FROM THE LAW SOCIETY OF BRITISH COLUMBIA
SOLICITORS' LEGAL OPINIONS COMMITTEE
OCTOBER, 1992

LEGAL OPINIONS: "THE SILVERADO ACCORD"

The Solicitors' Legal Opinions Committee was constituted for the purpose of reviewing materials previously published with respect to solicitors' opinions and possibly preparing a guide for the assistance of the profession.

The members of the Committee are:

Sandra D. Sutherland, Q.C. (Chair)	Freeman & Company
George P. Reilly (Deputy Chair)	Ladner Downs
Hamish C. Cameron	Bull, Housser & Tupper
Herbert D. Dodd	Farris, Vaughan, Wills & Murphy
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Anne M. Stewart	Blake, Cassels & Graydon
Gordon W. Young	Clark, Wilson

The Committee on Legal Opinions of the Business Law Section of the American Bar Association has now published the *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*.

Report

Most of the 57-page Report is devoted to the Accord, often called the "Silverado Accord." The Accord is comprised of 22 statements of position (*e.g.* assumptions, opinion issue analyses, qualifications, interpretations and limitations) with an introduction and a glossary. Although not part of the Accord, there is also a "Commentary" to assist interpretation for each statement and a "Technical Note" to assist understanding for each statement. The Accord is followed by an *Illustrative Opinion Letter* and by *Certain Guidelines for Negotiation and Preparation of Third Party Legal Opinions*. The Accord is a significant development and the Guidelines are a worthy separate endeavour.

The Report, including the Accord, has been published in Volume 47 of *The Business Lawyer*, November 1991 at page 167. Separate copies are available from the American Bar Association as indicated on the next page.

Accord

The Accord is intended to govern opinion practice in the United States for third party legal opinions which expressly adopt it. Adoption of the Accord is voluntary and appropriate language for adoption is provided. Once the Accord is adopted in an opinion letter, the opinion will be governed by, interpreted in accordance with, and read in conjunction with the Accord. Adoption of the Accord in an opinion does not preclude the giver and recipient of the opinion letter from modifying, limiting or omitting some of the provisions of the Accord.

The Report recommends that use of the Accord be deferred for a reasonable period of time to allow lawyers the opportunity to become familiar with it. The Committee considers that, notwithstanding that recommendation, adoption of the Accord in opinion letters in the United States may soon become commonplace. In addition, although the accord does not deal with legal opinion issues that are unique to international transactions, the Committee considers that there will soon be requests from American attorneys to Canadian lawyers to give or accept opinions governed by the Accord.

The Report acknowledges that state bar groups may in time develop supplements to the Accord to take into account jurisdictional differences in law. The recently formed Subcommittee on Commercial Opinions of the Ontario Business Law Section of the Canadian Bar Association has indicated that it intends to develop an "Ontario Supplement" to be attached to opinions governed by the Accord, to develop an "Ontario Accord" for opinions within Ontario, and eventually (in co-operation with others) to develop a "Canadian Accord" for opinions given in all provinces or between provinces.

The Accord covers much, although not all, of the same ground as the proposed guide upon which the Committee is working although the Accord is not comprehensive and, in particular, does not deal with legal opinion issues on security over real property and personal property security interests.

The Committee anticipates that the Accord will have a profound impact upon all opinion matters in Canada, as well as the United States. Accordingly, to avoid unnecessary conflict and duplication, the Committee has determined that a central part of its proposed guide for the profession will be a "B.C. Accord." We expect that a "B.C. Supplement" to the Accord itself will evolve out of the work on the "B.C. Accord." Work on the "B.C. Accord" will not prevent the Committee from issuing shortly the first two parts of the guide which are currently nearing completion. Those two parts are a commentary on real property opinions and a form of precedent for personal property security opinions.

In the meantime, all those in the profession who deal with transaction opinions should read the Report and those who are likely to be requested to provide opinions to American attorneys should read it soon.

If you are asked to provide or accept an opinion governed by the Accord, the Committee recommends that you familiarize yourself thoroughly with the Accord and, even then, be cautious about agreeing.

Adoption of the Accord in an opinion letter will mean that the opinion is subject to a number of qualifications, exceptions, definitions, limitations on coverage and other limitations which do not appear on the face of the opinion letter but are only to be found in the Accord. For all purposes, the opinion letter must be read in conjunction with the Accord for an understanding of its meaning. In addition, although an opinion governed by the Accord has the advantage (when read with the Accord) of clarity, and possibly certainty, the approach taken to some opinions issues differs from the current practice in British Columbia. Finally, of course, there are likely to be qualifications and limitations which are specific to British Columbia or unique to the transaction which you will wish to add if you are the giver of the opinion and there are likely to be specific legal issues which you will wish the giver of the opinion to address if you are the receiver of the opinion.

Guidelines

The introduction to the Guidelines suggests that the Guidelines should be applied to opinion practice in the United States generally whether or not the Accord is adopted. The Guidelines address many of the ethical issues which arise between lawyers when they are negotiating and preparing opinions. The Committee considers that the Guidelines are excellent and just as relevant to opinions practice in Canada as in the United States. Although the Guidelines mention some of the sections of the Accord for reference purposes, the Guidelines can be read and applied quite separately from the Accord.

With the permission of the American Bar Association, we have reproduced the full text of the Guidelines.

The Committee endorses the Guidelines for third party legal opinion practice in British Columbia, whether or not the proposed "B.C. Accord" or the Accord or any other accord is adopted. The Committee believes that adherence to the Guidelines will reduce conflicts, facilitate resolution and improve practice in the negotiation and preparation of third party legal opinions.

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Copies of the Report, in separate pamphlet form, may be purchased from the ABA Order Fulfillment Sales Department, 750 North Lake Shore Drive, Chicago, Illinois 60611 (Tel: (312) 988-5555) as follows: orders for up to 10 copies, $10.00 (U.S.) per copy; orders for 11 to 24 copies, $7.50 per copy; and orders for 25 or more copies, $5.00 per copy—together with, in each case, $3.95 to cover handling and mailing. Cheques should be made payable to the "American Bar Association." The Committee intends to explore with the Canadian Bar Association whether arrangements can be made to obtain copies of the Report in sufficient volume for resale to the profession.

CERTAIN GUIDELINES FOR THE NEGOTIATION AND PREPARATION OF THIRD-PARTY LEGAL OPINIONS

The Committee on Legal Opinions of the Section of Business Law of the American Bar Association regards the following guidelines as a sound and fair basis, drawn from current custom and practice, for the negotiation and preparation of third-party legal opinions. In the view of the Committee the guidelines, which are not part of the Accord, should apply to opinion practice generally, whether or not the Accord is adopted. The Committee believes that adherence to the guidelines will increase the likelihood that the legal opinion process will culminate in the rendering of a professional opinion that is within the reasonable ability of the Opinion Giver, and satisfies the reasonable needs of the Opinion Recipient.

I. **Negotiation**

A. *Scope and Coverage of Opinion*. The specific legal issues to be addressed in the Opinion Letter and any other information to be included should be negotiatied as early in the Transaction Document preparation phase as is practicable, consistent with the following principles:

(1) *Legal and Factual Matters*. Legal opinions should be (i) limited to questions of law and questions requiring legal judgment and (ii) confined to reasonably specific and determinable matters that are within the professional competence of the Opinion Giver or Other Counsel. Accordingly, any opinion that requires interpretation of financial statements, economic forecasts, engineering and environmental reports or appraisal opinions should not be requested. Although lawyers may furnish comment as to matters of fact, such as information concerning the existence of pending or threatened legal proceedings, they may wish to provide that comment, if no legal issue or professional judgment is involved, in the form of a confirmation as opposed to having it identified or presented as a legal opinion. (See also Sections 1 and 17 of the Accord.)

(2) *Relationship to Transaction*. The specific legal issues sought to be covered should bear a reasonable relationship to the Transaction and, to the extent relevant to the Transaction, to the Client. While the Opinion Recipient is entitled to exercise its discretion regarding the legal issues about which it will request opinion coverage, such issues should be of sufficient importance to warrant the time and expense necessarily involved in addressing each matter.

(3) *Sufficient Specificity*. Legal opinions should be requested only with respect to legal issues that are sufficiently specific as to permit the exercise of professional judgment. An opinion respecting legal compliance in general is neither meaningful nor a reasonable request (see also Section I-B(5) below).

(4) *Summary Request*. A requirement in a Transaction Document that a legal opinion reasonably satisfactory to the Opinion Recipient be delivered at closing, without more, would be inconsistent with the

aim that the specific legal issues to be addressed in the Opinion be established on a timely basis. Absent special circumstances, the parties should avoid this summary request practice. A provision often included with the opinion coverage request concerning additional items (*e.g.*, "and such further matters as [the Opinion Recipient] may reasonably request")—utilized to preserve flexibility with respect to items not at the time reasonably foreseeable—should not, however, be objectionable.

(5) *Materiality*. The concept of materiality is often incorporated into a legal opinion. Sometimes it is used as an adjective modifying a subject (*e.g.*, "material contract," "material litigation" or "material law") and in other instances it is used to describe the magnitude of an effect (*e.g.*, "the Client has obtained all consents, permits and licenses required for the consummation of the Transaction, except for those of such limited importance that the failure to obtain them will not have a materially adverse effect on the business of the Client after closing"). The use of the materiality concept in an Opinion Letter introduces a level of imprecision that may be unavoidable. Where practicable, however, it is preferable that the Opinion Giver and Opinion Recipient agree upon objective standards in order to eliminate the need to use materiality concepts. For example, rather than referring to "material contracts," the Opinion Letter could refer to specific contracts or to contracts by category (*e.g.*, contracts dealing with money borrowed or contracts on file with the SEC) or to contracts providing for future payments aggregating more than a specified dollar amount (*e.g.*, specified percentage of current assets). If a Transaction Document takes this approach, suitable cross-reference thereto may be made. Alternatively, it may be possible to narrow the scope of the opinion to such an extent that use of the materiality concept is not necessary.

(6) *Cost and Other Considerations*. As indicated in the Foreword to this Report, in paragraph 2 under "Premises of Report," cost or other considerations, such as the nautre of the Transaction, may cause the parties to depart from the basic format for the Opinion contemplated by the Accord. This may involve expanding the scope of the Opinion Letter to include one or more of the legal issues otherwise excluded from opinion coverage by Section 19 or the Accord or otherwise (see the last sentence of the Accord's introductory paragraph) or may involve scaling back the scope of inquiry to be made (see Section 2 of the Accord) or a decision not to include a Remedies Opinion (see ¶10.1 of the Accord Commentary). For example, the Opinion Letter might state the substance of Section 10(a)(i) of the Accord and thus deal only with the formation of the contract. In complex asset-based transactions, frequently involving leasing or secured financing transactions, the enforceability opinion is sometimes limited by the so called "generic qualification" (*e.g.*, "certain of the remedial provisions of [the Transaction Document] may be further limited or rendered unenforceable by other applicable laws and interpretations, but in our opinion such laws and interpretations do not, subject to the other exceptions and limitations of this Opinion Letter, make the remedies generally afforded by [the Transaction Document] inadequate for the practical realization of the benefits purported to be provided by such remedies with respect to [the Opinion Recipient's] ability to realize upon the principal benefits or security intended to be so provided by [the Transaction Document] (except for the economic consequence of procedural or other delay)"). (See ¶11.2 of the Accord Commentary.) Modifications and adjustments of this type, if acceptable to the Opinion Recipient, are contemplated by this Report (see Section 21 of the Accord). Concepts of "practical realization" and "principal benefits" do involve a measure of imprecision, but use of these concepts is neither endorsed nor disapproved.

B. *Inappropriate Opinion Requests and Responses*. In both requesting and responding to requests for opinion coverage, Opinion Recipients (and their counsel) and Opinion Givers should be guided by a sense of ethical behavior and professionalism. To that end:

(1) *Golden Rule*. It is inappropriate to request an opinion that the Opinion Recipient's counsel, possessing the requisite expertise (and therefore competence respecting the legal issue), would not render if it were the Opinion Giver. Similarly, it is inappropriate for the Opinion Recipient to be denied an Opinion, otherwise appropriate in the context of the Transaction, that lawyers skilled in addressing the matters under consideration would find within their competence and expertise. These related principles are qualified to the extent indicated below.

(a) If the Opinion Giver has resolved a particular legal issue in a positive way and, as a consequence, is willing as a matter of policy to render the opinion, the foregoing principles may not apply, since the Opinion Giver may be in a position to deliver an Opinion which the Opinion Recipient's counsel would not deliver.

(b) If the Opinion Giver is unable to give an appropriately requested opinion simply because it lacks the necessary expertise, it is appropriate for the Opinion Recipient or its counsel to request that the Client retain Other Counsel for this purpose. The consideration of such retention may properly take into account costs and possibly other considerations (*e.g.*, time constraints). (See also Section II-G below.)

(2) *Scope and Coverage*. Discussion of opinion issues during the Transaction Document preparation phase can produce constructive adjustments in the documentation that further the accomplishment of the parties' negotiated bargains. However, the proper purpose of a third-party legal opinion is to assist in the Opinion Recipient's diligence. It is not to transform the Opinion Giver into a surety for the Client or to serve as a strategic device employed by any party to renew pursuit of its business objectives. Any request that has the effect of making the Opinion more than an expression of professional judgment or that otherwise attempts to obtain overly broad opinion coverage is inappropriate. It is incumbent on the Opinion Recipient to provide a suggested form of legal opinion or list of opinion issues to be discussed at an early stage of the Transaction Document preparation phase, and the Opinion Giver should respond thereto no less promptly than it does to any other aspect of the proposed documentation, either agreeing to render the requested legal opinion, offering a valid justification for delaying its reponse or suggesting a specific counter-proposal. It is inappropriate for the Opinion Giver to defer known comments on the Opinion request simply on the basis that "business points" must be taken care of first. It is also inappropriate for the Opinion Giver simply to refuse to negotiate with respect to the legal issues to be covered by the Opinion or the form in which the Opinion is expressed.

(3) *Known Uncertainty*. With respect to a legal issue of known uncertainty or that poses obviously difficult and uncertain questions of professional judgment, a non-explained opinion should not be requested. The Opinion Recipient should either accept an explained opinion (see Section II-C below) or not require an opinion on the legal issue in question.

(4) *Comprehensive Foreign Qualification*. Where the Client's property and business activities extend beyond the Opining Jurisdiction, it will generally not be cost-effective for the Opinion Recipient to seek an opinion that the Client is qualified to do business as a foreign corporation in all jurisdictions where its property or business activities require qualification. Such an opinion requires an analysis of the Client's property wherever located and business wherever conducted. It further requires an analysis of the "doing business" requirements of each state in which any property is located or any business is conducted, as found in the state's applicable statutes and relevant case law. Unless the Opinion Giver, or a lawyer in its organization, has ongoing responsibility to monitor the Client's "doing business" activities and foreign qualification obligations, this combination of factual and legal analysis, if undertaken *de novo* for purposes of the Opinion, is both difficult and time consuming. Accordingly, the Opinion Recipient should be mindful of the cost involved and the possibility that a satisfactory level of comfort might be achieved through other means. (See also Section I-C(2) below.)

(5) *Comprehensive Legal Compliance*. It is generally inappropriate for the Opinion Recipient to request an opinion to the effect that, in the ownership of its properties and the conduct of its business, the Client is in compliance with all applicable (material) laws, possesses all necessary licenses and permits and satisfies all similar regulatory requirements, or is in compliance with all (material) contractual obligations, such as real and personal property leases. (See also Section 1-A(3) and (5) above and Sections 15 and 16 of the Accord.)

(6) *Negative Assurance*. In a Transaction involving the offering and sale of securities of the Client, a negative assurance (*e.g.*, "based upon [our participation in drafting the Transaction Documents, involvement in the Transaction negotiations, etc.], nothing has come to our attention that causes us to believe …") as to any misstatement or omission of material facts (excluding financial and accounting data) in the basic disclosure document is often provided by the Opinion Giver to parties who may, under certain

circumstances, be held liable for such misstatement or omission. However, the format normally used is other than the traditional legal opinion—even though the communication may involve a professional judgment. This practice is unique to securities offerings and evolved as a method to assist the underwriter in establishing the due diligence defense under Section 11 of the Securities Act of 1933. It has sometimes been extended to disclosure documents for private placements, offshore offerings, offerings of exempt securities, tender offers and mergers. Negative assurance regarding relevant legal or factual aspects of other types of transactions should not be requested.

(7) *Quitclaims*. Upon occasion, the Opinion Recipient will request confirmation that the Opinion Giver, notwithstanding the absence of any investigation or perhaps only casual contact on the Opinion Giver's part with the matters in question during the course of the Client representation, has no knowledge as to one or more legal or factual matters (*e.g.*, title to or liens against property) that would be unfavorable. It is not useful for the Opinion Giver to provide this type of empty assurance with respect to any legal or factual matters as to which the Opinion Giver has had no meaningful involvement, even through appropriately limited by a broadly-worded disclaimer; accordingly, this type of assurance should not be requested.

C. *Questionable Opinion Requests*. Absent special and compelling circumstances, the Opinion Recipient (or its counsel) should not request opinion coverage concerning the following:

(1) *Fraudulent Transfer*. The determination whether a Transaction results in a fraudulent transfer or conveyance depends almost entirely on factual matters as to which counsel is not competent to express an opinion, such as the adequacy of the Client's capital, the intent of the Client to hinder creditors, the solvency of the Client and the Client's ability to pay its obligations as they become due. A fraudulent transfer or conveyance opinion is almost wholly dependent on assumed facts or on certificates. Accordingly, a fraudulent transfer or conveyance opinion is of limited value and should not normally be requested. (See also ¶3.3 of the Accord Commentary.)

(2) *Specific Foreign Qualification and Good Standing*. Verification of the Client's qualification and good standing as a foreign corporation qualified to do business in a particular jurisdiction typically involves neither issues of law nor questions requiring legal judgment, but rather involves the mechanical task of collecting Public Authority Documents—a task usually delegated to a corporation service company—and including copies of them in the closing documents delivered to the Opinion Recipient. Receipt of the Public Authority Documents by the Opinion Recipient should suffice and opinion coverage should not normally be requested. (See also Section I-B(4) above.)

(3) *Concurrence with Other Counsel's Opinion*. Concurrence with the legal opinion of Other Counsel, requiring verification of the substance of that opinion, should not normally be requested. (See also Section 8(f) of the Accord and ¶8.4 of the Accord Commentary.)

(4) *Litigation Evaluation*. Evaluations of the possible outcome of pending or threatened litigation, individually or in the aggregate, should not normally be requested. (See also Section 17 of the Accord and ¶17.5 of the Accord Commentary.)

II. **Preparation**

A. *No Authoritative Format*. No format for third-party legal opinions has authoritative recognition. The initial draft of the substance of the Opinion itself (or a description thereof in a Transaction Document) should provide a reasonable starting point for counsel for the Opinion Recipient and the Opinion Giver to negotiate the scope and substance of the Opinion. The Illustrative Opinion Letter (see above) is intended to assist counsel in establishing such a starting point in cases where the Accord is adopted. Declaration in the Opinion Letter that it is governed by the Accord will make unnecessary inclusion of many of the provisions heretofore customarily set forth in an Opinion Letter. It is the responsibility of the Opinion Giver to make a timely response to the request for coverage as to particular legal issues so that a full and frank discussion of the issues rasied by the Opinion coverage request may ensue without disrupting the proposed schedule for completion of the Transaction.

B. *Presumption of Regularity and Continuity*. If the Client has been in existence for many years, its corporate records with respect to organization and other corporate actions relevant to the Transaction may be incomplete. After establishing this to be the case by reasonable investigation, the Opinion Giver should be permitted to rely upon the presumption of regularity and continuity (see *Rogers v. Hill*, 289 U.S. 582, 591 (1933)); that is to say, where there is no known basis for reaching a different conclusion (other than the fact of incomplete corporate records), reliance upon the presumption of regularity and continuity would be appropriate in the circumstances. Appropriateness should be determined taking into account the reason for the deficiencies in the corporate records (if known) and the importance of the missing records to the opinion being given. If the Opinion Giver considers that reliance on the presumption of regularity and continuity is necessary there should be specific disclosure to that effect in the Opinion Letter (*e.g.*, "In connection with our opinion in paragraph ___ below concerning the due organization of the Corporation, our investigation revealed that certain corporate records concerning [specify the missing records and describe their relevance] were either missing or incomplete. As a consequence, we have relied upon the presumption of regularity and continuity to the extent necessary to enable us to provide that opinion.").

C. *Explained Opinions*. In responding to the Opinion Recipient's requests for opinion coverage, the Opinion Giver is entitled to conclude, in appropriate circumstances, that the response with respect to a particular legal opinion issue should be in the form of an explained opinion. The Opinion Recipient's right to request the opinion coverage is not diminished because the complexity of the subject matter requires an explained opinion.

(1) *Non-Explained Opinion*. A "non-explained opinion" (often referred to as a "clean opinion") refers to a professional judgment regarding a specific legal issue relevant to the Client, the Transaction Documents or the Transaction as to which the Opinion Giver, after appropriate consideration of the facts and the law, is willing to express a professional judgment (subject to the normal assumptions discussed in the Accord and, if applicable, the General Qualifications) in a conclusory manner without the support of any legal analysis set forth in the Opinion Letter. A "non-explained" opinion may be qualified (*i.e.*, subject to specified exceptions in addition to the General Qualifications) or unqualified.

(2) *Explained Opinion*. In contrast, an "explained opinion" (often referred to as a "reasoned opinion") expresses not only a legal conclusion but also provides or summarizes the legal analysis supporting that conclusion. Explained opinions often deal with issues involving legal uncertainties due to the nature of the process (*e.g.*, bankruptcy), conflicting authority or perhaps lack of authority. While an explained opinion may also reach a qualified or unqualified conclusion, the ultimate professional judgment cannot, in either case, be fairly separated from the totality of the opinion provided.

(3) *Presentation of Explained Opinion*. Explained opinions should be an objective analysis rather than an exercise in advocacy. An explained opinion (whether qualified or unqualified) is sufficient to put the Opinion Recipient on notice concerning the uncertainties and limitations described or referred to therein, without regard to the form in which the ultimate professional judgment is expressed. If included in the Opinion Letter, it is often desirable to set the explained opinion off in a separate segment of the Opinion Letter (in narrative form) in order to distinguish it from the presentation of non-explained opinions. If an explained opinion is set forth in a separate letter, it may be advisable to refer in each letter to the other.

(4) *Non-Opinion*. If, in a given case, the Opinion Giver concludes that a requested opinion cannot be given, that fact should be explicitly communicated to the Opinion Recipient. It is inappropriate for an Opinion Giver to recite exceptions, qualifications or reservations concerning the subject matter of an opinion without relating such exceptions, qualifications or reservations to the conclusion reached as to a specific legal issue addressed in the Opinion.

D. *Exceptions, Limitations and Qualifications*. Exceptions, limitations and qualifications applicable to particular provisions of a contract that are not comprehended by the General Qualifications should be specifically set forth in the Opinion Letter and stated to be applicable, as the case may be, to the Remedies Opinion or any other opinion that is affected. (See also Sections 12, 13 and 14 of the Accord.) Some examples are set forth below.

(1) *Matters of Public Policy*. Since *all* statutes and decisions may be said to embody "public policy," an exception as to "other matters of public policy," even if stated expressly, could swallow the entire Opinion. If a matter of public policy (other than, in respect of an Opinion governed by the Accord, one identified by the Accord as within one of the General Qualifications) vitiates a contractual provision, a specific exception is necessary.

(2) *Agreement to Arbitrate Disputes*. Most disputes, including those arising under statutes, can be made subject to arbitration agreements that will be enforceable. A dispute may be pleaded under a variety of legal theories, all involving the same set of facts. Some of these theories may not be subject to resolution by arbitration. If the Opinion Giver has Actual Knowledge that a set of existing circumstances will generate a dispute under a Transaction Document (containing an agreement to arbitrate) that is not subject to arbitration, a specific xception to the Remedies Opinion is necessary. It is not, however, necessary for the Opinion Giver to discuss the differences between arbitration and judicial proceedings.

E. *Financial Interest in or Other Relationship with Client*. Disclosure in an Opinion Letter of the Opinion Giver's financial interest in or other relationship with the Client is a matter as to which there exists no general requirement and has been no consistent practice. However, certain specific requirements and case precedents do exist. For example, Paragraph 702.04 of the New York Stock Exchange Company Manual calls for disclosure of a directorship in an opinion rendered in support of the listing of the Client's securities. In connection with a requirement for the disclosure of a substantial interest in the registrant of counsel for the registrant named in the prospectus as giving an opinion upon the validity of the securities being registered, Instruction 1 to Item 509 of SEC Regulation S-K provides that if the interest of the organization and all attorneys participating in the matter does not exceed $50,000 in the aggregate, such interest will not be deemed substantial and need not be disclosed. See also *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987), in which the court suggests that, at least in the circumstances of that case, the concealment of the Opinion Giver's relationship to the Client (his brother-in-law) might support a charge of fraud. Recognizing the present lack of any common custom of practice regarding this type of disclosure and the complexity of the matter, in terms of the objectives to be served and the difficulties in establishing practical guidelines, this disclosure issue is not addressed in this Report beyond this brief notation regarding the subject.

F. *Client Consent*. Delivery of the Opinion Letter should be made only after the Opinion Giver has satisfied the relevant ethical obligation to the Client to obtain its informed permission to do so. (See, *e.g.*, ABA Model Rules of Professional Conduct, Rule 2.3.) Consent thereto may be inferred from the Transaction Documents and closing arrangements (if delivery of the Opinion Letter is a condition to consummation of the Transaction), but the need for review of the Opinion Letter, and its implications, with the Client should be considered prior to its delivery.

G. *Timeliness and Authority*. As noted in Section I-B(2), professionalism requires that the Opinion Giver and legal counsel for the Opinion Recipient be forthcoming with comments on a proposed form of legal opinion. It is an abuse of the professional relationship for a lawyer on either side to disclose, for the first time late in the negotiation, a lack of authority to resolve an opinion coverage issue. If a matter is beyond the authority of the lawyer conducting negotiations for either side to discuss dispositively (either because an Opinion Recipient refuses to allow its counsel to make concessions or because an opinion committee or similar entity must pass on the requested form and scope of the Opinion for the Opinion Giver), then persons able to make decisions should be made available without undue delay.