The Legal Opinion Risk Seminar Papers

*By Thomas L. Ambro and Arthur Norman Field**

The following two articles were written in connection with the Legal Opinion Risk Seminar held in New York City in October 2006. That Seminar was the first national opinion letter conference since the 1989 ABA Section of Business Law's Silverado Conference.[1]

While opinion letters are often given to clients, the opinion letters discussed at the Seminar, at Silverado and covered by bar reports are those presented at a transaction closing on the request of the client.[2] The opinion letter is presented to the party on the "other side" of a transaction. Thus, the opinion giver provides an informed judgment on the transaction to both sides, albeit to the "other side" in a limited way by letter. These opinion letters are referred to as "closing opinions" or "third party opinions."

Silverado aimed at a continuing liaison between the Section of Business Law and state and local bar groups. One aim was publication of broadly accepted statements as to legal opinion practice. Most of the energy and attention of the Silverado attendees post-Silverado was centered on the "Legal Opinion Accord."[3] The Accord was a contract-based attempt to avoid the necessarily "slippery slope" of a practice based on the custom of lawyers. How accurately can the conduct of lawyers be judged when a necessarily imprecise standard applies?

The Legal Opinion Accord failed to attract institutional support. Thus most opinion givers and recipients must look to customary practice to guide their work. There are few relevant judicial decisions. There have been two generations of bar

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1. *See* ABA Comm. on Legal Opinions, *Annual Review of the Law on Legal Opinions,* 60 Bus. Law. 1057, 1058–59 (2005) (describing the Silverado Conference) [hereinafter "2005 Annual Review"].

2. The standards applicable to opinion letters to third parties often differ from those applicable to clients; that is because the duty to a client is ordinarily broader than that owed to the third party. Thus any discussion of closing opinion letters to clients is a sophistication added to the third party opinion analysis.

3. ABA Comm. on Legal Opinions, T*hird-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association,* 47 Bus. Law.167 (1991).

reports post-Silverado that have guided lawyers, some restricted to a practice area, others to particular issues.[4] Most of these reports have come from state and local bar groups, a few have come from the ABA Section of Business Law. While these reports are in large part compatible, the variation in the language of them leaves open questions. Is there a consensus and, if so, how broad is it?

The business law practice has become more national and even international in the years since Silverado. The liaison between state and local bars and the ABA Section of Business envisioned at Silverado never took hold. The consensus that malpractice insurers, financial institutions, opinion recipient interests and rating agencies needed to agree as to customary practice is relatively recent.

The effort to move toward an articulated national consensus as to customary practice is impelled by a number of factors. First, while there are no statistics limited to third party opinion liability, it appears that claims based on closing opinions (often coupled with other claims) are on the rise. Such claims have been seen in a number of recent high profile civil and even criminal matters.[5] Second, as we see more bar reports on opinion practice, however intelligent, one must ask how well lawyers can learn about (and teach about) third party legal opinions when that practice is described in differing language in the reports. Finally, while the various reports have thoroughly covered familiar areas, there remain unexplored areas of opinion practice that deserve attention. The two articles published here fall into the last category. The first explores closing opinions from the viewpoint of the recipient, a matter little discussed in the literature about closing opinions.[6] The second considers the ethical aspects of opinion giving, a particularly challenging subject since an attorney's judgment is simultaneously given to both the client and the "other side" in a deal.[7]

When lawyers first began to write about closing opinion practice in the 1970s, the issue was how to communicate well in the short-hand style of the opinion letters. What did the language of the opinion letter mean and what diligence was to be done to give it? Could lawyers be held liable to non-clients who received a negligently given closing opinion? By the 1990s the courts had made clear that there would be liability to the recipient of an opinion letter that did not meet professional standards. It also became clear that the liability standards applicable to other professionals would be applied to lawyers in this situation. They would be liable for damages if they failed to exercise the skill and care ordinarily possessed by lawyers acting in similar circumstances.[8] While the standard does not seem to be a high one, it applies to each matter handled by a lawyer. Human experience tells us that careful lawyers make mistakes and that less careful lawyers are likely to make even more mistakes.

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4. *See* 2005 Annual Review, *supra* note 1, at 1057–60.
5. See cases cited in Reade H. Ryan, Jr., *Recipient Counsel Responsibilities and Concerns,* 62 BUS. LAW. 401 (2007).
6. *Id.*
7. Charles E. McCallum and Bruce C. Young, *Ethics Issues in Opinion Practice,* 62 BUS. LAW. 417 (2007).
8. *See id.* at 418.

A continuing forum on closing opinions allows those involved to draw together on their view of what the responsible lawyer will do in giving certain opinions and in describing those opinions. Opinions are not guarantees. Thus, they should be understood not to include matters that lawyers cannot know as well as those matters traditionally excluded from closing opinions. The timing or economics of a deal may impel the parties to agree to greater or lesser diligence and to broader or narrower exclusions. Any such agreement is normally stated in the opinion letter itself. Customary practice leaves room for variation, provided that the variation is clearly disclosed. The aim is to communicate. Doing so in a short-hand manner requires an agreed starting point. Variations from that starting point should reflect client needs.

The challenge of a national approach to opinion practice is to find common ground and from it try to identify and give special attention to the problem areas careful lawyers encounter. Some areas are obvious. The opinion giver firm properly has a primary duty to its client and may encounter pressure from its client not to deal with certain matters in a closing opinion. Balancing duties to both client and non-client is a task that is not a characteristic one for lawyers. Dealing with information that is in the office of the opinion giver is another problem area. What effort should be made to obtain information that is easily available, and when should conclusions of others who are not involved in preparing the opinion be accepted rather than having those who prepare the opinion letter evaluate the facts themselves? A national approach promises better communication, better information to all concerned and a lower liability concern.

In January of 2007 the Section of Business Law authorized the continuation and broadening of the risk seminar discussion. After the second Seminar in April 2007, a national Working Group on Legal Opinions, organized under the auspices of the Section but governed by representatives of the various interests in the opinion process, will continue the now-established forum on closing opinions. The process leading up to the two Seminars (which we had the honor to co-chair) has been one of cooperation and candor among all concerned. We expect the Working Group process to be productive in its efforts to foster a national opinion practice.