IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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CONTENTS

FROM THE CHAIR

I strongly recommend to all of you several important pieces in this issue of IN OUR OPINION. The first is by Art Field and relates to the relationship between third party closing opinions practice and the practice for other opinions. This is of particular importance because it is an area that has not been directly addressed before in legal opinion literature. Given recent attention to this area due to the *Bandera* case, Art's article definitely deserves our attention. The second article, by Truman Bidwell and Ettore Santucci, focuses on ongoing efforts to develop a consensus on appropriate opinion practices in cross-border business transactions. This article is a very thoughtful and insightful piece that analyzes the relevant issues and describes actions that need to be taken to achieve that consensus. The final article is by Mark Burnett and Stan Keller updating their article in our last issue about legal opinion issues raised by the decisions of the Delaware Court of Chancery in the *Moelis* and *Activision* cases. In this issue Mark and Stan describe Delaware's legislation in response to those and similar decisions, which, among other things, is intended to protect some commonly used governance practices.

Immediately following this letter is a listing of the schedule for Legal Opinions Committee events at the ABA Business Law Section 2024 Fall Meeting in San Diego, all of which will take place on Friday, September 13, 2024. The Legal Opinions Committee will present an important CLE program: "How to Avoid Problems in the Uncharted Waters of Giving Opinions on Agreement Amendments and Restatements." This is an important topic that has been largely overlooked and poses risks for those involved in opinion practice because there is little guidance on what these opinions mean. Experienced transactional lawyers will find the program particularly useful.

The CLE program will include an experienced panel. Christina Houston (DLA Piper LLP) and I will be moderators and we will be joined on the panel by Sylvia Chin (White & Case LLP), Bill Dunn (Clark Hill PLC), Bob Risoleo (MPM Capital) and Sandy Rocks (Cleary, Gottlieb, Steen & Hamilton LLP). The program will be at 2:00 p.m. (Pacific) on Friday, September 13, 2024.

Our Committee meeting will take place from 3:30 p.m. to 5:00 p.m. (Pacific). We are going to continue the approach we have taken at recent Committee meetings by focusing on substantive issues. We will devote most of the meeting to substantive discussion of a series of issues that members are facing or may face in their daily practices. Many Committee members have told us that this is preferable to more procedural meetings devoted to committee and task force reports.

We will also have three task force meetings in San Diego: the IP Opinions Task Force will meet from 8:00 a.m. to 9:30 a.m. (Pacific), the Cross-Border Opinions Task Force will meet from 10:00 a.m. to 11:00 a.m. (Pacific), and the Enforceability Opinion Task Force will meet from 2:00 p.m. to 3:00 p.m. (Pacific).

All the meetings (but not the CLE program) in San Diego will be available virtually if you are not able to attend in person.

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

Finally, I want to remind you all 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 their interaction with other bar groups, which have been extensive. 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 support to reach out to me. All the best.

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FUTURE MEETINGS

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

The following are presently scheduled times of meetings and programs of the 2024 Fall Meeting that may be of interest to members of the Legal Opinions Committee. **All meetings will be conducted both in person and virtually.** (The CLE program will not be available virtually.) For links to the meetings, go to the Business Law Section's 2024 Fall Meeting webpage, accessible to members of the Business Law Section here. **All times are listed in Pacific Time Zone.**

Legal Opinions Committee

Friday, September 13, 2024

Intellectual Property Opinions Joint Task Force Meeting
8:00 a.m. – 9:30 a.m.

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

Enforceability Opinion Task Force Meeting
11:00 a.m. – 12:00 p.m.

CLE Program: *How to Avoid Problems in the Uncharted Waters of Giving Opinions on Agreement Amendments and Restatements*
2:00 p.m. – 3:00 p.m. (not accessible virtually)

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

Law and Accounting Committee

Saturday, September 14, 2024

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

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Thursday, September 12, 2024

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

Federal Regulation of Securities
Committee Meeting 2024
December 5 - December 6, 2024
The Madison Hotel
Washington, D.C.

The Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee and the Law and Accounting Committee will meet at the Federal Regulation of Securities Committee meeting in December. Times for those meetings have not yet been announced.

ABA Business Law Section 2025
Spring Meeting
April 24 – April 26, 2025
Sheraton New Orleans
New Orleans, Louisiana

ABA Business Law Section 2025
Fall Meeting
September 18 - September 20, 2025
Sheraton Centre, Toronto
Toronto, Ontario

BUSINESS LAW SECTION 2024 SPRING MEETING

The Business Law Section of the ABA held its 2024 Spring Meeting in Orlando, Florida, and virtually from April 4 to April 6, 2024. The following are reports on meetings held at the Spring Meeting that are likely to be of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Legal Opinions Committee met on Friday, April 5, 2024. Members of the Committee attended in person and virtually. Committee Chair Arthur Cohen (Haynes & Boone LLP) reported on the program sponsored by the Committee earlier that day. The program "Legal Opinions – What Those in the Know Don't Cover" was moderated by Jim Smith (Foley Hoag LLP) and Arthur. The program was part of the Business Law Section's "Business Law Essentials Track," which recognized the ten most important programs out of more than 50 CLE programs presented in Orlando. As part of the Business Law Essentials Track, the Committee's program was live-streamed. Arthur reported that approximately 65 people attended in person and over 250 attended online. Arthur thanked Jim and the others on the panel (Ettore Santucci (Goodwin Procter LLP), Kim Desmarais (Jones Day) and Elizabeth Leckie (Allen & Overy LLP)) for a successful program. Arthur then pointed out that the ABA, with help from Topper Webb (Miles & Stockbridge P.C.), Stan Keller (Locke Lord LLP) and Arthur, has made past issues of the Committee's IN OUR OPINION newsletter more conveniently available on the Committee's website. All past issues are available in pdf format and can be accessed more easily than before.

Arthur introduced the first topic for discussion. Two recent opinions of the Delaware Court of Chancery have attracted attention in the opinion world – the *Moelis* decision,[1] which considers contract provisions that could infringe on a board's power to manage a corporation's affairs, and the *Activision* decision,[2] which considers important aspects of the process for corporate approval of a merger.

Two Delaware lawyers, John Mark Zeberkiewicz (Richards, Layton & Finger, P.A.) and Jim Honaker (Morris, Nichols, Arsht &Tunnell LLP), discussed the cases and amendments to the Delaware General Corporation Law ("DGCL") that have been proposed to address issues created by the two decisions.[3]

John Mark described how *Moelis* and *Activision* create uncertainty regarding enforceability under Delaware law of contract

[1] *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, 311 A.3d 809 (Del. Ch. 2024). *See* also *Wagner v. BRP Group, Inc.*, 2024 WL 2741191 (Del. Ch. May 28, 2024), and *Seavitt v. N-Able, Inc.*, 2024 WL 3534476 (Del. Ch. July 25, 2024), later decisions addressing similar stockholder agreements.

[2] *Sjunde AP-fonden v. Activision Blizzard, Inc.*, 2024 WL 863325 (Del. Ch. Feb. 29, 2024).

[3] The proposed legislation also addresses remedies for breach of a merger agreement dealt with in *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023).

provisions in a variety of settings and regarding validity of the approval process for a merger. He discussed the role of the Corporate Laws Committee and the Corporate Law Section of the Delaware Bar in proposing amendments to the DGCL. Amendments have been proposed that, if approved by Delaware's legislature and signed by the Governor, will be effective August 1, 2024. [Editor's note: Subsequent to the meeting, the legislation was enacted and became effective. See Mark Burnett's and Stan Keller's "Update on Recent Delaware Decisions and Legislative Response" beginning on page 13 herein.]

Jim Honaker discussed the *Moelis* decision. In *Moelis*, the Delaware Court of Chancery held as facially invalid certain contract rights and board composition provisions that were set forth in a stockholder agreement between a Delaware corporation and its controlling stockholder. The agreement was entered into in anticipation of a public offering of stock and permitted the controlling stockholder, who retained a minority interest after the public offering, to retain various pre-approval rights and rights to fill board and committee seats in exchange for agreeing to the company's going public and to a non-compete. The Court of Chancery determined that the provisions infringed on the power of the board of directors under Section 141(a) of the DGCL to manage the corporation's affairs. The court distinguished between commercial contracts with non-stockholders and agreements with equity owners that effectively are governance arrangements. Provisions of the latter that interfere with a board's role under Section 141(a), according to the court, must be in the charter. Jim observed that the decision creates uncertainty about the enforceability of commonly used contractual provisions.

Jim discussed the Delaware Bar's attempt to create clearer rules that will, if the proposed amendments become law, permit greater certainty in opinions as to the enforceability of contracts with these types of provisions. Among other things, the proposed amendments add a new subsection (18) to Section 122 of the DGCL giving a corporation express power to enter into contracts with current or prospective stockholders containing consent rights and other provisions that were ruled impermissible by the court in *Moelis*, provided that the corporation receives consideration for entering into the contract.

Jim also discussed the *Activision* decision and the approval of a merger by the directors of the defendant corporation. The merger agreement, when approved by the board, had important information left blank, had code names for the parties and did not include the merger consideration. The document that was approved did not have disclosure schedules or the charter of the surviving corporation. The plaintiff asserted that the merger had not been properly authorized because the final merger agreement was not approved by the board. Saying that a committee cannot approve something on behalf of the board if the matter requires a vote of stockholders, the plaintiff also challenged the board's delegation to a committee of authority to finalize the agreement. The Court of Chancery declined to grant a motion to dismiss the complaint that challenged the merger approval process under Section 251 of the DGCL. The court found that the merger agreement approved by the board of directors was not essentially complete and that the board improperly delegated to a committee resolution of an issue regarding dividends the defendant corporation could pay prior to closing. The court also considered whether the notice of the stockholders meeting satisfied information requirements under Section 251(c) of the DGCL and concluded that the notice did not comply. While legal opinions are no longer commonly provided in merger transactions, Jim pointed out that an opinion that a merger is effective typically is given to parties providing financing in a merger.

Jim discussed proposed new Section 147 of the DGCL. That section would, if enacted, permit board approval of agreements in either final form or substantially final form (meaning all the material terms are presented to the board) and permit the board to ratify an agreement (such as a merger agreement) in its final form before a

required filing is made with the Secretary of State.

Andy Kaufman (Kirkland & Ellis LLP) reported on a joint project of the Working Group on Legal Opinions Foundation (WGLO) and the Committee to consider a possible expansion of the *Statement of Opinion Practices*[4] developed by WGLO and the Committee in 2019 and approved by numerous bar associations and lawyer groups. Andy chairs the project and Stan Keller is a senior advisor. Andy reported that the group working on the project is examining provisions of the *Guidelines for the Preparation of Closing Opinions*[5] that were not included in the *Statement*, and identifying other topics not addressed in the *Statement* or in the *Guidelines* from other sources, including from the real estate bar, that might be included in an expanded *Statement*. The group will consider whether expansion beyond what was included in 2019 is appropriate.

Tim Hoxie (Jones Day), President of WGLO, discussed activities of WGLO. Tim commended the efforts of the group working on the *Statement* expansion project to consider views of various opinion giving and opinion receiving groups to promote greater convergence of views. Tim discussed other efforts of WGLO to reach out to firms and bar associations through its affinity groups and webinars, including the ten-session online seminar held by WGLO in late February and early March on risk management by law firms. The seminar, chaired by Art Field and Stan Keller, was intended to reach firms' general counsels and opinion committee members with discussions focused on risk management, litigation claims and similar topics. Arthur observed that the program's numerous break-out groups permitted in-depth discussions of how firms deal with specific issues.

The Committee will next meet at the Business Law Section meeting in San Diego on Friday, September 13.

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Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

The Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee met on April 4, 2024.

The meeting was conducted in person and virtually with Chair Rob Evans (Locke Lord LLP) and Vice Chair Eric Juergens (Debevoise & Plimpton LLP) present in Orlando.

The Subcommittee first discussed two recent decisions that are relevant to opinion practice for securities law practitioners. The first decision was *Moelis*, in which the Delaware Court of Chancery invalidated some provisions of a stockholder agreement on the grounds that they violated various provisions of the Delaware General Corporation Law ("DGCL"). The discussion covered the basics of the decision, led by Stan Keller, and then reviewed how firms are responding, including carveouts from opinions where necessary, pending proposed Delaware legislation designed to permit those provisions in stockholder agreements.

The second decision discussed was *Activision*, which involved the Delaware Court of Chancery enforcing provisions of the DGCL related to the board of directors approving a merger agreement and submitting it to stockholders for approval. While opinions are now less common in merger transactions, the decision raises issues for corporate and securities lawyers and could involve opinions given, not

[4] 74 BUS. LAW. 801 (2019).

[5] 57 BUS. LAW. 875 (2002).

just in connection with the merger itself, but in connection with merger-related financings or other transactions.

Finally, the Subcommittee discussed the updated draft of the Rule 144 Opinion Report. One key point raised about the Report was that it should attempt to illustrate how various issues that arise in giving Rule 144 opinions can be resolved and what assumptions or qualifications or diligence is required without making these opinions significantly more difficult to give.

The Subcommittee meeting wrapped up with a request for any members interested in participating in a small drafting group for the Rule 144 Opinion Report, as well as soliciting topics for the next meeting.

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Law and Accounting Committee

The Law and Accounting Committee met on April 6, 2024, in Orlando (and virtually). Alan Wilson (Wilmer Cutler Pickering Hale and Dorr LLP) opened the meeting and introduced James L. Kroeker, Vice Chairman, Financial Accounting Standards Board (FASB). Mr. Kroeker provided some prepared remarks and engaged in discussion with the Committee about recent FASB standard initiatives. Among others, Mr. Kroeker highlighted the FASB's current and recently completed projects involving income statement expenses disaggregation, statement of cash flows, accounting for software costs, income taxes, segment reporting and crypto assets.

Mr. Wilson and Thomas White (retired Wilmer Hale partner) discussed recent Public Company Accounting Oversight Board (PCAOB) developments, including Mr. Wilson's participation on behalf of the Committee in the PCAOB's March 6, 2024 Roundtable Discussion of Proposed Amendments to PCAOB Auditing Standards Related to a Company's Noncompliance with Laws and Regulations.[6] Mr. Wilson also briefly summarized the Business Law Section's March 28, 2024 supplement to its comment letter to the PCAOB dated August 23, 2023, in connection with Release No. 2023-003, *Proposing Release: Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations and Other Related Amendments*.[7] Mr. White commented on the PCAOB's research agenda, which includes a project to "understand why there continues to be a decrease in the average number of critical audit matters (CAM) reported in the auditor's report over time and whether there is a need for guidance, changes to PCAOB standards, or other regulatory action to improve such reporting, including the information that is provided as part of the CAM reporting." He highlighted this matter for the Committee to continue to monitor, reminding the Committee about its prior discussions when the PCAOB adopted the CAM standard.

The Committee briefly discussed other recent developments, including Congressional action on SEC Staff Accounting Bulletin 121 (accounting for obligations to safeguard crypto assets an entity holds for platform users),[8] accounting adjustments regarding executive

[6] A recording of the Roundtable is available at https://pcaobus.org/news-events/events/event-details/pcaob-staff-virtual-roundtable-on-noclar-proposal.

[7] ABA Bus. Law Section, Comment Letter on PCAOB Rulemaking Docket Matter No. 051 Proposing Release: Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations and Other Related Amendments, dated March 28, 2024, *available at* https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-051/184_aba-bls.pdf?sfvrsn=cb66bb6f_2.

[8] *See, e.g.*, H.J. Res. 109, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-joint-resolution/109/text.

compensation targets, and a Council for Institutional Investors petition for rulemaking regarding use of non-GAAP measures in executive compensation.[9]

Stanley Keller (Locke Lord LLP) led a discussion of two scenarios involving auditor-lawyer interactions – (i) providing audit response letters in the context of corporate restructurings and (ii) requests of a successor auditor to interview outside counsel as an intake quality control matter. In regards to corporate restructurings, among other takeaways, Mr. Keller underscored the importance of assessing the requests to identify the specific client requesting the audit response letter, the period to be covered, and the parties involved in the loss contingency matter(s) that may be reportable.

In regard to interview requests from successor auditors, Mr. Keller discussed legal and practical considerations that must be balanced. Such a request is a standard intake procedure for new auditor engagements as part of know-your-client checks and is separate from audit responses regarding loss contingencies. Nevertheless, it raises the same issues of maintaining the confidentiality of client information and preserving attorney-client privilege. To that end, he indicated that it is important for outside counsel to:

- Caution the client to think carefully about changing auditors since there can be a host of issues, including the new auditor questioning prior accounting and auditing decisions.

- Consult with the client and obtain its permission before speaking to the successor auditor. Some firms choose to decline to have this type of conversation with an auditor, while other firms do it but with care. At the end of the day, it is a matter of client relations and the needs of the client.

The Committee discussed and generally recognized that, if responding to an interview request by a successor auditor, counsel would be well served to keep the information shared of a general nature, as close as possible to "name, rank and serial number," and have someone from the firm General Counsel office participate if possible. Practically, it is helpful to ask to receive questions or the subject matter of the interview in advance.

The next meeting of the committee will be at the Fall Meeting of the Business Law Section on September 12 to 14, 2024 at the Marriot Marquis San Diego Marina in San Diego, California.

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ARTICLES

A Universal Opinion Practice[10]

Introduction

The relationship between third party closing opinions ("TPCO") practice and the practice for other opinions has not been directly addressed in legal opinion literature. Although descriptions of TPCO practice can appear to be limited to that practice, the basic principles of

[9] *See* Council of Institutional Investors Letter to Securities and Exchange Commission re File No. S7-14-23 (Mar. 11, 2024), https://www.cii.org/files/issues_and_advocacy/correspondence/2024/March%2011,%202024%20Reg%20Flex%20Letter.pdf.

[10] This article grew out of a presentation by the author Arthur N. Field and Reade Ryan at the Working Group on Legal Opinions Spring 2024 Seminar. The author thanks Reade for helping to develop these ideas and Stan Keller for his editorial assistance with the article.

TPCO practice are in fact applicable to other opinion practices, including opinions to clients and other opinions that do not fit the TPCO paradigm. Customary TPCO practice is often described as comprised of customary usage and customary diligence. Significantly, that practice also involves an overarching standard of fairness to the recipient of the opinion,[11] an aspect of which is to avoid misleading the recipient.

This article analyzes the relationship between TPCO and non-TPCO opinion practice by considering the aspects of customary TPCO practice and its application to non-TPCO practice.

The Default Opinion Practice

Whether or not a third party closing opinion is involved, opinion preparers typically begin work on an opinion with TPCO practice in mind. That is because there is no other opinion practice that the opinion preparers can reliably expect to be understood by the recipient and, if represented, its counsel. [12]

There are specialized areas where separate recognized opinion practices, such as those relating to real estate financing, federal tax law, securities law and municipal bond financing, will apply and, to the extent they do, they displace TPCO practice. Thus, TPCO practice can be considered to be the "default opinion practice" that applies when a recognized specialty practice is not applicable.[13]

The principal elements of TPCO practice and recognized specialty opinion practices are customary usage and customary diligence. The language of an opinion (usage) identifies the scope and meaning of the opinion, while customary diligence identifies the work required to give the particular opinion. The scope and meaning of a customary form of an opinion can be varied by changes in the wording of the opinion. The customary diligence for an opinion can be limited by changes in the opinion's wording and by exceptions and other limitations expressly stated in the opinion letter. Changes in the customary form of an opinion or the work required to give it will be described in or otherwise obvious from the opinion letter. In this regard, opinions provided in connection with a transactional closing as part of TPCO practice and opinions provided to a client or others apart from TPCO practice typically do not differ.

Satisfying the "Fairness Standard"

A critical element underlying all opinion practice is that a legal opinion is a professional representation of the opinion giver intended to communicate relevant information to the recipient. The opinion being given must be fair (and therefore not misleading) and objective, based on an appropriate professional analysis, and the opinion preparers must reasonably believe it is "correct"[14] (the "fairness standard").[15]

Unlike the customary usage/diligence elements of customary opinion practice, the

[11] References to opinion recipient also includes others entitled to rely on the opinion and sometimes others affected by it.

[12] See the Delaware Court of Chancery decision in *Bandera* cited in note 22 below.

[13] TPCO practice, as used in this article, refers to U.S. national opinion practice. Sometimes opinion practices will not be apparent to a recipient or its counsel. For example, practices that apply in a specialty area may be well known to attorneys who practice in the area but not to others. Also, there are local practices in a jurisdiction that may vary from TPCO practice. In these circumstances, disclosure of the different practice may be required for it to effectively vary TPCO practice.

[14] An opinion is based on a professional judgment as to how the highest court of the applicable jurisdiction would resolve the issues covered by the opinion.

[15] The "fair and objective" standard applies generally to professional representations by a lawyer. See comment c to Section 95 of the Restatement (Third) of the Law Governing Lawyers.

fairness standard is overarching and may not be modified. Opinion preparers may not give an opinion that does not meet the fairness standard.[16] As a result, customary practice, whether for TPCO or non-TPCO, requires the opinion preparers to take action to resolve any perceived fairness standard concerns before providing an opinion.

The specific language used to express an opinion (customary usage) and the diligence required to give an opinion (customary diligence) eliminate much of the subjectivity in opinion practice. The fairness standard, however, is inherently subjective and cannot be fully defined because it is dependent upon the particular circumstances in which the opinion is given, including the nature of the recipient and the extent to which it is represented by its own counsel.

In the TPCO situation, the opinion recipient typically is represented by its own counsel and it can reject the opinion letter if it does not appear to satisfy the contract or other requirements for its delivery. Also, there is a "closing" at which a determination is made whether to accept the opinion letter. The represented recipient is deemed to understand the opinion letter because it has its own counsel and because of its "acceptance" of the opinion letter. These characteristics (the TPCO "fairness guardrails") do not themselves establish that the fairness standard has been met. However, because of the absence of some or all of those guardrails in the non-TPCO setting the opinion preparers ordinarily give special attention to meeting the fairness standard.

In some typical non-TPCO situations, methods have been developed in an effort to meet the fairness standard. For example, public securities offerings are made pursuant to a prospectus or other disclosure document that may, when necessary, explain the relevant opinions and any permissible limitations and qualifications. In client opinion situations, the opinion preparers may seek to establish particular limitations for the opinion.[17] Because of their professional duty to the client, however, they may only do so in accordance with Model Rule 1.2(c),[18] and the opinion preparers may have the burden of explaining the opinion and any limitations on it to the client in accordance with applicable professional duties and ethics rules. Regulators and bar ethics opinions also may impose fairness standards, such as those applicable to tax shelter and other tax opinions.

A review of some litigated cases demonstrates the difficulty of satisfying the fairness standard. In *Dean Foods*[19] (a TPCO situation) the opinion preparers understood the need for disclosure but as a result of client pressure provided the opinion without it. In *Roberts*[20] (a TPCO situation) the opinion was not disputed but there was a disclosure failure. It is not clear that the opinion preparers understood that there was a fairness issue. Liability resulted in *Dean Foods* and *Roberts*. In *Resolution Trust*[21]

[16] The fairness standard remains operative even if, as a matter of applicable law, a court gives deference to the opinion in connection with an advice of counsel defense or in applying a contract provision protecting a party in relying on an opinion of counsel (see, for example, the Delaware Supreme Court decision in *Boardwalk Pipeline* cited in note 22 below). Such deference ordinarily will not be applicable to a claim by a client regarding an opinion to it.

[17] See Field and Smith, "Toward Articulating a Customary Practice Regarding Advice to Clients in the Third Party Opinion Context," 76 Bus. Law. 1265 (2021).

[18] Model Rules of Professional Conduct, Rule 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

[19] *Dean Foods Co. v. Pappathanasi*, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004).

[20] *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App.3d 104 (1976).

[21] *Resolution Trust Corp. v. Latham & Watkins*, 909 F. Supp. 923 (S.D.N.Y. 1995).

(an opinion used as part of disclosure material) the opinion preparers understood the fairness issue but believed that their analysis of the issues was sufficient to assure fairness and the court agreed. In *Bandera*[22] (an opinion to the client that, under the terms of an agreement, enabled the client to take unilateral action that adversely affected the rights of limited partners whose interests were issued under the agreement) the Delaware Court of Chancery held that the opinion was not objective.

Conclusion

TPCO practice is the universally applicable opinion practice in the United States. The relationship between TPCO and non-TPCO opinions can best be understood as the application of TPCO practice to non-TPCO opinions as the default practice, as described above. However, because some or all of the TPCO fairness guardrails are absent in non-TPCO settings, opinion preparers ordinarily pay special attention to meeting the fairness standard.

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Good Practice Principles for Cross-Border Closing Opinions: Where We Are – Where We Need to Go

In 2018 the Legal Opinions Committee of the Business Law Section of the American Bar Association ("ABA LOC") and the Legal Opinions Subcommittee of the Banking & Financial Law Committee of the International Bar Association ("IBA B&FLC") formed a joint task force on cross-border opinion practice (the "Joint Task Force"). The Joint Task Force is composed of a number of experienced practitioners from many different countries who came together under the auspices of the ABA and the IBA to build upon work done in the past by those two organizations, as well as by others like the Union International des Avocats, the City of London Law Society and a number of other bar groups internationally, to improve the practices of lawyers in countries throughout the world relating to the giving of, and advising recipients on, closing opinions in cross-border transactions. The overarching objective is that, as international markets continue to expand and evolve, lawyers throughout the world will work together toward the common goal of ensuring that the legal profession remains a constructive contributor to cross-border trade, commerce and finance.

In an increasing number of countries, businesses are seeking to procure capital from the international equity and debt markets to fund their growth in the global economy. As a result, an increasing number of lawyers in many different countries are being called upon to give legal opinions, the receipt of which is usually a condition to a capital provider's willingness to close a transaction ("closing opinions"). Closing opinions may be given to a lawyer's own client or, at the request of the opinion giver's client, to another party to the transaction, often a financial institution.

The development of a consensus on appropriate opinion practices is an important factor in facilitating cross-border transactions. It will be particularly important in countries in which foreign investment has not, to date, been significant but would greatly assist economic development. Reaching consensus will require the collaboration of lawyers in many countries. The Joint Task Force seeks to assist in that effort by promoting greater understanding of the issues involved in the closing opinion process, while at the same time respecting differences in legal regimes and rules of professional practice in different countries, as well as the legitimate concerns and expectations of the opinion giver

[22] *Bandera Master Fund LP v. Boardwalk Pipeline P'rs*, LP, 2021 WL 5267734 (Del. Ch. Nov. 12, 2021), rev'd on other grounds, *Boardwalk Pipeline P'rs, LP v. Bandera Master Fund LP*, 288 A.3d 1083 (Del. 2022).

and the opinion recipient in relevant markets across the globe.

The Joint Task Force recognizes that cross-border finance involves many different types of parties, including global financial institutions, private/public agencies supporting international trade, sovereign investment funds, banks, private equity and debt funds, and international institutional investors. These various parties must complete transactions that involve the laws and documentation practices of many different countries – a challenging task that defines cross-border practice. Although the parties may have disparate tactical interests, they and their counsel share a common strategic interest: making cross-border transactions as efficient and predictable as possible. When it comes to closing opinions this means reducing the time and cost of giving and receiving them, increasing their consistency and clarity, and reducing the friction that can develop in negotiating them. While areas of disagreement will always remain, the objective of the Joint Task Force is to improve the closing opinion process by developing approaches that reconcile the interests of all parties to the maximum extent possible.

The first project of the Joint Task Force was the development of "***Good Practice Principles for Cross-Border Closing Opinions***" (the "Cross-Border Principles"), which have been published in final form by the ABA[23] and the IBA. Development of the Cross-Border Principles was based on the following considerations:

- Over the past few decades, international commerce has changed dramatically. For many years, large financial institutions and their major customers had been doing business worldwide, but until fairly recently the majority of businesses (and almost all small and mid-sized businesses) had been domestically focused. Today, however, companies large and small routinely do business outside their home country or are strongly affected by commerce and business practices, including particularly those governing access to capital, from other countries.

- The legal profession has followed in the footsteps of its clients. In the past cross-border legal opinion practice, if it existed, focused largely on the London and New York financial markets and was the province of a thin tier of international firms. Today, however, law firms of all sizes, based in many centers of commerce (some large, some less so) and often operating across multiple jurisdictions around the world represent clients in cross-border transactions.

- Collaboration among practicing lawyers, the bar groups who represent them in different countries and trade organizations with a stake in the growth of international commerce and finance will promote convergence of opinion practice, while respecting differences in law and market practice.

- Development of cross-jurisdictional opinion guidance under the auspices of the Joint Task Force can have a beneficial effect, not only in lowering transaction costs but also in increasing the likelihood that the reasonable expectations of all stakeholders will be met.

Our hope is that the Cross-Border Principles will serve as the foundation for more focused initiatives by the Joint Task Force which may include:

- Identification of (i) recurring legal issues that are customarily addressed by closing opinions in various types of cross-border commercial transactions, and (ii) the role of the lawyers who most appropriately should address those issues in a particular transaction (*e.g.*, a party's own counsel,

[23] 79 BUS. LAW. 397 (Spring 2024).

counsel for a counterparty or, in some cases, with the consent of all parties, special counsel retained for the purpose).

- Consideration of the role of local counsel in cross-border transactions and the responsibilities of principal counsel with regard to closing opinions given by local counsel.

- Development of a better understanding of the role of country-specific rules of professional conduct and market practices in countries around the world.

- Dissemination of information on opinion practices in various countries.

- Collection of examples of opinion language with a view to (i) identifying appropriate and inappropriate opinion requests and (ii) developing a framework to make the closing opinion process smoother and reduce the risk of miscommunication between lawyers from different countries.

The Cross-Border Principles are only a first step. The Joint Task Force needs to reach out to international bar groups to enlist their help in accomplishing the objectives set out above. Publication of the Cross-Border Principles by the ABA and the IBA makes this an ideal time to launch an outreach effort to enlist support from practicing lawyers and bar groups in as many jurisdictions as possible.

At recent meetings of the ABA LOC and the Working Group on Legal Opinions ("WGLO") there was wide consensus to start a process of active solicitation for the wide adoption of the Cross-Border Principles as the foundation of a broader effort to create consensus and convergence internationally on opinion practice. This outreach effort has four prongs:

- ***Peer-to-peer***: Many practicing lawyers have been active in the work of the Joint Task Force over time because of their interest in cross-border opinion practice. We need renewed involvement by such lawyers to ensure that the Cross-Border Principles circulate widely within their firms and among law firms internationally with whom their firms do cross-border business. We plan to expand the Joint Task Force and agree on new objectives, a fresh program and clear responsibilities. This "peer to peer" approach was how the TriBar Opinion Committee was started and is how the ABA LOC and WGLO work to educate their members, exchange views among opinion experts and develop guidance for the profession at large.

- ***Bar group to bar group***: This approach has been effective both domestically (most recently for wide adoption of the "Statement on Opinion Practices") and internationally going back to the IBA's early work on cross-border legal opinions in the 1980's. This prong may be particularly important in jurisdictions where opinion practice is less developed or cross-order investment may still be an emerging trend. In those jurisdictions, but also in "major" jurisdictions, in-country organizations that serve the legal profession as a whole, including the establishment of rules of professional conduct, the enforcement of ethical standards, the formulation of policies on governance and the clarification of customs and practice around standards of care and liability regimes, could be powerful allies in moving the Joint Task Force initiative forward.

- ***Country ambassadors***: Existing members of the Joint Task Force will be asked to act as "ambassadors" in their respective jurisdictions to help make the right in-country connections and secure active support from their jurisdictions' bar groups, so as to build momentum from a core group of countries for a "next steps" effort. New members will be recruited by the Joint Task Force to cover other countries with a stake in the success

of the Joint Task Force's initiative. These volunteer ambassadors will be provided with support and tools to aid their effort.

- ***Financial institutions' gate-keepers***: Leading financial institutions will be approached to support the Joint Task Force initiative and help us keep a balanced, market-focused approach that continues in the best tradition of prior initiatives to improve opinion practice. Banks, particularly outside the United States, maintain panels of law firms that follow the lead of in-house lawyers as gatekeepers, operate on the basis of common guidelines and expectations, and often share expertise and experiences to help their clients' international finance business be successful in an increasingly complex, multi-centric and competitive world. Enlisting support from those gatekeepers and the bank-side law firms and practitioners who look to them for leadership would give the Joint Task Force a direct link to the needs and expectations of providers of international capital, thus adding to our arsenal an extra tool for promoting consensus and convergence.

The Joint Task Force intends to push for intense collaboration along all four prongs, including one-on-one meetings, educational programs, joint publications and other efforts. The hope is that this multi-pronged effort will first lead to wide adoption of the Cross-Border Principles and then act as the foundation for more focused initiatives which may include:

- Coordination of projects to be undertaken by or with other bar groups.

- Establishment of a resource center similar to the ABA LOC's Legal Opinion Resource Center but focused on cross-border resources such as sample closing opinions, relevant rules of bar associations and opinion practice guidance across jurisdictions.

- Acting as a clearinghouse for confronting emerging closing opinion issues and preparing guidance materials on good opinion practice in the cross-border context.

In the end, this is a call for help – help from anybody and everybody who sees a path for cross-border opinion practice to follow in the footsteps of TriBar, the ABA LOC, WGLO, many state bar groups across the United States and bar groups internationally who over decades have brought domestic opinion practice forward. Today we live in a very different world from the world on which James Fuld many years ago reflected in his visionary article. The Joint Task Force can be equally successful; it will be if we can count on active participation in this effort from many members of the ABA LOC.

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Update on Recent Delaware Decisions and Legislative Response

In the Spring 2024 issue of *In Our Opinion,*[24] we wrote about two Delaware Court of Chancery decisions that raised issues for legal

[24] Mark H. Burnett and Stanley Keller, "Recent Delaware Decisions Affecting Legal Opinions," IN OUR OPINION (ABA BUS. LAW SECTION LEGAL OPS. COMM.), Spring 2024 (Vol. 23, No. 2), at 14-18.

opinions, *Moelis*[25] and *Activision.*[26] Those decisions were controversial because they raised doubts about common market practices and prompted the Delaware Bar to propose corrective legislation. That legislation has been enacted and became effective on August 1, 2024.[27]

In *Moelis,* the 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 the corporation's initial public offering were facially invalid under Section 141(a) of the Delaware General Corporation Law (the "*DGCL*"). In addition, the court held that provisions related to the composition of board committees were also invalid under Section 141(c)(2), which vests the board with the authority to designate committees. The court noted that most of the invalidated provisions (but 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 certificate of incorporation.[28]

In *Activision,* the Court of Chancery declined to grant a motion to dismiss a complaint challenging the approval of a merger based on a failure to meet the requirements to approve a merger under Section 251 of the DGCL relating to (i) the need for a sufficiently final merger agreement to be approved by the board of directors and (ii) the required contents of the notice that must be sent to the stockholders when soliciting their approval of the merger. The court determined that, at least for purposes of dealing with the motion to dismiss, the board did not approve an essentially complete version of the merger agreement because of various omitted items. It then determined that the merger agreement provided with the notice to stockholders did not satisfy Section 251(b) because of certain omissions and that the alternative permitted under Section 251(c) of providing a brief summary of the merger agreement was not satisfied because the proxy statement with a summary sent with the notice was not part of the notice. The court also ruled that the board's delegation to a committee to finalize a provision of the merger agreement permitting the payment of certain pre-closing dividends by the target was invalid because under Section 141(c) a committee, as opposed to the board, cannot approve matters for which stockholder approval is required under the DGCL, such as approval of a merger agreement.

In response to the uncertainties created by the *Moelis* decision, the recently enacted Delaware legislation adds a new clause (18) to Section 122 of the DGCL to give corporations the power, notwithstanding Section 141(a), to enter

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[25] *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, 311 A.3d 809 (Del. Ch. 2024).

[26] *Sjunde AP-fonden v. Activision Blizzard, Inc*., 2024 WL 863290 (Del. Ch. Feb. 29, 2024) (corrected Mar. 19, 2024).

[27] S.B. #313, An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, vol. no. 84, ch. 309 Del. Laws (enacted on July 17, 2024). The legislation applies retroactively, except to matters in litigation begun before August 1, 2024.

[28] Following the *Moelis* decision, the Court of Chancery, in *Wagner v. BRP Group, Inc.,* 2024 WL 2741191 (Del. Ch. May 28, 2024), and *Seavitt v. N-Able, Inc.*, 2024 WL 3534476 (Del. Ch. July 25, 2024), found invalid provisions in other pre-IPO stockholder agreements that required approval by the identified stockholders of various actions. *Wagner* differed from *Moelis,* however, because following filing of the lawsuit, the parties modified the challenged stockholder agreement to provide that the stockholder would approve any action that a committee of the independent directors unanimously approved. The court held that the committee approval mechanism in the modified agreement, despite the unanimity requirement, was sufficient to overcome invalidity under Section 141(a), but not invalidity under other provisions of the DGCL. *N-Able* differed in that the certificate of incorporation had references to being "subject to" the stockholder agreement, but the court found that these references were not effective to incorporate the provisions of the stockholder agreement into the certificate and indicated that a private stockholder agreement cannot be incorporated into a public charter.

into governance agreements, like the ones in *Moelis*, *Wagner* and *N-Able*, that include approval rights and board composition provisions that otherwise could be included in the certificate of incorporation. To address the issues identified by the *Activision* decision, the legislation adds a new Section 147 to the DGCL to recognize that the board can approve a merger agreement and other agreements requiring board approval in substantially final form and can ratify a previously approved agreement before a filing is made with the Secretary of State. It also amends Section 232 dealing with notices to stockholders to provide that any materials included with, or attached to, a notice to stockholders, like a proxy statement, is considered to be part of the notice. In addition, it adds a new Section 268(a) to eliminate the need for the certificate of incorporation of the surviving corporation to be attached to the merger agreement or approved by stockholders in certain limited circumstances and a new Section 268(b) to make clear that disclosure letters and schedules are not part of the merger agreement that need to be approved by the board but will have the effects provided in the merger agreement.[29]

The addition of Section 122(18) eliminates some of the uncertainties for Delaware corporations arising from the *Moelis*, *Wagner* and *N-Able* decisions, but interpretive issues in applying the new provision, such as the scope of agreements authorized under it and how those agreements mesh with fiduciary duties, will need to be considered. While new Section 122(18) validates certain contractual provisions that otherwise would have violated Section 141(a) as interpreted in the recent Delaware decisions, that validation would not save contractual provisions that violate other sections of the DGCL, such as board and committee composition and officer and charter pre-approval requirements the recent decisions found facially invalid under Sections 142 and 242. For example, the Court in *N-Able* suggested that contractual provisions requiring the identified stockholders' approval before certain transactions could be initiated might have been invalid even if Section 122(18) applied because they might not have been permissible in the charter and might have violated provisions of the DGCL other than Section 141(a). The provisions that address the issues raised by *Activision* clarify and simplify the requirements under the DGCL for board and stockholder approval for mergers and certain other matters requiring stockholder approval, although the message from the *Activision* decision of the importance of strict compliance with the statutory notice and approval requirements still applies.

The DGCL amendments should make it easier in some circumstances to give opinions on a stockholder agreement of a Delaware corporation that contains governance provisions, but analysis will still be necessary as to whether particular provisions are permitted under Section 122(18) of the DGCL and whether provisions of the agreement may violate provisions of the DGCL other than Section 141(a). Accordingly, a practice of taking an opinion exception for the effect of the *Moelis* decision may continue to be followed when giving opinions involving such stockholder agreements. Of course, the Delaware legislation does not affect the potential concerns raised by the *Moelis* decision with respect to opinions given on governance agreements of corporations organized outside Delaware.

For opinions given on a merger or certain other corporate matters involving a Delaware corporation, the DGCL amendments should eliminate some of the concerns raised by the

[29] The legislation also adds a new Section 261 to address the holding in *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023), regarding remedies for breaches of a merger agreement by recognizing a provision in the agreement that allows a target company to seek damages, including lost stockholder premium, for a breach by the acquirer and, if so provided, to retain such damages. It also allows the stockholders, by approving the merger agreement, to appoint a stockholder representative to enforce their rights under the merger agreement.

Activision decision involved in approving those matters.

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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.[30] 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 are interested in hearing from members of the Legal Opinions Committee about important cases, legislation or other developments in their states that may be of interest to other Committee members. If you would like to submit an article for publication in IN OUR OPINION, we are always looking for content and would be happy to consider your submission.

IN OUR OPINION is currently published three times a year. We expect the next newsletter to be available in the late fall of this year. Please forward cases, news, items of interest and articles to Topper Webb (twebb@milesstockbridge.com) or Arthur Cohen (arthur.cohen@haynesboone.com).

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