

Legal Opinions in Corporate Transactions Affected by FCC Regulation: An Economic Approach

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I. INTRODUCTION

In 1996, the Subcommittee on Legal Opinions (Subcommittee) of the Federal Communications Bar Association (FCBA) published a report on legal opinion practice in corporate transactions where a Federal Communications Commission (FCC) licensee is one of the parties.¹ The *FCBA Report* consists of suggested language for opinions, accompanied by commentary explaining the recommended interpretation of the language.

The Subcommittee's foreword describes the *FCBA Report* as an "attempt[] to reach a consensus on the scope and language of opinions in FCC-related transactions."² According to the Subcommittee, the *FCBA Report* is designed to facilitate negotiation and interpretation of legal opinions issued by communications lawyers.³ "Inspired"⁴ by the efforts of the Business Law Section of the American Bar Association (ABA) to develop the *Legal Opinion Accord*,⁵ the *FCBA Report* cites the *ABA Accord*, particularly its

1. *Report of the Subcommittee on Legal Opinions of the Transactional Practice Committee of the Federal Communications Bar Association*, 48 FED. COMM. L.J. 389 (1996) [hereinafter *FCBA Report*]. The *FCBA Report* reflects the views of the Subcommittee's six members, who received comments from the FCBA's Transactional Practice Committee and other practitioners; the *FCBA Report* does not necessarily reflect the views of the FCBA.

2. *Id.* at 390.

3. *Id.*

4. *Id.*

5. Committee on Legal Opinions, *Third Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) [hereinafter *ABA Accord*]. Pages 224 to 232 of the *ABA Accord* contain "Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions" and are sometimes referred to collectively herein as the *ABA Guidelines*. See *infra* Part III.A. The *ABA Accord* was inspired, in turn, by the publication of, and response to, James J. Fuld, *Legal Opinions in Business Transactions—an Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915 (1973). The task of examining legal opinion customary practice has also been undertaken by the TriBar Opinion Committee (TriBar). The most recent work by TriBar is *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter *TriBar Report*]. The Practising Law Institute held a seminar in May of 1998 following the publication of the *TriBar Report* entitled *Legal Opinions: The Impact of the*

assumptions and definitions, as “a very helpful guide for communications opinions.”⁶

This Article responds to the Subcommittee’s request for comments on the *FCBA Report*.⁷ After a brief background on the role of legal opinions in corporate transactions generally, the major sections of the *FCBA Report* are analyzed, assessing whether it accomplishes its goals and comparing it to the *ABA Accord* and the more recent *TriBar Report*, which presents an exhaustive treatment of legal opinion customary practice. In carrying out this analysis, the Article argues that legal opinions add value to corporate transactions only when a lawyer is the least-cost provider of the information sought. Lawyers should not act as insurers or guarantors of corporate transactions;⁸ to ask lawyers to do so unnecessarily raises the costs of consummating corporate transactions. The Article concludes that the *FCBA Report* diverges in many cases from the *ABA Accord* and the *TriBar Report* without adequate explanation and imposes opinion obligations in many instances where a lawyer is not the least-cost provider of the requested information.

II. LEGAL OPINION PRACTICE

A. *The Purpose of Legal Opinions*

Parties to business transactions frequently look to legal counsel for assurance that the transaction documents are enforceable and comply with applicable laws. Typically, a lawyer delivers an opinion to a party or parties to the transaction other than the lawyer’s client. For example, where the lawyer represents the seller, the lawyer ordinarily gives a legal opinion to a buyer, underwriter, or investor. As such, legal opinions simply provide comfort to the parties to the transaction that the law will not prevent the transaction from being consummated.⁹

TriBar Committee’s New Report on Legal Opinion Practice (co-chairs Arthur Norman Field & Donald W. Glazer). The course materials were published by the Practising Law Institute under the same title and contain much useful material for the study of legal opinion practice. Another useful source for information about legal opinion practice is the recently published *Mortgage Loan Opinion Report*, which relies heavily on the *TriBar Report* and the *ABA Accord* in its examination of legal opinions in commercial mortgage loan transactions and contains a selected bibliography of legal opinion reports. 54 BUS. LAW. 119 (1998).

6. *FCBA Report*, *supra* note 1, at 392.

7. *Id.*

8. See *ABA Accord*, *supra* note 5, at 171, 227, para. I.B(2). See also *TriBar Report*, *supra* note 5, at 608.

9. For a discussion of legal opinion practice from a corporate lawyer’s perspective, see JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS § 8.4 (1975).

Given the highly technical nature of the FCC's regulatory framework, opinion recipients in FCC-regulated transactions often are not satisfied with a general opinion from the company's counsel, which ordinarily is assumed not to address specialized areas of law such as communications regulations. Instead, recipients seek specific assurance that execution, delivery, and performance of the transaction documents will not violate the Communications Act of 1934, as amended (Communications Act), and request that a communications practitioner deliver this opinion. Opinion recipients have also requested communications lawyers to opine on numerous other regulatory matters, such as the status of FCC licenses, FCC proceedings, and compliance by the company with FCC regulations. By their very nature, these opinions require extensive knowledge of factual matters (e.g., whether internal FCC procedures were properly followed when issuing a license or whether the company has violated any FCC regulations in operating its business) and may require the opinion giver to address matters that have little to do with his or her legal training. These requests for nonlegal (i.e., factual) opinions raise questions as to the underlying purpose of legal opinions. Why are lawyers asked to opine as to certain legal or factual matters in connection with corporate transactions? Who, if anyone, benefits from these opinions?

One answer is that lawyers often times are the least-cost provider of the information sought.¹⁰ For example, counsel to seller in a sale of assets is best able to opine as to whether the purchase agreement has been duly authorized and is enforceable against seller in accordance with its terms. For counsel to buyer to answer this legal question through due diligence would require him or her to duplicate work that seller's counsel likely has already undertaken. Similarly, in the context of an underwritten offering of securities, counsel to seller is best able to determine the capitalization of seller and whether the issuance of the securities will violate any provisions of seller's charter or bylaws. To ask counsel to the underwriter to confirm this legal conclusion through due diligence would duplicate the work of seller's counsel.

Although a legal opinion may be viewed as the least-cost source of information in corporate transactions, practically speaking, an opinion may serve other less value-enhancing purposes. For example, a legal opinion might be viewed as insurance (in the form of damages for malpractice or

10. The role of lawyers and legal opinions in corporate transactions was explored in Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984). Professor Gilson argued that "most of the matters on which legal opinions are required reflect the superiority of the . . . lawyer as an information producer." *Id.* at 275. See also LOU R. KLING & EILEEN NUGENT SIMON, *NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS* § 14.09 (1995 & Supp. 1998).

negligence) provided by the firm or lawyer giving the opinion. To the extent that legal opinions operate as insurance, opinion practice arguably subtracts value from corporate transactions; law firms and lawyers are not in the business of providing insurance and to ask them to do so merely adds unnecessary costs to doing deals.¹¹

One use of legal opinions is undeniably efficient—when the lawyer is the *only* source of the information sought. Specifically, because lawyers have a state-sanctioned monopoly for the practice of law, to the extent that a legal opinion addresses a purely legal issue, only a lawyer can give the opinion. Accordingly, requesting an opinion from a lawyer concerning a purely legal issue is an efficient and appropriate use of a legal opinion. Arguably, legal opinions add value to corporate transactions only when the lawyer is the least-cost provider of the information. Because lawyers have a monopoly on pure legal opinions, they are by definition the least-cost producers of such opinions.¹²

B. *Recent Trends*

Delivering overly expansive legal opinions should be of particular concern to lawyers in light of recent case law suggesting that legal opinion practice can expose a lawyer to serious risk of liability. This risk is heightened when the facts upon which the opinion giver relied turn out to be false; courts have shown an increasing willingness to disregard opinion givers' qualifying statements and to hold them liable to nonclients for erroneous statements.¹³

11. Reflecting these conclusions, title insurance has largely replaced legal opinions as to title in real estate transactions. For a discussion of the several factors leading to the ubiquity of title insurance, see Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241 (1997). Title insurance companies are experts in providing insurance; they spread the risk that any one title insurance policy will be inaccurate. Law firms are not in the insurance business and probably do not become involved in sufficient numbers of corporate transactions to spread the risk that any one legal opinion will prove incorrect and subject the lawyer or firm to exposure. Accordingly, to use a legal opinion as an insurance policy is an inefficient use of a lawyer's skills.

12. One other purpose has been suggested for legal opinions: internalizing the costs to lawyers who attempt to place "traps" in an agreement. Thomas L. Ambro & J. Truman Bidwell, Jr., *Some Thoughts on the Economics of Legal Opinions*, 1989 COLUM. BUS. L. REV. 307, 314 ("A firm, knowing that it must provide an enforceability opinion, may be less likely to attempt to place 'traps' in the contract in an attempt to give its client an edge in future dealings.").

13. See Joan Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615, 625 (1988 & Supp. 1996); Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties—at What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 13 (1989); *TriBar Report*, *supra* note 5, at 604 n.29.

Several recent cases illustrate this trend. *Kline v. First Western Government Securities, Inc.*, for example, was an appeal of a summary judgment in favor of the opinion giver where the plaintiffs alleged, *inter alia*, affirmative misrepresentations and material omissions in three legal opinions given to a securities dealer.¹⁴ The opinions addressed the tax treatment of gains and losses incurred by investors in forward contracts.¹⁵

The opinions were addressed to the dealer, not to the investors, and contained the following extensive disclaimers: (1) the opinions are predicated on facts supplied by the client, are assumed to be true, and have not been independently verified; (2) the opinions are for the personal use of the client (i.e., the securities dealer) only, and are not to be relied on by anyone else; (3) the Internal Revenue Service (IRS) and courts likely will challenge the stance taken by the opinion; and (4) the opining attorneys express no opinion about the advisability of the transaction to any particular investor because to do so would be "impossible" without knowing the "individual facts and circumstances affecting the particular taxpayer."¹⁶

Plaintiffs invested in forward contracts, incurred losses, and deducted these losses on their income tax filings. The IRS subsequently disallowed the deductions. Plaintiffs argued that the legal opinions made material misrepresentations and omitted material facts concerning the actual structure of the transactions. In reality, the facts supplied by the dealer to counsel did not accurately portray the substance of the "forward contracts" scheme. Thus, the legal opinion was in some sense "hypothetical"; that is, counsel may have reached an accurate legal conclusion with respect to the facts supplied by the client, but those facts bore an inaccurate resemblance to the underlying transactions into which investors, including plaintiffs, entered.

The Third Circuit reversed the lower court's grant of summary judgment in favor of the opinion giver on the omissions claim and upheld the denial of summary judgment on the misrepresentation claim.¹⁷ It ruled that the investors had standing to sue and could have reasonably relied on the opinion despite the disclaimers contained in the opinion. The court determined

14. *Kline*, 24 F.3d 480 (3d Cir. 1994).

15. Forward contracts are contracts to purchase or sell a specified security at a designated interest rate on a fixed future date.

16. *Kline*, 24 F.3d at 482-83. Two other facts should be noted about *Kline*. First, counsel to the dealer had represented its principals for many years prior to the creation of the "forward contracts" investment scheme and may have been involved in the development of the scheme. Second, counsel was put on notice numerous times that, despite its many disclaimers, investors apparently were obtaining and relying upon counsel's legal opinion in making their investment decisions. However, counsel did not encourage this reliance by investors.

17. *Id.* at 481.

that, due to counsel's alleged "long and close relationship" with the dealer, it may well have known that the facts that the client provided were not a complete and accurate description of the transactions. The court further determined that when a law firm has "good reason to know" that the facts provided are materially inaccurate or incomplete, "it cannot escape liability simply by including in an opinion letter a statement that its opinion is based on provided facts."¹⁸ Finally, the court held that reliance by investors like plaintiffs, notwithstanding the letter's express limitations, may have been reasonable because counsel knew the legal opinion was being distributed to investors. The court concluded that both the misrepresentation and omission claims by plaintiffs should be tried and remanded the case to the district court for further proceedings consistent with its opinion.

In a strongly worded dissent, Judge Greenberg responded that "the majority effectively holds that no matter how thoroughly a law firm conditions its opinion, it may be liable . . . for misrepresentation and omissions."¹⁹ He stated:

In the face of [plaintiffs'] claim, I ask the rhetorical question: how can an investor reasonably rely on opinion letters to anticipate favorable tax treatment when they: (1) are addressed to someone else; (2) are by their terms only for the use of someone else; (3) by their terms cannot be shown to the investor; (4) are predicated on facts not supplied by the author of the letters; (5) warn that the IRS likely will challenge the claim for favorable treatment as it has in similar situations; (6) explain the basis for the challenge; (7) state that the courts might take a strong stance contrary to the opinion; and (8) flatly announce that it is "impossible" for the author of the letter "to express an opinion as to the deductibility of any particular loss incurred by" an investor? The answer is obvious. The investors could not rely reasonably on such letters, and thus [counsel] is entitled to summary judgment on the Section 10(b) claims. In my view, nothing could be clearer.²⁰

A few harsh lessons emerge from *Kline*. First, correct legal conclusions are not a complete shield from liability for an opinion giver, who may be held accountable for a client's misrepresentations. Second, no matter how specifically, repeatedly, and clearly stated a disclaimer is, it may not be a sufficient basis for avoiding a trial on the merits. Thus, at least in those cases where an opinion giver has an ongoing relationship with a client, a disclaimer concerning "no independent investigation of facts" may be ineffective to avoid an evidentiary inquiry as to the lawyer's actual knowledge. Third, attempting to limit use of the legal opinion solely to the client's pur-

18. *Id.* at 487.

19. *Id.* at 499 (Greenberg, J., dissenting).

20. *Id.* at 498 (Greenberg, J., dissenting) (footnote omitted).

poses may have no effect, especially where counsel is on notice that third parties are relying on the legal opinion.

In another recent case, *Petrillo v. Bachenberg*, the New Jersey Supreme Court confirmed this trend toward expanded liability of lawyers to nonclients.²¹ In *Petrillo*, the court concluded that an attorney may be held liable for negligent compilation of an environmental report that he had given to a realtor in connection with an earlier transaction. The attorney's office had prepared a composite including some, but not all, tests performed by an engineering firm on land the client wanted to sell. The realtor was unsuccessful in selling the land, but he ultimately bought the land at an auction. He then sold the land to the plaintiff after giving her the environmental report without the attorney's knowledge. When plaintiff's tests revealed environmental damage, she sued the attorney of the original seller for not including all the tests in the composite report.

Although the trial court directed a verdict for the attorney, holding that he had no duty to the second buyer (plaintiff), the appellate court reversed, and the New Jersey Supreme Court affirmed that attorneys owe a duty to all nonclients who they should foresee may rely on their professional opinions or promises.²² According to the court, the attorney should have foreseen that the realtor would give the report to a potential seller who might rely on it as a complete compilation, and that, because the attorney represented the realtor in the second transaction, the plaintiff was not too remote from the attorney to rely on the report.²³

Noting the trial court's finding that the attorney was unaware that the report was given to the plaintiff and that the plaintiff testified that she in fact did not rely on the report in purchasing the property, dissenting Judge Garibaldi vigorously disagreed that the harm was foreseeable and that the attorney owed a duty of care to the plaintiff. He wrote:

Under the majority's opinion, an attorney may owe a professional duty to non-clients to oversee the care used in collating pages from their law office files. While an attorney should not be exempt from the need to exercise the same ordinary care that others do with respect to non-professional functions such as this, there should be no special duty arising from the fact that the source of this information is an attorney Although attorneys may be liable to non-clients for their own professional work, they are not and should not be guarantors of the accuracy of surveys or other similar experts' reports that they merely transmit.²⁴

21. *Petrillo*, 655 A.2d 1354 (N.J. 1995).

22. *Id.* at 1358.

23. *Id.* at 1361-62.

24. *Id.* at 1366 (Garibaldi, J., dissenting).

A third recent decision provides additional evidence of a trend toward liability to nonclients for misrepresentations of fact. In *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, counsel for the town of Winter Park, Colorado, provided plaintiff, a purchaser of municipal notes, with opinion letters erroneously concluding that a pending lawsuit against the town had no merit.²⁵ The Colorado appellate court reversed the trial court's dismissal of the case for failure to state a claim, despite the fact that it recognized that expressions of opinion generally cannot support a misrepresentation claim.²⁶ In affirming, the Supreme Court of Colorado determined that the attorneys could be liable for negligent misrepresentation *of fact* (specifically, by not investigating whether certain required hearings had been held). The supreme court further ruled that the plaintiff may have relied on the alleged misrepresentation even though plaintiff had submitted a letter to the town stating that it was relying on its own investigation of all material facts relating to the transaction.²⁷ Referring to the majority opinion, dissenting Judge Rovira wrote, "[w]hile counsel was aware that the opinions would be relied upon to evaluate the merit of the existing lawsuit and the risk of harm, nowhere . . . does [the record] indicate that counsel knew the purpose of the opinion was to transform them from advisors to insurers" of the investment.²⁸

Given the lessons of these cases—particularly the ineffectiveness of disclaimers and the expanding duty to third parties—it is incumbent upon opinion givers to limit legal opinions to matters about which they have knowledge and to resist unreasonable demands for opinions that convert them into insurers.²⁹ From an economic perspective, this means limiting le-

25. *Mehaffy*, 892 P.2d 230 (Colo. 1995).

26. The court cited *Van Leeuwen v. Nuzzi*, 810 F. Supp. 1120 (D. Colo. 1993) (misrepresentation claim generally cannot be based on expression of opinion) and *Chacon v. Scavo*, 358 P.2d 614 (Colo. 1960). "[R]epresentations as to whether certain lots were usable as building sites required an interpretation of the relevant city ordinances, and were not actionable because they were representations of law." *Mehaffy*, 892 P.2d at 237 (citing *Chacon*, 358 P.2d 614). See also Laurie G. Goldstein & Steven O. Weise, *Liabilities for Issuing Opinion Letters*, in *LEGAL OPINIONS—ACCORD OR DISCORD 4* (ABA Section of Bus. Law ed., 1992), citing *Kirsch v. Duryea*, 578 P.2d 935, 938 (Cal. 1978) ("The attorney is not liable for every mistake he may make in his practice; he is not . . . an insurer of the soundness of his opinions . . ."); SCOTT FITZGIBBON & DONALD W. GLAZER, *FITZGIBBON & GLAZER ON LEGAL OPINIONS* § 1.3.2, at 9 (1992 & Supp. 1999) ("Lawyers may be liable for negligence, but they are not liable merely for being wrong.")

27. *Mehaffy*, 892 P.2d at 238-39.

28. *Id.* at 243 (Rovira, J., dissenting).

29. Other jurisdictions have also expanded lawyers' duties to nonclients. See, e.g., *Donahue v. Shughart, Thomson & Kilroy*, 900 S.W.2d 624 (Mo. 1995) (holding that intended beneficiaries of a lawyer's services, even though they were not clients of the lawyer, have a cause of action for malpractice against the lawyer if, among other things, the harm to the plaintiffs was "foreseeable"); *Kirkland Const. Co. v. James*, 658 N.E.2d 699

gal opinions solely to legal issues where the opinion giver is clearly the least-cost source of the information sought.

III. THE LEGAL OPINION ACCORD AND THE *TRIBAR REPORT*

A. *The ABA Accord and ABA Guidelines*

The *ABA Accord*, an illustrative opinion letter incorporating it, and the *ABA Guidelines* together constitute the *Third Party Legal Opinion Report*, adopted by the ABA's Council of the Business Law Section in 1991. The *ABA Accord* resulted from two years of drafting and revising by "a representative group of [seventy-one] knowledgeable practitioners" in conjunction with comments solicited from the Business Law Section's 60,000 members.³⁰ The *ABA Accord* was designed as "the first step toward the establishment of a national consensus as to the purpose, format and coverage of a third-party legal opinion, the precise meaning of its language and the recognition of certain guidelines for its negotiation."³¹

The drafters of the *ABA Accord* styled the set of recommended opinions as an accord so that attorneys could, with necessary modifications, incorporate it or request it as the legal opinion to be used in their transactions, thereby saving drafting and negotiating time, as well as the costs of litigation over interpretation.³² The *ABA Accord* is accompanied by a glossary, and each section has a separate commentary and technical note providing guidance on interpretation of the particular section. The *ABA Accord* is designed as an "opt-in" set of default rules. Thus, the *ABA Accord* governs only those opinions that expressly adopt it.

Based on a 1995 survey by the ABA's Committee on Legal Opinions, few attorneys apparently have invested the time necessary to study the *ABA Accord* in the detail required to give or receive an *ABA Accord* opinion.³³ Of

(Mass. App. Ct. 1995) (holding that a lawyer owes a duty to a nonclient who he or she reasonably can foresee will rely on the lawyer's services).

30. *ABA Accord*, *supra* note 5, at 169. See also A.N. Field, *The ABA Opinion Report's Influence on Non-Accord Opinions*, in LEGAL OPINIONS—ACCORD OR DISCORD ch. 7 (ABA Sec. of Bus. Law ed., 1992).

31. *ABA Accord*, *supra* note 5, at 169.

32. *Id.* See also Stanley Keller, *The ABA Legal Opinion Accord: A Critical Commentary*, in BUSINESS OPINIONS 1992: THE USE AND IMPLICATIONS OF THE ABA ACCORD AND GUIDELINES 385 (Prac. L. Inst. Apr.-May 1992).

33. In an effort to document the *ABA Accord's* use and reputation, the ABA's Committee on Legal Opinions surveyed law firms across the country in 1995. Committee on Legal Opinions of the Section of Business Law of the American Bar Association, Results of June 1995 Survey on Use of Legal Opinion Accord [hereinafter Survey]. Some responses do not total 100% because not all questions were answered. Of the 109 firms that responded, 13 give *ABA Accord* opinions "regularly," 55 give them "sometimes," and 36 had

those firms that had offered an *ABA Accord* opinion that was rejected, the reason stated was “not familiar” or “too complicated” in seventy-nine of ninety-four responses.³⁴ On the other hand, the great majority view the *ABA Accord* as authoritative: 79 percent responded that they use the *ABA Accord* as a “normative guide” in asking for and giving opinions.³⁵

The *ABA Guidelines*, which accompany the *ABA Accord*, represent, in the view of the *ABA Accord*'s drafters, “a sound and fair basis . . . for the negotiation and preparation of third-party legal opinions.”³⁶ Unlike the *ABA Accord*, which, as noted above, was intended to be an “opt-in” set of default rules, the *ABA Guidelines* were written to apply generally to all opinion practice, regardless of whether the *ABA Accord* was adopted in the particular transaction at issue. Although the *ABA Accord* “has not gained the national acceptance the [Committee on Legal Opinions of the ABA] had hoped,” the *ABA Guidelines* “are frequently looked to for guidance regarding customary legal opinion practice.”³⁷ They were drawn from custom and offered as principles to which all legal opinion practice should adhere.³⁸

Some of the more important and relevant *ABA Guidelines* are:

- [1.] *Scope and Coverage*. [T]he 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 Client³⁹
- [2.] *Legal and Factual Matters*. Legal opinions should be . . . limited to questions of law and questions requiring legal judg-

never given an *ABA Accord* opinion. *Id.* The relatively low number of firms that report regularly giving *ABA Accord* opinions may reflect dissatisfaction not with the *ABA Accord*'s content, but with its length and complexity. See Joel I. Greenberg, *Third Party Legal Opinions Under ABA Accord*, N.Y. L.J., Aug. 16, 1993, at 1; Michael Gruson, *The Remedies Opinion in International Transactions*, 27 INT'L LAW. 911, 915 (1993).

34. Survey, *supra* note 33, at 2. The other responses were: “favors Opinion Giver” (15) and “favors Opinion Recipient” (1). Multiple responses were allowed.

35. *Id.* The fact that the *ABA Accord* remains one of the 10 most frequently used publications of the ABA is testimony to its continued influence. See ABA, *ABA Publishing* (visited Mar. 15, 1999) <<http://www.abanet.org/abapubs/home.html>>.

36. *ABA Accord*, *supra* note 5, at 224.

37. *Legal Opinion Principles*, 53 BUS. LAW. 831, 831 (1998) [hereinafter *Legal Opinion Principles*]. The *Legal Opinion Principles*, which were also published by the Committee on Legal Opinions of the ABA and comprise just two pages of maxims regarding legal opinion practice, are generally consistent with the *ABA Guidelines* and the *TriBar Report*.

38. Numerous articles, treatises, and state bar associations refer to the *ABA Guidelines* as authority. See, e.g., FITZGIBBON & GLAZER, *supra* note 26, at xxxvi; Michael Gruson, *Legal Opinions: Response to the American Bar Association's Opinion Accord*, in INTERNATIONAL COMMERCIAL AGREEMENTS 391 (Prac. L. Inst. 1993); State Bar of Texas, Business Law Section, *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 29 BULLETIN 1 (1992).

39. *ABA Accord*, *supra* note 5, at 227, para. I.B(2).

ment. . . . [A]ny 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 . . . in the form of a confirmation⁴⁰

- [3.] *Comprehensive Legal Compliance.* It is generally inappropriate for the Opinion Recipient to request an opinion to the effect that . . . the Client is in compliance with all applicable (material) laws, possesses all necessary licenses and permits and satisfies all similar regulatory requirements⁴¹
- [4.] *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 . . .) . . . is often provided by the Opinion Giver Negative assurance regarding relevant legal or factual aspects of other types of transactions should not be requested.⁴²
- [5.] *Quitclaims.* Upon occasion, the Opinion Recipient will request confirmation that the Opinion Giver, notwithstanding the absence of any investigation . . . has no knowledge as to one or more legal or factual matters . . . that would be unfavorable. It is not useful for the Opinion Giver to provide this type of empty assurance . . . even though appropriately limited by a broadly-worded disclaimer; accordingly, this type of assurance should not be requested.⁴³
- [6.] *Litigation Evaluation.* Evaluations of the possible outcome of pending or threatened litigation, individually or in the aggregate, should not normally be requested.⁴⁴

These *ABA Guidelines* highlight principles that are consistent with the economic approach to legal opinions. First, the *ABA Guidelines* state that legal opinions should not be used to transform the opinion giver into a surety or guarantor for the client. As noted above,⁴⁵ lawyers ought not to be in the business of providing insurance to third parties for their clients in connection with transactions. Requiring lawyers to do so needlessly raises the cost of consummating corporate transactions. Second, the *ABA Guidelines* state

40. *Id.* at 224, para. I.A(1).

41. *Id.* at 228, para. I.B(5).

42. *Id.* at 228, para. I.B(6).

43. *Id.* at 228, para. I.B(7).

44. *Id.* at 229, para. I.C(4).

45. *See supra* notes 8 and 11 and accompanying text.

that legal opinions should be limited to questions requiring legal judgment.⁴⁶ As noted above,⁴⁷ the best example of where a lawyer is the least-cost provider of information is where the lawyer is exercising legal judgment; lawyers have a licensed monopoly on legal judgments, and thus, there is no less expensive means of acquiring the information. Third, the *ABA Guidelines* recognize that, in very limited circumstances, a lawyer may be the least-cost provider of certain factual information for purely practical reasons.⁴⁸ The *ABA Guidelines*, however, recommend that lawyers commenting on matters of fact should provide such comments in the form of a confirmation.⁴⁹ Providing the information in the form of a confirmation rather than a legal opinion properly reinforces the economic notion that lawyers ought not certify facts in legal opinions and should only address those factual matters as to which they are the least-cost source of the information.

B. *The TriBar Report*

The *TriBar Report* is the latest effort of the TriBar Opinion Committee (TriBar) to provide guidance as to customary practice in giving and receiving legal opinions.⁵⁰ The *TriBar Report* synthesizes recent legal opinion literature, changes in corporate law and practice, and developments in legal opinion practice.⁵¹ The *TriBar Report* is, according to TriBar, generally consistent with the *ABA Guidelines*.⁵² The goal of the *TriBar Report* is to provide guidance on customary legal opinion practice, both as to the language used in opinion letters as well as the factual and legal investigation required to support particular opinions.⁵³

A section-by-section analysis of the *FCBA Report* follows, which is based on the *Accord* (and *ABA Guidelines*), which inspired the *FCBA Report*, and on the more recent *TriBar Report*, which was issued two years after the *FCBA Report*. As will be apparent, the authors of the *FCBA Report* in many respects have chosen not to follow the approach of the *ABA Accord* and the *TriBar Report*. In addition, in many cases where the *FCBA Report* diverges from the *ABA Accord* and the *TriBar Report*, the *FCBA*

46. *ABA Accord*, *supra* note 5, at 224, para. I.A(1). *See generally TriBar Report*, *supra* note 5, at 608-19.

47. *See supra* Part II.A.

48. For example, a lawyer is a likely source of information regarding the existence of litigation. *See ABA Accord*, *supra* note 5, at 224, para. I.A(1).

49. *Id.*

50. *TriBar Report*, *supra* note 5, at 592.

51. *Id.* at 593.

52. *Id.* at 593 n.3.

53. *Id.* at 595.

Report has chosen an inefficient position with respect to the use and scope of legal opinions in corporate transactions regulated by the FCC.

IV. NON-TRANSACTION-SPECIFIC OPINIONS

A. FCBA Report, *Paragraph I.A Licenses Held*

The *FCBA Report* offers two alternative formulations of the “licenses held” opinion often requested in FCC-related legal opinions. These two formulations are discussed in turn.

Option 1:

The Company holds the FCC licenses, permits, and authorizations specified on Exhibit A (the “FCC Licenses”).⁵⁴

The Subcommittee states in its commentary on the “licenses held” opinion that “[i]n normal cases, the opinion requires that counsel confirm that the relevant file records for each FCC license reflect the Company as the holder”⁵⁵ Typically, to determine whether a company holds certain licenses, an attorney instructs a legal assistant to review the publicly available records at the FCC.⁵⁶ This task presents no exercise of professional judgment or resolution of a question of law requiring a lawyer’s skill and training. Instead, the opinion giver is being asked to make a highly factual determination. This observation about the “licenses held” opinion immediately suggests that the opinion is economically inefficient; the opinion involves little, if any, legal judgment, and the lawyer is being asked to certify facts as to which he or she likely is not the least-cost source of the information. As the ensuing discussion demonstrates, the “licenses held” opinion almost certainly creates unnecessary costs in FCC-regulated transactions.

Despite its acknowledgment that the “licenses held” opinion requires reliance on FCC records, the Subcommittee recognizes the “vagaries of the FCC’s public reference rooms” and states that the FCC’s records can be “incomplete.”⁵⁷ Given this observation, it is difficult to understand why the Subcommittee considers licenses held to be the proper subject of a legal

54. *FCBA Report*, *supra* note 1, at 393.

55. *Id.* at 394.

56. Because the FCC does not ordinarily send copies of licenses when issued to attorneys and a client may have obtained licenses without the attorney’s assistance, an opinion giver’s files would not be a reliable source of information upon which to base the “licenses held” opinion.

57. *FCBA Report*, *supra* note 1, at 391.

opinion. Attorneys have no control over the FCC reference rooms and rarely can rely on a reference rooms search to be conclusive evidence of anything. The highly unreliable set of facts with which an opinion giver is presented when giving a “licenses held” opinion, coupled with the factual nature of the determination, suggests that the opinion giver is not the least-cost source of information. In addition, given the lessons of recent case law discussed above,⁵⁸ practitioners who give such “licenses held” opinions, knowing that the facts upon which they are relying may be highly inaccurate, risk exposure to legal malpractice liability. Accordingly, the “licenses held” opinion is not an appropriate subject for legal opinions.

Given the realities of public record keeping generally, the *ABA Accord*, unlike the *FCBA Report*, presumes that “all official public records (including their proper indexing and filing) are accurate and complete.”⁵⁹ Likewise, the *TriBar Report* asserts that “[a] public official is assumed to understand (and to have undertaken the appropriate diligence to support) the statement of ultimate fact (conclusion of law) contained in [a] certificate.”⁶⁰ These assumptions likely reflect a recognition that an opinion, such as a “licenses held” opinion, would necessarily expose an attorney to liability for mistakes by government clerks. This exposure is inconsistent with the premise of the *ABA Accord* and the *TriBar Report* that the opinion giver should not become an insurer or guarantor of the transaction.⁶¹ In short, the *FCBA Report*’s endorsement of a “licenses held” opinion is inconsistent with the approach of the *ABA Accord* and the *TriBar Report*.

In recommending the “licenses held” opinion, the *FCBA Report* does not address its departure from the *ABA Accord*’s presumption that public records are accurate and complete; it considers only the issue of whether verification of licenses requires “some legal judgment.”⁶² According to the Subcommittee, a legal opinion may be necessary because “counsel may need to track transfers of control, renewals, and name changes.”⁶³ It characterizes this license verification process as “akin to a real estate title search.”⁶⁴

As noted above, however, attorneys today, for good reason, rarely render real estate title opinions; rather, current practice is for purchasers to ac-

58. See discussion *supra* Part II.B.

59. *ABA Accord*, *supra* note 5, at 186.

60. *TriBar Report*, *supra* note 5, at 612.

61. See *supra* notes 8 and 11 and accompanying text.

62. *FCBA Report*, *supra* note 1, at 393.

63. *Id.*

64. *Id.* The *FCBA Report* elsewhere states, however, that the “licenses held” opinion does not require the opinion giver to address whether there have been defects in the chain of title prior to issuance of the license to the particular licensee. *Id.* at 395.

quire title insurance.⁶⁵ To the extent that the Subcommittee equates verification of licenses held to a title search, it suggests that the opinion giver is expected to act in the capacity of insurer. Given the admonition of the *ABA Accord* and the *TriBar Report* against transforming the opinion giver into an insurer,⁶⁶ the title search analogy is inappropriate and suggests an inefficient approach to legal opinion practice.

Opinion recipients, particularly lenders, express concern that if the status of the licenses is not addressed by the company's counsel, they will be unable to obtain the assurance they need to complete the transaction. This concern may be based on the assumption that the necessary factual investigation may be completed by reference to the files of the opinion giver or the company. In fact, as noted above, the opinion requires examination of the FCC's public records. Thus, the opinion giver is not the least-cost source of the information. Lenders could hire their own counsel or research service to acquire this information. It is doubtful that company counsel is in a position to complete the requisite due diligence any more efficiently than counsel (and legal assistants) engaged by the lender. In addition, as any attorney who has negotiated a legal opinion can attest, the vast majority of the time spent on the legal opinion involves the particular verbal formulation of the issues. If lenders hired their own counsel to perform the due diligence, these negotiating costs (which amount to a deadweight social loss) would be eliminated. Furthermore, lender's counsel is far more likely to be able to help his or her client (the lender) reach the comfort level he or she requires to do the deal, since their interests are aligned and they will be proceeding in a cooperative rather than adverse manner.⁶⁷

In view of its ubiquity in current practice, however, the "licenses held" opinion may be unavoidable for communications lawyers. If so, the *ABA Accord* would suggest that the issue be approached as a factual confirmation

65. See *supra* note 11.

66. See *supra* notes 8 and 11 and accompanying text.

67. In addressing the issue of foreign qualification and foreign good standing of corporations in legal opinions, the *TriBar Report* similarly concludes that opinion practice would be more efficient if opinion recipients undertook to obtain certain of the information they seek directly rather than rely on the opinion giver:

Because opinion preparers customarily base foreign qualification and foreign good standing opinions solely on certificates of government officials, which normally are presented at closing, those opinions usually add little (if anything) of value other than confirming that the opinion preparers do not know the certificates on which the opinions are based to be unreliable. The Committee believes that the opinion process could be streamlined without any meaningful detriment to opinion recipients if absent special circumstances the practice of rendering foreign qualification and foreign good standing opinions were discontinued and opinion recipients were to rely directly on the certificates themselves.

TriBar Report, *supra* note 5, at 647.

rather than a legal opinion.⁶⁸ The *ABA Accord*, for example, recommends that matters requiring no exercise of professional judgment, such as the existence of pending litigation, should be presented not as an opinion, but as a confirmation qualified by a statement describing the limited investigation performed.⁶⁹ Stating as “opinion” that the client holds certain licenses is apt to mislead the recipient into believing that professional judgment was exercised. Accordingly, if the matter of licenses held must be addressed, the opinion giver should provide merely a confirmation and should note his or her reliance on the FCC’s files and the possible inadequacy of these files. Unfortunately, given the existence of cases like *Kline*, *Petrillo*, and *Mehaffy*, opinion givers must be extremely careful to circumscribe their duties in such factual confirmations, and even then, they may be subject to substantial risk.

Option 2:

The Company validly holds the FCC Licenses, permits, and authorizations specified on Exhibit A (the “FCC Licenses”).⁷⁰

As optional recommended language, the *FCBA Report* states that counsel may opine that the company “validly” holds the FCC licenses.⁷¹ Option 2 is identical to Option 1 except for the addition of the word “validly.” The Subcommittee does not, however, identify the circumstances when it believes an attorney should give the “validly holds” opinion.

The Subcommittee defines “validly” to mean (1) that the FCC followed regular FCC procedures in conformity with prior FCC practice in licensing the company, and (2) “that there is no legal basis to conclude that the Company cannot hold [the license] as a matter of law.”⁷² Recognizing that the term “validly” is subject to misinterpretation, the Subcommittee suggests that attorneys may wish to avoid the term and simply address the two enumerated issues. In the Subcommittee’s view, “the addition of the word ‘validly’ necessarily involves the exercise of legal judgment”⁷³

Whether opining as to “validly holds” or opining as to the two identified meanings of “validly,” the opinion giver must grapple with exceedingly difficult issues in the “licenses validly held” opinion. The first enumerated

68. In this regard, the *TriBar Report* notes that “[s]ome opinion givers believe that statements dealing primarily with factual matters should be referred to as ‘confirmations’ rather than opinions.” *TriBar Report*, *supra* note 5, at 598 n.16.

69. *ABA Accord*, *supra* note 5, at 213.

70. *FCBA Report*, *supra* note 1, at 394.

71. *Id.*

72. *Id.* at 395.

73. *Id.* at 394-95.

issue compels the opinion giver to evaluate whether the FCC has acted in compliance with its own procedural rules. To make this determination, a lawyer would be required to ascertain whether agency action was both faithful to procedures and free from taint of any kind. In contrast to the approach of the *FCBA Report*, *ABA Accord* section 4(l) states that all agency action is ordinarily presumed valid.⁷⁴ Given the difficulty in determining whether the agency has in fact been punctilious in every respect, the *ABA Accord* approach is the more reasonable.

The second enumerated issue, whether the attorney has a legal basis to question the company's right to hold the license, would require, at a minimum, that the opinion giver verify that the company has committed no fraud on the agency; that the company has complied with all FCC rules and regulations; that the company has not violated any condition on its license; and, finally, that the license is not already the subject of proceedings that will lead to revocation of the license.

These verifications range far beyond what is reasonable to demand of opinion givers. No amount of due diligence would enable the opinion giver to reach the requisite conclusions. If a fraud has been perpetrated on the agency, there is no reason to believe that counsel would be able to uncover it. Whether the company is in compliance, and at all times has complied, with FCC rules, regulations, and conditions to its license could be ascertained only by continuous and pervasive monitoring of the company's facilities and activities.

In essence, the "licenses validly held" opinion is simply another way of obtaining a "compliance with law" opinion. In a "compliance with law" opinion, the opinion recipient asks the opinion giver to opine as to whether the licensee is operating in compliance with the Communications Act.⁷⁵ To make this determination, the opinion giver would need to research precisely the same two enumerated issues required in order to give the "licenses validly held" opinion (that is, whether the FCC has followed its own internal procedures and whether the licensee has acted properly in its dealings with the FCC). The *FCBA Report*, the *ABA Accord*, and the *TriBar Report* all indicate that a "compliance with law" opinion should not be requested, a conclusion with which this Article agrees.⁷⁶

The "licenses validly held" opinion would also require the opinion giver to render a prediction as to the outcome of any pending license renewal or revocation proceedings. The *ABA Accord* and the *TriBar Report* conclude that a prediction as to the "outcome of litigation" opinion cannot reasonably

74. *ABA Accord*, *supra* note 5, at 187.

75. *FCBA Report*, *supra* note 1, at 416-17.

76. *See* discussion *infra* Part VII.

be requested in most circumstances.⁷⁷ Although the opinion giver might appear to be the least-cost source of such information, the prediction requires far more than the exercise of legal judgment (including the assessment of facts that cannot be ascertained in advance by the opinion giver) and, thus, is not the proper subject of a legal opinion.

The Subcommittee attempts to ameliorate these burdens on the opinion giver by identifying three interpretations of the “licenses validly held” opinion that are “erroneous” in its judgment.⁷⁸ First, it asserts that opinion givers should not be accountable for defects in the chain of title.⁷⁹ Although reasonable, this conclusion is inconsistent with the Subcommittee’s earlier endorsement of the “licenses held” opinion as comparable to an attorney’s title opinion. More importantly, as discussed below, the opinion giver remains responsible for opining on the regularity of the FCC’s procedures in all other respects.

Second, the *FCBA Report* declares that the “licenses validly held” opinion should not be read to suggest that counsel has undertaken diligence as to the licensee’s compliance with law.⁸⁰ Nevertheless, the *FCBA Report* directs the attorney to appropriately qualify the opinion when he or she has “actual knowledge” of a violation by the licensee.⁸¹ Imposition of this duty on opinion givers is equivalent to requesting a “negative assurance” opinion (i.e., that nothing has come to the attention of the opinion giver indicating that the licensee is not in compliance with FCC rules).⁸² The *ABA Accord* approach is superior. The *ABA Guidelines* direct that an implied negative assurance ordinarily should not be requested.⁸³ As *ABA Guideline I.B.* explains, the negative assurance opinion was developed to assist an under-

77. *ABA Accord*, *supra* note 5, at 229, para. I.C(4); *TriBar Report*, *supra* note 5, at 664.

78. *FCBA Report*, *supra* note 1, at 395-96.

79. The Subcommittee gives the following example:

In certain services, for example, a license automatically expires if certain construction or operational requirements are not satisfied by a date certain. It is theoretically possible that the failure by a prior licensee to comply with these requirements could render the license a nullity, even though no action was taken at the time, and the license has thereafter been assigned to one or more subsequent parties by final order.

Id. at 395.

80. *Id.*

81. *Id.* at 395-96.

82. *ABA Accord*, *supra* note 5, at 228, para. I.B(6).

83. *Id.*

writer in establishing a due diligence defense under the Securities Act of 1933, and its use should be confined to securities transactions.⁸⁴

The *FCBA Report* also states in connection with its discussion of the second erroneous interpretation of the “licenses validly held” opinion that “[e]ven actual knowledge of noncompliance with operational rules of the Commission should not render counsel unable to give this opinion in the absence of a pending or overtly threatened proceeding to revoke the license.”⁸⁵ The *FCBA Report* does not explain, however, why the opinion giver should take the risk that the noncompliance could mature into a revocation proceeding. The *FCBA Report* suggests, moreover, that if there is a pending proceeding going to the company’s qualifications, then “the ‘validly holds’ opinion is an implicit opinion that the proceeding will be resolved in such a way that [would] not imperil the Company’s holding of the FCC license.”⁸⁶ This conclusion deviates from the *ABA Guidelines* and the *TriBar Report*, however, to the extent that it requires a prediction as to the outcome of litigation. The *FCBA Report* does not explain why the opinion giver should incur the substantial risks associated with implicit opinions such as predictions with respect to the outcome of litigation. As noted above, the approach of the *ABA Accord* and the *TriBar Report* is more economically efficient as well. Although no one is better able to predict the outcome of litigation than a lawyer, the prediction simply does not fall into the category of an opinion. A legal opinion is a professional judgment concerning compliance or non-compliance with the law as it relates to certain facts (typically corporate actions).⁸⁷ The inherent uncertainty of predicting the outcome of litigation is made more difficult in the context of FCC proceedings where political or policy issues may permeate the proceedings. In the end, predicting the outcome of litigation has very little to do with a present legal judgment and, therefore, is not a suitable subject for a legal opinion.

Finally, the Subcommittee proffers a third erroneous interpretation of the “licenses validly held” opinion that is based upon the possibility that the FCC may have misfiled and, therefore, not responded to petitions or comments.⁸⁸ The *FCBA Report* declares without limitation that “counsel is entitled to rely on the presumption that the Commission properly follows its own procedures.”⁸⁹ This position is sensible and is consistent with *ABA Accord*

84. *Id.* at 228. The *TriBar Report* also recognizes that a negative assurance opinion typically is limited to the securities offering context. *TriBar Report, supra* note 5, at 618 n.58.

85. *FCBA Report, supra* note 1, at 396.

86. *Id.*

87. *See, e.g., TriBar Report, supra* note 5, at 608.

88. *FCBA Report, supra* note 1, at 396.

89. *Id.*

section 4(l) regarding the validity of agency action.⁹⁰ However, it is otherwise inconsistent with the undertaking that the *FCBA Report* indicates is required by the first prong of the definition of “validly”—that the licenses were issued through means of regular Commission procedures.⁹¹ If the Subcommittee intends to permit the opinion giver to rely on FCC action only with regard to whether it addressed all petitions and comments (and, as noted above, that there are no defects in the chain of title), it should so clarify its *FCBA Report*. As indicated *supra*, the opinion giver should be permitted to rely on the regularity of FCC procedures in all respects, obviating the need for the “validly holds” opinion in the first place.

In addition to its effort to limit the scope of the term “validly,” the Subcommittee seeks to prescribe the due diligence that the opinion demands. It concludes that the opinion giver should:

- (1) review[] the licensee’s ownership structure, [including] both direct and indirect interests in the licensee, and determine[] that no changes have taken place since Commission approval that would have required Commission consent;
- (2) [make] reasonable inquiry of the Company to ascertain the Company’s compliance with any applicable provisions of Section 310(b) of the Communications Act concerning alien ownership and with any applicable ownership limitations of the rules . . . ; and
- (3) review[] the Commission’s publicly available files and [counsel’s] own files and determine[] that no petitions or comments relating to the most recent grant or assignment of the license to the Company appear that were not addressed by the Commission.⁹²

The *FCBA Report* does not explain why an opinion giver may so limit his or her due diligence, given that the opinion encompasses far more than compliance with ownership regulation or whether the Commission has considered all relevant pleadings. Moreover, the factual determinations as to changes in ownership are necessarily based on client-supplied information. Counsel in most cases will have no independent means of verifying information as to changes in stockholdings or alien ownership. In public companies, alien ownership may be ascertainable only through a random survey of stockholders, an undertaking of considerable expense. If this information is obtained by reliance on an officer’s certificate, the opinion becomes entirely dependent on the accuracy of the information the attorney receives and is, in

90. See *supra* note 57 and accompanying text.

91. See *supra* Part IV.A, Option 2.

92. *FCBA Report, supra* note 1, at 396-97.

essence, the “quitclaim opinion” disfavored by the *ABA Guidelines*.⁹³ Reliance on an officer’s certificate is appropriate only if it is reasonable to do so without investigation. Given that the opinion recipient seeks independent confirmation, reliance on an officer for information that goes to the heart of the opinion may be inappropriate.⁹⁴

Due to the almost unlimited scope of the term “validly,” the resulting unreasonable—if not impossible—due diligence requirements, the implicit opinions, the negative assurance, the quitclaim, and the overly broad reliance on client representations, a “validly holds” opinion should not be requested. If compelled to provide this opinion, the opinion giver should restate in full the several paragraphs of qualifications in the *FCBA Report*.⁹⁵ Yet, even if a heavily qualified opinion is accepted, cases such as *Kline* warn attorneys that their disclaimers could be ignored.

B. FCBA Report, Paragraph I.B Full Force and Effect

Recommended Language:

The FCC Licenses are in full force and effect.⁹⁶

According to the *FCBA Report*, the “full force and effect” opinion is intended to “complement[] and slightly overlap[] the ‘Licenses Held’ opinion” and to “affirm[] that there are no limitations on the [licensee’s] ability to use the [FCC] licenses in accordance with their terms.”⁹⁷

Implicitly acknowledging the numerous and far-reaching meanings of the phrase, the Subcommittee interprets the “full force and effect” opinion to mean only that:

- (1) the orders issuing the FCC licenses have become effective under 47 C.F.R. § 1.102;
- (2) all express FCC-imposed conditions precedent have been satisfied;

93. See *ABA Accord*, *supra* note 5, at 228. The discussion of *Kline*, *supra* Part II.B, illustrates the risk to the opinion giver of reliance on client provided information. Likewise, in *Greyhound Leasing & Financial Corp. v. Norwest Bank*, the concurring judge wrote that, in rendering an opinion that counsel was not aware of any liens on certain assets, reasonable care required at least a limited investigation and that mere reliance on client-supplied information was insufficient. *Greyhound Leasing*, 854 F.2d 1122, 1126 (8th Cir. 1988) (McMillian, J., concurring).

94. The *TriBar Report* states that opinion givers “may not rely on certifiers of fact for statements that are tantamount to the legal opinions themselves.” *TriBar Report*, *supra* note 5, at 611.

95. See *FCBA Report*, *supra* note 1, at 395-96.

96. *Id.* at 397.

97. *Id.*

- (3) no stay of effectiveness has been issued; and
- (4) the FCC licenses have not expired by their own terms⁹⁸ or been invalidated or modified by any subsequent FCC action.

As the *FCBA Report* correctly notes, this opinion does not offer a view as to the finality or sufficiency of licenses, special conditions on the licenses, or company compliance with the terms of the licenses;⁹⁹ each of these issues is covered by other opinions recommended in the *FCBA Report*. The four assurances listed above, however, may also be covered elsewhere in the *FCBA Report*, by either the “licenses held” opinion (as the Subcommittee recognizes) or the “absence of litigation” opinion. For instance, if the orders issuing the license have not become effective, the opinion giver will not be able to state without qualification that the company “holds” the FCC licenses. Consequently, a “full force and effect” opinion may be redundant if a “licenses held” opinion is provided.

Given the lack of precision in the term, its overlap with other opinions and because the term “full force and effect” is—like “validly”—subject to a wide range of interpretations (including, whether the license was “validly” issued), it should not be given. If an attorney must give this opinion, however, its meaning should be expressly limited to issues (1), (3), and (4) above, which are the only issues that are properly considered to be legal issues. Issue (2) concerns whether the company *in fact* has satisfied all conditions precedent imposed by the FCC. The company, and not the lawyer, is the least-cost source of this factual information, and therefore, it should be the subject of a representation in the underlying agreement, but not a legal opinion.

C. FCBA Report, *Paragraph I.C Final Order*

The Subcommittee notes that “[i]n [the] normal course, counsel is not asked to opine whether the grant of all of the Company’s FCC licenses has become final.”¹⁰⁰ The Subcommittee revisits the issue of “final order” opinions in its discussion of transaction-specific opinions.¹⁰¹ When discussing whether a “final order” opinion should be given with respect to a transaction-specific opinion, the Subcommittee recommends that it should not.¹⁰² The Subcommittee gives no justification for why a “final order” opinion is unacceptable in a transaction-specific opinion yet is acceptable here in a ge-

98. *Id.* (citation omitted).

99. *Id.*

100. *Id.* at 398. The Subcommittee observes, however, that an opinion may be appropriate when the licenses are recently issued or subject to recent controversy. *Id.*

101. *Id.* at 406.

102. *Id.*

neric opinion. The same concerns (e.g., the fact-specific nature of the inquiry) that arise in a transaction-specific opinion—discussed in detail below—arise in a generic opinion, and there is no reason for the differing treatment. Accordingly, a “final order” opinion should not be given except in the very limited circumstances discussed below with respect to transaction-specific opinions.¹⁰³

D. FCBA Report, Paragraph I.D Sufficiency of Licenses

Recommended Language:

First Approach:

The FCC Licenses include all FCC licenses, permits, and authorizations necessary for the Company to operate a [type] station on Channel [number] in [community of license].

Second Approach:

The FCC Licenses include all FCC licenses, permits, and authorizations necessary for the Company to conduct its business in the manner in which we have been advised it is currently being conducted.¹⁰⁴

While recognizing that counsel “should not be requested to render an opinion . . . about the actual operation of the station,” the Subcommittee offers two opinions as to “sufficiency of licenses.”¹⁰⁵ The first approach is designed to provide “the recipient with the comfort that the FCC licenses permit the Company to carry on its core business operations.”¹⁰⁶ This opinion would be rendered where there is a “‘core’ FCC license without which one cannot lawfully carry on the business . . .” (e.g., radio and television broadcasting).¹⁰⁷

Implicit in the Subcommittee’s recommendation as to the first approach is the notion that an attorney can readily identify the requisite “core” license and then determine whether the company has the necessary authority to operate on a specific frequency at a specific location.¹⁰⁸ Since the *FCBA*

103. See discussion *infra* Part V.

104. *FCBA Report*, *supra* note 1, at 398.

105. *Id.*

106. *Id.*

107. *Id.* at 398-99.

108. *Id.* at 399.

Report contemplates that the opinion disclaims any knowledge as to actual station operations, the opinion giver is providing the recipient with nothing more than information contained on the face of the license: class of station, frequency, and location. Stating as an opinion factual information that is readily ascertainable by the opinion recipient is inappropriate and unnecessarily exposes the opinion giver to risk of liability due to an overly expansive reading of the opinion. The opinion giver in this instance clearly is not the least-cost source of the information sought. The opinion recipient just as easily can obtain the information, which is the preferred method since it obviates negotiation and, thus, reduces costs.

The first approach also could be more broadly interpreted to provide assurance that the company is operating its facilities in conformance with the terms of its license. Counsel could provide this opinion, however, only by relying on factual statements of the client. Again, if an opinion is based merely on factual information supplied by the client, the only role for counsel in this matter appears to be the inappropriate and inefficient one of insurer.¹⁰⁹

When there is no “core” FCC license,” the Subcommittee endorses the second approach: The Company holds “all FCC licenses . . . necessary for the . . . conduct [of] its business.”¹¹⁰ The Subcommittee indicates that the second approach would be inappropriate when there is a “core” FCC license, apparently because of the technical and operational analysis that would be required.¹¹¹ Nonetheless, the Subcommittee indicates that the second approach would be appropriate for certain businesses (e.g., cable television) where FCC licenses “are in some measure important to the operation of the business.”¹¹²

The Subcommittee’s approach diverges sharply from the approach suggested by the *ABA Guidelines*. Paragraph I.B(5) states that “[i]t is generally inappropriate . . . 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, [and] *possesses all necessary licenses and permits*”¹¹³ While the *FCBA Report* tacitly rejects the

109. See discussion *supra* Parts II.A, III.A.

110. *FCBA Report*, *supra* note 1, at 398.

111. In that connection, the *FCBA Report* refers to its commentary explaining why a “compliance with law” opinion should not be given. *Id.* at 399.

112. *Id.*

113. *ABA Accord*, *supra* note 5, at 228, para. I.B(5) (emphasis added). The *TriBar Report*’s admonition that “opinion givers should not be asked to render an opinion that covers compliance by the Company with laws generally,” although it does not mention licenses and permits per se, has the same effect as *ABA Guideline* I.B(5). *TriBar Report*, *supra* note 5, at 661 n.162.

ABA Guidelines' approach, it recognizes the extensive factual analysis required to determine what licenses are "necessary" and suggests that the attorney prepare a questionnaire for the company.¹¹⁴ Given the complexity of the technical facilities and operations of companies in the telecommunications industry, the scope of any such questionnaire would itself be unduly broad.¹¹⁵ More importantly, designing questionnaires and interpreting responses to them are not tasks best suited to a lawyer's professional skills. Such tasks are, however, appropriately undertaken by the company itself and may, therefore, be the proper subject of a representation and warranty in the underlying agreement.

Both the first and second approach should be deleted from the *FCBA Report's* recommended opinion. The sufficiency of the client's licenses simply is not the proper subject of a legal opinion.

E. FCBA Report, Paragraph I.E Conditions on Licenses

Recommended Language:

The FCC Licenses are not subject to any conditions outside the ordinary course [or are subject to the following conditions outside the ordinary course].¹¹⁶

As the *FCBA Report* acknowledges, there are numerous conditions imposed on a license by the Communications Act and the FCC's rules.¹¹⁷ The issue posed for the opinion giver here is whether a particular condition is routine or is "outside the ordinary course." For example, technical conditions on the license of a broadcast station could be entirely benign or so severely limit the service area as to deprive the licensee of a major portion of its revenue base. This determination necessarily requires knowledge of the company's operations. While the Subcommittee elsewhere acknowledges that the opinion giver should not be charged with knowledge of the company's operations,¹¹⁸ the conditions opinion necessarily requires this knowledge on the part of the opinion giver. Accordingly, the conditions opinion should not be given or, at least, should be given only in modified form. Given the inherently factual nature of the subject, moreover, the existence

114. *FCBA Report*, *supra* note 1, at 399-400.

115. In this regard, the *TriBar Report* notes that delivering a general "compliance with law" opinion "would require a detailed understanding of a Company's business activities and could almost never be rendered (assuming it could be rendered at all) without great expense." *TriBar Report*, *supra* note 5, at 661 n.162.

116. *FCBA Report*, *supra* note 1, at 400.

117. *Id.*

118. *Id.* at 398.

vel non of conditions should be addressed as a confirmation or, alternatively, as a representation and warranty by the company in an underlying agreement.

F. FCBA Report, Paragraph I.F Call Signs

Recommended Language:

The Company has all necessary authority from the FCC to use the call signs listed on Exhibit A.¹¹⁹

As the *FCBA Report* explains, the “call signs” opinion means “nothing more than that the FCC has assigned that particular call sign to the station involved. It does not mean that the use of the call sign by the company is not subject to challenge by third parties under other laws”¹²⁰ Therefore, given the observations, the Subcommittee correctly concluded that the opinion “is of little, if any, utility.”¹²¹ This conclusion also warrants more than an acknowledgment that “counsel may prefer to put this information in the form of a factual confirmation”;¹²² rather, the *FCBA Report* should state unequivocally that verifying the authority to use call signs is not an appropriate subject for a legal opinion. If the information is of little utility, requesting a legal opinion on the subject wastes resources and needlessly exposes opinion givers to potential liability.

G. FCBA Report, Paragraph I.G Renewal

Recommended Language:

The most recent renewal of the FCC Licenses has been granted by the Commission in the ordinary course.¹²³

The Subcommittee’s comments explain their understanding of what is encompassed in the renewal opinions:

(1) the application for renewal of the licenses held by the Company was filed in timely fashion; (2) the Commission requested no further information; (3) no competing applications, petitions to deny, or informal objections were filed before the date that the application was granted; and (4) the renewal was granted by the Commission staff on

119. *Id.* at 401.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

delegated authority for the full-license term without the imposition of forfeiture, sanctions, or other conditions outside the normal course.¹²⁴

The four enumerated issues clearly are factual in nature. Because a communications lawyer with a historical relationship with the company is likely a least-cost source of such factual information, the opinion might be appropriate in certain circumstances. Given the factual nature of the opinion, however, it should be addressed as a confirmation rather than an opinion.

The *ABA Accord* approach is in substantial agreement with the analysis of this Article. *ABA Accord* section 17 discusses opinions concerning legal proceedings, which require information very similar to the information sought in a renewal opinion (e.g., whether pleadings were or were not filed in the docket).¹²⁵ The *ABA Accord* notes that “[w]hile the matter is inherently factual, the request is addressed to the Opinion Giver as a likely source of information relating to the topic.”¹²⁶ The ABA concludes that a “legal proceedings” opinion should be furnished as “a factual confirmation as opposed to a legal opinion.”¹²⁷ The *ABA Accord* approach is superior to the approach of the *FCBA Report*.¹²⁸

The Subcommittee also offers recommended language for renewal opinions in the context of (1) applications granted over objections,¹²⁹ (2) pending applications,¹³⁰ and (3) pending applications subject to objec-

124. *Id.* at 401-02.

125. *ABA Accord*, *supra* note 5, at 213.

126. *Id.*

127. *Id.*

128. The *TriBar Report*'s analysis of the “absence of litigation” opinion is generally consistent with the *ABA Accord*, and, hence, with the Authors' analysis of the renewal opinion. See *TriBar Report*, *supra* note 5, at 663-65. See also discussion *infra* Part VI.

129. *FCBA Report*, *supra* note 1, at 402.

The application for renewal of the FCC Licenses held by the Company was filed on [date] and granted on [date] for a period expiring [date]. This is the standard expiration period pursuant to the FCC's rules. The FCC's rules allowed the filing of competing applications or petitions to deny on or before [date] and the filing of informal objections before the date that the application was granted. A [competing application, petition to deny, or informal objection] was filed on [date]. The [application, petition, or informal objection] was dismissed [and all issues raised by the petition or informal objection were resolved in favor of the Company].

Id.

130. *Id.*

An application to renew the FCC Licenses held by the Company was filed on [date] and remains pending. The FCC's rules permit the filing of competing applications and petitions to deny on or before [date] and the filing of informal objections any time up until the date that the application is granted. If no competing applications or petitions to deny are filed, then the application to renew the licenses will be ripe for a grant after [date]. Any informal objections filed while

tions.¹³¹ In each case, the renewal opinion still requests essentially factual information. Thus, the analysis with respect to generic renewal opinions applies equally well to these special cases noted by the Subcommittee; they should be addressed, if at all, as confirmations rather than as opinions.

V. TRANSACTION-SPECIFIC OPINIONS

A. FCBA Report, *Paragraph II.A If Consent Is Required*

1. Grant of Consent

Recommended Language:

The FCC has granted its consent to the [describe the aspect of transaction requiring FCC approval, for example, assignment or transfer of control of the FCC Licenses] without the imposition of conditions outside the ordinary course (or subject to the following conditions outside the ordinary course).¹³²

For the reasons discussed above with respect to conditions on the license,¹³³ it is not appropriate to request an opinion as to whether the consent is subject to conditions outside the ordinary course. Moreover, whether the consent has been granted is again a fact-based determination and, consistent with the *ABA Accord*,¹³⁴ should be provided, if at all, as a factual confirmation, not as a legal opinion.

In some circumstances, such as when the consent has been challenged, the *FCBA Report* endorses an opinion that the consent has been “validly”

the application to renew the licenses remains pending would have to be resolved before the application could be granted.

Id.

131. *Id.* at 403.

An application to renew the FCC Licenses held by the Company was filed on [date] and remains pending. The FCC’s rules permit the filing of competing applications or petitions to deny on or before [date] and the filing of informal objections up until the date that the application is granted. There are no known competing applications, petitions to deny, or informal objections affecting the application for license renewal on file with the FCC. The application for license renewal is ripe for a grant, although any informal objections filed while the application for renewal of license remains pending would have to be resolved before the application could be granted.

Id.

132. *Id.*

133. *See supra* Part IV.E.

134. *ABA Accord, supra* note 5, at 224, para. I.A(1).

issued.¹³⁵ For the same reasons that the “licenses validly held” opinion is not appropriate,¹³⁶ the “validly issued” opinion is not appropriate (e.g., it is exceedingly difficult for the opinion giver to determine whether the FCC complied with its own internal procedures). The opinion is particularly inappropriate when there is a challenge to the consent because, as noted in *ABA Guidelines* paragraph I.B(3), any request for an unexplained opinion regarding a legal issue of known uncertainty is inappropriate.¹³⁷ If the challenge to the consent has not been finally adjudicated, moreover, counsel would be unreasonably compelled to opine as to the outcome of litigation, a task the *ABA Guidelines* and the *TriBar Report* agree should not normally be undertaken in a legal opinion.¹³⁸

2. Full Force and Effect

Recommended Language:

The FCC’s consent is in full force and effect.¹³⁹

The Subcommittee’s comments on the “full force and effect” opinion in the context of transaction-specific opinions where consent is required are virtually identical to its comments in the context of generic opinions (i.e., the FCC Licenses are in full force and effect).¹⁴⁰ As in the context of generic opinions, the “full force and effect” opinion should not be requested or given.

3. Final Order

Recommended Language:

The order of the FCC granting its consent was [issued or released] on [date], and public notice of such consent was given on [date]. The time within which any party in interest other than the FCC may seek administrative or judicial reconsideration or review [has expired or expired on {date}], and no petition for such reconsideration or review was timely filed with the FCC or with the appropriate court. The time within which the FCC may review the

135. *FCBA Report*, *supra* note 1, at 404.

136. *See supra* Part IV.A, Option 2.

137. *ABA Accord*, *supra* note 5, at 227, para. I.B(3).

138. *Id.* at 229, para. I.C(4); *TriBar Report*, *supra* note 5, at 664.

139. *FCBA Report*, *supra* note 1, at 405.

140. *See supra* Part IV.B.

consent on its own motion [has expired or expired on {date}], and the FCC has not undertaken such review.¹⁴¹

The Subcommittee recognizes the difficulty in giving “final order” opinions or opinions stating that the consent is “no longer subject to administrative or judicial reconsideration or review,” an observation with which most communications lawyers would quickly agree.¹⁴² Rather than simply suggest that the opinion should not be given, the Subcommittee instead hedges the recommended language to such an extent that it essentially becomes a factual determination. Indeed, the Subcommittee recommends, as part of the opinion giver’s due diligence, that he or she inquire of the FCC’s staff or the general counsel’s office.¹⁴³ This action hardly constitutes legal analysis and only serves to demonstrate that the Subcommittee’s recommended language is a factual confirmation, not a legal opinion. Because the opinion giver is not the least-cost source of these facts, the opinion should not be given.

The “final order” opinion attempts to give assurance where, unfortunately, none can be given. A communications lawyer reading the opinion will understand what it attempts to accomplish. However, a business person reading the opinion likely will be lulled into a false sense of security based on the recommended language. This unjustifiable reliance by the third party should cause concern for an opinion giver in light of recent case law and, therefore, is an additional reason not to give the opinion.

4. Sufficiency of Consent

Recommended Language:

Such consent constitutes all necessary consents, approvals, and authorizations required under the Communications Act for the [describe FCC aspect of the transaction to be consummated at the closing, for example, assignment of the FCC licenses to the borrower, transfer of control of the FCC licenses to the borrower,

141. *FCBA Report, supra* note 1, at 406.

142. *Id.* The Subcommittee notes as evidence of the difficulty in giving “final order” opinions the following two cases: *Sunrise Communications, Inc.*, Letter from Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau, to Sunrise Communications, Inc., and Chronicle Broadcasting of Omaha (Jan. 16, 1987); and *Letter to Richard M. Riehl*, Letter from Larry D. Eads, Chief, Audio Services Division, to Richard M. Riehl (June 21, 1985) (on file with the Mass Media Bureau of the FCC). In those two cases, the Mass Media Bureau discovered procedural irregularities and reconsidered its prior action well after the standard time period for such reconsideration had expired.

143. *FCBA Report, supra* note 1, at 407.

execution and delivery of the loan documents, funding of the loan].¹⁴⁴

The “sufficiency of consent” opinion represents an appropriate exercise of professional legal judgment and, thus, the opinion should be given if requested. The Subcommittee properly notes that various alternative formulations of this opinion (e.g., “the consent is sufficient ‘for the performance by the Company of its obligations under the Agreement’”) attempt to broaden its scope.¹⁴⁵ The Subcommittee correctly states that these broader versions embrace future events and, therefore, are not the proper subject of a legal opinion.¹⁴⁶ The Subcommittee would merely qualify these broader opinions with limiting language.¹⁴⁷ This approach is risky, and, since the opinion giver is not the least-cost source of this information concerning future events, the broader opinion should not be given.

B. FCBA Report, Paragraph II.B If No Consent Is Necessary

Recommended Language:

No consent, approval, or authorization of, [or filing with], the FCC is necessary for the [describe transaction to be consummated at the closing . . .] [except as described in the agreement].¹⁴⁸

Like the “sufficiency of consent” opinion, a determination that the transaction does not need FCC approval is an appropriate use of the professional skills of a communications practitioner, and therefore, “no consent necessary” is an appropriate opinion to request. It is precisely this kind of determination that permits a lawyer to add value to a transaction. If two companies wish to merge, they want to know from whom they must obtain consent before they proceed to consummate the transaction. Here, the lawyer’s skills can inform them of obstacles that may need to be overcome before they can proceed. The lawyer is the least-cost source of this crucial information; therefore, the “no consent necessary” opinion is efficiency enhancing and can be given.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 408.

148. *Id.*

C. FCBA Report, Paragraph II.C Transaction Does Not Violate

Recommended Language:

The execution and delivery of the agreement, and the performance by the Company of its obligations under the agreement, will not violate the Communications Act.¹⁴⁹

Typically, an opinion giver will confirm that execution and delivery by the company of the agreements do not, and performance by the company of its obligations under the agreements will not, violate certain provisions of statutory law (e.g., the Communications Act).¹⁵⁰ Like the “sufficiency of consent” opinion and the “no consent is necessary” opinion above, this opinion is a proper exercise of a lawyer’s professional skills. It is precisely the issue nervous clients want to resolve before the transaction is consummated. Furthermore, the company’s special communications counsel is the least-cost source of the information sought. This Article is in agreement with the Subcommittee that a “no violation” opinion properly can be requested by an opinion recipient.

However, the “transaction does not violate” opinion should not be understood to address the company’s compliance with laws generally. The opinion is limited in two important respects. First, it covers only the execution and delivery of the *transaction documents* and the performance by the company of its obligation thereunder.¹⁵¹ Second, the opinion is expressly limited to violations of the Communications Act.¹⁵² This Article agrees with the *ABA Accord* approach that “[i]t is inappropriate for the Opinion Recipient . . . to request an opinion to the effect that the [company] is in compliance with all applicable or ‘material’ laws” of a specified jurisdiction or scope.¹⁵³ Likewise, this Article agrees with the position in the *TriBar Report* that “[d]espite its apparent breadth . . . the no violation of law opinion addresses only the law (including published rules and regulations of government agencies) of jurisdictions that are specified for coverage in the opinion letter.”¹⁵⁴ The opinion giver typically has no way of knowing whether all relevant activities of the company are being conducted in compliance with law, especially in communications opinions where FCC counsel often is

149. *Id.* at 409.

150. *ABA Accord*, *supra* note 5, at 210-11.

151. *FCBA Report*, *supra* note 1, at 409.

152. *Id.*

153. *ABA Accord*, *supra* note 5, at 212.

154. *TriBar Report*, *supra* note 5, at 661.

asked to opine with respect to a transaction where it has no historical relationship with the company. Thus, the "transaction does not violate" opinion should be given when requested, but should not be understood to encompass the company's compliance with laws generally.¹⁵⁵

VI. ABSENCE OF LITIGATION

Recommended Language:

Based upon a review of the public files of the FCC, appropriate files of this firm [identify with particularity any other information relied upon . . .] and an inquiry of lawyers in this firm who have substantial responsibility for the Company's legal matters handled by this firm, we confirm that, except as disclosed at [exhibit attached to opinion or schedule to Transaction Document]:

Alternatives:

- (1) there is no unsatisfied adverse FCC order, decree, or ruling outstanding against the Company, the Station, or any of the FCC licenses;
- (2) there is no proceeding (including any rulemaking proceeding), complaint, or investigation against the Company or in respect of the Station or any of the FCC licenses pending or threatened before the FCC (including any pending judicial review of such an action by the FCC) except for proceedings affecting the [*e.g.*, radio, television, cable] industry generally, to which the Company is not a specific party;
- (3) the Company is not a party to any complaint, action, or other proceeding at the FCC, including both complaints against other licensees or applicants and rule makings of general applicability;
- (4) [the appropriate schedule to the transaction documents] includes all applications on behalf of the Station or with respect to the FCC licenses that are now pending before the FCC;
- (5) the Company has not been the subject of any final adverse order, decree, or ruling of the FCC (including any notice of forfeiture which has been paid) since [specify date, such as the date of the grant of the last renewal application]; and
- (6) no action, suit, proceeding, or investigation is pending or threatened, and no judgment, order, decree, or ruling has been entered, against the Company in any court or before or by any governmental authority (other than the FCC) that gives us reason

155. See also *infra* Part VII.

to believe that any of the FCC licenses will be revoked or will not be renewed in the ordinary course.¹⁵⁶

The Subcommittee acknowledges that information regarding pending or threatened litigation is “inherently factual” and not “an opinion of law.”¹⁵⁷ Nevertheless, the Subcommittee rejects the approach of the *ABA Accord* and the *TriBar Report* that this information should be narrow in scope and require only a very limited amount of due diligence.¹⁵⁸

The Subcommittee justifies its divergence on two grounds. First, the Subcommittee states that it “believes” the opinion giver is the most efficient source of the information.¹⁵⁹ Nonetheless, the Subcommittee does not acknowledge the significantly increased cost to the opinion giver and client due to expanded legal proceeding confirmations—costs that may be prohibitive for those clients involved in a broad range of activities. Second, the *FCBA Report* declares that a confirmation regarding legal proceedings in the FCC context is “broader in scope and requires more investigation” than the confirmation request envisioned by the *ABA Accord*.¹⁶⁰ Accordingly, it states that to ascertain the existence of legal proceedings, counsel should review the public records of the FCC (the same files it says are disorganized and incomplete) and may rely on information supplied by the client.¹⁶¹ However, the Subcommittee does not explain why any legal judgment is involved or what makes the FCC context different than other fora.

The *FCBA Report* suggests some options for this “opinion,” such as whether “any” applications are pending at the FCC, that it later explains, cannot be delivered “with a great deal of certainty” due to the state of the FCC’s records.¹⁶² Given the Subcommittee’s admission that a search of known sources may not reveal pending applications, it is improbable that

156. *FCBA Report*, *supra* note 1, at 411-12.

157. *Id.* at 412. The Subcommittee’s belief that the confirmation may nevertheless “require[] the exercise of legal judgment” is misplaced; confirming that a proceeding is pending requires effort, but not legal judgment. Moreover, the *FCBA Report*’s reference to the “absence of litigation” confirmation options as “opinions” could be misleading. *Id.*

158. The *ABA Accord* in paragraph 17.2 states that “[t]he Opinion Giver need do no more with respect to pending or threatened legal proceedings than confirm information listed or otherwise provided by the Client to the Opinion Recipient in or pursuant to the Transaction Documents.” *ABA Accord*, *supra* note 5, at 213. Similarly, the *TriBar Report* states that “[a]s a matter of customary diligence the [‘absence of litigation’] opinion does not require that the opinion preparers check court or other public records or review the firm’s files” *TriBar Report*, *supra* note 5, at 664.

159. *FCBA Report*, *supra* note 1, at 412.

160. *Id.*

161. *Id.*

162. *Id.* at 414.

any benefit is derived from such an “opinion,” other than, again, transforming the opinion giver into an insurer.

Another option endorsed by the Subcommittee would require the opinion giver to identify even non-FCC misconduct—a task the Subcommittee acknowledges will likely require questioning all attorneys in the firm who have worked for the client.¹⁶³ Although it also concedes that this “may be an administratively difficult task in a large firm,” it nevertheless discards this potentially prohibitive obstacle and endorses requests for the opinion.¹⁶⁴ The Authors disagree with this conclusion and believe that the administrative costs associated with such a task far outweigh the benefits to be derived from any opinion based upon it. In sum, the *ABA Accord*’s approach to “absence of litigation” opinions is more realistic and more efficient than the *FCBA Report* approach, and accordingly, the opinion should be furnished only as a limited factual confirmation and not as a legal opinion. In this regard, the *TriBar Report* has appropriately concluded that “in most cases the no litigation opinion could be omitted with no real loss to opinion recipients if opinion recipients were instead to rely directly on the Company or its officers for information regarding litigation affecting the transaction and the Company.”¹⁶⁵

VII. COMPLIANCE WITH LAW

The Subcommittee concludes that a “compliance with law” opinion should not be requested.¹⁶⁶ The *ABA Accord* and the *TriBar Report* are in agreement.¹⁶⁷ The Subcommittee notes that the scope of Communications Act regulation is so broad that to require an opinion giver to opine as to compliance with law would require the opinion giver to engage in an extensive and fact-intensive investigation.¹⁶⁸ The Subcommittee concludes that the opinion recipient instead “should rely on the representations of the Company in the operative documents.”¹⁶⁹ The *FCBA Report*, the *ABA Accord*, and the *TriBar Report* have reached the proper conclusion with respect to the “compliance with law” opinion. The opinion giver is not the least-cost

163. *Id.* at 414-15. In contrast, the *TriBar Report* observes that as a matter of customary practice, opinion givers do not consult with every lawyer in a firm or review all of the firm’s files as to factual matters. *TriBar Report*, *supra* note 5, at 614.

164. *FCBA Report*, *supra* note 1, at 415.

165. *TriBar Report*, *supra* note 5, at 665.

166. *FCBA Report*, *supra* note 1, at 416.

167. *ABA Accord*, *supra* note 5, at 228, para. I.B(5); *TriBar Report*, *supra* note 5, at 661 n.162.

168. *FCBA Report*, *supra* note 1, at 416.

169. *Id.*

source of the information—the company is—and, therefore, should not give a “compliance with law” opinion.

VIII. CONCLUSION AND SUMMARY

The *FCBA Report* provides a helpful starting point for negotiations over communications opinions. Further editions of the *FCBA Report*, however, should address in greater detail the Subcommittee’s reasons for departing from the *ABA Accord* and the *TriBar Report*. These departures often are economically inefficient and, therefore, subtract value from corporate transactions that are regulated by the FCC. Many FCC legal opinions are largely factual in nature, and therefore, the opinion giver typically is not the least-cost source of the information sought. In addition, a comparison to the *ABA Accord* and the *TriBar Report* raises questions as to whether the *FCBA Report* strikes a reasonable balance between the needs of the recipient and the burdens placed on the opinion giver. The *ABA Accord* and the *TriBar Report* generally have adopted the more reasonable as well as more economically efficient approach. For this reason, and in view of recent trends in the appellate courts as to the liability of opinion givers, communications attorneys should adhere more closely to the *ABA Accord* and the *TriBar Report* than to the *FCBA Report* when drafting and negotiating legal opinions in corporate transactions regulated by the FCC.

In sum:

1. Except for certain factual confirmations that may be reasonably requested (e.g., “licenses held,” “conditions on licenses,” and “renewal”), none of the *non-transaction-specific opinions* should be given (i.e., “full force and effect,” “final order,” “sufficiency of licenses,” and “call signs”).
2. With respect to *transaction-specific opinions (consent required)*, only the “sufficiency of consent” and “transaction does not violate” opinions should be given, and the “full force and effect” and “final order” opinions should not be given. The “grant of consent” opinion may be given as a factual confirmation, if required.
3. In connection with *transaction-specific opinions*, the “no consent is necessary” and “transaction does not violate” opinions represent a proper use of a lawyer’s skills and may be given if requested. Because the lawyer is a likely source of information regarding litigation, the “absence of litigation” opinion may be given, but only as a factual confirmation.

4. Finally, this Article agrees with the *FCBA Report*, the *ABA Accord*, and the *TriBar Report* approach to a “compliance with law” opinion—it is overly broad and should not be given.