that guidance for such limited role counsel could

¹⁰ The URL is http://apps.americanbar.org/buslaw/tribar/materials/20111203_florida_third_customary_practice.pdf.

address aspects that affect limited role counsel's opinions which are not shared by the lead transaction counsel. It was noted that this approach would, among other things, preserve the underlying meaning of legal opinions while specifying any related distinctions in the factual or reliance bases or customary practices utilized in rendering opinions by "non-lead" counsel.¹¹ For the remainder of this summary, local, special or other limited role counsel is referred to a "non-lead counsel".

Scope of Non-Lead Counsel Engagement. Often non-lead counsel is engaged rather late in a transaction. The participants considered whether the timing of the engagement should affect the level of diligence that non-lead counsel is expected to perform. The participants were in agreement that a good practice for non-lead counsel is to make clear in its opinion letter what it has and has not done. There was also agreement that normally non-lead counsel does not rely on the opinions of lead transaction counsel as to matters that support the non-lead counsel's opinion, but expressly assumes those matters. On the issue of who should be permitted to rely on non-lead counsel's opinion, it was the consensus of the participants that the persons permitted to rely on non-lead counsel's opinion should not extend beyond persons permitted to rely on the lead transaction counsel's opinion.

Inappropriate Opinion Requests. The participants generally agreed that non-lead counsel should not be asked to give a "no litigation" confirmation, a "no breach of or defaults under agreements" opinion, a "no violation of judgments, decrees or orders" opinion, or a negative assurance opinion, absent special circumstances or qualifications, or both.

Form of Non-Lead Counsel Report. The group considered whether the form of the proposed report should be a comprehensive opinion report with model opinion language, or whether it should just focus on the opinion issues that were particular to non-lead counsel. Some felt that the proposed report should at a minimum describe the role of non-lead counsel, the relationship with lead transaction counsel, the limited scope of diligence and document review, the types of predicate facts that appropriately may be assumed, and the limitation on laws covered (*e.g.*, whether non-lead counsel should be asked to cover federal law, to which point, the consensus of the participants was against local counsel having to cover federal law in their local counsel opinion letters).

Next Steps. It was the consensus of the group that a committee be formed to begin the process of considering the best path to move forward with this project.

2. Communications with Accountants (Summarized by Stanley Keller)

Stanley Keller, Edwards Wildman Palmer LLP, Boston, Chair
Julie M. Allen, Proskauer Rose LLP, New York, Reporter

This breakout session discussed a range of issues lawyers currently face in communications with their clients' accountants. These included issues related to direct communications by lawyers with the auditors, principally through the audit response process, and issues involved in advising clients with respect to their communications with the auditors in response to the auditors' requests. There was also discussion of the lawyer's role and responsibilities in advising the client regarding the client's financial disclosure obligations.

¹¹ A previous bar report on inside counsel opinions adopted a similar approach of relating inside counsel's opinion to that of the lead transaction counsel. See "*Closing Opinions of Inside Counsel*," Committee on Legal Opinions, ABA Section of Business Law, 58 Bus. Law. 1127 (2003).

The session began with a show of hands that indicated a clear consensus that auditors have become more aggressive in the information they are seeking regarding potential loss contingencies, both from the clients and from lawyers. This increased aggressiveness is explained, in part, by the vigorous PCAOB inspection process to which auditors are subject, as well as their continuing exposure to liability.

Several particular topics were considered. One was dealing with internal and governmental investigations in connection with audit responses. These become especially problematic when the matter is confidential, such as in a *qui tam* proceeding. Another topic was treatment of settlement discussions for purposes of evaluating the potential loss or range of losses.

There was discussion of the special challenges faced when dealing with foreign clients that report in accordance with International Accounting Standards or other foreign standards rather than U.S. GAAP. So far, U.S. law firms have been successful in limiting their responses to U.S. GAAP, but there are indications that this may be changing, particularly when the foreign accountants are not affiliated with major U.S. accounting firms and press for an audit response tied to IAS No. 37, which has a “more likely than not” standard for loss accrual in contrast to the ASC 450-20 “probable” standard. The discussion also included risk management challenges faced by U.S. law firms which have foreign offices.

There also was a discussion of handling audit letter update requests, which have increased in volume because of the change in the auditing rules to require audit documentation to be as of the date the auditor’s report is issued.

Finally, there was recognition that the scope of information auditors are seeking directly from clients has increased. The responsibilities of lawyers to advise clients of the legal consequences of providing this information, including the potential loss of attorney-client privilege protection, was considered.

3. Multi-National Opinion Practice (Summarized by Sylvia Fung Chin)

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

Nicolas Grabar, Cleary Gottlieb Steen & Hamilton LLP, New York, Co-Chair

David A. Brittenham, Debevoise & Plimpton LLP, New York, Reporter

This breakout session focused on issues encountered by law firms engaged in multi-national opinion practice. The discussion benefitted from the participation of Jennifer Paradise, general counsel of White & Case LLP, and Mary Elizabeth Taylor, general counsel of Cadwalader, Wickersham & Taft LLP.

The discussion first focused on the importance of inter-office coordination. It was noted that certain opinion recipients, such as rating agencies, are particularly concerned about opinion coverage issues when different offices give different portions of opinions.

The discussion then turned to common opinions that present special issues in the cross-border context, such as the “no conflicts” opinion. An example would be an opinion that documents governed by French law do not violate New York law. It was noted that some firms decline to give this type of opinion, even involving two states in the United States, let alone two different countries. Other firms might give the opinion if they have offices in both jurisdictions or if they have lawyers qualified in both jurisdictions. It was noted that the current draft of the ABA cross-border opinion report advises against giving such an opinion in the cross-border context since foreign contracts are likely to contain terms that

are unfamiliar to U.S. opinion preparers and to depend on concepts that do not have an equivalent under typical U.S. usage or law. Foreign contracts also may incorporate (with or without explicit reference) provisions from the law of a non-U.S. jurisdiction. Thus, foreign contracts may have a materially different meaning than U.S. opinion preparers would ascribe to them from a reading of the document. It was suggested that a best practice may be to list the contracts being covered in the opinion so that contracts not governed by U.S. law could be easily excluded from the “no conflicts” opinion.

The group next considered methods to determine whether clients are opinion shopping among different offices of a law firm to obtain the most favorable opinion.¹² The participants discussed whether the conflicts procedures of most law firms relating to new matters would have flagged a matter in one office related to one that was already opened in another office. One participant questioned whether any procedures would disclose the use of an opinion. One of the general counsel present noted that some firms have very stringent intake procedures and have a policy against taking on matters that only involve the rendering of opinions. Other firms require that all matters related to a particular client be centralized under one partner or one group of partners. Ultimately, relying upon conflicts check and new client screening procedures to address this sort of inter-office coordination is only as effective as the information collected. Strong conflict and client intake procedures were encouraged.

The discussion next turned to quality assurance procedures for U.S. law opinions issued from offices not in the United States. Practice varies widely among the participants’ firms. Some firms have a centralized Opinions Committee that reviews all opinions. Other firms have an attorney responsible for opinions in each office and a global Opinions Committee. Still other firms have second partner review of all opinions, which review may or may not be substantive. The participants generally agreed that second partner reviewers of opinions issued by foreign offices should be attorneys licensed to practice the law of the jurisdiction covered by the opinion. One firm represented at the session does not permit attorneys in their non-U.S. offices to give U.S. opinions at all; other firms permit attorneys in their non-U.S. offices to give U.S. opinions so long as they are licensed and qualified in the applicable law; still other firms require that opinions prepared by a U.S. qualified partner in a non-U.S. office be reviewed by the Opinions Committee in the United States. It was noted that some firms also require a lawyer admitted in a particular jurisdiction to physically sign any opinions which they have reviewed that are given under the law of such jurisdiction.

Regardless of the particular review procedure utilized, quality assurance can be greatly assisted by an opinions database with standard opinion forms. Some firm forms also list non-substantive deviations that are permitted. Some firms do not permit any substantive deviation from such forms without further review or approval.

A question was raised as to whether the use of the letterhead of a particular office affects the liability of the firm. The participants did not have a definitive answer, although standard practice might depend on the attorney licensing rules of a particular jurisdiction. Most firms have rules regarding the use of letterhead for an opinion. Generally it was noted that a signatory typically uses the letterhead of the office where the signatory is located.

¹² While not cited as an example of “opinion giver shopping,” mention was made of the examiner’s report in the *Lehman Brothers Holding* case in which Lehman obtained favorable true sale opinions from English counsel under English law where such opinions could not have been obtained from a U.S. law firm under U.S. law. See Report of Anton R. Valukas, dated March 11, 2010, at pages 783-784, *In Re Lehman Brothers Holdings Inc.* (U.S. Bankr., S.D.N.Y., No. 08-13555), Docket No. 7531.

An observation was made that U.S. opinion practices are increasingly being adopted by jurisdictions outside of the United States. France was described as one jurisdiction that is developing its own customary practice. Other jurisdictions, such as Russia, do not have customary opinion practice. One suggestion made was to expressly state, where practicable, the local practice in the opinion letter rather than rely upon U.S. customary practice for non-U.S. opinions.

The last topic discussed was law firm liability in non-U.S. jurisdictions. One suggestion made was to provide choice of law and submission to jurisdiction provisions in the opinion so that litigation against the opinion giver would more likely occur in a jurisdiction or under laws with which the opinion giver is comfortable. Some panels have noted that New York is one of the most favorable jurisdictions for opinion givers. It was noted that firms are starting to see higher damage claims in actions brought outside of the United States.