IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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CONTENTS

FROM THE CHAIR

I regularly go back and reread the seminal article on legal opinion risk published by Don Glazer and Jon Lipson in *The Business Lawyer* in the March/April 2008 issue entitled "Courting the Suicide King: Closing Opinions and Lawyer Liability," (17 Bus. Law. 4 (2008)) available on our committee's Legal Opinion Resource Center, which is open to all as a public service. The article explains the unusual dangers posed by giving opinion letters to non-clients. One of the unique features of the Legal Opinions Committee is that it is (to my knowledge) the only ABA committee focused on an area of law (issuance of third-party legal opinions to non-clients) that many practitioners fervently desire would no longer exist. Giving these opinions creates in many cases a disproportionate level of risk for practitioners, and our committee serves a valuable function in helping lawyers understand and manage those risks.

Consistent with that mission, we have a terrific CLE session planned for Friday morning, April 28, from 10:00 to 11:30 a.m. (Pacific time), titled "Risky Business: Practical Advice for Reducing Risks in Rendering Third-Party Legal Opinions." In the session, John Power, Steve Weise, Anna Mills and I will cover two topics: (i) an upcoming Tribar report on a new but widely accepted "risk allocation" exception that opinion givers are commonly including in opinion letters and (ii) a report (issued by the Legal Opinions Committee) that discusses the results of a 2019 national survey of law firm opinion practices, which included survey responses from about 300 geographically diverse firms of all sizes.

As usual, the Legal Opinions Committee has a full schedule of additional activities planned for the upcoming ABA Business Law Section 2023 Hybrid Spring Meeting, to be held in Seattle on April 27 to 29. In particular, there will be meetings of, or reports from, the Intellectual Property Opinions Task Force, the Cross Border Opinions Task Force, the M&A Opinions Task Force, the Publications Task Force, the Local Counsel Opinions Project (a joint effort of our committee and WGLO), and the Enforceability Opinions Task Force.

One indication of the strength of the Legal Opinions Committee has been the number, breadth and depth of its ongoing activities, as well as the scope of those activities and their extensive interaction with other bar groups. Our committee has more than 1,200 members, and a great proportion of those members are regular participants in one or more of our many activities.

That said, we are always looking to do more. I strongly encourage anyone who has an idea for a new project that the committee could support to reach out to me. All the best.

- Arthur Cohen, Chair
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FUTURE MEETINGS

ABA Business Law Section
2023 Hybrid Spring Meeting
April 27-April 29, 2023
Seattle, Washington
Hyatt Regency Seattle

What follows are the presently scheduled times of meetings and programs of the 2023 Hybrid Spring Meeting that may be of interest to members of the Legal Opinions Committee. All meetings and programs will be conducted and presented in person and virtually. For links to the meetings and programs, go to the Business Law Section's 2023 Hybrid Spring Meeting webpage, accessible to members of the Business Law Section here.* **All times are listed in Pacific Time Zone.**

Legal Opinions Committee

Thursday, April 27, 2023

Cross-Border Opinions Task Force Meeting
8:00 a.m. – 9:00 a.m.

Friday, April 28, 2023

Program: Risky Business: Practical Advice for Reducing Risks in Rendering Third-Party Legal Opinions
10:00 a.m. – 11:30 a.m.

*The URL is https://www.americanbar.org/content/dam/aba/events/business_law/2023/04/spring/alpha-schedule.pdf.

Legal Opinions Committee (continued)

Intellectual Property Opinions Joint Task Force Meeting
1:30 p.m. – 2:30 p.m.

Friday, April 28, 2023

Committee Meeting
2:30 p.m. – 4:00 p.m.

Law and Accounting Committee

Saturday, April 29, 2023

Committee Meeting:
10:00 a.m. – 11:30 a.m.

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Thursday, April 27, 2023

Subcommittee Meeting
11:00 a.m. – 12:00 p.m.

ABA Business Law Section
2023 Fall Meeting
September 7-September 9, 2023
Chicago, Illinois
Sheraton Grand Chicago

ARTICLES

Class Voting and Duly Authorized Opinions

In a recent decision, *Garfield v. Boxed, Inc.*, 2022 WL 17959766 (Del. Ch. Dec. 27, 2022), the Delaware Court of Chancery addressed the requirement for a separate class vote under section 242(b)(2) of the Delaware General Corporation Law (DGCL) when the corporation, which had common stock designated in its certificate of incorporation as "Class A" and "Class B," increased the number of authorized shares of Class A common stock. Section 242(b)(2) provides for a separate class vote when the number of shares of a class is increased (absent a provision in the certificate of incorporation negating the need for a class vote). The separate vote requirement of section 242(b)(2) does not apply to an increase in the number of shares of a series. Section 242(b)(2) also provides for separate class or series votes on other types of amendments, such as when the rights of a class or series are altered so as to "affect them adversely."

The *Boxed* case did not involve the validity of the corporate action because the corporation amended its proxy material to add a class vote before the stockholder vote was taken in response to a Class A stockholder raising the issue. Instead, the case involved whether the stockholder added substantial benefit by raising the issue, so that its attorney was entitled to a fee award. The court found that a class vote was required and that therefore the stockholder added substantial benefit. In particular, the court ruled, based primarily on the statute and contract interpretation principles, that the designation of the common shares as classes in the certificate of incorporation resulted in there being classes, not series, under the DGCL, entitling the Class A stockholders to a class vote on the increase.

The *Boxed* decision caused other Delaware corporations, especially former special purpose acquisition companies (SPACs) like Boxed that had completed deSPAC transactions, to review their prior corporate actions in approving similar amendments. Many found that they only sought an approving vote of a majority of the outstanding common stock, without seeking a separate class vote. Some of these found that they in fact obtained the approving vote of a majority of the outstanding shares of the class, but without having sought that separate class vote, while others found that they did not obtain that class approving vote. As a result of the actual or potential invalidity of their corporate actions and subsequent stock issuances, many companies have filed petitions with the Delaware Court of Chancery under section 205 of the DGCL to validate their corporate actions and stock issuances. The Court of Chancery has heard a number of these petitions and granted section 205 validation orders, issuing an explanatory opinion in *In re Lordstown Motor Corp.*, 2023 WL 2155651 (Del. Ch. Feb. 21, 2023), and orders referencing the *Lordstown* opinion in others (*see, e.g.*, *In re EVgo Inc.*, C.A. No. 2023-0132-LWW (Del. Ch. Feb. 21, 2023)). The court ruled that validation was justified, including in situations in which the corporate action might not have been legally defective because the separate class vote, even though not sought, was obtained, finding that the uncertainty as to the validity was sufficient to invoke section 205 validation.

The invalidity of the amendments because of the failure to seek and obtain the requisite separate class vote means that opinions given that the amendments were duly adopted or that the shares created by the increase in authorized capital and subsequently issued were duly authorized and validly issued could be incorrect in the absence of validation under section 205. Affected opinions would include Exhibit 5 opinions included in registration statements filed with the SEC for offerings and sales of those shares. Normally, lawyers who discover that an opinion was incorrect when given would consider whether they need to take further action, such as advising the recipient of the issue or withdrawing the opinion.

Fortunately, as noted above, the DGCL has validation provisions and the Delaware Court of Chancery, sensitive to the difficulties faced by affected corporations, has shown a willingness to validate the defective and potentially defective corporate actions and share issuances retroactively as permitted by section 205. Those section 205 validation orders eliminate this problem with the opinions that were given, and the willingness of the Court of Chancery to promptly grant validation orders in these situations has allowed opinion givers to wait before taking further action in anticipation of a 205 order being granted. Should a 205 order not be obtained, opinion givers would have to consider what action to take with respect to their potentially incorrect opinions.

The uncertainties created by the *Boxed* situation highlight the need for care in addressing the corporate action required to authorize charter amendments and to take other corporate actions. The issue can be especially acute for non-Delaware lawyers dealing with Delaware corporations.[1] In some situations in which the separate class vote was not sought or obtained, non-Delaware counsel may have gotten informal advice of Delaware counsel that no separate class vote was needed. The common practice of non-Delaware lawyers giving opinions with respect to Delaware entities raises a number of questions worth considering:

- When should non-Delaware counsel consult Delaware counsel? The traditional answer has been when the opinion is non-routine, but when is that and how can non-Delaware counsel be sensitive to when consultation is needed?
- What level of formality should that consultation take, ranging from oral advice (which may or may not be memorialized by non-Delaware counsel), to written advice (which might be a casual email or a more formal response), to an actual written opinion?
- Should reliance on that advice be expressly stated in the non-Delaware lawyer's opinion letter?
- What is the non-Delaware lawyer's exposure if that reliance is not expressly stated?
- Alternatively, should Delaware counsel be asked to give the opinion directly?
- If advice (in whatever form) is received from Delaware counsel, to what extent should it be relied upon in subsequent transactions without being refreshed?

These questions are worth consideration and discussion among opinion practitioners.

- Stanley Keller
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Dealing with a Third-Party Closing Opinion Claim

This article provides an overview of a third-party closing opinion claim from the time the claim surfaces to the completion of the summary judgment phase of the litigation. Attorneys who give opinions or advise their clients who receive opinions are generally aware of court decisions concerning opinion liability. They also are aware of their ethical responsibilities as they give and advise on opinions their clients receive. Court decisions reflect the court's assessment of the arguments of both sides, typically in the context of a summary judgment motion made by one or both parties. In many respects, an opinion liability

[1] For a discussion of issues relating to non-Delaware lawyers giving Delaware law opinions, *see* Frasch, Bidwell and Hoxie, *Legal Opinions on Delaware Business Entities by Non-Delaware Lawyers*, IN OUR OPINION (ABA BUS. LAW SECTION LEGAL OPS. COMM.), Spring/Summer 2021 (vol. 20, nos. 3&4), at 9-13. Also for the attitude of a Delaware court regarding non-Delaware lawyers addressing Delaware law in an opinion, *see Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP,* 2021 WL 5267734 (Del. Ch. Nov. 12, 2021), at *68-*69 ("Knowingly Going Where Others Would Not Tread"), *rev'd on other grounds, Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP,* 288 A.3d 1083 (Del. 2022).

claim is much like any other legal malpractice claim.

However, both the significance of customary practice in the opinion area and the possibility of liability to a non-client (as well as the client in some situations) makes the opinion claim different from most legal malpractice claims. Court decisions reveal very little about how the litigating parties prepare their case, how they deal with the clients involved, who oversees the effort made by each side, the role of the insurer, the role of the opinion preparer, and the time, costs and emotional impact on the lawyers involved in the opinion, in getting through the summary judgment phase of the litigation.

A. Overview

In this article, we provide general guidance regarding the issues and events that a law firm typically encounters when an opinion recipient threatens or files a claim seeking damages from a law firm arising from a third-party closing opinion. These issues and events are presented as they might appear to a law firm's general counsel (the "**GC**"), who ordinarily has responsibility to deal with such a situation.

This article provides only an overview. It uses a typical factual setting to identify commonly encountered issues and events. The issues and events relating to actual claims will of course vary.[2]

B. The Setting

We assume for this article that:

(1) The claim is asserted by a lender, which is the third-party opinion recipient (the "**claimant**");
(2) Only one attorney in the law firm is the opinion preparer and the law firm is the opinion giver as counsel to the borrower (the "**client**");
(3) The claimant does not assert a claim against the client because the client is essentially insolvent, although it remains in business;[3]
(4) The law firm does not anticipate that:
    (a) the client will later be named as a defendant;
    (b) the client will make a cross-claim against the law firm arising out of the closing opinion or the surrounding circumstances, even if the client is named later as a defendant; or
    (c) the filing of a complaint will involve significant reputational risk for the law firm or its client;
(5) The law firm has sufficient malpractice insurance so that the claim will not cause it financial difficulty; and
(6) In connection with the underlying transaction, neither the transaction nor the client is directly subject to a regulatory system, such as one administered by the SEC or banking authorities.

The nature of the claim is important in determining how the opinion giver firm should

[2] We have assumed that the claim will be litigated in the courts rather than arbitrated. However, if the claim is arbitrated, the considerations involved would probably be similar, except that:

(a) there are typically no appeals;

(b) there is no possibility of a jury trial; and

(c) the risk of publicity is substantially reduced.

[3] When the client is also involved as a defendant, the client may take the leading role in the litigation, ordinarily using other counsel. In that situation, the choices of the opinion giver firm are likely to be narrower than indicated below. Of course, if the client is a defendant and also threatens or actually files a cross-claim against the opinion giver firm (and possibly the opinion preparer), the situation is much more complicated.

proceed.[4] The claimant may assert more than one theory of liability. However, we assume that the claimant asserts only that it was misled because the opinion giver did not disclose material information relevant to one or more of the opinions given. Unlike a malpractice claim by a client, a claim by a non-client recipient typically is based on negligent misrepresentation.

Frequently, the alleged omission is not directly related to one of the opinions but is important to properly evaluate the opinion. We assume that the lender claims it would not have approved the loan to the borrower if it had been given the omitted information. In this connection, we assume that the lender's possible interest in the information was understood by the opinion preparer, but not by the lender or its counsel for the transaction. Thus, the claim is similar to the claim in *Roberts v. Ball Hunt* [5] and in *Dean Foods*.[6] Typically, the ultimate question in cases involving claims primarily based on omissions will be whether, under the circumstances, the recipient had a reasonable expectation that it would receive disclosure of the type of information not disclosed.

There are other familiar fact patterns for opinion claims. *Prudential v. Dewey*[7] involves a situation in which an opinion giver made an error that might have been discovered before the closing by the attorney for the recipient. However, it was discovered only after the closing. In cases involving a clear error, whether the error gave rise to the damages claimed and resulted from the opinion giver's negligence may remain subject to dispute.

The *GemCap* case[8] and *Fortress* case[9] involve claims that diligence for an opinion given was not adequate. That type of case implicates the concept of customary diligence.

Claims made by a client, such as those in the *Nomura* case[10] and in *Taylor v. Bell*,[11] raise more difficult problems than third-party claims. That is because the duty to a client is

[4] Claims made by governmental entities and bankruptcy trustees raise special problems not considered here. Such claims may involve public policy concerns that can overshadow the financial issues in the case, which otherwise tend to dominate decision-making on both sides.

[5] Roberts v. Ball, Hunt, Hart, Brown, & Baerwitz, 57 Cal. App.3d 104, 128 Cal. Rptr. 901(1976) (negligent misrepresentation claim alleging failure to disclose dispute among partners regarding their general partner status survives motion to dismiss).

[6] Dean Foods Co. v. Pappathanassi, 18 Mass. L. Rptr. 598, 2004 WL 3019442 (Mass. Super. Ct. 2004) (law firm liable for failure to disclose criminal investigation in no-litigation confirmation) (co-author Field was an expert witness).

[7] Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831(1992) (law firm not liable for opinion on mortgage that understated amount of debt secured).

[8] GemCap Lending LLC v. Quarles & Brady, LLP, 269 F.Supp.3d 1007 (C.D. Cal. 2017), *affd*. 787 F. App.'x 369 (9th Cir. 2019); *cert. den*. 140 S. Ct. 2509 (2020) (law firm not liable for withheld information that was not the subject of an opinion and was known by the recipient) (co-author Field was an expert witness).

[9] Fortress Credit Corp. v. Dechert LLP, 89 A.D.2d 615, 934 N.Y.S.2d 119 (2011) (law firm not responsible for genuineness of the transaction both as matter of customary practice and express negation of investigation).

[10] Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft, LLP, 115 A.D.3d 228, 980 N.Y.S.2d 95 (1st Dept. 2014), *mod. and summary judgment granted*, 26 N.Y.3d 40, 41 N.E.3d 353, 19 N.Y.S.3d 448. (N.Y. Ct. App.) (law firm not responsible to its client in securitization transaction to determine eligibility of underlying loans) (co-author Field was an expert witness).

[11] Taylor v. Bell, 340 P.3d 951 (Wash. App. 2014) (law firm responsible to client for advising how to cope with foreign state law issue despite opinion given by counsel for the other party in that state).

typically more extensive than the duty to a third party.

C. The Checklist

1. The First Contact with the Opinion Preparer

The attorney who represented the recipient in the transaction for various reasons typically is not the one to raise the claim. In our assumed fact pattern, a litigator representing the recipient/claimant becomes involved after the facts underlying the claim are discovered and asserts that the recipient believes that the opinion preparer had specific information that should have precluded delivering the closing opinion or required disclosure of the information when the closing opinion was delivered.

We assume that the initial notice of the claim, as is often the case, is given by telephone and directed to the opinion preparer, as the lead transactional attorney. The opinion preparer is surprised by the call and later remembers the conversation as largely one-sided. The opinion preparer makes notes of the telephone conversation during and after the call but does not respond to any of the statements made by the litigator representing the claimant. It is important to note that any conversation between the opinion preparer and the litigator for the claimant can result in admissions against interest.

Sometimes, the claim will first come to the attention of the opinion giver firm in some other way, perhaps when a demand letter is received or a complaint is served. Service of a complaint eliminates some informal options for resolving the claim quickly, but also averts the possible complications of a cold contact discussed above.

The opinion preparer's recollection of the call is that the claimant's litigator stated that the claimant intends to file a complaint but would provide a reasonable period of time for the opinion giver law firm to respond before filing. The opinion preparer had previously become aware that the client was in serious financial difficulty but had not been contacted by the client post-closing about that and had not reviewed the file.

The opinion preparer does not at the time of the call completely remember the closing opinion that was delivered about three years earlier. The opinion preparer recalls that the closing opinion seemed routine. The opinion preparer believes the information now stated to have been omitted and alleged to be the basis of the claim would have been well outside the scope of the opinions given.

Takeaway: *A transactional lawyer needs to be prepared for a cold call raising a claim and to field it without comment other than that the firm will respond promptly .*

The opinion preparer is aware of the law firm's policy that the GC should be informed immediately of any claims or threats of any claims against the law firm. However, before contacting the GC about the call the opinion preparer discusses the matter with another partner who does transactional work and has experience with third-party closing opinions.[12] That is done in part to gain sympathy and support for the opinion preparer's view that the opinions were properly given. That partner, after briefly reviewing the closing opinion, offers his view that it was not necessary to disclose the information in question under customary practice.[13]

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[12] There can be at least a partial waiver of the attorney-client privilege if the attorney receiving the initial notice discusses the matter within the law firm with any attorney other than the GC, a lawyer in the GC's office or a lawyer designated by them. If there is no internal GC, the risk of a waiver may be increased by discussions of this type.

[13] Of course, the discussion between those attorneys would be far more problematic if the response of the consulting partner had been less positive.

The opinion preparer then informs the GC of the call.

Takeaway: *Lawyers in a law firm need to be aware that conversations with other lawyers in the firm may not be privileged. Therefore discussions regarding a claim ordinarily should be limited to the firm's GC or someone the GC designates.*

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2. The GC's Background and Role

The GC has a commercial litigation background and has dealt with other legal malpractice and ethics claims asserted against the law firm. However, the GC in our situation, as a litigator, does not have the experience to evaluate whether the closing opinion was prepared properly or to evaluate the potential liability.

The GC obtains the transaction file and a description from the opinion preparer of what is known about the possible claim, as well as the contact information for the claimant's attorney. The GC reminds the opinion preparer of the firm's policy that no discussions about any claim or threat of any claim should occur, internally or externally, except with the GC or someone the GC designates. The opinion preparer then discloses to the GC the prior discussion had with the other partner and that partner's conclusion.

Often the law firm's management does not disclose claims against the firm to partners generally or only notes the presence of the claim but not the partner involved or the type of claim. As a management matter, disclosure and related discussion of the claim is typically viewed by the law firm's management as a distraction and potentially divisive. Unfortunately, when there is no opportunity for discussion, the opinion preparer may feel isolated by the rumors within the law firm that inevitably take place.

Because the GC in our situation does not have the experience to evaluate the claim, another transactional attorney in the firm is appointed to assist the GC to evaluate the claim. However, unless the appointment is made in a formal way, there is a risk that an evaluation by that attorney will be subject to discovery if the claim moves to litigation**.** Instead, the GC may choose to retain a consultative expert from another law firm to make the evaluation. Any evaluation at this stage is preliminary since the claimant's allegations are not fully known.

Takeaway*: Typically, the law firm's GC will not have a transactional background. Therefore, the GC will want assistance in evaluating a claim involving a closing opinion.*

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3. Preserving Documents and Other Information

A claimant's case can sometimes be based on using information of the opinion giver law firm. Accidentally destroying or reducing the usefulness of evidence or information that could be used to develop evidence ("**spoliation**") may result in punitive action against the law firm. Intentionally doing so may be a crime. Spoliation of evidence can result in sanctions that could preclude an effective defense.

Accordingly, the GC could consider the following:

(a) evaluating which attorneys and non-attorneys in the law firm are likely to have evidence or information that might lead to evidence regarding the claim;

(b) determining the best method of communicating with those attorneys and non-attorneys regarding a "legal hold notice";

(c) deciding whether to preserve telephone records in addition to preserving texts, emails, hard copies and other formats containing information, taking into account the significant cost typically associated with preserving telephone records; and

(d) considering whether the client should be sent a "legal hold notice," including whether the client needs a detailed explanation.

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***Takeaway**: A first step following notice of a potential claim often is a preservation notice to relevant law firm personnel.*

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4. The Need to Establish Communication Lines Quickly

The GC should move promptly to establish and maintain the following communications:

(a) inform firm management;

(b) inform the insurer;

(c) inform the client;

(d) assure that a public relations contact is available if required; and

(e) maintain contact with the opinion preparer.

The GC does not know how much time is available before the claimant will file a complaint if there has been no meaningful communication with the claimant's attorney. The GC needs to know more before determining an initial strategy. A filed complaint may limit the firm's options.

However, the GC should consider evaluating the likely claims and determining whether the applicable statute of limitations might be an effective defense. This could be relatively simple if the jurisdiction has a specific legal malpractice statute that includes claims by non-clients.

More frequently, there will be more than one claim and both the date the statute of limitations started running and whether there is any tolling will require analysis. Typically, a definitive answer will not be available at an early stage.

We assume for our setting that the statute of limitations will not become a defense for now. Therefore, it will not be a factor in assessing whether the GC should call the claimant's attorney. Such a call could result in a better understanding of the claim. It provides a way to show that the law firm is giving attention to the matter. It may provide additional information and permit establishing a schedule for preliminary discussions.

There may be good reason for the GC not to call the claimant's attorney at an early stage, including running of the statute of limitations. However, the decision to wait, or not respond at all, should be carefully considered based on the circumstances.

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***Takeaway:** Careful consideration should be given to when and how to contact a claimant's attorney, including statute of limitations considerations.*

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The claim, if pursued, may require disclosures that could affect the client. That raises potential client confidentiality questions under ABA Model Rule of Professional Conduct 1.6 ("Confidentiality of Information"). The GC would likely establish communications with the client's internal legal staff or other counsel representing the client to manage any such questions and obtain client consent if required. Also, early communication with the client may be helpful in dealing with possible client concerns about the claimant's allegations in any filed complaint regarding the professional conduct of the opinion preparer and the opinion giver firm.

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***Takeaway:** Professional obligations to the client and possible conflicts of interest need to be carefully considered.*

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5. Insurance Questions and Notice of Claim

The GC is responsible to ensure that a prompt written notice required by the policy will be filed with the insurer. A contact with a claims representative of the insurer will quickly be established since the insurer typically has the major monetary risk regarding the outcome of the claim.

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Takeaway: *Required notices to the firm's insurer need to be given in a timely fashion and a relationship with a claims representative of the insurer established.*

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6. Place of Filing and Hiring the Defense Attorney and the Consultative Expert

An initial question for the law firm is: Where is the claimant likely to pursue its claim, if it does so? Often the claim is filed in the "home" jurisdiction of the claimant.

However, if the client is also a potential defendant, the claim may be filed in the jurisdiction required by the underlying transaction agreements. In addition, the transaction may involve contacts with other jurisdictions that could support a filing elsewhere.

When very large potential claims are involved, it may be appropriate to bring in a defense team with relevant experience and a national reputation. Doing so, though, is likely to raise the costs of defense significantly. Also, if the case is brought in a jurisdiction in which the defense team is not admitted to practice, there may be additional costs involved in retaining local co-counsel.

The terms of the insurance policy will determine whether the insurer or the law firm has the right to designate the counsel to be engaged to defend the case. Often, the insurer has that right.

The insurer typically prefers to use a law firm and an attorney who has handled malpractice defense cases for it before. The typical insurer's concern is to engage attorneys with experience in avoiding high settlements and verdicts while controlling fees. There may be negotiations between the opinion giver firm and the insurer about the attorneys to be engaged and the costs involved. When a financial institution (or other major employer of law firms) is a claimant, many large transactional law firms will decline to be engaged as the defense attorney because of conflicts of interest or business relationship concerns.

An attorney experienced in legal malpractice or similar cases against attorneys may be able to evaluate the opinion-based claims, including the question of whether the alleged non-disclosure caused the damage. However, in cases where the allegation is that diligence in preparing the opinion letter was not adequate, a detailed knowledge of customary third-party closing opinion diligence would be required to evaluate whether the closing opinion was properly given.

Unless the proposed defense attorney has had experience with third-party opinion cases sufficient to evaluate the conduct of the opinion preparer, it may be appropriate to engage a consultative expert. Either the proposed defense attorney or a consultative expert should be capable of evaluating the opinion preparer's conduct under the circumstances of the transaction. A consultative expert may also be prepared to act as or assist in hiring the testimonial expert (see Section 15 below).

There also may be negotiations with the insurer about retaining the consultative expert and related costs. The consultative expert is for practical purposes part of (and an additional cost of) the defense team.

There is some time pressure involved in finding the defense attorney and, if needed, the consultative expert. Substantive discussions with the claimant's attorney typically proceed only after a careful preliminary evaluation of the

opinion preparer's conduct. That will include an inquiry into the nature, extent and source of the information that was not disclosed. Typically, that involves informal and formal discovery, including depositions.

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Takeaway: *Assembling the appropriate defense team, including counsel and experts, is an important part of the early efforts.*

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7. Initial Interviews and Evaluation of the Claim

We have assumed that the claim involves non-disclosure of information relevant to an opinion given. There are a number of opinion cases and a large number of non-opinion misrepresentation cases involving non-disclosure claims. Neither customary opinion practice nor misrepresentation law requires disclosing all relevant information.

The initial evaluation must, of necessity, be made without full knowledge of what the claimant will allege in its complaint. Any evaluation at this stage will primarily rely on:

(a) the closing opinion itself;

(b) an interview with the opinion preparer;

(c) a review of relevant cases and bar reports;

(d) whatever there is in the law firm's transaction files relating to the opinion given; and

(e) available information about the claimed non-disclosure.

If the opinion preparer consulted with another partner before reporting the claim to the GC, as we have assumed above, that attorney would, of course, also be interviewed.

8. Strategy for Responding to Initial Contact

Each side in the case typically lacks significant information before discovery takes place. Each side, though, will attempt to develop an overall understanding of the relevant facts. When that is done, each side will evaluate whether and the extent to which the early and informal exchange of information that will become known in discovery is then in its interest. Each side will continue to review its strategy as it comes to better understand the facts and the strategy of the other side.

9. Exploring Repair, Mediation and Settlement with Claimant's Attorney

In some claim situations, the alleged damage may be limited or may only be the imposition of an unanticipated risk. The parties may explore repairing the damage or preventing potential future damage even if the responsibility for it is unclear. In the situation assumed, however, the claimant's concern arises out of a loss already sustained.

There may be arguments that the claimant bears some responsibility for any damage. For many years, in most states, if a plaintiff was partially responsible for any damages based on negligence or more culpable acts or omissions, the defendant would prevail.

The new Restatement (Third) of Torts, Liability For Economic Harm (ALI 2020) recognizes that most states now apply comparative negligence principles in malpractice and negligent misrepresentation cases. As a result, proving that the opinion recipient was negligent in connection with the content of the closing opinion or the non-disclosure is no longer a complete defense in most jurisdictions.

An early settlement may sometimes appear to have significant financial advantages for both parties. The claimant will recognize that it has no insurance to cover legal fees for the litigation, that proof for its claims is frequently difficult to establish and that the outcome of the

litigation is difficult to predict. Litigation funding and contingent fee arrangements may be available, but typically will significantly reduce any recovery.

Opinion giver firms often handle transactions having a value far in excess of their malpractice insurance coverage. The opinion giver firm and the insurer usually will want to avoid litigating any large claim that appears to involve a realistic chance of a material loss.

The typical claimant and its attorney will pursue some type of discovery, which might be informal, before settling a claim involving a substantial loss. Both sides will find it difficult to settle a very substantial claim before they believe that they know enough about the facts to assess whether the claim has a realistic chance of success.

Nevertheless, there may be an early mediation effort. Even if that effort does not succeed, it may establish some common ground that will be useful in achieving a settlement at a later stage in the dispute.

Takeaway: *Mitigation efforts and potential settlement opportunities should be part of the early evaluation of the claim.*

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10. Maintaining a Relationship with the Opinion Preparer

There are typically good reasons to consider selectively precluding the opinion preparer from participating in the strategic and even tactical discussions regarding the defense. That is so even though the opinion preparer frequently is a co-defendant and, in such event, has a right to be involved in defending the case.

One reason, from the law firm's perspective, is that the opinion preparer may not be able to continue both to function full time as a transactional attorney and to be actively involved in the litigation, especially when there is extensive deposition testimony. Another reason is that the opinion preparer will be a witness and, although testimony about attorney-client discussions cannot be compelled, there can be uncertainty whether discussions will be protected.

There are also tactical risks. For example, the opinion preparer's testimony can be negatively affected by participating in the typical strategy discussions with the defense attorney. Also, an opinion preparer often perceives the claim as a personal affront that puts the opinion preparer's professional reputation in question and possibly the relationship with colleagues and clients also at risk. Consequently, the opinion preparer may not have the necessary objectivity to assist in developing an effective strategy.

The opinion preparer will probably believe that being excluded from significant discussions about the defense is not fair. Also, the opinion preparer may leave the law firm during the pendency of the claim and end up being a poor or even somewhat hostile witness. That may happen even if the opinion preparer remains at the firm but is distracted by the claim, feels isolated or becomes disgruntled. For these and other reasons, the opinion giver firm should be supportive in what frequently becomes a long period of distress for the opinion preparer.

Takeaway: *The opinion preparer affected by the claim should not be forgotten and there are good reasons for continuing to provide support for the opinion preparer.*

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11. The Complaint

We assume that the claim will not be resolved before a complaint is filed. We also assume that the complaint is filed in the claimant's home jurisdiction, which we assume is distant from the opinion preparer's home and office. Even if the opinion preparer never visited that jurisdiction in connection with the transaction, sending the opinion to the recipient

there as part of the closing will typically be sufficient for a court there to accept jurisdiction.

Attempts are often made to defeat jurisdiction. For example, in the *GemCap* case the defendant law firm was primarily located in Wisconsin and the opinion preparer worked and lived in Illinois, but the complaint was filed in California.[14] Personal jurisdiction was contested by the opinion preparer, but the motion to dismiss was denied (see Section 12 below).

The complaint often goes beyond the claims asserted by the claimant in any discussions that preceded the filing. New theories of liability may be asserted, including fraud. For example, in the *Dean Foods* case the plaintiff alleged that the failure to disclose the criminal investigation also involved a failure to comply with customary opinion practice by relying on a client representation that was known to be unreliable.[15] Often, no significant new factual information is provided in the complaint.

The claimant will typically make a demand for a jury trial in connection with filing the complaint. In most opinion claim situations, neither side would trust that a jury could follow the conflicting expert testimony and complex court instructions. Nevertheless, the demand is typically made as a symbolic threat to the defendant.

By this point, the major responsibility for conducting the litigation will have shifted from the GC to the defense attorney. The GC, though, will likely continue to be the overall coordinator and be the primary contact with the opinion giver firm management, the client, the opinion preparer and the insurer.

Managing the law firm--insurer relationship can be challenging. While the law firm typically bears the early costs of any litigation up to the "retention amount," the insurer bears the larger risk. The insurer usually has extensive experience with malpractice claims, but may not with third-party negligence claims involving opinions.

Under the insurance policy, the insurer typically has a veto over any settlement and is consulted on strategy matters. If fraud is alleged, which often occurs, the insurer will typically issue a "reservation of rights" letter to the law firm. Fraud is not covered by insurance. However, the insurer continues to pay litigation costs until fraud is proven.

Because the complaint is a public document, the law firm and the client may receive press inquiries. Coordination with the opinion giver's public relations contact may be required. Sometimes the complaint is drafted to attract press attention due to the amount of damages claimed or the misconduct alleged.

12. Motion to Dismiss and its Denial

We assume that motions regarding jurisdiction over the opinion giver firm and the opinion preparer, if made, will fail. We also assume, as noted above, that there is no statute of limitations defense and that the complaint is sufficient to withstand a motion to dismiss for failure to state a cause of action. Such a motion concedes the facts in the complaint solely for that motion, but maintains that, even with that concession, the claimant cannot prevail as a matter of law.

If the claimant has any reasonable chance of success, and the statute of limitations has not run, these motions are seldom successful. Even in the few situations where a motion to dismiss is granted, the court frequently will allow the claimant to amend the complaint at least once to avoid dismissal.

Takeaway: *Motions to dismiss, absent a good statutes of limitations defense, are hard to prevail on in closing opinion claim cases.*

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[14] *See* note 7, *supra*.

[15] *See* note 5, *supra*.

13. The Answer

The motion to dismiss often precedes the answer. The reasoning is that there is no need to answer if the case will be dismissed. If the motion to dismiss is denied, the answer must be filed within 14 days in federal court and within a similar relatively short time in many state courts. Therefore, most of the work necessary to file an answer should be completed while the motion to dismiss is pending.

The answer admits certain facts, denies others and states that the defendant does not have sufficient information to answer other allegations. It often provides little new information to the claimant.

14. Denial of Motion to Dismiss, Pre-Trial Conference and Discovery Schedule

We assume that the motion to dismiss is denied and that the litigation proceeds. The court will typically call a pre-trial conference and set a schedule for completing discovery at or about the time the court denies the motion to dismiss. A period of months is typically provided, more as a goal than a deadline. The conference and schedule are routine court management efforts applicable to almost all cases. On application of one or both of the parties, the deadline may be extended.

15. Hiring the Testimonial Expert

The claimant ordinarily cannot make its case without utilizing expert testimony to establish the standard of care applicable in the circumstances.

In response to or in anticipation of the claimant engaging a testimonial expert, the defendant law firm and opinion preparer will also engage a testimonial expert to undermine or rebut the testimony of the claimant's expert.

Unlike the consultative expert (*see* Section 6 above), the testimonial expert is not part of the litigation team that engages the expert. The party engaging a testimonial expert is not considered to be the testimonial expert's client. Rather, the court expects the testimonial expert to be objective in his or her testimony, although experts for different sides always differ. The engaging party can dismiss its testimonial expert but it cannot control the expert's testimony.

The testimonial expert has only one function, which is providing testimony that supports the position of the party engaging the expert. Thus, the plaintiff's testimonial expert will testify that the closing opinion delivered did not meet customary practice standards or was not "fair and objective" and was "misleading," because it failed to disclose the information in question. The defendant's expert will take the contrary position.

In some cases, a consultative expert will also act as a testimonial expert. A consultative expert is almost never subject to examination by opposing counsel in that capacity alone, but a testimonial expert is subject to examination by opposing counsel in discovery and at trial.

A court may not protect the expert performing both roles from questioning about the consultative role. That risk discourages the use of a single expert as both a consultative and testimonial expert.

In addition, there is a credibility risk. The role of the consultative expert is typically as part of the defense team. On cross-examination, the consultative expert who later becomes a testimonial expert can be accused of a lack of objectivity.

All testimonial experts can be alleged in cross-examination to be so-called "hired guns" for the party that retained them. That allegation, however, will appear to a jury (and possibly to a judge or arbitrator) to have more substance when the testimonial expert also was retained as a consultative expert. Moreover, once the consultative expert becomes a testimonial expert, it is ethically difficult to justify continuing to provide services as a consultative expert.

Engaging testimonial experts is challenging for both the expert and the engaging party. At the time experts are engaged, discovery is often at an early stage. Thus, the facts to be presented in the case are not fully understood. In deciding if the desired testimony can be given, each prospective testimonial expert must assume that the facts known from early depositions (which they will have examined) will not be significantly undermined by later deposition testimony. Thus, the expert and the engaging party (on each side) both face the risk that the facts relied on when the expert was engaged will be undermined by later testimony. Should that occur, the expert probably will not be able to provide the desired testimony.

There are many attorneys with significant experience in giving and reviewing third-party closing opinions. All of them might qualify as experts. There is no course of study to become an expert, and there is no process for the certification of experts other than the admission of their testimony in a court proceeding.

For various reasons, the number of attorneys with substantial opinion practice experience who are interested in serving as experts is limited. Some of those attorneys are simply not effective witnesses in a stressful situation. The testimonial expert is likely to be questioned aggressively, often about hypothetical situations never previously discussed. Hostile responses can undermine the credibility of the expert, causing the expert to appear or allowing the expert to be described by the opposing litigator to a judge and/or jury as defensive or highly partisan.

As typically occurs in claims made against attorneys, claimants in legal opinion cases often start searching for a testimonial expert early in the case because such claimants frequently have a more difficult time engaging experts than do defendants. While the testimonial expert is not an attorney for the side of the litigation for which he or she was engaged, conflicts of interest rules are applicable to some extent.[16] Moreover, attorneys in law firms with a transactional practice often are reluctant to act as an expert for a claimant against a law firm.

There is limited case authority in most states involving third-party opinion claims, and state bar opinion reports are often based on the national opinion reports. As a result, experts often refer to "national opinion practice" as a basis for their conclusions. When that approach is likely to be required, the parties frequently choose testimonial experts who have experience in interstate transactions rather than those with more localized experience.

In addition, more than one testimonial expert may be required for the claimant to meet its burden of proof and for the defendant law firm and opinion preparer to counter it. For example, the closing opinion may include a tax opinion, regarding which a tax expert may be required, in addition to an expert regarding opinion practice generally.

Takeaway: *As a practical matter, a qualified testimonial expert usually is needed to defend against a closing opinion claim. That expert sometimes will be the consulting expert who was already involved. However, that is unusual and there are good reasons to retain a testimonial expert who is not the consulting expert.*

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16. Early Phase of the Discovery Period

Each side is required to provide a list of possible witnesses for its case. Litigators often use the early stage of discovery to uncover information to be used to undermine the anticipated deposition testimony of the principal witnesses for the other side. That early testimony also is typically used to establish the timeline of events and other basic largely uncontested facts.

[16] Also, the testimonial expert cannot be engaged for a fee that is related to success in the litigation. *See* ABA Model Rule of Professional Conduct 3.4 comment 3 (2020).

The defense attorney for the opinion giver law firm will have interviewed the opinion preparer and other proposed defense witnesses in significant detail before they are deposed. This is done to obtain as complete a picture of the actions and circumstances as possible. These interviews also serve to prepare the witness for potentially difficult questioning when deposed and to avoid surprises when the witness is deposed.

17. Re-Evaluation of the Claim and Possible Revival of Mediation or Settlement Negotiations

As discovery proceeds, each party will develop its view of the facts. That will be based on its own investigation, the depositions noticed by the opposing party, and depositions of those identified from other discovery, typically interrogatories.[17]

At that point, the testimonial expert for the claimant will review the depositions and begin to prepare the expert report that is required in most courts. In some state courts, instead of a report which tends to be much like a brief, the expert is only required to provide a summary of conclusions. That difference typically will not change the extent or intensity of the deposition review.

As the likely trial testimony for the opposing side becomes clearer, the parties will have a better view of the likelihood of the claims succeeding. They may again discuss settlement. At this point, the parties and the insurer may have sufficient information to make progress toward a settlement.

[17] The specific use of interrogatories is beyond the scope of this article. They are typically numerous and detailed. They require more attention in opinion-related cases than in most types of litigation.

Takeaway: *Flexibility is important because as information is developed the nature of the claim and the prospects for a successful defense may change.*

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18. Expert Reports and Later Phase of Discovery

The principal fact witnesses on each side are typically deposed prior to the depositions of expert witnesses. Under court rules, the expert reports must be submitted before each expert is deposed by the opposing side. Each testimonial expert's report typically will support all or at least most of the critical positions taken by the party that engaged the testimonial expert.

The expert report for the claimant supports the claimant's allegations of negligent misrepresentation. The expert report of the defendant follows the strategy of the defendant law firm's attorney. In some situations, the defense will focus its efforts on the inadequacy of the claim. In other situations, the law firm will try to demonstrate that the opinion preparer's conduct was appropriate. Often, defense attorneys use both approaches.

The expert report typically reads much like a brief, reciting key facts and law and including references to opinion practice treatises and bar opinion reports prior to stating conclusions on each issue. Expert reports can be very lengthy. The expert report is influenced by, but should not be prepared by, the party hiring the expert. The expert report is presented as the product of the testimonial expert.

When there is more than one testimonial expert for a party, the experts typically focus on different issues. Some degree of coordination is often necessary. Coordination, though, can be difficult and it is not always achieved.

The deposition of the expert witnesses provides an opportunity for the attorney for the opposing side to undermine that testimony. A consultative expert, if one has been engaged,

may be helpful in preparing questions to ask the opposing testimonial expert.

That testimony can be undermined in two ways. First, the testimonial expert's credentials will be questioned in an attempt to demonstrate that the expert is not qualified to reach the conclusions reached. Then the conclusions reached are questioned, based on the opposing testimonial expert's report and the opposing attorney's analysis of other relevant authority.

Testimonial experts will be familiar with relevant opinion practice cases. However, the authority relevant to the court typically will also include non-opinion negligent misrepresentation cases, particularly those in the forum jurisdiction.

Takeaway: *Testimonial expert reports and depositions challenging those reports can be important factors in resolving closing opinion claims.*

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19. Summary Judgment Motion, Briefs and Related Motions and Argument

Not every case is appropriate for a summary judgment motion. Closing opinion claims are often dependent on what the trier-of-fact believes was known by the opinion preparer and the recipient or its attorney when the closing opinion was delivered.

Each party will carefully evaluate whether filing a motion for summary judgment is beneficial. In theory, a motion for summary judgment is a faster method of reaching a decision in the case and precluding the cost and uncertainty of a jury trial. It should be noted, however, that motions for summary judgment can lead to discovery activities that might not have been utilized but for the motion.[18]

To obtain a summary judgment, a party must demonstrate both that: (a) there is no genuine dispute as to any material fact; and (b) that the moving party is entitled to judgment as a matter of law. Expert testimony is received as "fact" testimony. As a result, summary judgment cannot be granted unless the testimony of the experts is deemed irrelevant or the testimony of the expert on the losing side is held not to be sufficient to raise a genuine question of fact. The grant of summary judgment in the *GemCap* and *Nomura* cases illustrates both approaches.[19]

Notwithstanding the heavy burden on the moving party to obtain summary judgment, a motion for summary judgment is made in many opinion liability cases, often by both sides. This reflects the concern of each side that the outcome of a trial, whether a bench trial or a jury trial, is highly unpredictable.

Summary judgment, if granted, typically provides an early decision, which requires that the court rule there is no dispute regarding the material facts. Even though it might be reversed on appeal, it typically provides a major advantage to the prevailing party in settlement negotiations.

Few trial judges have presided over an opinion liability case. For initial guidance, the judge will likely look to any "pattern jury instructions" developed for use of judges for negligent misrepresentation cases in the jurisdiction.

Also, each side may submit motions to exclude or limit consideration of testimony, including expert testimony. The trial court in *Taylor v. Bell* excluded the testimony of an expert not admitted to practice in Washington State.[20] That ruling was reversed on appeal in a decision that specifically recognized the existence of a national opinion practice.

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[18] In addition, in many complex transactions the contract waives the right to a jury trial. This may cause complications in those cases where the client is also named as a defendant and decides to cross-claim rather than enter into a tolling agreement.

[19] *See* notes 7 and 9, *supra*.

[20] *See* note 10, *supra*.

Takeaway: *Efforts to dispose of a claim on a summary judgment motion, while often difficult, can be an important part of the defense strategy.*

20. Summary Judgment Decision and Possible Appeal

Often, when the summary judgment motion(s) is denied, it is because the opposing expert testimony has created a disputed material issue of fact. If the defendant can only prevail by demonstrating that there was compliance with customary practice through expert testimony, summary judgment will usually not be available.

When summary judgment is denied, an immediate appeal is available only in courts that permit interlocutory appeals. In the *Nomura* case, the denial of summary judgment was affirmed by the intermediate appellate court. However, on a second level of appeal, the New York Court of Appeals granted summary judgment.

If summary judgment is granted, an appeal is immediately available. In the *GemCap* case, the grant of summary judgment was affirmed in an unpublished memorandum opinion by the 9th Circuit Court of Appeals. The plaintiff sought certiorari in the U.S. Supreme Court, which, not surprisingly, was denied.[21]

21. Appeals, Another Re-Evaluation of Claim – Possible Mediation/Settlement

Except in states that permit an interlocutory appeal, the denial of summary judgment means that a trial is the next step.

When an appeal is available, notice of appeal will likely be filed to retain that option. The quality (or lack thereof) of the summary judgment decision itself may encourage or discourage an actual appeal.

Appealing a denial of summary judgment may cause a reversal that grants summary judgment (as in the *Nomura* case[22]) but could result in a remand to the trial court for further consideration. A denial of summary judgment may state multiple grounds for the denial, which makes success on any appeal more difficult.

In many cases, when the trial court rules on the summary judgment motion(s), the parties may be ready to consider settlement rather than further litigation. Even the winner of a summary judgment motion in a trial court often prefers not to subject that decision to an appeal.

In *Taylor v. Bell*, the grant of summary judgment for the defendant was overturned on appeal with an appellate opinion that seemed to mandate judgment for the plaintiff.[23] When summary judgment is denied, many litigants conclude that settlement is required as a practical matter.

22. Trial and Appeals

Trials are expensive and time consuming. Even when a motion for summary judgment is granted, the litigation may involve additional expense because the summary judgment may be appealed and potentially reversed. Frequently, the principals on each side of a case are adversely affected by the significant amount of time devoted to it.

At a trial, jurors (who typically have never seen a closing opinion or the types of agreements involved) decide whether an attorney followed "customary practice" and gave "a fair and objective opinion," after hearing conflicting expert testimony. It also should be noted that most judges[24] (even those sitting in "money center" locations) have never handled a

[21] *See* note 7, *supra*.

[22] *See* note 9, *supra*.

[23] *See* note 10, *supra*.

[24] Some arbitrators have more experience than some judges with commercial litigation, but very few have prepared a closing opinion.

claim involving an opinion letter or prepared a typical transactional closing opinion.

These considerations are usually sufficient to cause the parties to settle virtually all cases involving third party legal opinions that were not determined at the summary judgment stage.

Therefore, in this article, we have not dealt with the numerous and frequently complex issues involved in a trial and appeals. While the *Dean Foods* case did go to trial, there have been few, if any, other trials involving third-party opinions. In addition, we are not aware that any of these cases have involved a jury trial.

Takeaway: *Failure to prevail on motions for summary judgment increase the value of claims and often prompt increased efforts to settle the claim.*

D. Conclusion

The general procedure followed by law firms in dealing with opinion claims is not materially different from that followed for claims against law firms that do not involve opinions. Many of the questions and issues involved are not unique to opinion claims. Many other cases involve expert testimony and industry practices are sometimes important in other cases. Third-party claims also are asserted against accountants, surveyors, appraisers and other business services that provide evaluations.[25]

However, opinion cases are different. There are few other situations in which the judgment of the attorney is as clearly challenged by being measured against customary practice. It is not surprising that these cases are bitterly fought and are frustrating for the litigants and the judges involved.

Transactional attorneys see themselves as advisors and facilitators. They are accustomed to asking the questions rather than being questioned. They have difficulty when they have to operate as a defendant. The professional competence of the opinion preparer and the law firm is at issue and sometimes their honesty as well.

Regardless of their merit, negligent misrepresentation claims against law firms by opinion recipients tend to be both divisive and disruptive. That is especially true when fraud or deceit is alleged. Such claims divert scarce management resources, become the subject of gossip about who and what is involved and are expensive. Insurance coverage of defense costs is typically subject to an initial payment solely by the firm. These cases may also raise client and more general reputational concerns.

Inside the law firm, settlements are not accepted as a cost of doing business, even if the law firm has experienced multiple malpractice-type claims. Absent clear evidence that negligence or more culpable acts or omissions occurred, transactional attorneys have difficulty with settling a claim based on the allegation they negligently prepared a closing opinion. Many settlements leave unresolved questions about the competence or professionalism of the opinion preparers and perhaps the law firm itself.

Most of opinion claims are settled at or before the end of the phase of the proceedings in which a summary judgment motion might be made and finally decided. Litigators frequently regard three years or longer as a typical time frame to resolve an opinion claim even when settled.

The defendant law firm and the attorneys involved in the case draw little solace from knowing that the claimant typically regards the settlement, net of legal fees and expenses, as inadequate to cover its damages and the disruption created within the claimant's

[25] *See* Feinman, PROFESSIONAL LIABILITY TO THIRD PARTIES (3d ed. ABA 2013).

organization by the alleged error(s) in the closing opinion.

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The co-authors appreciate the contribution of Stanley Keller, a senior partner of Locke Lord LLP, in editing this article.

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This article will be posted as a stand-alone item in the Legal Opinion Resource Center under "Other Publications and Articles of Interest." The Legal Opinion Resource Center is maintained by the Legal Opinions Committee and can be found on the website of the Business Law Section of the American Bar Association ("here").]

CHART OF LEGAL OPINION REPORTS

[Editor's 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 March 15, 2023.**]**

A. Selected Published Reports Available From the ABA Legal Opinions Resource Center[26]

ABA Business Law Section	2009	Effect of FIN 48 – Audit Responses Committee
		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
	2014	Updates to Audit Response Letters – Audit Responses Committee
	2015	No Registration Opinions (Update) – Securities Law Opinions Subcommittee
		Cross-Border Closing Opinions of U.S. Counsel
	2016	Report on the Use of confirmation.com – Audit Responses Committee
	2017	Opinions on Debt Tender Offers — Securities Law Opinions Subcommittee
	2022	Legal Opinions on Section 4(1½) Resale Transactions – Securities Law Opinions Subcommittee
		Report on 2019 Survey of Law Firm Opinion Practices – Legal Opinions Committee

[26] 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, https://www.americanbar.org/groups/business_law/committees/opinions/tribar/.

Selected Published Reports Available From the ABA Legal Opinions Resource Center (continued)

ABA Real Property Section (and others)[27]	2012	Real Estate Finance Opinion Report of 2012
	2016	Local Counsel Opinion Letters in Real Estate Financing Transactions
	2018	UCC Opinions in Real Estate Transactions
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report
		Comprehensive Report
	2009	Venture Capital Opinions
	2014	Revised Sample Opinion
	2014	Sample Venture Capital Financing Opinion
	2016	Third-Party Closing Opinions: Limited Liability Companies and Partnerships
	2020	Sample Personal Property Security Interest Opinion
Florida	2011	Comprehensive Report
	2021	First Supplement to Comprehensive Report
Georgia	2009	Real Estate Secured Transactions Opinions Report
City of London	2020	Updated Guide
Maryland	2009	Revised Comprehensive Report
Michigan	2010	Comprehensive Report
Multiple Bar Associations	2008	Customary Practice Statement
	2019	Statement of Opinion Practices and related Core Opinion Principles[28]
Multiple Law Firms	2016	White Paper – Trust Indenture Act §316(b)

[27] These Reports are 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").

[28] A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions, each of which has approved the documents, along with many other bar and lawyer groups. For a list of the approving groups, see https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/schedule_of_approving_organizations.pdf.

Selected Published Reports Available From the ABA Legal Opinions Resource Center (continued)

National Association of Bond Lawyers	2011	Function and Professional Responsibilities of Bond Counsel
	2013	Model Bond Opinion
	2014	501(c)(3) Opinions
	2017	Update of Model Letter of Underwriters' Counsel
National Venture Capital Association	2013	Model Legal Opinion
New York	2009	Substantive Consolidation – Bar of the City of New York
	2012	Tax Opinions in Registered Offerings – New York State Bar Association Tax Section
North Carolina	2009	Supplement to Comprehensive Report
Pennsylvania	2007	Update
South Carolina	2014	Comprehensive Report
Tennessee	2011	Comprehensive 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
Virginia	2018	Comprehensive Report
Washington	2019	Comprehensive Report
TriBar	2008	Preferred Stock
	2011	Secondary Sales of Securities
	2011	LLC Membership Interests
	2013	Choice of Law
	2017	Opinions on Limited Partnerships
	2020	Comment on Use of Electronic Signatures & Third-Party Opinion Letters
	2022	Opinions on LLCs (Update)

B. Pending Reports

ABA Business Law Section	- Sample Asset Purchase Agreement Opinion – Mergers and Acquisitions Committee - Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee & Legal Opinions Committee - Third-Party Legal Opinions and Negative Assurance Letters Covering Intellectual Property Issues
California	- Exceptions and Other Qualifications to the Remedies Opinion - Update to 2007 Report on Legal Opinions in Business Transactions (Excluding the Remedies Opinion) - Addendum re Estate Planning Trusts to Sample Third-Party Opinion Letter for Business Transactions
Florida	Second Supplement to Comprehensive Report
Multiple Bar Associations	Local Counsel Opinions[29] Good Practice Principles for Cross-Border Closing Opinions[30]
Texas	Comprehensive Report Update
TriBar	- Report on Enforceability of Risk Allocation Provisions - Follow-on Opinions Report - Opinions Under 2022 Amendments to the Uniform Commercial Code on Emerging Technologies - An Addendum to Third-Party Closing Opinions: Limited Partnerships and Third-Party Closing Opinions: Limited Liability Companies (Revised 2021) – Enforceability of Governing Agreement

[29] A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions.

[30] A joint project of the ABA Legal Opinions Committee and the Legal Practice Division of the International Bar Association.

OUR COMMITTEE

The mission of the Legal Opinions Committee is to deal with legal opinion practice. We seek to foster national standards for legal opinions in business transactions through discussions, programs and reports on issues relevant to opinion practice.

The committee was constituted by the Business Law Section of the American Bar Association in 1988. The following have served as chairs of the committee.

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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, *In Our Opinion*, please direct him or her here.[31] If you have not visited the website lately, we recommend you do so. Prior newsletters and numerous opinion resource materials are posted there. The Legal Opinion Resource Center also can be accessed from the Committee's website, as well as directly. For answers to any questions about membership, you should contact our Director of Membership, Diversity and Inclusion, Natalie S. Lederman of Sullivan & Worcester LLP, at nlederman@sullivanlaw.com.

[31] The URL is https://www.americanbar.org/groups/business_law/committees/opinions/

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NEXT NEWSLETTER

We expect the next newsletter to be circulated in advance of the 2023 Fall meeting to be held in Chicago. Please forward cases, news and items of interest to Topper Webb (twebb@milesstockbridge.com) or Arthur Cohen (arthur.cohen@haynesboone.com).