

WORKING GROUP ON LEGAL OPINIONS

FALL 2007 SEMINAR SUMMARIES

The following summaries have been prepared to provide a general idea of the subjects covered by the panel sessions and breakout groups at the October 30, 2007 WGLO3 seminar in New York. The summaries were prepared in most cases by members of the audience. Program and breakout group chairs are preparing separate summaries that will be available on or through the WGLO website.

PANEL SESSIONS:

1. **Limiting Opinion Liability: Strategy and Ethics**

(Summarized by Martin Brinkley)

Lucian T. Pera, Adams & Reese LLP, Memphis, Chair

Frank R. Adams, Dewey LeBoeuf LLP, New York

Lori S. Gordon, Attorneys' Liability Assurance Society, Chicago

Cheryl A. Gorman, Gibbon P.C., Newark

This panel addressed the feasibility of and ethical ramifications associated with various techniques of limiting malpractice liability, both in opinion practice and in general. These techniques include agreements providing for binding arbitration of malpractice disputes and agreements prospectively limiting the law firm's liability (and inclusion of such provisions in opinion letters). The panel also discussed the practice, occurring increasingly in the U.S., of permitting non-client third parties to rely on due diligence memoranda prepared by counsel at the request of its client.

Downsides to mandatory arbitration. Some have suggested including mandatory arbitration clauses in opinion letters. Although there has been sporadic movement towards including arbitration clauses in client engagement letters, experience (confirmed by a show of hands among those attending the WGLO seminar) suggests that few law firms actually do. Perceived advantages of arbitration (foreclosing jury prejudice, avoiding discovery costs, confidentiality, etc.) may be outweighed by disadvantages. Arbitrators may be biased or uninformed and may not feel compelled to apply governing law (or may deliberately ignore it). Arbitration does not necessarily reduce litigation costs. The lack of discovery rules in arbitration may reduce the availability of evidence the law firm can offer to defend the case. There is no meaningful appellate review from arbitration decisions. Firms considering mandatory arbitration should draft standard arbitration clauses with care rather than leaving individual lawyers to craft inadequate provisions. Arbitration clauses should address (1) scope and mechanics of discovery; (2) governing law and whether the arbitrators are required to apply it; (3) whether the arbitrators must explain the reasoning for their decision and whether the decision will be binding; (4) reasons why the arbitration award could be vacated by a court; (5) the nature of the remedies available to the client or opinion recipient; and (6) any rules that will control the conduct of the

arbitration proceeding. It may not be feasible to include all these details in an ordinary engagement letter or opinion letter.

Are liability limitations limited by ethics rules? Some suggest including direct limitations on liability in legal opinions. Rule 1.8(h) of the ABA Model Rules of Professional Conduct provides that a lawyer may not “make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” Rule 1.8(h) has not been adopted uniformly by all jurisdictions. A majority of state bars have embraced the rule, while nine states (including New York, California and the District of Columbia) prohibit any agreement limiting future malpractice liability. Most state bars that have considered the issue have found that arbitration agreements are not governed by Rule 1.8(h), but there is considerable variation in approach among jurisdictions. This rule is applicable to agreements with clients, but doesn’t seem to apply to those with non-clients, including opinion recipients.

Providing due diligence reports to non-clients and related liability risks. U.S. law firms are increasingly being asked to furnish non-clients, often lenders, with due diligence reports or memoranda prepared at the request of their clients. Can firms limit their liability in doing so? In the U.K. some law firms asked to furnish the results of their due diligence investigations to non-clients are including caps on their liability.

Recognizing that claims and suits by non-clients can pose significant malpractice liability risks, some U.S. law firms are including explicit disclaimers in the diligence report purporting to prohibit reliance by the non-client. Some firms seek to have the non-client acknowledge in writing the effect of these disclaimers and prospectively release the law firm from any liability associated with providing the report. Alternatively, firms seek to cap their liability exposure to non-clients. Professional ethics rules condition or prohibit lawyers from prospectively limiting their liability to clients, but do not speak to lawyers’ ability to limit potential liability to non-clients. Therefore, U.S. firms’ efforts do not appear to violate ethics rules. While such disclaimers or limitations may offer a firm some inoculation against exposure associated with furnishing the results of due diligence investigations to non-clients, they are not a universal cure. The non-client may attempt to avoid the disclaimer’s effect by arguing that it was a third-party beneficiary of the law firm’s services to its client, that reliance was justifiable and reasonable, or that misstatements in the diligence report were made with fraudulent intent. Although the firm may be able to refute these arguments, firms considering including disclaimers in these diligence reports should review the law in their states carefully for exceptions before moving ahead. Tendering a diligence report to a non-client should be treated as a risk management issue (not unlike opinion letter practice). Lawyers charged with preparing a diligence report should make special efforts to learn about the report’s ultimate destination.

2. Opinions on Due Authorization of Preferred Stock (Summarized by Jerome Grossman)

Arthur Norman Field, New York, Co-Chair

Donald W. Glazer, Goodwin Procter LLP, Boston, Co-Chair

This panel discussed the TriBar Opinion Committee’s current project, a report on the diligence required to give an opinion that preferred stock is “duly authorized.” Project participants have agreed that this opinion means:

(1) The shares are part of a class or series of shares that the company has the authority to issue.

(2) The company has a sufficient number of authorized shares of that class or series available for issuance.

(3) The proper procedural steps were taken to create the class or series of shares.

(4) The company’s charter contains all the substantive terms required by the applicable state corporation statute to create the class or series of preferred stock.

Project participants appear to have reached consensus that the “duly authorized” opinion does not mean that stockholders can enforce the provisions of the preferred stock. Rather, the opinion covers only the power of the company under the corporation statute and its charter to create the preferred stock. Still under discussion, however, is the exact extent to which the opinion covers whether the actual terms of the preferred stock violate the corporation statute or the terms of the company’s charter.

Delaware courts have held that stock not created in accordance with the procedural requirements of Section 151 of the Delaware General Corporation Law is invalid, and the Delaware Supreme Court has held that, if convertible preferred stock is invalid, the common stock issuable upon conversion is also invalid. If a term of the preferred stock violates the relevant corporation law, will the existence of that term result in invalidation of the entire class or series of stock? What is the responsibility of the opinion giver in relation to that issue?

The panelists also addressed the responsibility of the opinion giver regarding the effect of noncompliance with fiduciary duties or with nonstatutory procedural requirements (e.g., charter requirements) in the preferred stock authorization process.

In any given transaction, they concluded, it is relevant to ask what the opinion recipient thinks it is getting when it receives an unqualified “duly authorized” opinion, as well as what the opinion giver thinks it is giving. Ultimately, customary practice should control: the opinion should not be interpreted to cover more than opinion preparers customarily consider in performing the work to support it.

3. Responsibilities and Concerns of Opinion Recipients

(summarized by John B. Power)

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

Doris J. Bryant, Allstate Investments LLC, Chicago

Warren F. Cooke, Milbank, Tweed, Hadley & McCoy LLP, New York

William Viets, JPMorgan Chase & Co., New York

This panel began with the premise that an opinion giver is justified in assuming that customary practice is applicable to the opinion, and has no duty to determine whether the opinion recipient or its counsel understands customary practice. The discussion then focused on the responsibility of recipient counsel to its own client. The major points were as follows:

Recipient counsel engagement. Inside counsel to the opinion recipient provides advice to its client and helps evaluate risk. When outside counsel for the recipient is involved, its responsibility is measured by the terms of its engagement, which typically is broader than merely reviewing the opinion. Outside counsel generally “runs” the documentation, including negotiating the opinion, within the boundaries of the client’s policies and, in syndicated credits, the demands of the market. Outside counsel typically understands client policies and market acceptability. Outside counsel involves a business person or inside lawyer in the opinion process when major issues arise. In some cases, outside lawyers complain that they have difficulty getting the attention of a responsible business person or inside lawyer.

In negotiating the opinion, the role of recipient counsel typically is to “clean up” inappropriate laundry list items and then to judge whether the opinion (1) is clear, (2) provides the appropriate scope without material gaps, and (3) is substantially correct. Recipient counsel explains the opinion and any issues it raises to the client.

Reliance on the opinion. Recipient counsel typically advises the client whether it is reasonable to rely on the opinion, based on the documents it has seen “on the table” in the transaction.

Providing requested form of opinion. Where the client is in control of the transaction (i.e., not simply a member of a group or syndicate), the recipient or its counsel typically provides the opinion giver the form of the opinion it wants, not including assumptions, exceptions and the like, reserving the right to supplement the request if dictated by later developments in the deal.

Acceptability of the opinion giver. Occasionally, an opinion giver is found to be unacceptable to the market. As a practical matter, it is hard to disqualify counsel where its client is a “customer” of the recipient. This issue does not normally arise with well-recognized opinion givers.

Acceptability of opinion content. Recent write downs of loan portfolios have caused many recipients to look at opinions in new deals very carefully. Recipient counsel determines whether an important requested issue is missing, and whether the opinion giver appears to have studied the transaction and thought about it in preparing the opinion.

Opinions by recipient counsel. Historically, it was not unusual for lender’s counsel and borrower’s counsel both to give opinions to the lender, but that is now uncommon. If there is a legitimate difference of opinion as to enforceability of a particular provision, recipient counsel sometimes provides the enforceability opinion on that provision. When documents have been drafted by recipient counsel and the opinion giver is not from the jurisdiction whose law is chosen, recipient counsel may give the enforceability opinion.

4. When a Problem Arises
(summarized by Steven K. Hazen)

Jeffrey M. Smith, Greenberg Traurig LLP, Atlanta
Philip Shaeffer, White & Case LLP, New York

The panelists described critical issues that arise for a law firm when it becomes apparent that a closing opinion may generate a potential claim. These include: (1) what should be communicated to whom; (2) what the risk manager of the opinion giver should be told; (3) what attorney-client privilege and attorney work product immunity issues exist; (4) what the opinion preparer should do; (5) what specialized statutes (e.g., Sarbanes-Oxley) might apply; (6) the impact of pressures for cooperation when criminal actions are pending or possible; and (7) any office-wide rules and procedures that apply. The panelists did not address all of these topics in detail, focusing instead on the question of what should be disclosed and when -- to the malpractice insurance carrier, the client, the government, and to other non-clients or non-agents.

What to disclose to the insurance carrier. The panelists focused on the need for open and clear communications, recognizing that the carrier is the agent of the opinion giver for purposes of a claim and would have co-counsel with respect to any settlement. Different dynamics are at play when the focus is on cooperating in defense of the claim versus any dispute between the opinion giver and the carrier over scope of insurance coverage. The panelists recommended that concern for the latter not be allowed to affect the former.

What to disclose to clients. The panelists focused on the obligation of candor and potential incongruity of interests as between the opinion giver and the client. Where the potential conflict of interest is waived, efforts should be made to avoid any residual inhibition about responding to a potential claim because of the continuing duty of professional responsibility to the client. If an actual conflict of interest arises, communications between the opinion giver and its client could prove not to be protected by the attorney-client privilege.

5. Assignable Opinions
(summarized by Susan Cooper Philpott)

A. Mark Adcock, Moore & Van Allen PLLC, Charlotte, Chair
Robert L. Nutt, Ropes & Gray LLP, Boston
Williams Viets, JPMorgan Chase & Co., New York

To enhance post-closing marketability of loans and put initial and future lenders on an equal footing, opinion recipients in syndicated loan transactions and securitizations typically require that assignees of the loan be expressly entitled to rely on borrower counsel's closing opinion. Opinion givers have long been concerned about the ramifications of allowing reliance by unknown future assignees. They fear that (1) assignees will rely on "market standards" and will not have read the actual opinion or be informed of its express exceptions, qualifications and limitations; (2) even if a copy of the opinion is actually received, the buyer will purchase the loan participation in the market without being represented by counsel and may not understand the

opinion's coverage due to lack of familiarity with customary practice; (3) the facts, law and/or special qualifications of the initial lenders upon which the opinion was based may have changed since its date; and (4) since the market typically breaks large loans into \$1 million segments that may be acquired by multiple buyers and any claim will likely be based on a negligent misrepresentation theory, the opinion giver may be subjected to multiple claims, in multiple jurisdictions, under multiple substantive laws.

Current approaches. Opinion givers have attempted to address these concerns in various ways. Some have expressly prohibited reliance or limited reliance on the opinion to lenders joining the syndicate within the first 60 days. Agent banks have strenuously objected to this approach. A more commonly accepted practice is to include language (often referred to as the Wachovia policy limitation) in the opinion letter's reliance provision limiting reliance to assignees in transfers made in accordance with the terms of the credit agreement, on the following conditions and understandings: (a) the opinion speaks only as of its date; (b) the opinion giver has no responsibility or obligation to update the opinion or to take into account changes in law, facts or other developments; and (c) any reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including changes in law, facts or any other developments known to or reasonably knowable by the assignee.

Proposal. The panelists suggested a new approach that they believe could prove better than the Wachovia policy limitation for all parties concerned. The opinion letter would be addressed only to the agent bank on behalf of all lenders, present and future, and distribution to, or reliance by, third parties on the opinion letter would be expressly prohibited. A new provision would be added to the credit agreement expressly providing for the bringing of suit on the opinion by the agent bank for the benefit of all lenders and prohibiting individual lenders from pursuing any such claims. The panelists expressed the belief that these limitations would be enforceable under New York contract law. Since the tort of negligent misrepresentation in most jurisdictions requires reasonable reliance by a plaintiff, reliance on an opinion by individual holders of the loans in the face of clear non-reliance language would likely be found unreasonable. From the lender's perspective, the proposal would reduce the cost of pursuing a claim against the opinion giver and would eliminate the need to prove individual reliance on the opinion. From the agent bank's perspective, any additional duties and associated liability that might arise out of acting as the administrative agent for any suit on an opinion probably can be handled through additions to the exculpatory language in the credit agreement. Finally, from the opinion giver's perspective, it is unclear whether the proposal's procedural benefits in resolving opinion-related litigation would be offset by an increased likelihood of suit on the opinion if the loan goes bad. It appears that no loan has yet implemented this proposal.

6. Local Counsel Opinion Responsibility
(summarized by Martin Brinkley)

Louis G. Hering, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Chair
Joseph P. Hadley, Davis, Polk & Wardwell, New York
Scott A. Stengel, Orrick, Herrington & Sutcliffe, LLP, Washington, DC
William A. Yemc, Richards, Layton & Finger, P.A., Wilmington

This panel was a continuation of the LORS II April 17, 2007 breakout session on local counsel opinions. A central topic of discussion in the April session was whether customary practice is different for local counsel opinions than for lead counsel opinions. Many participants in the April session believed that it was, and sought to advance the discussion by deciding how the differences could be reflected in the local counsel opinion itself.

The panelists focused on the roles of the three primary participants in transactions in which local counsel opinions are delivered: (1) lawyers whose clients need a local counsel opinion from the other party to the transaction; (2) lawyers representing clients who are asked to obtain a local counsel opinion; and (3) lawyers who deliver local counsel opinions. The following major points emerged:

If you are counsel to the opinion recipient, think about the need for local counsel opinions early in the transaction. What is the purpose of the local counsel opinion? Is specific comfort on issues of local law needed, or is the opinion relatively formulaic? Early dialogue between lead counsel and local counsel in an effort to filter the content of the local counsel opinion can avoid misunderstanding and delay. Lawyers serving as lead borrower's counsel should strive to make the local counsel opinion process efficient by tailoring opinion requests and limiting the local counsel opinion's coverage to issues of local law reasonably related to the transaction.

Involve an experienced lawyer in the opinion request. Junior lawyers with little opinion experience are often given the task of communicating with local counsel. Difficulties on the eve of closing may be avoided by an early conversation between senior lawyers on all sides of the opinion request.

Opinion content may properly reflect the local counsel's limited role. Local counsel may appropriately (1) list the documents reviewed, (2) assert that they have made no independent factual investigation to support the opinions given, and (3) make explicit the narrow "laws covered" limitation that is typical in local counsel opinions. If counsel for the opinion recipient (or, in the case of a "bundled" opinion request, lead counsel for the borrower) questions limitations in the local counsel's opinion draft, local counsel should be prepared to explain why the additional limitations are necessary.

Panelists noted that the practice of "unbundling" of opinions seems to have become widespread, with fewer requests seen for "bundled" opinions.

7. Side Letters and Opinions (summarized by Gail Suniga)

Philip B. Schwartz, Akerman Senterfit, Miami, Chair
Paul M. Altman, Richards, Layton & Finger, P.A., Wilmington
Thomas H. Bell, Simpson, Thacher & Bartlett LLP, New York

This panel reported on changes that have occurred regarding side letter disclosure practice. Side letters have been proliferating, especially in fund formation practice. For

example, a proposed limited partner to a fund in formation may be subject to some regulatory scheme in the country of its residence that requires special treatment for the limited partner, such as a special accounting from the fund. However, some of these side letters include agreements among parties to the principal agreement that change the terms of the principal agreement, such as a provision releasing one potential limited partner from making an additional capital contribution to the fund that all other limited partners are obligated to make.

The panel indicated that it has become more common to disclose all side letters to all participants in the transaction. Moreover, “enabling clauses” have begun to appear in the principal agreements that permit side letters and specify what can be in them. “Most favored nation” clauses are now being added to the principal agreements to the effect that every investor will receive the same right to receive benefits as is given to any other investor in a side letter.

Since counsel representing the issuer, and perhaps local Delaware counsel, must render an opinion that the formation documents are valid and binding, the general partner of the issuer is increasingly being required to represent that all side letters have been delivered to counsel for review. If all side letters are not available, counsel should be permitted to state this in its opinion and that the unavailable side letters may affect the opinion.

The panelists agreed that the existence of an “enabling clause” does not render the principal agreement illusory.

Generally, breach of fiduciary duty and breach of implied covenants of good faith and fair dealing would be understood as a matter of customary practice not to be covered by a remedies opinion. However, an opinion giver who is consciously aware of serious fiduciary duty or implied covenant issues may need to consider whether it would be misleading not to make reference to these issues in the opinion.

CONCURRENT BREAKOUT SESSIONS:

1. Foreign Counsel Opinions (summarized by Martin Brinkley)

Elizabeth Van Schilfgaarde, NautaDutilh, New York, Chair

This breakout discussed questions and challenges relating to the role and responsibilities of U.S. counsel with regard to foreign counsel opinions delivered at closing.

Foreign counsel opinions present significant challenges. There was consensus that obtaining foreign counsel opinions can be a daunting task for U.S. lawyers. There is little or no “customary practice” in the rendering of third party legal opinions among lawyers in other countries. Significant issues that may confront U.S. counsel seeking a foreign counsel opinion may include: (1) whether reliance on a foreign counsel opinion is reasonable; (2) whether the foreign counsel opinion’s coverage is adequate and what responsibility U.S. counsel has for recognizing and dealing with coverage problems; (3) what issues are appropriate for foreign

counsel to address and whether the “golden rule” applies to the relationship between U.S. counsel and foreign counsel; (4) problems with the use of forms of opinion when local counsel does not interpret opinion language in accordance with U.S. customary practice standards; and (5) practical problems of communication with foreign counsel and coordinating delivery of opinions with closing. Some of these issues echo themes encountered in traditional U.S. local counsel opinion practice. The absence of consistent customary practice standards in the foreign counsel opinion arena exacerbates the difficulties.

Communication is key. If these challenges are to be overcome, full and frank communication with foreign counsel early in the transaction is essential. Foreign counsel should be given enough background information to understand the transaction and the purpose of the opinions they are being asked to render. To avoid misunderstanding and inefficiency, a senior lawyer may need to facilitate these initial conversations rather than leaving them in less experienced hands. U.S. counsel may find it helpful to adopt a flexible approach to dealing with foreign counsel. A discussion of opinion “topics” may be better than seeking to impose traditional U.S. language formulations and customary practice standards on foreign counsel. A list of “due diligence” questions related to the aspects of the transaction relevant to the foreign jurisdiction may be a better first step than sending foreign counsel a form of opinion derived from U.S. opinion practice.

Retaining two foreign counsel firms may be the best solution. It is often advisable for the client to retain its own counsel in the foreign jurisdiction to engage in direct communication with the opposing party’s foreign counsel. (In some countries, particularly the U.K. and Ireland, it is standard practice for the recipient’s own counsel to render any necessary legal opinions.) It may be possible to select a single neutral “counsel to the transaction” where the foreign legal issues are relatively straightforward, but this approach can raise significant conflict and confidentiality problems if a party needs to discuss private concerns. If business issues involving the opinion need to be resolved, retaining two foreign counsels can be the best solution, assuming the cost can be managed. Having the ability to turn to the client’s own foreign counsel for advice on opinion coverage issues can ease U.S. counsel’s burden of advising the opinion recipient.

Practical realities. Practical techniques such as dating documents “as of,” executing signature pages in advance and holding them in escrow, and holding previously signed foreign counsel opinions in escrow are sometimes used to address challenges of timing and closing mechanics, but these approaches may present other issues and meet with resistance from foreign counsel. There are no “one size fits all” solutions to the problems of working with foreign counsel, but commonsense steps, such as retaining a firm with which U.S. counsel is comfortable and making contact several weeks prior to closing, can mitigate them.

2. Opinions to Accountants, Rating Agencies and Regulators (summarized by Steven K. Hazen)

Rebecca J. Simmons, Sullivan & Cromwell LLP, New York

This breakout session identified opinion recipients as falling into two different categories: addressees and other recipients. The three types of opinion recipients discussed in the session

share the characteristic of not being party to the transactions in which the opinion is delivered. For those that are not addressees, two issues are present: (1) whether the rights of non-addressees who receive reliance letters should be analyzed in the same way as those of addressees; and (2) whether the rights of recipients who receive a copy of the opinion letter with notice that they are not permitted to rely should be analyzed differently than those of non-addressees who receive a reliance letter or are not informed that reliance is prohibited. The session also discussed special problems of permitting reliance by a party who may not be familiar with customary practice on which the opinion is based and is not represented by legal counsel.

Opinions to rating agencies. This part of the discussion occupied a significant part of the session, due in part to the particular interest of the participants. It included such issues as whether the opinion giver should attend the presentation to the rating agency, whether the rating agencies paid greater attention today than in the past to the substance of legal opinions and whether that reflected the role that evaluation of opinions plays in the diligence performed by the rating agency.

Opinions to regulators. This part of the discussion addressed the fact that statutory provisions, such as those providing for criminal sanctions, may impact the role of the opinion giver. Lawyers giving opinions to regulators may feel a greater need to address contrary authority head-on rather than merely state legal conclusions. Some participants observed that state regulators with whom they deal are increasingly requesting opinions incorporating the ABA Accord in the face of uncertainty by them as to why different opinion givers use different exceptions in their legal opinions.

Opinions to accountants. The discussion addressed the question of whether the relationship with auditors was more “across the table” (*i.e.*, similar to an adversarial relationship) than for the other two types of recipients as to which a more collaborative approach was often the norm.

The group concluded that additional work could productively be done on this topic, but that opinions to each type of recipient probably need to be examined separately. The goal would be to recognize different dynamics in the opinion process for each type of recipient, and not to suggest different kinds of opinions or practices for each.

3. Current and Upcoming Bar Reports on Opinions (summarized by John B. Power)

John B. Power, O’Melveny & Myers LLP, Los Angeles, Chair

This breakout session heard brief summaries of recently issued bar opinion reports and reports in preparation, emphasizing the general subject of the respective reports and the reasons for their preparation:

Recently Issued Reports:

Maryland	Comprehensive Update	Sharon A. Kroupa
California	Remedies Opinion Report Update Comprehensive Report Update	Jerome A. Grossman
Pennsylvania	Update	E. Carolan Berkley

Reports in Process:

ABA	Negative Assurance Update	Richard R. Howe Section of Business Law, Securities Regulation Committee, Subcommittee on Securities Law Opinions
California	Model Opinion Venture Capital Opinions	Jerome A. Grossman
Florida	Comprehensive Update	Philip B. Schwartz
Texas	ABA Principles and Guidelines	Gail Merel
TriBar	Preferred Stock	Stanley Keller

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Most of these reports update earlier reports.

In the discussion, a strong consensus favored a central website providing information about all published state, local, ABA and other bar reports. Currently, access to all reports is provided by *Glazer and Fitzgibbon on Legal Opinions*. The ABA Section of Business Law Legal Opinions Committee is in the process of expanding the resource center on its website to include state and local bar reports.

The consensus also favored a clearinghouse through which information about bar reports in preparation would be available. Authors would be able to share information with those involved in other reports and obtain ideas from others, and cross-citation would be facilitated. The group also expressed the hope that there would be an opportunity for further discussion of this topic at the next WGLO seminar.

4. M&A Opinions
(summarized by Martin Brinkley)

Joel I. Greenberg, Kaye Scholer LLP, New York, Chair

This breakout session discussed trends in third party legal opinions in M&A transactions. According to studies by the ABA Section of Business Law's Committee on Negotiated Acquisitions, opinions have essentially been abandoned in acquisitions of public companies, presumably reflecting a consensus that they provide little value in that context. Opinions are still relatively common in private company acquisitions, with some variation based on the nature of the buyer (public company, private equity, etc.), although decline in the frequency of opinion giving appears to be accelerating even in this context. The study results may suggest that opinions are required more frequently in smaller transactions, leading to further reflections on the sophistication and experience of the counsel involved. The data provide no information on the coverage of opinions that are still being given frequently in the M&A context.

The breakout discussion went on to discuss several questions and issues:

Should legal opinions still be regarded as providing value in M&A transactions in which a private company is the target? The greater availability of post-closing contractual remedies against the seller for breaches of representations and warranties covering some of the same issues that may be addressed in a legal opinion seems to make the opinion less necessary. The group's collective experience suggested that the scope of opinion coverage in private M&A transactions is narrowing, which may reflect recognition of this reality. The "golden rule" appears to apply vigorously in the M&A context because counsel tend to switch roles (from representing the buyer to representing the seller) more frequently than in commercial loan transactions. There was concern, however, that smaller firms acting as counsel to targets may be under pressure to deliver opinions that larger firms would find unacceptable.

If seller's counsel has limited or no prior experience with the target, is its opinion a useful source of information concerning the target? Why is buyer diligence not equally efficient? The group discussed situations in which it may be better for the buyer to rely on its own counsel or local counsel of its own selection for advice in specialized areas or cross-jurisdictional issues (such as the enforceability of noncompetition covenants).

Some customary opinions may be more important in M&A transactions. For example, there may be a difference between the value of an enforceability opinion between counsel who jointly negotiated the acquisition agreement (low) as opposed to status, power and authority opinions on the parties and due execution and delivery of the transaction documents (higher).

5. Proposed Customary Practice Report (summarized by John B. Power)

Steven O. Weise, Heller Ehrman LLP, Los Angeles, Chair

This breakout session discussed the proposed statement on customary practice, drafted by Steve Weise and Bill Nimkin and designed to educate judges and litigation lawyers on the importance of customary practice in preparing and understanding third-party legal opinions. The statement was circulated broadly for comment and is achieving broad sponsorship by bar associations.

Steve reported that he has received comments in the following areas:

- Drafting edits
- Relationship between customary practice and the duty of care
- Relationship between customary practice and plain meaning
- Sources of customary practice
- National vs. state customary practice
- Variations from customary practice
- Citations to the Restatement of the Law Governing Lawyers

Steve listed approximately 15 bar associations that have already agreed to co-sponsor the statement, subject to review of the final form, or were studying it with the expectation that they would co-sponsor it. He explained and the group discussed comments received. He will prepare and circulate another draft responding to comments, and plans to publish the statement in the February 2008 issue of the *Business Lawyer*.

By consensus, the breakout group approved the statement and Steve's approach to comments, subject to reviewing the final draft.

6. Structured Finance Opinions
(summarized by Steven K. Hazen)

Scott A. Stengel, Orrick, Herrington & Sutcliffe LLP, Washington, DC, Co-Chair
J. Truman Bidwell, Jr., Sullivan & Worcester LLP, New York, Co-Chair

Some of the questions posed in this breakout session were similar to those for the session on "Opinions to Accountants, Rating Agencies and Regulators": the extent of duties to non-addressees or permitted assignees, duties to a non-client if the lawyer knows that an opinion provided in the transaction by another opinion giver is wrong, and duties to a rating agency beyond the content of the opinion letter. One issue focused on transactions utilizing a single "deal counsel" where the opinion recipients are not separately represented and no other counsel is present to serve as a check on the content and meaning of a legal opinion rendered by the deal counsel. That prompted discussion of whether customary practice is relevant where there may be no common understanding of the meaning of and diligence for an opinion, because the recipient does not have separate legal counsel to apply customary practice to the situation or to explain its impact to the recipient.

Another issue addressed was whether the typically lengthy recitation of facts in "true sale" and "non-consolidation for bankruptcy purposes" securitization opinions could be shortened when recipient counsel is involved and can assess the legal analysis upon which the opinion is based and all recipients are sophisticated parties with experience in that type of transaction. The group also discussed the role that recitation of the legal analysis plays in putting a recipient on notice that it needs to consult with its own counsel to assess the opinion's significance in the context of the transaction. To the extent any consensus emerged, it was that structured finance transactions at the very least present difficult issues for customary practice and its application

7. **Risk Analysis for Opinions**
(summarized by Harry Bryans)

William Freivogel, Ethics Consultant, Chicago, Co-Chair
Henry S. Bryans, Aon Risk Services, Radner, Pennsylvania, Co-Chair

This breakout session focused on base line quality control procedures adopted by firms in their opinion practice. Substantially all the firms represented in the group had an active opinions committee. Several of the firms represented indicated that their opinions committees met regularly, while others stated that they met on an as-needed basis. Almost all present said that their firms had written policies on opinions. Several noted that the policies are on their firm's intranet.

Almost all present indicated that they have second-partner reviews for closing opinions, tax opinions, and any opinions given in real estate transactions. Most present stated that the second partner has to be someone not involved in the particular transaction and approximately half of those present said that the second-partner review had to be by a member of the firm's opinions committee. Several indicated that changes to the opinion draft frequently occurred as a result of these reviews. Several firms require a heightened review of reasoned corporate opinions.

There was a further discussion of requested non-client reliance on diligence reports. There was general agreement that this is potentially a high risk area and that opinions committees at some firms are actively considering the relevant issues, promulgating policies on the conditions for releasing reports to non-clients, and reviewing the relevant documentation to accompany the report prior to furnishing diligence reports to non-clients. For more discussion of this problem, see the relevant portion of the panel session summary on "Limiting Legal Opinion Liability: Strategy and Ethics" (p. 2 above).

It was generally accepted by members of the group that dishonest, insolvent, and otherwise "unworthy" clients present the greatest single risk to large law firms. Most of those present said that their firms require background checks (via internet sources or otherwise) on new clients that are proposed for representation in corporate matters.