

## **BACKGROUND STATEMENT REGARDING THE MICHIGAN AD HOC COMMITTEE ON LEGAL OPINIONS**

### **SUMMARY**

The Business Law Section's Ad Hoc Committee on Legal Opinions in Business Transactions has been revised under the name "Michigan Ad Hoc Committee on Legal Opinions." The Committee developed and published an August 1, 1991 document entitled "Report of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions" (the "1991 Report"). The revived Ad Hoc Committee will study and report on closing opinion matters in the wake of the substantial activity in this area at the state and national level since the issuance of the 1991 Report. The Committee does not intend to issue a new comprehensive report but rather will attempt to further the goal of development of national standards for delivery and interpretation of opinions while identifying Michigan-specific issues that state lawyers should consider.

### **BACKGROUND**

Issuance of the 1991 Report was made in the context of widespread activity at the time among state and local bar associations as well as the national "Silverado" project. These activities involved study and reporting on the forms and meanings of legal opinion letters typically delivered at the closing of business transactions. There was significant sentiment, first crystallized in a 1973 article by James J. Fuld,<sup>1</sup> that while such opinion letters tended to follow fairly routine forms, there was no consensus among practitioners as to the specific meanings of key provisions included in the letters, the level of investigation and responsibility attached to delivering those opinions or the appropriateness of requesting various specific opinions.

The Ad Hoc Committee had been appointed in 1989 to study the issue with regards to Michigan. Other bar associations and professional organizations had issued reports on opinion practice, some of which were quite lengthy. Also, at the time the 1991 Report's release, the ABA Legal Opinion Accord had been published in draft form. The Accord was an ambitious undertaking arising from the so-called "Silverado" project and promulgated by the ABA Legal Opinions Committee. The Accord contained a comprehensive explication of opinion issues with the goal that opinion givers and recipients would routinely incorporate it by reference into transaction opinions. This, it was hoped, would standardize both the form and interpretation of such opinions as well as streamlining them by allowing elimination of the many assumptions and qualifications that had come to be incorporated into opinions as a matter of customary practice.

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<sup>1</sup> *Legal Opinions in Business Transactions – An Attempt to Bring Some Order Out of Some Chaos*, James J. Fuld, 28 Bus. Law. 915 (1973).

The 1991 Report consisted of Part I, a 30-page discussion of issues arising in connection with transaction opinions, and Part II, a 3-page set of interpretative guidelines intended to be incorporated by reference into opinions. The 1991 Report was designed to be used in tandem with the ABA Accord or on a stand-alone basis.

The ABA Accord never achieved widespread acceptance as a document to be incorporated by reference into legal opinions. Part of the problem was the length and complexity of the Accord, which limited its practical usefulness, as opinion recipients did not want to have to study and become familiar with it. Money-center banks especially refused to accept Accord-based opinions. While the Accord continued to be consulted as a resource by opinion givers and recipients, it never achieved its originally intended use. Incorporation by reference of the much-shorter Part II of the 1991 Report did gain some acceptance in the 1990's, but it is no longer used in that fashion.

Since the release of the 1991 Report, there have been numerous other efforts to inform lawyers regarding practices and interpretations applicable to legal opinions in business transactions. The ABA Legal Opinions committee has grown into quite a large and active body and has published several documents relating to opinion practice. Chief among these have been the opinion principles, the opinion guidelines and the recently-published statement on customary practice.<sup>2</sup> These documents have been much shorter statements of general applicability to opinion practice. They have noted the existence and importance of the customary practice of lawyers involved in the giving and receipt of transaction opinions in interpreting the meaning of opinion language and defining the traditional scope of opinions and the work that opinion givers are expected to perform in preparing opinions.

Also particularly influential in this area have been the reports generated by the so-called "Tri-Bar Committee." This Committee has issued several reports, some directed to specific aspects of opinions. Its 1998 report<sup>3</sup> relating to opinion practice is considered one of the most influential reports among the outstanding literature.

## **RECENT DEVELOPMENTS**

The Working Group on Legal Opinions ("WGLO") was formed in 2007 as a "big tent" organization devoted to matters related to legal opinions in business transactions. As described on its web site, the mission of the WGLO is "to provide a national forum for the discussion of important issues relating to closing opinions. Participants in the Working Group on Legal Opinions include opinion givers, opinion recipients, the ABA, State and local bars as well as rating agencies and law firm malpractice insurers."<sup>4</sup> The WGLO includes a Law Firm Advisory Board, consisting of law firms that join and pay to participate, and an Association Advisory Board, which includes representatives from

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<sup>2</sup> *Legal Opinion Principles*, 53 Bus. Law. 831 (1998); *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law 875(2002); *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008). The State Bar Business Law Section endorsed the *Statement* and is listed as one of 28 endorsing bodies in the *Statement*.

<sup>3</sup> *Third-Party "Closing" Opinions*, 53 Bus. Law. 591 (1998).

<sup>4</sup> <http://www.abanet.org/buslaw/wglo/home.shtml>.

state and local bar associations, counsel associations and organizations of entities that are typically opinion recipients. The WGLO aims to promote national standards for opinion practice and help identify customary practice as in use in various jurisdictions.

As noted above, numerous state and local bar organizations in other states published their own opinion reports, and a number have been updated or replaced in recent years. Among states that have done so recently are California, Pennsylvania and Maryland. North Carolina and Florida currently have comprehensive reports or updates in process. Some of these updates or new reports are very lengthy documents, running to up to 200 pages.

## **PROPOSAL**

While the 1991 Report is now very old, the Committee does not intend to create a comprehensive update or new report. Though the other state reports are very thoroughly researched and prepared and very well done, we believe that a multiplicity of state reports is not helpful to the goal of developing national standards for the delivery of opinions. Either they agree with the existing literature and therefore do not add usefully to the discussion, or they diverge from the existing literature and defeat the goal of normalization of approaches. This is not to say that there is no role for state input. There are some opinion practices that are unique to state law, and it is highly useful to have a source that identifies and describes these distinctions for the benefit of practitioners in those jurisdictions and opinion recipients receiving opinions from those practitioners. In our view, however, this does not require a comprehensive report that devotes considerable time and effort to treading the same ground, typically with the same results, as the existing literature.

The Committee intends to pursue the following tasks:

- Review the 1991 Report and identify any provisions that have become obsolete or inoperative in light of developments since its issuance.
- Review the existing national literature and, to the extent the Committee judges it appropriate, recommend that literature as useful guidance to Michigan attorneys involved in the preparation and delivery of transaction opinions.
- Determine and make recommendations regarding those areas unique to Michigan law which may require additional consideration or treatment.
- Provide information to Michigan lawyers on Michigan law underlying some of the typical provisions found in transaction opinions. Examples might include the law supporting choice of jurisdiction clauses or the ability to waive jury trial provisions.

The end product would be a report to be published in either the Michigan Business Law Journal or the Michigan Bar Journal and otherwise made available for

distribution to Michigan business lawyers, including through the Business Law Section's web site.