IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

Volume 23 – Number 2 **Spring 2024**

CONTENTS

FROM THE CHAIR

I recommend to all of you several important articles in this issue. One is by Alan Wilson addressing the June 2023 NOCLAR proposal by the PCAOB. That proposal has generated a large number of comments from investors, preparers, auditors, academics and other stakeholders. It would dramatically increase the responsibilities of auditors to identify and report potential issues of legal noncompliance in ways that would affect many aspects of the corporate landscape. It is still in the proposal stage and is definitely something that people should be following. The second article, by Jim Gadsden, focuses on an area of opinion practice about which little has been written: third party closing opinions for general partnerships. While this dearth of commentary probably results from the rarity of the use of general partnerships in commercial transactions in which opinions are given, they are used often enough to merit attention, and this article is a thoughtful and insightful piece analyzing relevant issues. Lastly, the third article, by Stan Keller and Mark Burnett, discusses the importance of two recent opinions of the Delaware Court of Chancery that are relevant to opinion practice. The *Moelis* case and the *Activision* case will be on the agenda for discussion at the upcoming Committee meeting in Orlando.

The schedule for Legal Opinions Committee events at the Business Law Section 2024 Spring Meeting in Orlando from April 4-6, 2024 follows this message. The Legal Opinions Committee will present an important CLE program: "Legal Opinions: What Those in the Know Don't Cover" at the Spring Meeting. This program has been selected by the Business Law Section as a "Business Law Essentials Track" program, which means that it is recognized as one of the ten most important CLE programs being presented at the Spring Meeting. As a result, the program will be live-streamed and available on Zoom (without cost of registration). Firms should encourage their transactional lawyers, especially those less experienced in opinion practice, to view the program.

The program will be presented by an experienced panel. Jim Smith (Foley Hoag LLP) and I will be moderators and will be joined by Kim Desmarais (Jones Day), Elizabeth Leckie (Allen & Overy LLP) and Ettore Santucci (Goodwin Procter LLP). The program will begin at 2:00 p.m. (Eastern) on Friday, April 5, 2024, and will be available virtually. Whether or not you are able to attend in Orlando, you are encouraged to pay attention to this important program.

Our Committee meeting will take place on Friday, April 5, from 3:30 p.m. to 5:00 p.m. (Eastern). We will continue the approach we have taken recently by making the meeting more substantive and issue focused. We will devote most of the meeting to a series of substantive discussions of issues that members face in their daily practices. The response from members was overwhelming that this was preferable to prior meetings that focused more on Committee procedural matters. People who register (which is FREE for virtual attendees) will receive instructions for accessing both the CLE program and the Committee meeting.

One of the traditional strengths of the Legal Opinions Committee has been the strong and insightful dialogue that has traditionally taken place on our listserv. Over the past several months, we have seen a decline in posts, and I strongly encourage all of you to post topics and issues that you face, both to alert other practitioners and also to get feedback from others. As a reminder, the posting address for the listserv is: BL-OPINIONS@MAIL.AMERICANBAR.ORG.

Finally, I want to remind all of you that another of the strengths of the Legal Opinions Committee has been the number, breadth and depth of its ongoing activities, as well as their scope and extensive interaction with other bar groups. We have 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, and I strongly encourage anyone who has an idea for a new project that the Committee could undertake to reach out to me. All the best.

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FUTURE MEETINGS

ABA Business Law Section
2024 Spring Meeting
April 4-April 6, 2024
Orlando, Florida
Hyatt Regency Orlando

The following are the presently scheduled times of meetings and programs of the 2024 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 2024 Spring Meeting webpage, accessible to members of the Business Law Section here.[1] **All times are listed in Eastern Time.**

Legal Opinions Committee

Friday, April 5, 2024
Intellectual Property Opinions Joint Task Force Meeting
8:00 a.m. – 9:30 a.m.

Enforceability Opinion Task Force Meeting (originally scheduled for 9:00 a.m. –10:00 a.m.) has been cancelled and will be rescheduled at a later date.

Cross-Border Opinions Task Force Meeting
10:00 a.m. – 11:00 a.m.

Program: Legal Opinions: What Those in the Know Don't Cover
2:00 p.m. – 3:30 p.m.

Committee Meeting
3:30 p.m. – 5:00 p.m.

Law and Accounting Committee

Saturday, April 6, 2024
Committee Meeting
10:00 a.m. – 11:30 a.m.

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Thursday, April 4, 2024
Subcommittee Meeting
11:00 a.m. – 12:00 p.m.

ABA Business Law Section
2024 Fall Meeting
September 12-September 14, 2024
San Diego, California
Marriott Marquis San Diego Marina

Information regarding the schedule of meetings and programs will be available when registration for the Fall Meeting opens.

[1] The URL is https://web.cvent.com/event/820c1b3c-694d-46c9-8940-d2e53743ca80/summary.

RECENT MEETINGS

Legal Opinions Committee
December 7, 2024
Virtual Meeting

The Legal Opinions Committee met on Thursday, December 7, 2023. The meeting was held virtually. Committee Chair Arthur Cohen (Haynes and Boone LLP) presided. Arthur welcomed everyone and thanked them for the strong turnout. (There were 146 participants as the meeting began, and at one point in the meeting there were 172 participants.) Arthur referred to the agenda for the meeting that he had posted on the Legal Opinions Committee listserv the previous day. He pointed out that he also had posted the latest edition of the Committee's IN OUR OPINION newsletter and he encouraged everyone to read it.

Arthur reported that the Committee has submitted a topic for a CLE session for the Spring Meeting of the ABA Business Law Section in Orlando (April 4 to April 6, 2024). The session will be titled "Legal Opinions: What Those in the Know Don't Cover." It will be moderated by Jim Smith (Foley Hoag LLP) and Arthur. The panel will include Ettore Santucci (Goodwin Procter LLP), Kim Desmarais (Jones Day) and Elizabeth Leckie (Allen & Overy LLP). The program has been submitted for recognition as a "Business Law Essentials Track" program, a track comprised of the ten most important CLE programs out of the 52 that will be presented in Orlando. Each program in the track will be live-streamed. [Editor's note: Subsequent to the meeting, the Committee was notified that its program had been selected.]

Arthur then stated that this meeting of the Committee would take a different approach from prior meetings. Rather than having subcommittee and task force reports, the meeting would be entirely devoted to issues that opinion givers and lawyers representing opinion recipients deal with in day-to-day practice.

Arthur introduced the first topic for discussion -- the meaning of "unqualified" when one speaks of an unqualified opinion. Historically, "unqualified" typically has meant that an opinion does not include a limiting statement such as "while it is not free from doubt . . ." and the opinion includes only customary qualifications and exceptions. Because different firms now include different and sometimes extensive limitations in their opinions, the term "customary" no longer seems apt. The issue is most salient when the receipt of an "unqualified" opinion is a condition to closing a transaction.

Don Glazer noted that a "reasoned" (or "explained") opinion points out issues that the opinion recipient should consider, which is different from exceptions, assumptions and qualifications that go to what is and is not covered by an opinion. Arguably neither goes to the confidence the opinion preparers are expected to have in the opinion they are giving. A limitation like "not free from doubt" is very different.

The conversation explored the questions of what standard satisfies a contractual condition that an "unqualified" opinion be delivered and how a court would resolve the issue. The 1998 TriBar Report says that an unqualified opinion is an opinion subject only to customary exceptions and qualifications. When it was written, however, that report referred only to the standard bankruptcy exception and equitable principles limitation. Now many practitioners think in terms of "commonly used and accepted" exceptions and qualifications rather than "customary."

While today a consensus does not exist on what qualifies as an "unqualified" opinion, there was consensus among participants that, when drafting contracts, a requirement of an unqualified opinion should be avoided because of uncertainty as to its meaning. An alternative could be to refer to an opinion that is "reasonably acceptable" to a contract party or similar

description. When, however, confronted with a requirement for an "unqualified" opinion, Don Glazer offered his view that the term "unqualified" goes to the opinion-giver's level of confidence in the opinion, with exceptions and qualifications going only to what is covered and not covered. Some suggested that this deserves further thought.

Arthur moved the meeting to the next topic -- the use of the term "performance" in opinions. When opinions refer to consummation of a transaction, they simply cover matters up to closing of the deal. The meaning of references in an opinion to a party's "performance of its obligations" under specified agreements is less clear. The phrase could be read to mean performance of post-closing obligations that are subject to obtaining additional approvals and other conditions not in place at the time of closing, which could require extensive qualifications or assumptions. Thus, use of the term "performance" can present issues that are best avoided. There is consensus that an opinion is intended to state the law and the status of matters on the date of the opinion. If a party's future "performance" of a contractual obligation could be prohibited as a result of a restrictive covenant or condition not in effect at the time the opinion is given, the covenant or condition might not prevent giving an opinion as to performance. On the other hand, the absence at present of a regulatory approval that would clearly need to be obtained in the future to accomplish performance, even if the approval is not required at present, could make giving the opinion problematic. The 1998 TriBar Report includes discussion of the distinction and appropriate cautions on the use of "performance."

Arthur transitioned the conversation to the next topic -- the legal existence opinion and the role of a state authority's legal existence (or "good standing") certificate. Arthur noted the common practice of giving an opinion on the legal existence of an entity "based solely" on a legal existence certificate from a state authority. But often opinion letters expressly state only that the legal existence opinion is based on that certificate, even though the entity's legal existence is also a pre-condition to certain other opinions in the letter, including, for example, due authorization, execution and delivery of specified agreements, and due authorization and valid issuance of corporate stock. As time was running out, Don Glazer stated that he is addressing this topic in a new edition he is preparing of his treatise. He invited participants to share comments with him regarding their firms' views on whether opinion letters should state expressly that the "based solely" on a legal existence certificate concept also applies to other opinions that require the entity to legally exist.

Arthur asked Tim Hoxie (Jones Day) to briefly discuss the impact of the Corporate Transparency Act on legal opinions. Tim referred participants to "Corporate Transparency Act: Does it Effect Legal Opinion Practice?" that appeared in the Fall 2023 edition of IN OUR OPINION. Tim wrote the article with Barry Bendes (Locke Lord LLP). Tim stated that the CTA does not ordinarily bear on opinions typically given in transactional practice, but could come up in the context of a compliance with law opinion or an opinion as to required filings, but those opinions usually are limited to violations of law and required filings in the particular transaction. So it is expected that the CTA will apply only where a transaction gives rise to a filing requirement or where a confidentiality or other provision prevents a party from complying with the CTA. Even though application of the CTA will rarely be an issue, many firms will likely be excluding the CTA from their opinions just as they exclude other statutes like CFIUS.

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Federal Regulations of Securities Committee
2024 Winter Meeting
December 6-December 7, 2023
Washington, D.C.
Grand Hyatt Washington

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

The ABA Securities Law Opinions Subcommittee met on December 6, 2023 at the Federal Regulation of Securities Committee Winter Meeting in Washington, D.C.

The Subcommittee discussed Judge Jed Rakoff's decision in *Getty Images* holding the issuer liable for failing to allow the exercise of warrants when an effective registration statement was in effect covering the underlying shares. The issue addressed by the Court's opinion was whether a company has an effective registration statement and a current prospectus for purposes of a warrant exercise when it used a Form S-4 for a merger that registered warrants issued in the merger and the underlying shares. The Court ruled that it did. There was a lively discussion of whether Judge Rakoff's views matched the common practice of issuers in similar situations.

The Subcommittee then briefly discussed the *Macquarie Infrastructure Corp. v. MOAB Partners, L.P.* case pending before the U.S. Supreme Court. The case addresses addressing the Circuit split concerning whether a private right of action exists under Rule 10b-5 for failure to disclose material trends in MD&A under Item 303 of Reg S-K in the absence of an otherwise misleading statement. The Subcommittee also discussed the SEC's Solar Winds enforcement action against the company and its chief information security officer for failure to disclose cybersecurity risks and vulnerabilities.

The next topic was the draft Rule 144 Opinions Report, which had been updated to describe common pitfalls encountered in providing Rule 144 delegending opinions. A number of suggestions of additional situations to include in the next draft were offered.

The final topic was an update on delegending securities issued in PIPEs offerings, with reference made to the article "Securities Act Legend Removal Requests" that appeared in the Summer 2023 issue of IN OUR OPINION.

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Law and Accounting Committee

The Committee met on December 6, 2023, at the ABA Business Law Section Federal Regulation of Securities Winter Meeting in Washington, D.C. Alan Wilson opened the meeting and introduced Natasha Guinan, Chief Counsel – Office of the Chief Accountant, Securities and Exchange Commission. Ms. Guinan provided some prepared remarks and engaged in discussion with the Committee. Ms. Guinan focused her remarks on a recent statement by SEC Chief Accountant Paul Munter.[2] She emphasized the need for issuers to look at risk broadly for purposes of considering the effectiveness of internal control over financial reporting. She also highlighted recent enforcement actions that illustrated the

[2] Paul Munter, SEC Chief Accountant, *The Importance of a Comprehensive Risk Assessment by Auditors and Management* (Aug. 25, 2023), https://www.sec.gov/news/statement/munter-importance-risk-assessment-082523.

perspectives set forth in Mr. Munter's statement.[3] The Committee engaged in discussion, including the application of the statement to cyber and other events. The Committee also noted differences between internal control over financial reporting and disclosure controls and procedures.

The next meeting of the Committee will be the Spring Meeting on April 4-6 at the Hyatt Regency in Orlando, Florida.

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ARTICLES

NOCLAR – Where Do We Stand and What Comes Next?

Last June, the Public Company Accounting Oversight Board ("PCAOB") issued *Proposing Release: Amendments to PCAOB Auditing Standards Related to a Company's Noncompliance with Laws and Regulations and Other Related Amendments* (the "NOCLAR Proposal")[4], which triggered a large number of comments from investors, auditors, academics and other stakeholders. A majority of commenters have been critical of the proposal because it would expand auditors' responsibility to identify and report potential existence of legal non-compliance and, in doing so, disrupt the traditional role of auditors and their legal counsel with regard to legal matters.[5] As of this writing, the proposed standard remains at the proposal stage.

Background

As explained in the NOCLAR Proposal, the proposed amendments aim to establish and strengthen requirements for:

- Identifying, through inquiry and other procedures, laws and regulations with which noncompliance could reasonably have a material effect on the financial statements;
- Assessing and responding to the risks of material misstatement arising from noncompliance with laws and regulations;
- Identifying whether there is information indicating noncompliance has or may have occurred; and
- Evaluating and communicating when the auditor identifies or otherwise becomes aware of information indicating that noncompliance with laws and

[3] *See, e.g., In the matter of Charter Communications, Inc.*, SEC Release No. 34-98923 (Nov. 14, 2023); *Securities and Exchange Commission v. Cavco Industries, Inc., Joseph Stegmayer, and Daniel Urness*, SEC Lit. Release No. 25196, No. 21-cv-01507 (D. Ariz. filed September 2, 2021).

[4] PCAOB Release No. 2023-003 (June 6, 2023) [hereinafter "Proposing Release"].

[5] Center for Audit Quality, *CAQ Analysis of PCAOB Proposed Amendments to PCAOB Auditing Standards Related to a Company's Noncompliance with Laws and Regulations (NOCLAR) and Other Related Amendments* (November 2023), https://thecaqprod.wpenginepowered.com/wp-content/uploads/2023/11/caq_comment-letter-analysis-noclar_2023-11.pdf (noting that approximately 78% of commenters opposed the proposal) [hereinafter "CAQ Survey"].

regulations, including fraud, has or may have occurred.[6]

Currently, PCAOB auditing standard AS 2405, *Illegal Acts by Clients*, sets forth the consideration auditors should give to the possibility of illegal acts by an audit client in the audit of financial statements. This auditing standard works in conjunction with Section 10A of the Securities Exchange Act of 1934, which establishes investigation procedures and required communications for when an auditor "detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred."

Under the NOCLAR Proposal, and in a significant departure from current requirements, auditors would be responsible for affirmatively identifying the laws and regulations with which noncompliance by a company could reasonably have a material effect on its financial statements and would be required to plan and perform specified procedures to identify whether there is information indicating noncompliance with those laws and regulations has or may have occurred. The NOCLAR Proposal would expand upon the "baseline" identification and communications obligations set forth in Section 10A. For example, the NOCLAR Proposal would broaden the instances of noncompliance with laws and regulations to cover those that "could reasonably have a material effect on the financial statements," whether directly or indirectly. Moreover, auditors would be obligated to comply with expanded requirements to communicate to management and the audit committee "information indicating that noncompliance with laws and regulations *(whether or not perceived to have a material effect on the financial statements) . . . has or may have occurred"* (emphasis added). The reporting is required "as soon as practicable," including before the auditor is able to complete its evaluation of the information to determine whether any noncompliance has or may have occurred and/or whether it is material.

Comment Letters

A total of 140 comment letters had been submitted on the NOCLAR Proposal as of the end of February 2024, when the PCAOB reopened the proposal for comment. The Center for Audit Quality (CAQ) conducted a survey of the comment letters and summarized several trends.[7] Common themes among commenters critical of the NOCLAR Proposal that the CAQ identified include:

- The NOCLAR Proposal is overly broad.
- The NOCLAR Proposal creates ambiguity in the distinction between management and the auditor.
- The NOCLAR Proposal thrusts auditors into roles requiring legal expertise and complicated legal judgments that lawyers and courts of law are best positioned to handle.
- The NOCLAR Proposal is expected to impose costs that do not justify the anticipated benefits.
- The NOCLAR Proposal should be further studied to better articulate and support the notion that the proposed expansion of the auditor's function would necessarily link to enhanced investor protection.

The Business Law Section of the American Bar Association was among the commenters on the NOCLAR Proposal. The following excerpt from the Section's comment

[6] Proposing Release, *supra* note 1 at 5.

[7] CAQ Survey, *supra* note 2 (note that 139 comment letters had been submitted at the time of the CAQ's November 2023 survey).

letter[8] encapsulates its concerns with the NOCLAR Proposal:

> *Among other concerns, the Proposed Standards (i) place an unworkable responsibility upon accountants to make subjective assessments of often complex and uncertain legal matters, the probability of future events, and the potential impact of those events, all of which are outside the scope of auditors' typical responsibilities, (ii) endanger the confidentiality and protections of client communications that are foundational components of the lawyer-client relationship and our legal system and which are designed to promote legal compliance, (iii) risk diluting the audit function that is at the core of ensuring the integrity of financial reporting, (iv) would disrupt the separate roles played by the legal and accounting professions that benefit clients, and (v) would do the foregoing by adding costs to the audit process that will far outweigh any limited and speculative perceived benefits.*

If adopted as proposed, the NOCLAR Proposal could have a meaningful effect on current systems and processes within the auditing ecosystem and the relationship of a company with its lawyers and auditors with respect to legal compliance matters.

Next Steps

In light of the comments that had been submitted on the NOCLAR Proposal, on February 26, 2024, the PCAOB announced the holding of a roundtable discussion on March 6, 2024 (the "Roundtable") and the reopening of the comment period until March 18, 2024 to solicit additional feedback on the NOCLAR Proposal. The three-session roundtable addressed the following topics:

- The threshold for auditors to identify laws and regulations
- Distinction between direct illegal acts and indirect illegal acts
- Auditor competence to assess relevant noncompliance with laws and regulations
- Concerns regarding potential waiver of attorney-client privilege
- Costs and benefits of the NOCLAR Proposal

Participants in the Roundtable represented a breadth of views from the accounting, legal, academic, regulatory and investor perspectives. Among other themes, the Roundtable discussion revealed differences in understanding concerning the interpretation of the NOCLAR Proposal's requirements, as between the PCAOB and those in the accounting and legal professions, including as to the scope of the auditors' obligation to identify all laws and regulations with which noncompliance could reasonably have a material effect on the financial statements. The Roundtable also revealed disagreement over the appropriate scoping of the auditors' responsibilities in this regard.

The potential effects of the NOCLAR Proposal on the legal profession, including in auditor-attorney communications, remain a potential concern following the Roundtable. The Section is planning to submit a supplemental comment letter to again underscore the issues that were the foundation of the Section's original comment letter. Among other key points, the Section's supplemental comment letter will make clear:

[8] Comment Letter of American Bar Association's Business Law Section on NOCLAR Proposal, dated August 23, 2023, *available at* https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/134_aba-bls.pdf?sfvrsn=b0454185_4.

We believe the Board can address this concern and develop effective standards by adopting a more tailored approach that (i) better aligns with the expertise, capabilities and core competencies of financial statement auditors and (ii) recognizes the critical roles of company management and legal counsel with respect to legal compliance. Such an approach can and should build upon existing standards and financial statement auditor capabilities.

The standard should clarify that this is an appropriate action for auditors to pursue when necessary to evaluate material noncompliance matters. In doing so, however, the standard could make clear that it does not require any actions or communications on the part of companies or their counsel that would be inconsistent with a lawyer's ethical duties to preserve and protect client confidences or that would impair the attorney-client privilege or the work product doctrine. In addition, the standard should state expressly that it does not alter the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information and the related auditing standard, AS 2105 (collectively, the "Treaty"), which remain in effect and applicable.

We strongly encourage the Board to reconsider the Proposed Standards in light of the Section's and other similar comments raising serious concerns about the Proposed Standards as originally proposed and to repropose any revised standards that the Board determines merit consideration.

With additional input in hand, including from the Roundtable and over 40 additional comment letters submitted since the comment period was reopened, the PCAOB is left to determine next steps with the NOCLAR Proposal. Next steps could include reproposing a revised standard or moving toward adoption of the NOCLAR Proposal either largely as originally proposed or with some minor clarifying changes based on commenter input. Any final standard adopted by the PCAOB would then require approval by the U.S. Securities and Exchange Commission before becoming effective.

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Closing Opinions for General Partnerships

There is a wealth of literature on third-party closing opinions delivered when corporations, limited partnerships and limited liability companies are parties to transactions.[9] Prior articles in this newsletter and programs at the Working Group on Legal Opinions seminars have discussed closing opinions for trusts,

[9] Corporations: *See, e.g.*, Third-Party Closing Opinions, 53 BUS. LAW. 542 (1998) ("TriBar II") and the many state reports available in the Legal Opinions Resource Center ("LORC") of the American Bar Association's Section of Business Law: https://www.americanbar.org/groups/business_law/resources/legal-opinions-resource-center/ or published as Appendices to D.W. Glazer, S. FitzGibbon and S.O. Weise, Glazer and FitzGibbon on Legal Opinions (3d ed. 2008) and Supp. 2023) [hereinafter "Glazer and FitzGibbon"].

Limited Partnerships: *See, e.g.*, Third-Party Closing Opinions: Limited Partnerships, 73 BUS. LAW. 1107 (2018) [hereinafter "LP Report"] - and Addendum, 77 Bus. Law. 230 (2021/2022).

Limited Liability Companies: *See, e.g.*, Third-Party Closing Opinions: Limited Liability Companies (Revised 2021), 77 BUS. LAW. 201 (2021/2022) [hereinafter "LLC Report"].

including business trusts.[10] This article addresses closing opinions for general partnerships, about which little has been published.[11] The absence of literature is likely because general partnerships are not often seen in commercial transactions in which opinions are given. Nevertheless, they are used often enough, such as in joint ventures, to merit attention.

In 1997 the Uniform Laws Commission promulgated the Revised Uniform Partnership Act ("RUPA") [12] to supersede the Commission's 1914 Uniform Partnership Act ("UPA") that had been adopted in all states except Louisiana. RUPA has now been adopted in 40 states and the District of Columbia.[13] Section 201 of RUPA establishes that "a partnership is an entity distinct from its partners." This article principally addresses opinions for general partnerships governed by RUPA.

Opinion as to Status

Unlike a corporation, limited partnership and limited liability company, a public filing is not required to form a general partnership under RUPA.[14] Further, a written partnership agreement is not a legal prerequisite to the formation of a general partnership. As defined in Section 101(11) of RUPA, carrying forward the formulation in Section 6 of UPA, a partnership is "an association of two or more person to carry on as co-owners a business for profit."

Although no partnership agreement is required to form a general partnership, lawyers asked to deliver a legal opinion with respect to a general partnership may be expected to require, as necessary support for the opinion, that the partners enter into a written partnership agreement. The agreement should establish that the entity is formed to be a general partnership and has not elected to be treated as any other form of entity (which may be assumed without being stated), identify the partners and their interests in the partnership, state the business (which must be "for profit") to be conducted by the partnership and the actions required to authorize action by the partnership, and choose the law to govern the partnership agreement.[15]

Under Section 29 of UPA, when any partner ceases to be associated in carrying on (as distinguished from winding up) the business of the partnership, then the partnership is dissolved. Under Section 801 of RUPA, however, a partner may become "disassociated" from the partnership without triggering a dissolution and winding up of the partnership business. Disassociation may be due to, among other things, becoming

[10] J. Gadsden, Closing Opinions for Common Law Trusts, IN OUR OPINION, Vol. 15, No. 4 (Summer 2016); S. Keller, J. Gadsden and T. Haskins, "Closing Opinions for Business Trusts", IN OUR OPINION, Vol 22., No. 3 (Summer 2023).

[11] The available literature includes Partnerships and Limited Liability Companies Committee of the Business Law Section of the State Bar of California, Third-Party Closing Opinions: Limited Liability Companies and Partnerships (December 9, 2016), available in LORC (See note 1 above under "State Bar and Other Reports") (the "California 1998 Report"). *See* also Donald E. Percival, Status, Power and Authorization Opinions Relating to Unincorporated Entitles, an unpublished paper presented at the American Bar Association Section of Business Law 2004 Spring Meeting in Seattle, Washington on April 3, 2004, from which this article draws heavily.

[12] Available, as amended in 2011 and 2013, at https://www.uniformlaws.org/viewdocument/final-act-98?CommunityKey=52456941-7883-47a5-91b6-d2f086d0bb44&tab=librarydocuments.

[13] RUPA has not been adopted in Georgia, Indiana, Louisiana, Massachusetts, Michigan, Missouri, New York, North Carolina, South Carolina or New Hampshire. Current information on enactments is available on the Uniform Law Commission's website for the Uniform Partnership Act. https://www.uniformlaws.org/committees/community-home?CommunityKey=52456941-7883-47a5-91b6-d2f086d0bb44#LegBillTrackingAnchor

[14] *See* RUPA § 202. California allows a permissive filing. Cal. Corp. Code § 16303. See California Report pp.43-44.

[15] The California Report suggests that the opinion refer to the general partnership as "existing" under the statute. California Report p. 43.

ineligible to continue as a partner or withdrawing or being expelled from a partnership. Thus, another purpose of a written partnership agreement, which can be helpful to an opinion giver, is to address the consequences of the separation of any partner from the partnership.

Because no filing with a state official is necessary to form or maintain a general partnership, no certificate is available from a state official to certify that a general partnership has been formed, is "in good standing,"[16] has not been dissolved or wound up or its existence terminated.[17] Opinions addressing the valid existence of a general partnership will necessarily be based on fact certificates provided by partners as to the formation and continued existence of the partnership, the current partnership agreement, and the absence of any event of dissolution and any winding up or termination of the partnership. Opinion preparers will also have to determine whether the partnership agreement includes a term of existence for the partnership and, if so, whether the term has expired. In view of the absence of any state official certificate, a typical status opinion for a general partnership will state: "[Name of entity] is a validly existing general partnership under the [RUPA] of [jurisdiction]." The opinion would not include the phrase "in good standing."

Opinion as to Power

An opinion addressing the power of a partnership to enter into and perform an agreement and engage in a transaction requires an examination of the applicable partnership law and the partnership agreement. RUPA does not grant specific powers to a general partnership nor does it limit the powers of a general partnership to conduct business or own assets. Therefore, the partnership agreement must be examined to determine the scope of the powers of the partnership. Depending on the business being conducted by the partnership and the nature of the transaction, an opinion giver may wish to obtain fact certificates from partners to confirm the intended purposes of the partnership.

The power opinion does not address whether the action is restricted by other laws, such as those requiring licenses or permits, or does not result in a breach or default under other

[16] If a California general partnership makes a permissive filing of a Statement of Partnership Authority (Form GP-1) with the California Secretary of State, the Secretary of State will issue a good standing certificate with respect to the general partnership. See California Report p. 43.

[17] Some states, such as New York, require a filing with the county clerk or similar authority in each county in which a partnership conducts business. New York also requires the display in each place of business of a certificate stating the address of the business and the names and residential addresses of each partner. NY General Business Law § 130(1)(a) and (4). In New York, an amended certificate must be filed if a partner is added or withdraws (except for law firms or where the partnership has filed a certificate under § 80 of the Partnership Law to continue the use of the firm name provided that at least 50% of the members continue as members of the new partnership). NY General Business Law § 130(3). Failure to comply is a criminal violation and, similar to the typical consequence of the failure of a corporation to qualify to do business in a state, an action may not be maintained in the firm name until the certificate is filed. NY General Business Law § 130(9). Those requirements are not relevant to the valid existence of the general partnership and are not addressed by an opinion regarding the existence of the entity.

agreements. Those matters ordinarily are addressed by separate opinions.

A typical form of power opinion for a general partnership will state: "[Name of entity] has the partnership power to enter into and perform its obligations under [the agreement]." A more expansive form could add "[Name of entity] has the partnership power to own its assets and carry on its business as the assets and business are described in [a fact certificate]."

Opinion as to Authorization

Another standard opinion addresses whether the necessary action has been taken to authorize execution and delivery of the transaction agreement, the authority of the person or persons who executed the agreement on the partnership's behalf, that the agreement was approved in a manner consistent with the partnership agreement, including any action required by the partners in their capacity as such, and that the delivery of the executed transaction agreement for the purpose of forming a contract was done in a manner permitted by applicable law.[18] Thus, this opinion requires the opinion giver to examine the relevant partnership law, the terms of the partnership agreement and evidence of approval of the action taken by the person or persons acting for the partnership. The person signing the transaction documents might not be a partner, but could be another individual acting as an officer or other authorized agent of the general partnership.

When a person taking action on behalf of the general partnership is an entity, the same considerations as those applicable to limited partnerships and limited liability companies regarding whether there is a need to look beyond the action of the entity should apply to action necessary for execution of transaction documents by a partner and by upstream entities of a partner of a general partnership.[19] In addition, the unstated assumption that the execution of the agreement did not violate fiduciary duties should be equally available to an opinion on a general partnership.[20]

A typical authorization opinion for a general partnership will state: "[The transaction agreement] has been duly authorized by all necessary action on the part of the partners and has been duly executed and delivered by [name of entity].

Opinion as to Enforceability; Enforceability Against Individual Partners

The salient feature of general partnerships is that all partners of the partnership "are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." RUPA § 306(a). An important question is whether an opinion on the enforceability of an agreement entered into by a general partnership should be understood to extend to enforceability of the agreement against each partner of the general partnership. The California Report takes the position that an enforceability opinion given for a general partnership does *not* address enforceability of the agreement against individual partners and states that this limitation should be understood even if not stated. The California Report suggests the following qualification for those who wish to state the qualification explicitly: "Our opinion in paragraph ___ above on the enforceability of [the agreement] against [name of entity] does not address, and we express no opinion on, the

[18] For ease of reference, this report speaks only of contracts, but the same principles should apply to opinions on other actions taken by a partnership. *See* California Report pp. 15-16, TriBar II § 3.5.2(b) at p. 629, § 6.4 at p. 654.

[19] The literature recognizes an unstated assumption that the necessary action was taken by each upstream entity to authorize execution by a signatory and that a signatory has the legal capacity or entity authority to act. LLC Report § 4.0 at p.217; LP Report § 3.0, note 63 at p. 1121.

[20] *See* LLC Report, n. 65 at p. 214.

enforceability of [the agreement] against the individual partners of the [name of entity]."[21]

Partnerships in New York (and Other States That Have Not Enacted RUPA)

As observed in the 1997 Prefatory Note to RUPA, although early drafts of UPA had proceeded on the entity theory of partnerships, later drafts were based on the common law "aggregate theory" and UPA as ultimately promulgated embodied certain aspects of each theory.[22] Through the middle of the twentieth century, as set out in decisions of the New York Court of Appeals and lower New York courts, the law in New York (which has not enacted RUPA) was well established that for most purposes a general partnership was not an entity distinct from its members.[23] A revision to the pleading rules in New York's Civil Practice Act in 1945, which has been carried forward into the current Civil Practice Law and Rules, permitted partnerships to sue or be sued in the partnership name.[24] This provision is "permissive and not mandatory." A partner may still sue "on a debt due the partnership" but "must bring the action on behalf of and for the benefit of the partnership and may not recover on such an obligation individually."[25] The most recent New York Court of Appeals authority, In re Nassau County Grand Jury Subpoena Duces Tecum,[26] while acknowledging that "for many purposes, it is certainly true that a partnership is not a legally separate entity from its member partners, the Court of Appeals, characterizing a law firm partnership as an entity, held that an individual partner in a law firm could not rely on his privilege against self-incrimination to avoid producing the law firm's subpoenaed records.[27] As the leading treatise on New York practice summarizes, although "a partnership, unlike a corporation, is not an entity entirely separate and apart from the individuals of which it is composed, it is treated as an entity for pleading purposes."[28]

Similar to New York, the laws in other states that have not adopted RUPA do not clearly establish entity status for general partnerships. Opinions regarding general partnerships formed in those jurisdictions should be approached with caution.

[21] *See* California Report at p. 44.

[22] "A partnership is in many respects the opposite of corporation. Historically, a partnership was not considered a legal entity. The term "partnership" merely described the legal relationship of the partners and the consequences of agreeing to carry in a business together as co-owners." California Report at p. 3 (FNs omitted).

[23] Williams v. Hartshorn, 296 N.Y. 49, 51 (1946); Caplan v. Caplan, 268 NY. 445, 447, 198 N.E. 23 (1935); Hartigan v. Casualty Co. of America, 227 N.Y. 175, 179 (1919); Diaz v. Rusbrock Assocs. Partnership, 298 A.D.2d 547, 749 N.Y.S.2d 46 (App. Div. 2002); Kaplan v. Kaplan, 27 Misc. 2d 56 (Sup. Ct. 1961) (discovery of partnership records in an action brought against a partner); but see In re Nassau County Grand Jury Subpoena Duces Tecum, 4 N.Y.3d 665 (2005); Dembitzer v. Chera, 285 A.D.2d 525 (App. Div. 2001) (attorney for partnership disqualified from bringing an action against a 50% partners in that partnership).

[24] Civil Practice Act § 222-a. See Rudzicka v. Rager, 306 N.Y. 191, 196-97, 111 N.E.2d 878 (1953) (limited partnership case). Civil Practice Law and Rules § 1025. Two or more persons conducting a business as a partnership may sue or be sued in the partnership name.

[25] D'Ippolito v. Cities Serv. Co., 374 F.2d 643 (2d Cir. 1967), citing Ruzicka v. Rager, 305 N.Y. 191, 197, 111 N.E. 2d 878, 881 (1953) and Kirschbaum v. Merchants Bank of New York, 272 App. Div. 336, 71 N.Y.S. 2d 79, 80 (1947).

[26] 4 N.Y.3d 665, 830 N.E. 2d 1118, 797 N.Y.S. 2d 790 (2005).

[27] 4 N.Y.3d 675-677.

[28] 3 Weinstein, Korn & Miller New York Civil Practice ¶ 1025.00 (2023)

Liability of Partners

A recognized fundamental difference between general partnerships and other forms of business entities is the extent of the partners' liability for the debts and obligations of the partnership. Under Sections 13 and 14 of UPA, partners are jointly and severally liable for breach of trust or other wrongful acts which are liabilities of the partnership and jointly liable for other debts.[29] Under Section 306 of RUPA, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law. As noted in comment 1 to that section, however, under Section 307(d) of RUPA a judgment creditor generally is required to exhaust the partnership's assets before enforcing a judgment against the separate assets of a partner.

Because of the general liability of partners for the debts and obligations of a general partnership, it is not common for an opinion to be given on the liability of general partners. As noted above under "The Opinion as to Enforceability; Enforceability Against Individual Partners Liability," the California Report adopts the position that an opinion on the enforceability against a general partnership of an agreement to which the partnership is a party should not be understood to address the liability of the partners for partnership obligations.[30]

Limited Liability Partnerships

Many states have provided for a special form of general partnership called a limited liability partnership, a status which can be adopted by a public filing with a state official. Partners of a limited liability partnership are not liable with respect to the actions of other partners in which they did not participate but are liable only for their own actions, thus negating vicarious liability. In some states the partners of a limited liability partnership are not personally liable for the contractual obligations of the partnership. This form of entity has been mostly used by professional service providers, like law firms and accounting firms, and opinions on the liability of partners of a limited liability partnership are not common.

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Recent Delaware Decisions Affecting Legal Opinions

Two recent decisions of the Delaware Court of Chancery deserve attention because they are relevant to legal opinions that often are given.

Moelis Decision

In *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, 2024 WL 747180 (Del. Ch. Feb. 23, 2024),[31] the Delaware Court of Chancery held that certain pre-approval rights and board and committee composition provisions in a stockholder agreement entered into by the corporation with its controlling stockholder in anticipation of an initial public offering by the corporation were facially invalid under Section 141(a) of the Delaware General Corporation Law (DGCL) because they infringed on the power of the board of directors to manage

[29] A partner might also personally guarantee obligations for which the partner otherwise has no personal liability.

[30] *See* California Report at p. 44.

[31] In a prior decision, *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, 2024 WL 550750 (Del. Ch. Feb. 12, 2024), the Court held that laches and ripeness did not apply when the issue was violation of the statute.

the corporation's affairs.[32] The stockholder agreement in *Moelis* required the corporation to obtain the stockholder's approval before taking various corporate actions and granted the stockholder extensive rights designed to ensure that the stockholder could elect a majority of the directors and that the composition of board committees was proportionate to the stockholder's designees on the full board. While the Court characterized the agreement as a "new-wave" stockholder agreement, rights of the types included in the *Moelis* agreement are often found in agreements entered into in connection with debt and equity (including venture capital and private equity) financings and other commercial arrangements. The decision raises significant issues for due authorization, no violation of law and enforceability opinions given in these types of transactions.

The Court analyzed the challenged *Moelis* agreement provisions under DGCL Section 141(a), which confers authority on the board of directors to manage the business and affairs of the corporation, except as otherwise provided in the corporation's certificate of incorporation. The Court held that the pre-approval requirements, viewed collectively, and some of the stockholder's rights involving the composition of the board of directors and its committees were invalid under Section 141(a). In addition, the Court held that the committee-related provisions were also invalid under Section 141(c), which vests the board with the authority to designate committees (but without the ability to vary that authority in the certificate of incorporation). In invalidating these provisions, the Court noted that most of them (though not those relating to the composition of board committees or that are inconsistent with a mandatory feature of the DGCL) would have been valid if they had been included in the corporation's certificate of incorporation. This can be done either (i) expressly or by incorporation by reference to an agreement as permitted by DGCL Section 102(d)[33] or (ii), if the certificate of incorporation authorizes the board to create new classes or series of stock ("blank check" authority), in a certificate of designation, which could involve issuing a single golden preferred share. An amendment of the certificate of incorporation would, of course, require stockholder approval, but a new class of stock could be created by the board alone if it had blank check authority.

The Court was careful to note that, although Delaware is a contractarian state that favors private ordering, the ability to do so is subject to the limitations of the DGCL. The Court emphasized the need to differentiate between an agreement creating an internal governance arrangement and an external commercial contract that constrains board actions, like a credit agreement with restrictive covenants or an exclusive supply contract, while at the same time recognizing the challenge in differentiating between the two. The Court identified a number of factors indicating that an agreement creates an internal governance arrangement, but did not

[32] The *Moelis* decision addresses issues relating to Delaware corporations. It is not clear whether other states will follow the reasoning in the *Moelis* decision under their corporation statutes. Unlike Delaware, many state corporation statutes authorize stockholder agreements that may vary the director management norm, although typically with conditions, like all stockholders being parties. *See* Model Business Corporation Act, Section 7.32. Some states, including Delaware, have close corporation provisions that permit such stockholder agreements. The issues raised in *Moelis* are unlikely to apply to Delaware limited liability companies or limited partnerships because of the difference in the statutes governing those entities and their contract-based nature.

[33] Section 102(d) permits certain provisions of the certificate of incorporation to "be made dependent on facts ascertainable outside such instrument, provided that the manner in which such facts shall operate on such provision is clearly and explicitly set forth therein." The question of whether and the extent to which the terms of an agreement may be incorporated by reference pursuant to this section is currently being considered by the Court of Chancery in *Seavitt v. N-able, Inc.* (C.A. No. 2023-03226-JTL).

specify how those factors are to be weighted, other than that all are matters of degree and none are essential. It then indicated that once a contractual provision appears to be part of the corporation's governance arrangements, a court must assess whether the provision prevents or limits the ability of the directors to use their own best judgment and make decisions in managing the corporation's affairs in a substantial way. Applying these standards, the Court had no problem concluding that the *Moelis* stockholder agreement involved an internal governance arrangement that was not tied to any underlying commercial transaction between the corporation and the controlling stockholder and that most of its provisions, because they had the effect of removing from the directors in a substantial way their ability to use their own best judgment in managing the affairs of the corporation, violated Section 141 and thus were invalid. The Court did find valid several provisions in the agreement that related to the rights of the stockholder to nominate board members and for the company to use best efforts to cause them to be elected.

The initial task for opinion givers considering whether they can give opinions on an agreement that contains governance provisions is to determine whether those provisions limit the authority and exercise of discretion by the board of directors. In the case of agreements with these limitations, opinion givers would then have to determine whether those provisions are internal governance arrangements to be tested against Section 141 and other provisions of the DGCL or external commercial contract provisions that do not. An agreement like the *Moelis* stockholder agreement between the corporation and one or more stockholders, which the Court described as not being tied to any underlying commercial transaction between the corporation and the stockholder, that was designed to address corporate governance in an extensive way will likely be viewed as an internal governance arrangement. Correspondingly, traditional commercial credit agreements with lenders or other non-stockholder parties that contain customary restrictive covenants associated with protecting the credit or the transaction should not be viewed as an internal governance arrangement. Unclear is the status of agreements that fall between these two, such as an equity financing agreement with extensive protective and governance provisions. The validity of these provisions are addressed in opinions on the enforceability of the agreement in question, but, even if that opinion is not given (for example, in the case of a separate stockholders agreement), they also may be addressed in other opinions regarding the agreement, such as a corporate power opinion, a duly authorized opinion and a no violation of law opinion.

A consistent opinion practice has not yet developed in response to the *Moelis* decision, which is subject to appeal. Analyzing provisions implicated by the *Moelis* decision may be problematic and costly and the need to do so should be weighed in the context of the specific transaction. Alternatives for opinion givers include (i) giving an unqualified opinion after being satisfied that the agreement constitutes an external commercial contract with permissible restrictions or that the provisions in the agreement are of a type permitted by the *Moelis* decision, (ii) providing a reasoned opinion (which could be unqualified or qualified) with analysis supporting a conclusion that the agreement does not involve an internal governance arrangement that violates Section 141, or (iii) taking an exception for the effect of the *Moelis* decision that could be tailored to the particular agreement provisions or included as a blanket carve out for the possible application of the *Moelis* decision. If an opinion giver or a recipient is concerned about the validity of provisions in an agreement, alternatives may be to redraft the provisions, for example by including a fiduciary duty exception, or to include some or all of the provisions in the certificate of incorporation, either through an amendment or in a certificate of designation creating a class or series of stock that becomes part of the certificate of incorporation. Even when governance provisions are included in the corporation's certificate of incorporation, however, they still need to be analyzed to make sure they are permitted to be included in the certificate. For example, as noted above, limitations on the board's authority to designate committees under

Section 141(c) can raise issues, as can those that are inconsistent with a mandatory feature of the DGCL. Although opinions do not typically cover the enforceability of the provisions of the certificate of incorporation, opinion givers will need to evaluate any governance-related provisions in the certificate of incorporation that relate to the capital stock to be sure that they are valid if an opinion is given with respect to the due authorization of the corporation's capital stock.

Whatever approach is followed, opinion givers should carefully consider the effect of the *Moelis* decision if they are giving an opinion on an agreement that includes provisions relating to the internal governance of the corporation.

Activision Decision

In *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024), the Delaware Court of Chancery, in declining to grant a motion to dismiss a complaint challenging the approval of a merger, reminds practitioners of the importance of strictly following the requirements to approve a merger under DGCL Section 251. These requirements relate to the need for the final merger agreement to be approved by the board of directors and the contents of the notice that must be sent to the stockholders when soliciting their approval of the merger.

First, in Delaware an essentially final merger agreement must be approved by the board. The key question addressed by the Court in *Activision* was what essentially final means. The plaintiff argued for the execution version to be approved while the defendants asked the Court to recognize market practice that had a draft or near-final form submitted to the board for approval. The Court held that, at least for purposes of dealing with the motion to dismiss, in order to comply with Section 251(b) the board had to approve an essentially complete version of the merger agreement. It then went on to conclude that the plaintiff adequately pled that the merger agreement approved by the board was not essentially complete because it omitted the name of the company being acquired, the merger consideration, a disclosure letter that qualified a number of provisions of the agreement, the disclosure schedules called for by the agreement, and the surviving corporation's charter[34] and because the board delegated resolution of a key open issue regarding the dividends the acquired company may pay prior to closing to a board ad hoc committee. The defendants may be able to establish at trial that the board had before it some of the omitted information, such as the name of the company to be acquired and the merger consideration, and the Court recognized as an open issue whether the disclosure schedules were essential, but the Court's decision indicates that the merger agreement that the board approves, to be essentially final, must be close to being the execution version.

The Court then examined whether the information required under Section 251(c) to be included in the notice of the stockholder meeting was satisfied. It acknowledged that the notice purported to provide a copy of the merger agreement by referring to the exhibit to the accompanying proxy statement, but the Court determined that the merger agreement provided with the notice did not satisfy Section 251(b) because, among other things, it omitted the surviving corporation's charter.[35] The Court also ruled that the notice did not satisfy the alternative

[34] The Court's reference to Section 251(b) requiring the surviving corporation's charter to be included in the merger agreement does not appear to be apt because Section 251(b)(4) requires that only for a consolidation; under Section 251(b)(3), for a merger only a statement that the surviving corporation's charter shall be its charter is necessary, unless it is to be amended or restated, in which event that shall be stated.

[35] *Id.*

permitted under Section 251(c) of containing a brief summary of the merger agreement because, although the proxy statement contained a brief summary, the proxy statement was not the notice.[36]

Finally, the Court ruled that the board's delegation to a committee to finalize the provision of the merger agreement relating to permissible pre-closing dividends was invalid because under Section 141(c) a committee cannot approve on its own matters for which stockholder approval is required under the DGCL, such as approval of a merger agreement.

It is common, at least in states outside of Delaware, to structure mergers using both a transactional agreement, usually called a plan of reorganization, and an agreement of merger included as an exhibit that contains only the merger terms required by the corporate statute. The Court's decision in *Activision* may create doubt about the efficacy of this approach, at least in Delaware.

Although opinions have become less common in merger transactions, they still are sometimes given. In those situations, opinion givers should pay careful attention to make sure the requirements for authorizing the merger agreement, as interpreted by the Court in *Activision*, are satisfied. This also is important when opinions are given in connection with merger-related or post-merger debt and equity financings that address the effectiveness of the merger or involve matters that are dependent on its being effective. The Court's approach in *Activision* may also be relevant for opinions given with respect to other corporate matters, such as charter amendments, for which the DGCL contains specific authorization requirements.

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ALSO NOTEWORTHY

An Important Program: "Legal Opinions: What Those in the Know Don't Cover"

The Legal Opinions Committee will present a program "Legal Opinions: What Those in the Know Don't Cover" at the Business Law Section 2024 Spring Meeting in Orlando. The program has been selected by the Business Law Section as a "Business Law Essentials Track" program, which means that it is recognized as one of the ten most important CLE programs being presented at the Spring Meeting. As a result, the program will be live-streamed and available on Zoom (without cost of registration). Firms should encourage their associates in transactional

[36] The Court noted that Section 251 did not contain the amendment to Sections 228 on stockholder consents and 242 on certificate of incorporation amendments that permits notice of internet availability of proxy material to satisfy the merger agreement notice requirement. Instead of referring just to the merger agreement attached as an exhibit to the proxy statement, the notice could have incorporated the summary of the merger agreement in the proxy statement.

practices to view the program. In addition, more experienced transactional lawyers will find it useful.

Arthur Cohen (Haynes & Boone LLP) and Jim Smith (Foley Hoag LLP) will be moderators and will be joined by Kim Desmarais (Jones Day), Elizabeth Leckie (Allen & Overy LLP) and Ettore Santucci (Goodwin Procter LLP). The program will begin 2:00 p.m. (Eastern) on Friday, April 5, 2024 at the Spring Meeting and will be available virtually.

The panel will discuss examples of requests from recipients that their firms will not cover or will cover only in a limited way and the rationale for why they don't cover them or, if they do, how they qualify them with appropriate assumptions and exceptions. The panel also will discuss strategies for bridging the gap between opinion givers and recipients when coverage disputes arise.

ACGC Cheek Award

The American College of Governance Counsel (ACGC) has announced the inaugural James H. Cheek III Award for the Best Article on the professional responsibilities of counsel in the corporate governance area, including aspects above and beyond compliance with the ethics rules.

ACGC invites published articles or papers accepted for publication after December 31, 2023 and before July 1, 2025 from judges, scholars, practitioners, and students in any discipline. The ACGC Award Committee will review papers submitted by authors or nominated by peers. The winner will receive $10,000 and a physical award. Additionally, the winner will be invited to present and discuss the article at an ACGC program. Papers should be emailed to info@amgovcollege.org by June 30, 2025. Questions should be emailed to the ACGC Award Committee at info@amgovcollege.org.

Past Issues of IN OUR OPINION

If you are interested in past issues of IN OUR OPINION, all issues can now be found on the home page of the Legal Opinions Committee. Scroll down to Resources and click on "Committee Newsletter PDF Library."[37] You will find a library of PDF versions of each issue of IN OUR OPINION since December 2002. In addition, you will find one PDF document that compiles the table of contents of all the newsletters. That will make it easier to search for content that you might be looking for. If you find an article that you would like to review, you can click on the title in the document containing all the tables of contents and you will be linked to the issue of the newsletter where the article itself appears. We hope you find that to be a useful resource. If you have any suggestions to make it more valuable, please share with leadership of the Committee.

LEGAL OPINION REPORTS

Readers are accustomed to seeing in this space a chart of published and pending legal opinion reports of sections of the American Bar Association, various state bar associations, the TriBar Opinion Committee and other bar groups. Because there have been no changes to the status of those reports since the Summer 2023 edition of IN OUR OPINION, we have not included the chart in this edition. Note that all the published reports previously listed in the chart are available at the Legal Opinions Resource Center. Please read the

[37] https://communities.americanbar.org/topics/13162/media_center/folder/553403ea-94f4-40cc-9afc-65b8848e7c09.

article by Jim Fotenos "Legal Opinions Resource Center: The Best Source for Opinion Literature" beginning on page 15 of the Fall 2023 issue of IN OUR OPINION, which describes the history of the Legal Opinion Resource Center and emphasizes its value.

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:

Arthur A. Cohen	2022-present
Richard N. Frasch	2019-2022
Ettore A. Santucci	2016-2019
Timothy G. Hoxie	2013-2016
Stanley Keller	2010-2013
John B. Power	2007-2010
Carolan Berkley	2004-2007
Arthur N. Field	2002-2004
Donald W. Glazer	1998-2002
Thomas L. Ambro	1995-1998
Steven O. Weise	1992-1995
Henry Wheeler	1988-1992

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 them here.[38] 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.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in the late summer of 2024. Please forward cases, news, items of interest and articles to Topper Webb (twebb@milesstockbridge.com) or Arthur Cohen (arthur.cohen@haynesboone.com).

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