KANE KESSLER, P.C.
Our Business Is You® | September 2012

About Kane Kessler

Kane Kessler is a midsized law firm located in Midtown Manhattan serving clients throughout the United States and around the globe. Kane Kessler has been in the business of providing exceptional legal services to its clients for more than 80 years with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

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For more information about the Firm, please visit our website at www.KaneKessler.com or call us at (212) 541-6222.

The Editors,

Judith A. Stoll
Gary E. Ostroff

THE IMPORTANCE OF Employee Handbooks

With the economy still faltering and the job market dismal, employees whose employment is terminated are increasingly filing charges and making claims against former employers under various theories. It is as important as ever for employers to take a proactive approach to implementing rules and regulations setting forth the terms and conditions of employment, policies regarding the legal rights of employees and general standards of conduct to which employees must adhere. In defending itself against possible charges and claims, an employer may be called upon to demonstrate that employees were actually informed of such policies; therefore, it is advisable to implement and distribute an Employee Handbook to all employees. There are various provisions that should be included in an Employee Handbook and should be updated periodically.

PRELIMINARY STATEMENT: A Handbook should begin with a preliminary statement advising that the policies contained within are to be considered guidelines and that the employer may add, change or delete any part of the Handbook. It should further state that the Handbook is not intended nor should it be construed to create a contract of employment between the employer and any of its employees and does not guarantee continued employment for any period of time, that employment at the employer is "at will" (i.e., that employment is entered into voluntarily, and employees are free to resign at any time, with or without cause). Similarly, the employer is

free to terminate the employment relationship at will at any time, with or without notice or cause, and no exceptions or modifications can be made to an employee's at will status except by a written employment contract signed by a duly authorized representative of the employer.

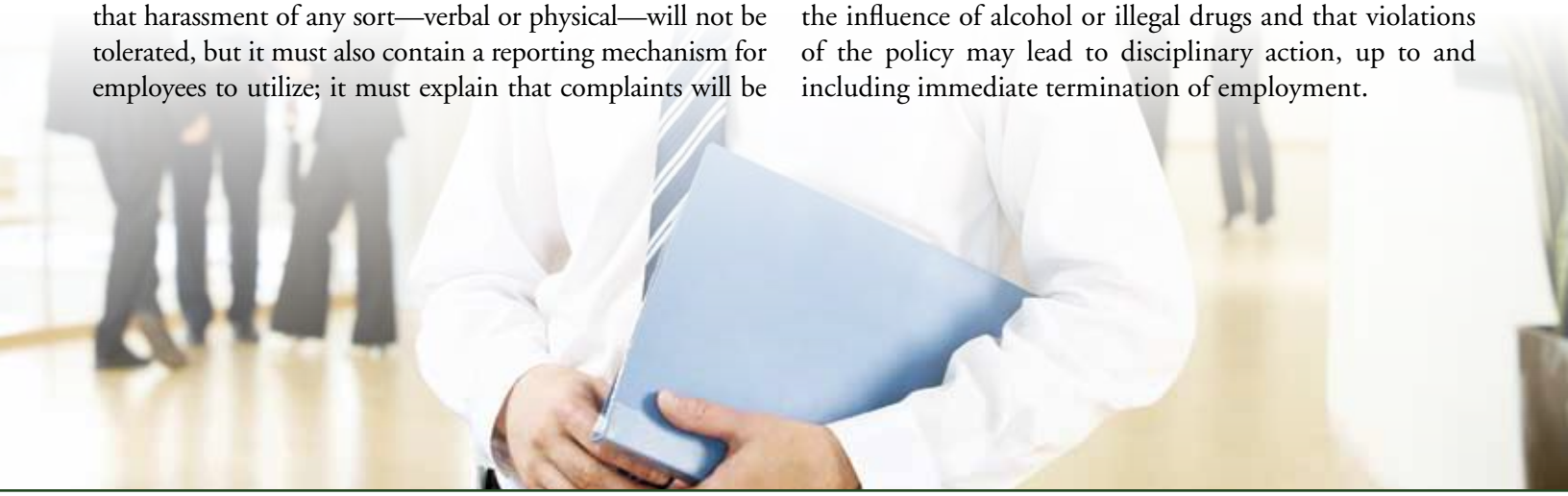
EQUAL EMPLOYMENT OPPORTUNITY POLICY: A Handbook should include a policy stating that no one at the employer will be denied opportunities or benefits on the basis of age, sex, race, color, religious persuasion, creed, national origin, marital status, political belief, disability or any other legally protected category that does not prohibit performance of essential job functions nor will anyone receive special treatment for these reasons. The policy should also state that the employer will make reasonable accommodations to ensure equal employment opportunities for qualified individuals with known disabilities in accordance with applicable federal, state, and local laws and regulations. Finally, the policy should make clear that the employer will employ only United States citizens and aliens authorized to work in the United States and that each new employee must complete the Employment Eligibility Verification Form I-9 and present documentation establishing identity and employment eligibility.

ANTIDISCRIMINATION AND HARASSMENT POLICY: A Handbook should include an antidiscrimination and harassment policy that affirmatively sets forth that the employer intends to provide a work environment that is pleasant, healthy and comfortable as well as free of discrimination, intimidation, hostility or other offenses that might interfere with work performance. The policy should advise that harassment can take many forms that may be but are not limited to: words, jokes, physical contact, intimidation, pranks, signs or comments based on an individual's sex, race, ethnicity, age, religion or any other legally protected characteristic. Not only should it make clear that harassment of any sort—verbal or physical—will not be tolerated, but it must also contain a reporting mechanism for employees to utilize; it must explain that complaints will be investigated; that employees may not be retaliated against for making a complaint; and that disciplinary action up to and including termination of employment may result from any employee violating the policy, depending on the severity of the problem and the number of occurrences.

FAMILY AND MEDICAL LEAVE ACT ("FMLA") POLICY: The FMLA generally covers employers who employ 50 or more employees for each working day in 20 or more calendar weeks of the current or preceding calendar year. For those employers that are covered by the FMLA, the Handbook should include a policy outlining the rights and obligations of employees, including eligibility requirements, permitted reasons for the leave, notice and other requirements.

VIOLENCE IN THE WORKPLACE POLICY: A workplace violence prevention policy should be included in the Handbook setting forth that the employer is committed to workplace violence prevention and to the maintenance of a safe work environment. Among other things, the policy should state that employees are expected to refrain from fighting, "horseplay" or other conduct that may be dangerous to others and that firearms, weapons and other dangerous or hazardous devices and/or substances are prohibited from the employer's premises.

DRUG- AND ALCOHOL-FREE WORKPLACE POLICY: The policy should set forth that it is the employer's desire to provide a drug-free, healthful and safe workplace and that, to promote this goal, employees are required to report to work in appropriate mental and physical condition to perform their jobs in a satisfactory manner. It is advisable that the policy further state that while on the employer's premises and while conducting business activities off premises, no employee may be in possession and/or under the influence of alcohol or illegal drugs and that violations of the policy may lead to disciplinary action, up to and including immediate termination of employment.



STANDARDS OF CONDUCT: The Handbook should set forth the employer's standards of conduct, including rules that, if violated, will result in disciplinary action, up to and including termination of employment.

ELECTRONIC COMMUNICATIONS POLICY: The Handbook should advise employees about acceptable and unacceptable uses of the Internet, e-mail, social media sites and the like. If you intend to monitor electronic communications between employees, the Handbook should make employees aware that they should not have an expectation of privacy when corresponding with co-workers through the employer's electronic systems. For further information on this subject, please refer to Kane Kessler's October 2011 newsletter.

"…employers should take a proactive approach to implementing rules and regulations setting forth the terms and conditions of employment…"

NO SOLICITATION AND NO DISTRIBUTION POLICY: The Handbook should contain a prohibition against the solicitation and distribution of material for any groups or organizations by any person not employed by the employer as well as a prohibition against the solicitation or distribution by employees of literature for any groups or organizations, including charitable organizations, during working time and/or in the presence of customers.

EMPLOYER-SPECIFIC POLICIES AND STATEMENT OF BENEFITS: The Handbook should inform employees about employer-specific policies such as the workweek, hours of work, overtime eligibility, regular paydays, etc. It should also set forth the employer's policy regarding benefits including vacation time, sick time and holiday,s as well as information regarding health insurance, retirement plans and other similar benefits.

ACKNOWLEDGMENT OF RECEIPT: It is advisable that employees be issued an Employee Handbook at the time of hire and that they sign and date an acknowledgment of receipt affirming that they received a copy of the Handbook. The acknowledgment of receipt should be maintained in the employee's file. As stated earlier, because it is common for laws relating to human resources to change rather frequently, a Handbook should be reviewed and updated periodically in order to ensure that the policies contained in it comply with current law. Each time the Handbook is updated and redistributed, employees should be required to sign off on acknowledgments of receipt.

SPECIAL RULES FOR UNIONIZED EMPLOYERS: For those employers that are unionized, certain aspects of an Employee Handbook may be considered mandatory subjects of bargaining under the National Labor Relations Act. Therefore, if the Employee Handbook is the first to be issued by the employer or if the policies contained in it are revised, it is advisable to provide the union with a copy of the Handbook and to offer an opportunity to discuss the Handbook with a union representative in advance of its implementation.

In addition, the Handbook for an employer with a unionized workforce should include a statement that the terms and conditions of employment for some employees are generally governed by a collective bargaining agreement between the employer and the union; that the provisions of the Handbook apply to such employees to the extent that they are not inconsistent with that collective bargaining agreement; and that, particular in the area of benefits, union employees are encouraged to refer to the collective bargaining agreement.

Kane Kessler has extensive experience in drafting comprehensive Employee Handbooks for those employers that do not have an existing Employee Handbook and in reviewing and updating existing Employee Handbooks. ■

David R. Rothfeld is Chair of the Firm's Labor and Employment practice group, and **Niki Franzitta** is an associate in the Firm's Labor and Employment practice group. David can be reached at (212) 519-5154 or drothfeld@kanekessler.com, and Niki can be reached at (212) 519-5177 or nfranzitta@kanekessler.com.

A Little Equity Can Go a Long Way Toward ENFORCING RESTRICTIVE COVENANTS

Generally, an employer seeking to enforce a restrictive covenant (either a noncompete or a non-solicitation provision) against a former employee has a heavy burden to bear. However, often overlooked case law suggests that this heavy burden is alleviated where the restrictive covenant is not part of an employment agreement that was imposed as a condition of employment.

In the seminal case of *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303 (1976), the Court of Appeals held that a non-compete covenant (that is, a covenant not to accept work with a competitor of the former employer) will be enforced only (i) "to the extent necessary to prevent the disclosure or use of trade secrets or confidential information" or (ii) "where an employee's services are unique or extraordinary." As a result, employers who seek to restrain a former employee from competing have the onerous burden of establishing that either materials taken constitute "trade secrets" or "confidential information" not otherwise available to any other competitor in the field or that the employee's services were so unique that the employee could not easily be replaced. Such a burden is often very difficult to overcome, leaving former employees free to compete with impunity.

However, more than 20 years after *Reed, Roberts*, the Court of Appeals decided *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999), which held that where a non-solicitation covenant (that is, a covenant not to solicit the customers or employees of the former employer) was not imposed as a condition of employment but was instead agreed upon by the employee as part of the consideration given for a promotion or ownership interest in the company, the employer can nevertheless enforce such a non-solicitation covenant even in the absence of use of trade secrets or uniqueness of services. While the covenant still must be reasonable in duration and scope, the Court of Appeals recognized the legitimate interest of the employer in the goodwill and business relationships attributed to the services of the former employee while that person was working on the employer's payroll. The Court of Appeals emphasized that the non-solicitation covenant was not imposed upon the employee as a condition of employment.

Guided by these cases, courts in New York are now inclined to enforce a non-solicitation covenant that is not imposed as a condition of employment. For example, courts are more easily persuaded to enjoin a former employee from soliciting those clients of the employer with whom the employee worked closely, where the employee was also a member of the employer/limited liability company (even if only a minority member) and the non-solicitation covenant is contained in the LLC operating agreement. In such case, the former employee cannot avoid an injunction with the plea that it would deprive him of a livelihood—the restriction is not imposed as a condition of employment but as consideration for an ownership interest and therefore falls within the *BDO Seidman* line of cases enforcing non-solicitation covenants.

> ***"…courts in New York are now inclined to enforce a non-solicitation covenant that is not imposed as a condition of employment."***

Kane Kessler's Litigation Department recently prevailed in applying these legal principles to obtain a temporary restraining order (TRO) against a former employee who was also a minority member of the limited liability company/employer and signatory to an operating agreement that contained a restrictive covenant against solicitation. ■

Jeffrey H. Daichman is Co-Chair and **Gerard Schiano-Strain** is an associate in the Litigation practice group. Jeff can be reached at jdaichman@kanekessler.com or (212) 519-5142, and Gerard can be reached at gstrain@kanekessler.com or (212) 519-5164.

Board Compensation Committees

End to Conflicts of Interest?

On June 20, 2012, the U.S. Securities and Exchange Commission (the "SEC") released final rules implementing Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The final rules require national securities exchanges to establish listing standards with respect to the "independence" and "authority" of compensation committees as well as the independence of compensation consultants and advisers. The SEC also amended the proxy rules to require additional disclosure on conflicts of interest of compensation consultants.

The SEC rules require the exchanges to propose new listing standards by September 25, 2012, and implement final rules by June 27, 2013. Companies must provide the new disclosures describing consultants' conflicts of interests in proxy or information statements for meetings of shareholders at which directors will be elected occurring on or after January 1, 2013.

"Companies must provide the new disclosures describing consultant's conflicts of interest in proxy or information statements"

COMPENSATION COMMITTEE INDEPENDENCE

New Rule 10C-1 requires national securities exchanges to adopt listing standards requiring all members of the issuer's compensation committee to be "independent." Each exchange may develop its own definition of "independent" after considering: (i) a director's source of compensation, including any consulting, advisory or compensatory fee paid by the issuer and (ii) whether a director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer. This list is non-exhaustive. The SEC emphasized that the exchanges have been given flexibility to develop their own minimum independence criteria.

COMPENSATION CONSULTANTS' AND OTHER ADVISERS' INDEPENDENCE

Rule 10C-1 also requires exchanges to adopt listing standards that permit compensation committees in their sole discretion to: (i) retain or obtain the advice of compensation consultants, independent legal counsel and other advisers (collectively, "compensation advisers"); (ii) appoint, compensate, and oversee the work of compensation advisers; and (iii) determine the appropriate funding for payment of reasonable compensation to compensation advisers.

The final rule does not require a compensation adviser to be independent. However, it directs the compensation committee to consider the following independence factors when selecting a compensation adviser: (i) other services provided to the issuer by the compensation adviser's employer; (ii) the amount of fees received from the issuer by the compensation adviser's employer as percentage of the employer's total revenue; (iii) the policies of the compensation adviser's employer that are designed to prevent conflicts of interest; (iv) the existence of any business or personal relationship between the compensation adviser and any member of the compensation committee or an executive officer of the issuer; and (v) whether the compensation adviser owns any of the issuer's stock.

The SEC's requirements relating to both the independence of compensation committees and compensation advisers do not apply to controlled companies (an issuer of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company) or smaller reporting companies with a public equity float of less than $75 million.

DISCLOSURE OF COMPENSATION CONSULTANTS' CONFLICTS OF INTEREST

The final rules also expand the current proxy disclosure requirements regarding compensation consultants who have advised the issuer in determining or recommending executive or director compensation. Amended Item 407(e) of the proxy rules will require additional disclosure of: (i) whether the work of a compensation consultant raised any conflict of interest and (ii) if so, the nature of such conflict and how it is being addressed. However, these new requirements apply only to conflicts of interest with respect to compensation consultants, not to outside legal counsel or other advisers.

It remains to be seen whether and how these rules will affect the size of executive compensation. ■

Jeffrey S. Tullman is Co-Chair and **Marisa A. Jerome** is an associate in the Firm's Corporate and Securities practice Group. Jeffrey can be reached at jtullman@kanekessler.com or (212) 519-5101. Marisa can be reached at mjerome@kanekessler.com or (212) 519-5132

PATENT FREEDOM TO OPERATE

To Study or Not to Study

Contrary to some popular opinion, "getting a patent" is not the only time companies need to deal with the patent system.

Patentability is determined by the U.S. Patent Office and relates to whether you can exclude others from making, selling or using your invention. But what companies should be equally if not more concerned with is being able to sell their products free from patent interference. Having a patent does not help you sell your product, but being free from infringement claims definitely does help. We can help achieve that. The relevant process is referred to as "freedom to operate" and involves determining whether someone else (your competitor, for example) has a patent that might prevent you from selling your product. For many of our clients, freedom to operate is key and is a primary patent-related service we provide for them.

We do this by conducting a patent search and looking at existing patents on similar products. We study patents owned by your competitors and any other specific patents we become aware of that may present a problem.

One aspect of the patent search involves attempting to place your product in the public domain; that is, we look for one or more expired patents that are for a product that is exactly or very nearly the same as your product. When a patent expires (usually 20 years from filing), everything it covers enters the public domain, so you are free to use that technology and no one else can have a valid patent covering it.

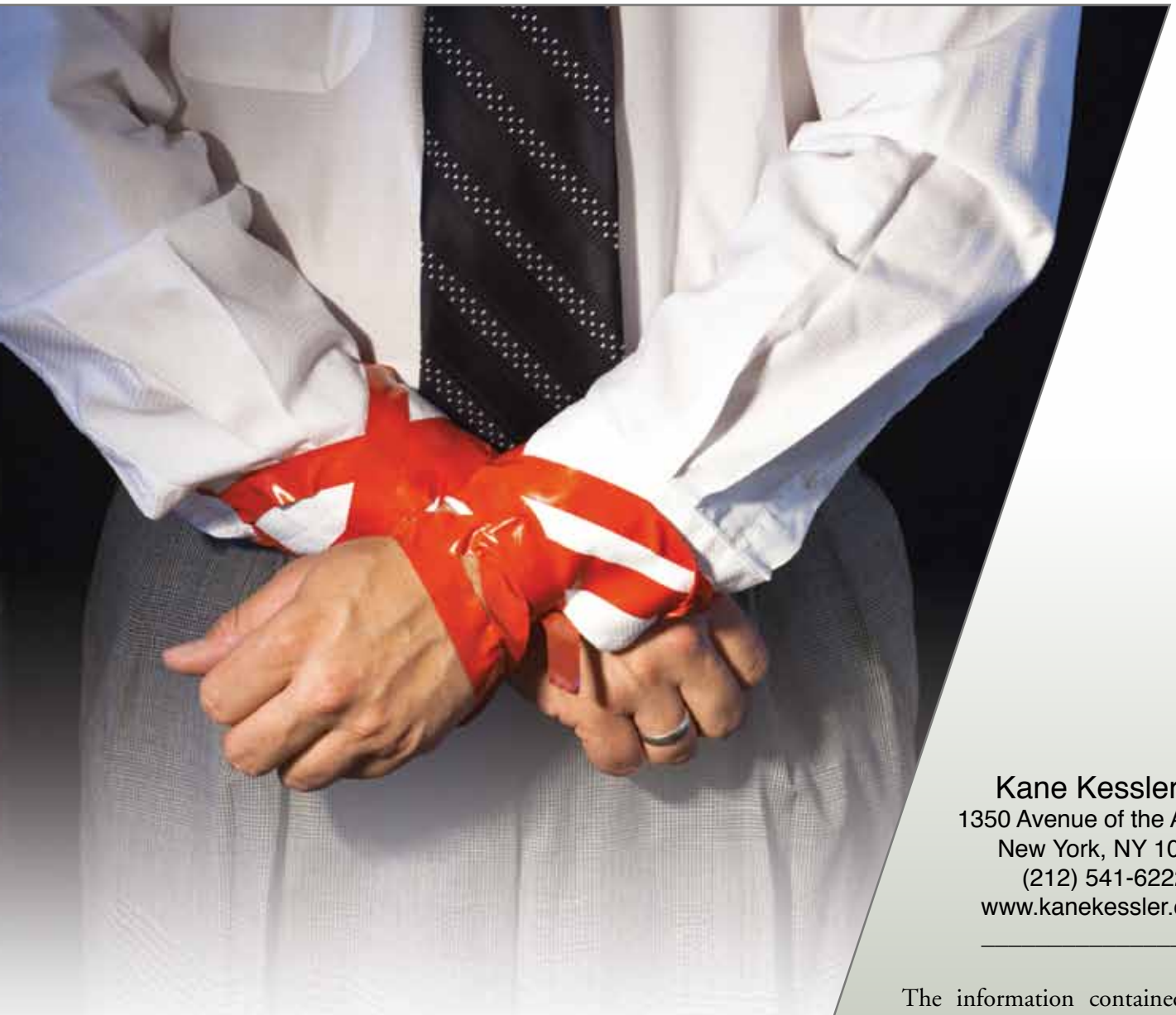
Ideally, we can provide a freedom to operate report based on such a determination. Sometimes we discover a problem patent – one that is still in force and has claims that might cover your product. There are several ways we can attempt to work around it.

For example, we might be able to show that the problem patent is itself invalid. That is, when the Patent Office granted the patent it may have missed some invalidating prior art (earlier patents). For example, following a recent Supreme Court decision, *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), it has become easier to invalidate a patent on the ground of obviousness. In appropriate situations, we can seek reexamination of the patent under new patent law procedures recently enacted by the America Invents Act.

Alternatively, we can advise on how it may be possible to design around a problem patent. This involves studying the patent and its prosecution file history; determining exactly what is and is not covered by the patent; and coming up with some commercially feasible redesigns that avoid the patent. In this case, even if we cannot clear your initial product, we can help you market a similar product that will be free from claims by others of patent infringement.

When this work is done in advance of product introduction, you may avoid losing time, money and resources defending against an allegation of patent infringement. Even if a dispute is resolved without a lawsuit being filed, the attorney fees for such a process can be significant, not to mention the possible need for a cash payment to the patent holder to cause it to withdraw its claim or a continuing royalty to be paid if a license is granted on future sales. If a lawsuit is filed, fees and damages can easily run into the tens or hundreds of thousands of dollars. You might even be enjoined from further manufacture of your product.

So, it is best to address freedom to operate reviews up front. When it looks as though a new product under development has significant market potential, contact IP



counsel and ask for a freedom to operate study. A freedom to operate opinion is not a guarantee that you will not be "attacked" by an aggressive patent holder. But it can place you in a better position to defend yourself against or negotiate with a patent holder. It can also prevent a finding of willful infringement, which can lead to enhanced damages under Section 287 of the Patent Act. And an opinion of counsel can also be helpful (or even required) in the case of a sale of the business or if a creditor is planning to take a security interest. Kane Kessler provides these opinions on a regular basis and would be pleased to assist. ■

Paul E. Szabo is counsel to the Firm and practices in the Firm's Intellectual Property practice group. Paul can be reached at pszabo@kanekessler.com or (212) 519-5143.

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Firm News...

ANNOUNCEMENTS
Joining the Firm:

Peter Campitiello
Mr. Campitiello, a Partner with the **Corporate and Securities practice group**, focuses on a wide range of corporate, securities and commercial matters for public and private companies in an array of industries, including health care, biotechnology, pharmaceuticals, manufacturing, private equity, mining and energy. Mr. Campitiello plays a key role with management in developing and executing business plans, including structuring financing, mergers and acquisitions, commercial matters, corporate governance, and regulatory issues.

Mr. Campitiello routinely serves as outside general counsel to both public and private companies and those in the process of going public as well as to the venture capital and private equity firms that support them. He has represented numerous companies in going public, frequently from organization through initial offerings, financing and securities listings. In providing proactive and business-focused solutions, Mr. Campitiello leverages his broad network of funding, marketing and support firms for the benefit of his clients.

Melissa B. Morales
Ms. Morales is an associate in the **Corporate and Securities practice group**. Her experience includes the representation of public and private companies in a wide variety of business transactions, including public and private offerings of debt and equity securities, reverse mergers, and stock and asset acquisitions in a range of industries, including technology and life sciences.

ACHIEVEMENTS
On July 27, 2012, after more than eight months of negotiations, we represented our client in its successful completion of the acquisition of a wholly-owned U.S. subsidiary of a major U.K.-based public company that designs, manufactures and markets duty gear and related products for law enforcement and commercial markets. The closing was a culmination of a competitive auction process commenced by the seller in October 2011, in which we represented our client through the auction bidding process, as well as the negotiation of the definitive purchase agreement with the seller. The purchase price for the acquisition was $114 million, subject to certain adjustments, including working capital. Our banking and finance teams assisted the client in the simultaneous closings of financing transactions, including a $45 million senior secured revolving credit facility with Bank of America and a $50 million subordinated mezzanine term loan facility with an affiliate of the Blackstone Group. We also represented our client in closing a $10 million investment in preferred stock and warrants, and a $2.5 million investment in common stock by an affiliate of the mezzanine lender.

Kane Kessler is proud to announce that **S. Reid Kahn**, Co-Chair of the **Litigation practice group**, has been selected as a Super Lawyer and featured in the 2012 ***Super Lawyers Business Edition***. **Adam Cohen**, Chair of the Firm's Intellectual Property practice group and **David Rothfeld**, Chair of the Firm's Labor and Employment practice group were selected for inclusion in ***Super Lawyers*** **New York Metro Edition** 2012. The Super Lawyers designation recognizes outstanding attorneys in more than 70 areas of practice using a rigorous, multiphase, selection process that considers 15 separate indicators of peer recognition, professional achievement and high ethical standards. **S. Reid Kahn** has also been included in the litigation section of the 2012 edition of ***New Jersey's Top Rated Lawyers***, which was published in July.

SPEAKING ENGAGEMENTS
Adam Cohen, Chair of the Firm's Intellectual Property practice group, was a speaker on the May 31 panel "Lawyers Not on the Clock" sponsored by the PLASA trade association serving the motion picture, television and commercial rental markets. **David R. Rothfeld**, Chair of the Firm's Labor and Employment practice group, was a panelist at the 2012 Labor and Employment Roundtable sponsored by the Cornell University School of Law, Industrial Relations and Hospitality.

Practice Groups

Bankruptcy, Reorganization and Creditors' Rights
Corporate and Securities
Corporate Investigations
General Business
Intellectual Property
Labor and Employment Law
Litigation
Matrimonial
Mediation
Real Estate
Trusts, Estates and Taxation