

**2023 SPRING LEGAL OPINION SEMINAR
MAY 2, 2023, NEW YORK**

Program Co-Chairs: Willis R. Buck, Jr. and Reade H. Ryan, Jr.
Program Vice-Chairs: Arthur Norman Field
Gail Merel (Editor-in-Chief)
Steve Tarry (Co-Editor)
President: Timothy G. Hoxie

AGENDA

Monday Evening, May 1, 2023

6:00 – 9:30 p.m.

Welcome Reception Followed by Dinner and Discussion

The Role of Experts and the Use of Opinion Literature in Litigation

Moderator: *Timothy G. Hoxie, Jones Day, San Francisco*

Panelists: *William T. Burke, Williams & Connolly LLP, Washington*
Arthur Norman Field, Field Consulting LLC, New York
Donald W. Glazer, Newton
Craig D. Singer, Williams & Connolly LLP, Washington
Steven O. Weise, Proskauer Rose LLP, Los Angeles

A discussion of the role of experts in opinion litigation and how they make use of bar reports and other opinion literature.

Tuesday, May 2, 2023

8:00 – 8:50 a.m.

Registration and Continental Breakfast

8:50 – 9:00 a.m.

Welcome and Introductory Remarks

*Honorable Thomas L. Ambro, U.S. Court of Appeals, Third Circuit,
Wilmington*
Timothy G. Hoxie, Jones Day, San Francisco

9:00 – 10:00 a.m.

Tax Opinions Are Different: Guidance for Transactional Lawyers

Moderator: *Amy McDaniel Williams, Hunton Andrews Kurth LLP, Richmond*
Panelists: *Linda Galler, Max Schmerz Distinguished Professor of Law*
Maurice A. Deane School of Law at Hofstra University
New York
Cecelia Philipps Horner, Hunton Andrews Kurth LLP, Richmond
Andrea Mandell, Schulte Roth & Zabel LLP, New York

Corporate and commercial lawyers are often asked the threshold question “can you give this opinion or not.” The threshold question for tax lawyers is much more nuanced because there are “levels” of opinions that can be

9:00 – 10:00 a.m.

Tax Opinions Are Different: Guidance for Transactional Lawyers (cont'd)

offered, representing different levels of certainty as to the conclusions expressed in the opinion, as designated by terms of art generally understood by tax practitioners. During this program, you “will” learn about differences between tax opinions and corporate opinions, and information from a survey that “should” give you food for thought regarding law firm policies and procedures for tax opinions. Also, “more likely than not,” the panel will endeavor to engage with attendees during the course of the session, so don’t hesitate to ask questions or make comments at any time. Finally, there is “substantial authority,” or at least a “reasonable basis,” for the proposition that the presentation will be leavened with a little fun (even though it is about tax matters).

10:00 – 11:00 a.m.

Securities Law Opinion Issues: Underwriting Agreement Opinions and Legend Removal Opinions in PIPEs and Other Contexts

Moderator: *Rob Evans, Locke Lord LLP, New York*

Panelists: *Roshni Banker Carielo, Davis Polk & Wardwell LLP, New York*
Adam T. Greene, Goldman Sachs, New York
Thomas W. Yang, Bank of America, New York

This session will look at opinions typically requested by investment banks when acting as underwriters, including negative assurance (or 10b-5) letters. The discussion will consider (i) common points of negotiation with input from members of the panel who are internal investment banking counsel, as well as (ii) market developments, including the changes in opinions and negative assurance letters in deSPAC transactions following the SEC’s release last year proposing new rules and outlining its views of potential underwriters’ liability for those transactions. The panelists will also discuss opinions regarding the removal of legends from restricted shares held by non-affiliates issued in PIPEs transactions (“private investment public equity” transactions) and other contexts.

11:00 – 11:45 a.m.

Current Audit Letter Practice

Panelists: *Thomas W. White, Wilmer Cutler Pickering Hale and Dorr LLP (ret.), Washington, D.C.*
Alan J. Wilson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.

Audit letters provided by lawyers in connection with the preparation of their clients’ audited annual financial statements are generally viewed as close relatives of legal opinions, and their preparation and review are often overseen by law firm opinion committees. This session will survey current practice in this area, considering topics such as dealing with government investigations, how to approach materiality determinations, whether loan and other material contract defaults or impending defaults should be addressed in audit letters, how to deal with a matter resolved during the period under audit and how to advise in-house counsel of clients on their duties and responses.

11:45 – 12:00 a.m.

Break to Pick up Lunch

12:00 – 1:15 p.m.

Recent Opinion Developments

Panelists: *Kimberly Desmarais, Jones Day, New York*
Frank T. Garcia, Norton Rose Fulbright LLP, Houston
Donald W. Glazer, Newton
Ettore A. Santucci, Goodman Proctor LLP, Boston
Steven O. Weise, Proskauer Rose LLP, Los Angeles

This session will address a number of recent issues and developments relating to opinion practice, including an update on the implementation of Article 12 of the Uniform Commercial Code, the status of the joint WGLO/ABA Business Law Section Legal Opinions Committee Local Counsel Report, evolving practice regarding opinions on the removal of legends from restricted shares in PIPEs and other transactions, and a review of recent cases and developments of interest to opinion givers and recipients.

1:15 – 2:00 p.m.

Takeaway: Opinion Letters that Affect Contract Rights – Another Look at the Williams and Bandera Cases

Arthur Norman Field, Field Consulting LLC, New York

Third-party and client opinions provide information or advice to the recipient. But in some instances, such as in the *Williams* and *Bandera* cases, they also affect the rights of other parties to a contract to which the opinion recipient is a party. This takeaway session will explore issues related to the question of why the courts apply one standard (negligence) when the claim is made by a party with a right to rely on an opinion letter and another standard (good faith) when a contract party claims that the same opinion letter does not meet the requirements of the contract.

2:00 – 3:15 p.m.

Concurrent Sessions

(1) **Current Practice Trends: Insights from the 2019 Survey of Law Firm Opinion Practice**

Co-Chairs: *Arthur A. Cohen, Haynes & Boone, LLP, Washington D.C.*
Donald W. Glazer, Newton
John B. Power, California

Most law firms have practices and procedures in place to stay current on the substantive law and facts addressed in third-party opinion letters and to monitor customary practice in giving those opinions. It is harder, however, to get information regarding the opinion practices followed by other firms in managing risk in their opinion practice. Participants in this session will discuss a series of questions arising out of the results of a 2019 national survey of firm opinion practice conducted by the ABA Business Law Section's Legal Opinions Committee. The committee received survey responses from about 300 geographically diverse firms of all sizes. The survey was designed and implemented in a way that would not establish customary practice but would rather show the range and prevalence of various approaches by different size firms in a variety of geographic locations. In the course of this session, participants will discuss issues arising from the variety of responses and the ways in which those responses were expected and surprising.

[Concurrent sessions continued next page]

(2) **Forms of Legal Advice and Comfort: Opinions, Memoranda, Etc.**

Co-Chairs: *Justin G. Klimko, Butzel Long PC, Detroit*
James A Smith, Foley Hoag LLP, Boston
Robert A. Wittie, K&L Gates LLP, Washington, D.C.

In addition to formal third-party closing opinions, a law firm is often asked to provide “opinions,” memoranda, or other legal advice to a client in situations where the firm expects, or has reason to believe, that a client will share the advice with investors, counterparties, customers or regulators, either to persuade or provide comfort to third parties. Notwithstanding the expectation that the advice will be shared, the firm may address it only to the client and may even explicitly provide that the advice is intended solely for the client; in other situations, such as a diligence memorandum, the firm might share the information with the third party directly, either on a reliance or non-reliance basis. Unlike traditional third-party closing opinions, this type of advice may be provided by members of firm practice groups who do not regularly deal with third-party opinions and the issues they raise. This breakout session will be a forum for sharing experiences and ideas for identifying and managing these situations, including whether second partner or opinion committee review is required, considerations that should be addressed in the course of any such review, how counsel’s duty to the client relates to its possible duty to a third party receiving a copy of the advice, and risk management issues generally.

3:15 – 4:15 p.m.

Current Ethics Issues Relating to Opinions

Panelists: *William T. Burke, Williams & Connolly LLP, Washington*
David L. Miller, Pillsbury Winthrop Shaw Pittman LLP,
Northern Virginia
Craig D. Singer, Williams & Connolly LLP, Washington

This session will address the duties of lawyers when representing clients in financial distress, focusing on ethics issues that may arise when lawyers represent distressed companies attempting to dig themselves out of a hole. Panelists will consider a number of scenarios and related questions. Attendees will be encouraged to ask questions and contribute their own experiences during the course of this session.

4:15 – 5:00 p.m.

Closing and Cocktails

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