Business Law Section Newsletter

Vol. 39, No. 1 — October 2015

Notes from the Editors

by Denise Walsh, Edward Sturchio and Thomas Zalewski

This edition of the *Business Law Section Newsletter* contains several articles reminding us, as business lawyers, that if our clients do not comply with various federal and state laws, harsh penalties or business litigation may be right around the corner.

The issue contains two articles tackling hot employment issues. One of these articles examines recent Department of Labor guidance regarding the frequently debated issue of whether a service provider is an employee or an independent contractor. It warns of the potential adverse consequences to businesses if an individual is misclassified. The second employment-based article focuses on employee theft of a company's confidential information and trade secrets. It warns employers about the importance of protecting their confidential information and trade secrets, and discusses recent cases addressing whether an employee's taking of such information was wrongful under the circumstances.

Also included is a timely article discussing the need for global businesses to implement and enforce anti-bribery policies and procedures as part of their overall compliance policies. It cautions lawyers about the Department of Justice's and the Securities and Exchange Commission's (SEC's) aggressive expansion efforts under the Foreign Corruption Practices Act.

The issue also provides an insightful article examining the lack of a uniform fiduciary standard for a securities broker-dealer despite both Congress's directives under the Dodd-Frank Act and the SEC staff study from almost five years ago recommending a uniform standard.

If your business clients find themselves in litigation, they may want to avail themselves of the new Complex Business Litigation Program. This issue contains an article, written by the chair of the Working Group on Business Litigation, which discusses the evolution of the business court in New Jersey and the advantages it offers businesses.

In this installment of Lydia Stefanowicz's opinion column, Lydia focuses on third-party opinion practice and how a law firm can reconcile the giving of a third-party legal opinion with its ethical duties.

As always, we hope the articles contained in this edition of the newsletter are helpful in your practice and in advising your business clients.

We encourage you to submit an article for publication on a topic of interest to you and other members of the business law community. We also welcome input from you about topics you would like to see addressed in future editions. Please feel free to reach out to any of the editors with suggestions on future topics or how this newsletter can better benefit you and your practice.

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Call for Articles

We are seeking articles for the winter 2015/2016 issue of the *Business Law Section Newsletter* on topics of interest to business lawyers in New Jersey and written by New Jersey State Bar Association members.

The deadline for submitting articles for the winter edition is **Nov. 30, 2015**.

Interested in submitting? Contact any of the editors:

Ed Sturchio at 973-443-3256 or sturchioe@gtlaw.com

Denise Walsh at 973-232-0608 or dwalsh@saiber.com

Tom Zalewski at 973-966-8115 or tzalewski@daypitney.com

We look forward to hearing from you.

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This installment of the In My Opinion column focuses on third-party legal opinion practice. It also discusses the rarely considered ethical dilemma that arises when a firm issues a third-party legal opinion.

The opinions of the various authors contained within this issue do not reflect any legal advice on the part of any author or any author's law firm and should not be viewed as the opinions of the Business Law Section or the New Jersey State Bar Association.

Commentary:

The Evolution of Complex Business Litigation

by Hon. Peter E. Doyne

The New Jersey Judiciary, under the extraordinarily capable stewardship of Chief Justice Stuart J. Rabner, has tried to evolve and improve to meet the needs of those individuals and entities that seek judicial resolution of disputes. One such evolution has been the institution of the complex business track in an effort to meet the reasonable and understandable needs of the business community. It has never been suggested that this innovation will have a talismanic influence on all such litigation; rather, it was conceived as an initial step in the New Jersey Judiciary's attempt to reasonably respond to certain defined needs of the business community—timeliness, finality, cost efficiency and certainty.

The purpose of this article is to demonstrate the history of the difficulties and the judicial efforts to remedy the same. In writing this article, the author does not suggest that he speaks for the Judiciary, nor did he ever. This article is offered, though, from the perspective of a former jurist who now, in a new career, is able to hopefully take a broader view of the problems presented and how they might be addressed. It was never the thought that this project was completed; rather, it was and is envisioned as a first step with a willing Judiciary open to modifications and improvements as experience might suggest are needed.

Business owners are understandably wary of litigation. "[L]awsuits in various iterations can wreak financial, productivity and emotional havoc on companies and their owners/employees."[1] Lawyers have always sought ways to counsel their business clients to avoid the courtroom, but it is a rare business that will be able to avoid litigation altogether. The Great Recession of 2008 made business owners even more sensitive to the costs and efforts required to litigate a dispute. The legal community, as a whole, had to respond to the changing demands of their clients to deliver sophisticated and cost-effective services. The New Jersey Judiciary followed suit, innovating ways to support business owners and their attorneys in response to that reasonable request.

The New Jersey Judiciary's History of Case Management Improvements

Throughout its history, the New Jersey Judiciary has striven to improve the management of the court system and its methods of addressing pending matters to serve the changing needs of litigants. Prior to the adoption of the 1947 New Jersey Constitution, the Judiciary was considered unwieldy and confusing, as it was comprised of 17 different courts that were fragmented and unmanageable. The Judiciary was streamlined with the adoption of the 1947 New Jersey Constitution and, in 1995, a unified court system was established. New Jersey's Judiciary has since been recognized as a national model.

Even with New Jersey's unified court system, the Judiciary sought additional methods to better manage business disputes and serve the needs of the business community. The general equity part of the Chancery Division was created as a specialized part to hear corporate and commercial disputes, with the benefit of having the same judge handle the matter from beginning to end. In 1996, the Supreme Court authorized a pilot program in the Bergen and Essex vicinages that designated a business or commercial judge in the civil part of the Law Division. Much like general equity judges, the same judge handled matters from the inception through disposition with active case management. The complex commercial matters under this program were provided 450 days of discovery, with the goal that each case would conclude within two years from the date of filing the complaint.

In 2004, the Supreme Court created another complex commercial pilot program, this time in the Burlington, Mercer, Hudson, and Ocean vicinages. In this program, litigants were permitted to request that a general equity judge manage complex commercial damage actions that might otherwise be cognizable in the civil part of the

Law Division. In order to enter the program, litigants were required to submit a written request, a written waiver of a jury trial signed by all parties, and written consents to use complimentary dispute resolution techniques and to expedite discovery. This program's goal was to conclude matters within one year.

In addition to creating programs, the Supreme Court amended the Rules Governing the Courts of the State of New Jersey to implement 'best practices' statewide in 2000. Best practices created the four-track differentiated case management system. Complex commercial and complex construction cases were given a Track IV designation, requiring that a single judge manage the case from the beginning of the matter through its disposition.

Working Group on Business Litigation

In the fall of 2013, Chief Justice Rabner created a Working Group on Business Litigation to address the particularized needs of business litigants. The working group was to identify and assess the needs of the business community, review the Judiciary's current programs and practices, recommend steps to address the needs of the business community, and address methods of publicizing the Judiciary's current and future programs. The working group was comprised of New Jersey state judges, New Jersey state legislators, members of the New Jersey State Bar Association, New Jersey Defense Association, New Jersey Business & Industry Association and New Jersey Association for Justice, private law firm representatives, and staff of the Administrative Office of the Courts. The members of the working group came from a range of professional backgrounds and interests to ensure their recommendations would try to best address the needs of the business community, the bench, and the bar.

The working group not only considered the Judiciary's current structure, but also reports from business court programs from other jurisdictions, law review articles, and a prior New Jersey State Bar Association report on business courts. The materials consistently emphasized the need for: 1) a special designation reserved for complex commercial matters; 2) appointment of judges experienced in business matters who were not rotated through other court divisions; 3) use of alternative dispute resolution and/or special masters; 4) early and consistent case management; 5) accelerated adjudication; 6) published business-related decisions; 7) jury trials; and 8) monetary thresholds. In March 2014, the working group issued a report on its findings to the Supreme Court.[2]

Creation of the Complex Business Litigation Program

On Nov. 13, 2014, Chief Justice Rabner entered an order authorizing the implementation of the Complex Business Litigation Program. The acting administrative director of the New Jersey courts, Judge Glenn A. Grant, J.A.D., issued a notice to the bar regarding the details of the program and a list of designated complex business litigation judges (CBL judges). The program went into effect on Jan. 1, 2015, and is based on the recommendations of the working group as approved by the Supreme Court. The program expands the 1996 pilot program in the Bergen and Essex vicinages to all vicinages statewide.

Around the country, the term 'business court' refers to a range of business, equity, and complex litigation programs organized as courts, divisions, or tracks within a civil division. The New Jersey Judiciary, however, does not assign equity cases to the program. Additionally, New Jersey has a separate multicounty litigation program that manages mass tort matters. Unlike many other jurisdictions, the program in New Jersey will focus exclusively on complex business and construction matters, providing expertise and timeliness for New Jersey businesses.

Fifteen judges have been designated as CBL judges throughout the state. The CBL judges are primarily Law Division judges, but a few general equity judges also have been designated. The CBL judges have regular meetings, similar to conferences held for presiding judges. The Administrative Office of the Courts, Judicial Education Unit, offers complex business and complex construction law training to CBL judges.

Program Eligibility

In order to qualify for the program, the amount in controversy must be at least $200,000. However, parties in cases that fall below the monetary threshold may file a motion to the designated judge to have their matter included in the program if there are compelling issues, a large number of parties or witnesses, or the matter involves a significant interpretation of a business or commercial statute. Parties in cases that meet the monetary threshold may also move for removal from the program "on grounds that the action does not meet eligibility criteria."[3] The vicinage assignment judge and/or

the program judge may also review cases to determine if the matter is appropriate for the program or should be transferred to the Law Division.

Attorneys or parties will designate a matter as complex business litigation on the civil case information statement as case type 508 (complex commercial) or case type 513 (complex construction), according to applicable definitions. Actions seeking to establish a constructive trust or impose an equitable lien also are cognizable in the program, "as are cases seeking legal relief in which ancillary injunctive relief is sought."[4] The program does not include matters that are handled by general equity or matters primarily involving consumers, labor organizations, personal injury, condemnation, or cases in which the government is a party.

Program Advantages to Business Litigants

The program provides several advantages to business litigants and supports the business community's reasonable need for "certainty, finality, timeliness, and cost effective means of addressing business disputes."[5] In addition to new advantages, business owners still will be able to opt for a jury or non-jury trial. Litigants will not be required to participate in the Judiciary's mandatory civil mediation and arbitration programs. However, the parties will be encouraged to mediate their disputes.

Perhaps the most advantageous aspect of the program is the case management and legal expertise provided by its judges. One judge in each vicinage is designated as the CBL judge, and that judge will receive all cases that are part of the program for the vicinage. Through this immersive process each CBL judge hopefully will develop a sophisticated expertise in complex commercial areas of law. Additionally, the CBL judge will manage cases from filing through conclusion.

Matters in the program will not follow the traditional route of civil litigation involving multiple judges at different stages of the proceedings. This aspect will allow CBL judges to develop a better sense of a case throughout the proceedings, and obviate the need to educate a judge new to the matter at trial. Litigants and their attorneys will benefit from having their matters decided by the CBL judges who specialize in the complex issues their cases present, and who are involved at every stage of the proceedings.

Commentators have noted that the requirements of having designated CBL judges will also increase finality in business matters.[6] CBL judges will actively manage and oversee matters in the program, limiting the potential for errors during the pre-trial phase. As the CBL judges will receive significant training and experience in legal issues raised by complex business cases, their rulings are expected to be more consistent, and hopefully more exacting. Thus, the need for appellate review may be reduced, further benefitting business owners.

Business owners and their lawyers also will enjoy the development of legal principles through the program. Each CBL judge is expected to post at least two written opinions per year "to develop a body of case law on issues relating to business litigation." CBL judges also are encouraged to issue more written opinions on interesting or novel issues. This body of case law will take time to develop, as the cases are provided with 450 days for discovery and the program was launched earlier this year. However, as the cases in the program complete their discovery phases, opinions will start to be posted with greater frequency. A developed body of case law will increase certainty and cost-effectiveness in litigating business disputes and clarity on legal issues for the bar.

Also looking forward, business owners may benefit from amendments to the rules of court. As the CBL judges will be managing complex business cases through the pre-trial phase, they will undoubtedly uncover additional procedures and methods to streamline the discovery and case management processes in these matters. With judges looking for new ways to minimize the impact of litigation on business operations, business owners will be able to better manage costs and time devoted to litigating their matters. Additionally, innovative methods of managing cases will stand to benefit the bar and the public as a whole.

Overall, the program is a welcomed improvement to doing business in New Jersey. Christine Stearns, vice president of the New Jersey Business and Industry Association, remarked that the program will benefit not only the parties to a complex business litigation, but also "shareholders, employees, creditors, suppliers, customers, and clients."[7] In 2014, 199 complex commercial and 71 complex construction cases filed in New Jersey courts would have been deemed eligible for participation in the program.[8] As of Aug. 31, 2015, 106 program cases are active and 21 have been resolved.[9] As the program has been expanded statewide, and practitioners become more familiar with its requirements and benefits, those numbers will continue to increase in 2015. Additionally, the program is poised, as it develops over time, to

make New Jersey an attractive option for businesses, potentially increasing jobs and revenue in the state. The number of individuals and businesses who will reap the benefits of the program may reach far beyond litigating parties, or at least it is so hoped.

Suggestions Welcome

Although the program is now underway, the working group envisioned a fluid approach in order to improve the program's efficiencies. Since the program's launch, the bar and bench have made several valuable suggestions. The bar has an open invitation to provide suggestions on how to improve the program based on their experiences with cases in the program.

Many suggestions relate to addressing e-discovery issues, which can prove expensive and time consuming in complex business litigation. As e-discovery is an emerging area of law, suggestions were made to include training on the mechanics of e-discovery at the upcoming 2015 Judicial College. Another suggestion for an aspect of e-discovery for the CBL judges to address is proportionality. Litigants in federal court have been required to address proportionality under Federal Rule of Civil Procedure 26(b), and ensure that the burden or expense of proposed discovery does not outweigh likely benefits. The complex cases in the program will likely require such proportionality as an additional means of controlling expenses.

The bar also is making suggestions to improve both flexibility and certainty in complex business matters. Individuals have suggested the program allow for relaxation of court rules where necessary to manage complex cases. While the program does not currently allow for such rule relaxation, having the same CBL judge managing the case for its duration will undoubtedly allow that judge to tailor the management of the case to best serve the needs of the litigants. The bar also suggested that opinions be published in addition to posted, in order for the bar to rely on the authority of such decisions. Both suggestions speak to the need for some flexibility in case management and written authority in case law.

The CBL judges have already begun, and will continue, their intensive training. In Feb. 2015, the National Center for State Courts presented a three-day course for the CBL judges on financial statements, business valuation reports, and management of complex business disputes. In March 2015, the Civil-Equity Education Conference included the following courses: economic damages; demystifying complex cases – advanced; UCC issues in sophisticated business transactions; corporate bankruptcy; and New Jersey Revised Uniform Limited Liability Company Act. Additionally, the upcoming 2015 Judicial College will include courses on complex construction, holders in due course, and a CBL judge roundtable discussion hosted by the Hon. James S. Rothschild Jr., J.S.C., and the Hon. Robert C. Wilson, J.S.C. This additional training for CBL judges will further enhance their ability to address the most complex legal issues.

As the author has been permitted to work with cases throughout New Jersey, it has become apparent that the improvements herein addressed should be a welcomed attempt to better address complex commercial matters. As this new program is in its infancy, experience will be the guide on how best to improve the program and how the Judiciary should further respond to new and emerging requests.

Counsel are encouraged to review this innovation to determine whether it best serves their clients' interests. The author believes the more the program is utilized, hopefully the better it shall become, and counsel should not be shy in recommending improvements to the Judiciary. ■

The Hon. Peter E. Doyne (ret.) is the former chair of the New Jersey Working Group on Business Litigation, assignment judge of the superior court of New Jersey, Bergen County, and a member of the Judiciary for 22 years. He is a member of Ferro Labella & Zucker L.L.C. and the chair of the firm's alternative dispute resolution and corporate investigations practices. Bonnie C. Park, an associate of Ferro Labella & Zucker L.L.C., contributed to this article.

Endnotes

1. George N. Saliba, Commercial Litigation Concerns, *New Jersey Business Magazine*, available at: klgates.com/files/Publication/2542b06a-59b6-46b9-9ce7-f075393448bf/Presentation/PublicationAttachment/7ce77534-6285-48ca-a2c2-f9f9ee90ccff/Commercial_Litigation_Concerns.pdf.
2. Report of the Working Group on Business Litigation, March 2014, pp. 4-5, available at: judiciary.state.nj.us/reports2014/business_litigation.pdf.
3. Notice to the Bar, Complex Business Litigation Program, Nov. 13, 2014, p. 2, available at: judiciary.state.nj.us/notices/2014/n141113b.pdf.
4. *Id.*
5. Report of the Working Group on Business Litigation, March 2014, p. 4, available at: judiciary.state.nj.us/reports2014/business_litigation.pdf.
6. Sergio D. Simões, Complex Business Litigation Program Offers Significant Benefits, *New Jersey Law Journal*, May 21, 2015, available at: njlawjournal.com/id=1202727131858/Complex-Business-Litigation-Program-Offers-Significant-Benefits?slreturn=20150717140856.
7. New Jersey Business & Industry Association, NJBIA Praises Creation of Judiciary's Business Litigation Program, Nov. 13, 2014, available at: njbia.org/docs/default-source/news-releases/NewsRelease_2014-11-13.pdf?sfvrsn=0.
8. Michael Booth, NJ Judiciary's Business Court Program Going Statewide, *New Jersey Law Journal*, Nov. 14, 2014, available at: archerlaw.com/files/articles/11.14.14.NJ_Law_Journal._Judiciary_Court_Program.pdf.
9. Program statistics provided by Kevin M. Wolfe, assistant director, Civil Practice Division of the Administrative Office of the Courts.

Clarification of the Duties of Securities Broker-Dealers: A Premise Unfulfilled?

by Howard A. Teichman and Bruce E. Baldinger

One of the best known legacies of the Great Recession of 2007-2008 and its aftermath is the Dodd-Frank Wall Street and Consumer Protection Act of 2010 (Dodd-Frank act).[1] With this legislation, signed into law by President Barack Obama on July 21, 2010, Congress and the president sought to protect investors and level the playing field on Wall Street. The direct and immediate regulatory reforms implemented by this legislation are widely known. Of somewhat lesser fame are the directives by Congress for the appropriate executive branch agencies to review and study certain specific subjects and report on additional potential legislative and/or regulatory reforms to further protect consumers of financial products and services. One such topic is the scope and level of the duty owed by a securities broker-dealer, as distinct from a registered investment adviser. Nevertheless, almost five years after the issuance of a Securities and Exchange Commission (SEC) staff study supporting the adoption of a uniform fiduciary standard, and despite the support for that standard by other voices within the government, the regulatory landscape on this key issue remains virtually unchanged and equally as murky as it was in the pre-Dodd-Frank era.

Title IX, Subtitle A of the Dodd-Frank act (titled "Increasing Investor Protection") includes Section 913, titled "Study and Rulemaking Regarding Obligations of Brokers, Dealers and Investment Advisers." Section 913(b) states as follows:

> (b) Study.-- The [Securities and Exchange] Commission shall conduct a study to evaluate--
>
> (1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards; and
>
> (2) whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.[2]

The statute then goes on to provide the SEC with a list of 14 considerations, many of which are stated in great detail, that must be taken into account in performing the study. Among them are:

- Whether retail customers understand or are confused by the differences in the standards of care that apply to broker-dealers and investment advisers;[3]
- The regulatory, examination, and enforcement resources to enforce standards of care;[4]
- The substantive differences in the regulation of brokers, dealers, and investment advisers, when providing personalized investment advice and recommendations about securities to retail customers;[5]
- The potential impact on retail customers if regulatory requirements change, including their access to the range of products and services offered by broker-dealers;[6]
- The potential impact of eliminating the broker-dealer exclusion from the definition of "investment adviser" under the Investment Advisers Act of 1940;[7] and
- The potential additional costs to retail customers, broker-dealers, and investment advisers from potential changes in regulatory requirements.[8]

The Dodd-Frank act further provided the SEC with the authority to conduct rulemaking procedures, taking into account the findings, conclusions and recommendations of the study it was to conduct,[9] and amended Section 15 of the Securities and Exchange Act of 1934[10] to grant the SEC authority to adopt new regulations consistent therewith.[11] In the event it was not already clear which direction Congress was looking with respect to such rules, the title of the latter statutory subsection is "Authority to Establish a Fiduciary Duty for Brokers and Dealers," and the specific authority granted to the SEC was to:

> promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

On Jan. 21, 2011, the SEC issued its staff report, entitled "Study on Investment Advisers and Broker-Dealers."[12]

The 2011 study notes that under current law and regulations, investment advisers have a fiduciary duty to their clients, including an obligation "not to subordinate clients' interests to its own," as well as a requirement that any conflict of interest either be rectified or fully disclosed to the client.[13] Broker-dealers, on the other hand, generally do not have a fiduciary duty to their clients.[14] Instead, the standard is one of complying with the antifraud provisions of federal securities laws and the rules of the Financial Industry Regulatory Authority (FINRA), dealing fairly with customers and making recommendations that are suitable for the customer.[15] The 2011 study found that the lower standard of care for broker-dealers is not generally understood by the investing public.[16] To the contrary, it was observed that "retail customers do not understand and are confused by the roles played by investment advisers and broker-dealers, and more importantly, the standards of care applicable to investment advisers and broker-dealers when providing personalized investment advice and recommendations about securities. This lack of understanding is compounded by the fact that retail customers may not necessarily have the sophistication, information, or access needed to represent themselves effectively in today's market and to pursue their financial goals."[17]

The 2011 study sets the stage for its recommendations as follows:

> Retail investors are relying on their financial professional to assist them with some of the most important decisions of their lives. Investors have a reasonable expectation that the advice that they are receiving is in their best interest. They should not have to parse through legal distinctions to determine whether the advice they receive was provided in accordance with their expectations.[18]

Following the lead set by Congress in the Dodd-Frank act, the 2011 study recommends the SEC engage in rulemaking "to implement the uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers."[19] That standard would be "no less stringent than currently applied to investment advisers under [the Investment Advisers Act of 1940] Sections 206(1) and (2)" and would require that broker-dealers, like investment advisers, shall have a duty "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment advisor providing the advice."[20]

Perhaps foreshadowing the controversy over the 2011 study that has forestalled any action to implement the same, two SEC commissioners released a statement criticizing the 2011 study and opposing the uniform fiduciary standard.[21] On the other hand, SEC Chair Mary Jo White has stated that it is her "personal view" that the uniform fiduciary standard should be adopted.[22] In Feb. 2015, the White House Council of Economic Advisers issued its own report, entitled "The Effects of Conflicted Investment

Advice on Retirement Savings," which found substantial conflicts of interest that benefit the brokerage industry, and estimated the annual cost to investors at $17 billion.[23]

The White House and investor advocates also have supported a uniform fiduciary standard, while the securities and brokerage industries and their advocates have been opposed.

With the SEC apparently placing its priorities in other areas, due in part to this controversy, no action has been taken to date. While the recent support of the White House and the chair of the SEC might tend to suggest movement toward breaking the regulatory logjam, the looming end of the current administration and the lack of any attention to these issues in the presidential campaign thus far, may suggest that consideration of a uniform fiduciary standard may be an issue for the next administration.

Author's Note

As this article was on its way to press, the U.S. Department of Labor was proceeding with proposed rulemaking to broaden the fiduciary standard to broker-dealers with regard to retirement accounts. At the same time, the House of Representatives was considering a bill to block that rule from being finalized. On Sept. 30 the bill passed the House Financial Services Committee and is now before the full House of Representatives for consideration.

Howard A. Teichman is an attorney who focuses his practice on commercial litigation and debtor-creditor issues. He is a 1986 graduate of Rutgers Law School – Newark, where he was managing editor (articles) of the Rutgers Computer and Technology Law Journal. Bruce E. Baldinger is the managing member of The Law Office of Bruce E. Baldinger, LLC, in Morristown. He is a 1984 graduate of the University of Miami Law School and focuses his practice on commercial and securities litigation.

Endnotes

1. P.L. 111-203 (legislink.org/us/pl-111-203), 124 Stat. 1376 (legislink.org/us/sta-124-1376).
2. *Id.* at Section 913(b). Section 913(d) of the Dodd-Frank act requires that the study be submitted to the appropriate congressional committees within six months.
3. *See id.* at Section 913(c)(3)&(4).
4. *See id.* at Section 913(c)(5).
5. *Id.* at Section 913(c)(6).
6. *See id.* at Section 913(c)(9).
7. *See id.* at Section 913(c)(10).
8. *See id.* at Section 913(c)(13).
9. *See id.* at Section 913(f).
10. 15 U.S.C. 78o.
11. P.L. 111-203 at Section 913(g).
12. sec.gov/news/press/2011/2011-20.htm.
13. Study at iii-iv.
14. *Id.* at iv. For example, in New Jersey the U.S. District Court has recognized that a broker-dealer has a fiduciary duty only when it has discretion over the account or other facts exist that mandate such a duty under the particular circumstances. *SEC v. Pasternak*, 561 F. Supp. 2d 459, 499 (D.N.J. 2008).
15. Study at iv.
16. *Id.* at v.
17. *Id.* at 101.
18. *Id.*
19. *Id.* at 109.
20. *Id.* at vi.
21. sec.gov/news/speech/2011/spch012211klctap.htm.
22. *Wall Street Journal*, March 17, 2015, *SEC Head Backs Fiduciary Standards for Brokers, Advisers*, Justin Baer and Andrew Ackerman.
23. whitehouse.blog/2015/02/23/effects-conflicted-investment-advice-retirement-savings.

Misclassification of Employees—Risky Business II

by Elaine M. Cohen

This is a follow-up to the author's article published in the *New Jersey Law Journal* on August 29, 2011, titled "Misclassification of Employees – Risky Business," wherein the author strongly recommended that all employers conduct an internal audit to ensure correct classification of their workers as employees or independent contractors.

U.S. Department of Labor Issues Admonition That "Most Workers are Employees"

On July 15, 2015, the U.S. Department of Labor (DOL) issued Administrator's Interpretation No. 2015-1, announcing that there has been an increase in the misclassification of workers as independent contractors and that employees are not receiving proper protections, such as minimum wages, overtime, and workers' compensation insurance. Recognizing this as a serious issue, the interpretation provides guidance on how to determine if an individual is indeed an employee or an independent contractor.

In the interpretation, the DOL sets forth a revised six-factor 'economic realities' test.[1] The six factors the DOL scrutinizes in determining employee status are:

1. The extent to which the work performed is an integral part of the employer's business;
2. The worker's opportunity for profit or loss depending on his or her managerial skill;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer.

This article discusses in detail each of these six factors and the relative weight afforded to each factor by the DOL.

Work Performed is Integral to the Business

Despite stating that a totality of the facts and circumstances are to be reviewed and that one factor should not be given greater weight than any other factor, the DOL has elevated to a prominent position the first factor listed—whether the work performed is an integral part of the employer's business. It is important to note that, in the past, this first factor has received minimal attention.

The interpretation illustrates the impact of the first factor on the employee status test through a few examples. If a person answers calls through a call center, that person likely would be an employee, even if the work is performed in the person's home. In the residential construction industry, the DOL opines that carpenters are an integral part of any construction company's business; therefore, a carpenter hired to assist in the framing of homes is a *prima facia* employee. On the other hand, if the construction company hires a software developer who tracks bids and schedules crews for the company, the developer is not integral to the business, and, therefore, may be an independent contractor.

Ability to Realize Profit or Loss

The second factor in the DOL's revised test is the worker's ability to realize a profit or loss in a business. This factor depends on the worker's managerial skills and not just on the number of hours worked. The example provided by the DOL involves a cleaning company that hires a worker to clean for different corporate clients. This individual agrees to work where and when he or she is told to by the cleaning company. The person does not advertise his or her cleaning services, nor seek to reduce the costs of performing his or her business. There is no managerial skill affecting profit and loss of the business. He or she is an employee of the cleaning company. On the other hand, a worker who negotiates contracts with different companies, hires assistants, or advertises for new business and additional work, and can experience a profit or loss regardless of the hours worked, may not be an employee.

Level of Investment

The third factor is the type of investment an individual has to make to the operations of the business. An

independent contractor normally has to make a financial investment to support his or her business beyond one job. Many courts have determined that a small investment, or one considered minor compared to the employer's investment, will not suffice to support a finding of an independent contractor relationship. For example, a field worker on a farm who provides his or her own work gloves has not made a substantial investment compared to the farmer supplying equipment, fertilizer, seed and the land. The interpretation stresses that a comparison of the worker's investment to the employer's business investment is important to the determination, noting that a worker providing the supplies to clean a corporate client's office is minimal when the company generally provides insurance, the vehicle to transport, equipment and supplies.

Skills and Initiative of Worker

Factor number four discusses special skills and initiative of the worker, which alone may not be sufficient to determine whether someone is an independent contractor. The example provided in the interpretation recognizes that carpenters and electricians are skilled workers; however, if they are economically dependent on an employer, they are not independent contractors. To be classified as an independent contractor, there must be a showing that they are operating an independent business. A skilled carpenter who provides services to build custom cabinets for multiple companies, for instance, might be classified as an independent contractor.

Permanence of Relationship

A fifth factor to review under the DOL's test is the level of permanence of the relationship between the individual and the hiring party. An editor who works for only one publishing house for several years and does not edit books for any other party demonstrates a permanent relationship establishing employment. On the other hand, an editor who has a history of working for different publishing houses over several years, and advertises and negotiates rates for each individual job, demonstrates independent contractor status.

Degree of Control

The sixth factor discussed in the interpretation involves the level, nature, and degree of control that exists. This factor is commonly found in the employee versus independent contractor analysis. The interpretation stresses that, in today's society, with flexible work schedules and telecommuting, flexibility in one's job is not indicative of whether an employer lacks the requisite control over a worker. The nature and degree of control is to be viewed in relation to the economic dependence issue. The example provided in the interpretation involves the different degree of control an employer might have over a registered nurse listed on a registry. Where an agency directs the work hours and wage range, and the nurse has to advise the agency if hired by another party, the nurse is considered an employee. Where the nurse individually contacts potential clients, determines who to work for and how much to charge and sets his or her own schedule, he or she is an independent contractor. The work is the same, but based on the facts, circumstances, and degree of control, the classification of the job is different.

Conclusion

It is clear from the recent DOL guidance, as well as a recent New Jersey Supreme Court case[2] finding the ABC test[3] is the correct test to apply in wage payment and wage hour law, that both the state of New Jersey and the DOL are targeting and investigating employer/worker relationships to minimize improper use of the independent contractor classification. Defending an employer's classification in an audit can be very difficult and frustrating, as independent contractors may not cooperate and may not provide the needed documents and evidence to substantiate that they work for others companies or that they, in fact, have title to business equipment.

The author believes the ramifications and adverse consequences to employers across the country must be reviewed and analyzed, and the impact may devastate small and medium-size businesses currently relying on independent contractor classification for their workers.

If the DOL generally considers all workers as employees, what is the result? If more than 1,000 hours of service are provided, these additional people will need to be considered under a company-sponsored qualified retirement plan. Also, depending on the number of hours worked and total number of employees employed, the company may need to consider how these newly classified employees factor into the company's sponsored health insurance coverage. Companies that have additional benefits, such as life insurance and medical leave, will have to provide these fringe benefits to all

the individuals they formerly treated as independent contractors. If audited and a change in classification from independent contractor to employees is upheld, the adverse consequences of the audit will result in the company owing additional benefits, taxes, interest and possible penalties, and playing the audit lottery is indeed risky business. ■

Elaine M. Cohen is an associate with Witman Stadtmauer, P.A. in Florham Park. She holds a New Jersey and Florida license and concentrates her practice on transactional business law including mergers and acquisitions, employment and contract law, and general business agreements.

Endnotes

1. The drafters of the Fair Labor Standards Act developed the broader, more expansive 'economic realities test' from the more inclusive definition of employee than what was used in the common law control test. Instead of focusing on if the employer controls when and how the individual works, the economic realities test focuses on the economic dependency of the worker. In *NLRB v. Hearst Publications, Inc*., 322 U.S. 111 (1944), the Court focused on the economic relationship of the parties in the context of the National Labor Relations Act. In that case, the Court found that the newsboys were entitled to the protections of the statute and the publisher could not treat them as independent contractors. The Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), extended the test in the context of the Fair Labor Standards Act. For the expansion of the definition into discrimination cases under Title VII, *see* Nancy E. Dowd, The Test of Employee Status: Economic Relations and Title VII, *26 Wm. & Mary L. Rev. 75* (1984), scholarship.law.wm.edu/wmlr/vol26/iss1/7.
2. *Hargrove v. Sleepy's LLC*, 220 N.J. 289 (2015).
3. Under the ABC test, the individual is presumed to be an employee unless the employer can prove the worker performs the services free from control and direction, the services are outside the usual course of business or are performed outside of all places of business of the employer, and the worker is performing the services as an independent business or profession. All three factors must be satisfied to sustain independent contractor status.

Protecting Confidential Information and Trade Secrets from Employee Theft in the Digital Age

by Martin W. Aron and Allison J. Vogel

In the Digital Age, companies face new and expanding legal and technological challenges. Employees regularly have access to sensitive technical, marketing, financial, sales or other confidential business information; trade secrets; and private or confidential personal information during their employment. Moreover, with ubiquitous social media and increasingly versatile personal devices that can record and broadcast through the Internet, it has become easier than ever for confidential information and trade secrets to fall into the hands of a disgruntled employee, with severely damaging consequences.

This article is intended to address the challenges of protecting confidential information and trade secrets from employee theft in light of recent case law developments. Companies can and should take affirmative steps to protect confidential information and trade secrets in order to protect valuable corporate assets and maximize the ability to obtain protection from the courts when necessary. This article discusses the type of information that is protected, the legal implications of an employee's unauthorized taking of confidential information from an employer and the employer's remedies. This article also discusses policies employers can implement to protect their confidential information and trade secrets.

Confidential Information and Trade Secrets

In Jan. 2012, New Jersey enacted a version of the Uniform Trade Secrets Act (UTSA), entitled the New Jersey Trade Secrets Act (NJTSA), to protect trade secrets.[1] The NJTSA defines a "trade secret" as information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:

> Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]

The NJTSA further defines "misappropriation" as "(1) [a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means"; or "(2) [d]isclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who: (a) used improper means to acquire knowledge of the trade secret; or (b) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived or acquired through improper means; or (c) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired through improper means."[3]

Under the NJTSA, employers must ensure their trade secrets are "the subject of efforts that are reasonable under the circumstances to maintain [their] secrecy."[4] Such efforts may include limiting disclosure of confidential information and trade secrets within the company, implementing security measures to restrict the manner in which confidential information is stored or maintained, requiring employees in any sensitive position to sign confidentiality agreements, and monitoring the effectiveness of security measures electronically. Senior management, sales, marketing and financial personnel, and technical and production employees, such as chemists and engineers, should be required to execute a confidentiality, non-solicitation and non-disclosure agreement to protect the company's interests.

Such agreements typically cover, at a minimum, an appropriate definition of the confidential information or trade secrets to be protected, confirmation of the requirement to return such information and all copies

upon termination, assignment of rights in any inventions, confirmation of at-will status, post-employment covenants not to solicit other workers upon termination, and agreement to the appropriateness of injunctive relief in the event there is a breach or threatened breach of the agreement. The agreement also can address choice of law and venue options to best suit the company's interests in the event of litigation. Any such agreement should conform with other company policies, such as those that might be contained in an employee handbook.

Unauthorized Taking of Confidential Documents to Support Employment Claims

Despite the existence of comprehensive agreements, employees may nonetheless attempt to obtain and remove confidential information without authorization in order to obtain a position with a competitor, gain a competitive advantage in the marketplace, or pursue legal action against the employer. The NJTSA provides for broad equitable and legal relief in addition to reimbursement of counsel fees for a misappropriation of trade secrets.[5] In addition, there are a number of statutes that can be implicated when electronically stored information is stolen by employees. Under the New Jersey Computer-Related Offense Act (CROA), a person may be liable if he or she purposefully or knowingly, and without authorization, takes data existing on a computer, computer system or computer network.[6] Likewise, the federal Computer Fraud and Abuse Act (CFAA) prohibits the unauthorized access, or the exceeding of authorized access, to computers.[7]

While an employer has a legitimate right to safeguard its confidential documents and trade secrets, recent case law has shown that this right is not absolute. In 2010, the New Jersey Supreme Court had occasion to develop a framework for courts to use to determine whether an employee's removal of confidential documents from her employer's files in the context of prosecuting a discrimination case is protected conduct under the New Jersey Law Against Discrimination (LAD).[8]

Joyce Quinlan was employed as an executive director of human resources in Curtis-Wright Corporation's human resources department. In 2003, the company promoted a male employee to the position of corporate director of human resources and management development, which made him Quinlan's supervisor. Quinlan believed the male employee was less qualified than her. In order to prove her allegation that her employer discriminated against her and engaged in widespread gender discrimination, Quinlan gathered over 1,800 pages of internal documents from her employer's confidential files, including confidential personnel files, and provided them to her attorneys.

In Nov. 2003, Quinlan filed a lawsuit against her employer alleging gender discrimination. During discovery, Quinlan's attorneys produced the 1,800 pages of documents Quinlan had turned over to them. Shortly thereafter, Quinlan came into possession of her supervisor's performance review in her capacity as executive director of human resources. She copied the document and provided it to her attorneys, who used it during her supervisor's deposition. Once the company became aware of Quinlan's unauthorized removal of confidential and privileged information, it terminated her for theft of company property. Following her termination, Quinlan amended her complaint to add a claim for retaliation.

The first jury trial ended in a mistrial and the second jury trial resulted in a substantial compensatory and punitive damages award in the plaintiff's favor.[9] On appeal, the Appellate Division reversed and remanded the retaliation verdict for a new trial, and vacated the punitive damages award.[10] The plaintiff petitioned the New Jersey Supreme Court for certification.

The Supreme Court began its analysis of the employee's removal of documents by recognizing that "employees have a common law duty to safeguard confidential information they have learned through their employment relationship and that they are generally precluded from sharing that information with unauthorized third parties."[11] The issue, however, required the Court to "strike the balance between the employer's legitimate right to conduct its business, including its right to safeguard its confidential documents, and the employee's right to be free from discrimination or retaliation."[12]

The Court found that the following factors should be considered in deciding whether an employee is privileged to take or use documents belonging to the employer: 1) how the employee obtained possession or access of the documents; 2) what the employee did with the documents; 3) the nature and content of the documents; 4) whether the company had a clearly identified privacy or confidentiality policy; 5) whether disclosure of the documents was unduly disruptive to the employer's ordinary business; 6) the strength of the employee's expressed reasons for copying the documents; and 7) the impact of the broad remedial purposes of anti-

discrimination laws and the balance of employer and employee rights.[13]

Importantly, the Court asserted it was "mindful that employers may fear that [it had] opened the floodgates by granting protected status to such conduct," but it "[did] not share the concern that employers will be powerless to discipline employees who take documents when they are not privileged to do so."[14] Rather, the Court made it clear that "employees may still be disciplined for that behavior and even under the best of circumstances, run the significant risk that the conduct in which they engage will not be found by a court to fall within the protection [the court's] test creates."[15]

Applying these standards, the Supreme Court found Quinlan's act of removing the documents, including her supervisor's performance review, was not protected activity, and her employer could terminate her for her actions.[16] The Court also found the jury was correctly instructed to decide whether the company actually terminated Quinlan for taking the documents or for pursuing her claim that the failure to promote her was discriminatory. Given that the jury was correctly instructed at the trial court level, the Supreme Court reversed the judgment of the Appellate Division and reinstated the retaliation verdict.[17]

Prosecuting Employees for Unauthorized Taking of Confidential Documents

While *Quinlan* may have granted protected status to an employee's unauthorized taking of confidential documents in the context of prosecuting a discrimination case, such action may now be at the employee's own peril.[18] More recently, the Supreme Court addressed the criminal prosecution of an employee for unlawfully taking highly confidential documents obtained during the course of an employment relationship to support employment claims.[19]

Ivonne Saavedra was employed by the North Bergen Board of Education. In 2009, Saavedra and her son filed a lawsuit against the board alleging claims of employment discrimination and retaliation under the LAD, the Conscientious Employee Protection Act (CEPA), and other state and federal statutes. At some point, Saavedra gathered over 367 confidential student records, including 69 original file copies, without her employer's permission, to use in support of her discrimination lawsuit. Saavedra's counsel produced copies of the records in response to the board's discovery requests.

Upon learning that Saavedra removed the board's confidential documents, the board's counsel notified the county prosecutor's office. The county prosecutor pursued charges against Saavedra and presented evidence to a grand jury. The grand jury returned a two-count indictment charging Saavedra with second-degree official misconduct and third-degree theft by unlawful taking of public documents. Following her indictment, Saavedra voluntarily dismissed her employment discrimination lawsuit against the board.

She moved to dismiss the indictment, which was denied by the trial court. On appeal, the Appellate Division affirmed the trial court's denial of Saavedra's motion to dismiss the indictment.[20] She petitioned the New Jersey Supreme Court for certification, asserting, in part, that the Appellate Division's decision should be reversed because it "contravenes the anti-discrimination policies of the LAD, CEPA, and the Supreme Court's decision in *Quinlan*, and that it authorizes employers to circumvent the *Quinlan* balancing test by reporting an employee's collection of documents as a theft to a prosecutor."[21]

The Supreme Court found the "court rules provided [Saavedra] the opportunity to obtain from the Board relevant documents in support of her civil claim, subject to procedural safeguards and judicial oversight."[22] Contrary to Saavedra's assertion, the Court found its decision in *Quinlan* "did not endorse self-help as an alternative to the legal process in employment discrimination litigation" or "bar prosecutions arising from an employee's removal of documents from an employer's files for use in a discrimination case, or otherwise address any issue of criminal law."[23]

The Court revisited its analysis in *Quinlan* and found the balancing test may be used in cases involving retaliation under the LAD "when the employee's conduct in taking or using confidential documents allegedly provoked the employer to take retaliatory action."[24] The Court also reiterated that "nothing in *Quinlan* state[d] or implie[d] that the anti-discrimination policy of the LAD immunizes from prosecution an employee who takes his or her employer's documents for use in a discrimination case."[25] The Court, therefore, concurred with the Appellate Division that the statutes met due process standards.[26] Accordingly, the Court affirmed the judgment of the Appellate Division and remanded the matter to the trial court.[27]

Company Policies and Handbooks

It is prudent for employers to implement policies to protect their confidential information and trade secrets. The New Jersey Supreme Court suggested that courts consider whether a company has a clearly identified privacy or confidentiality policy that the employee's disclosure violated as a factor in deciding whether an employee is privileged to take or use documents belonging to the employer. By implementing confidentiality and privacy policies, codes of business conduct and ethics, and including confidentiality and privacy policies in employee handbooks, employers place their employees on notice that the unauthorized taking of confidential documents constitutes theft and can result in an employee's termination.

Employers also may require employees to sign post-employment agreements with restrictive covenants concerning the disclosure of confidential information. Such agreements ensure the company's confidential information and trade secrets remain protected during and for a specified period of time after the employee's separation with the company.

Employers also may consider implementing an electronic communications policy. By implementing an electronic communications policy, a company can identify permissible and impermissible uses of the company's systems, email, and Internet access. Companies also can restrict their employees' personal usage of information systems and monitor employees' business and personal communications to protect their confidential information and trade secrets.

Employers may consider instituting a 'bring your own device' (BYOD) program in recognition of the rapidly emerging technology and devices used for personal and other communications. A BYOD program permits eligible employees and certain others limited connectivity to the company's corporate networks. The purpose of a BYOD policy is to define standards, procedures, and restrictions governing participation in the program for individuals who wish to connect a mobile personal device.

Finally, employers can request employees sign acknowledgements stating that non-compliance with the terms and conditions of the program and policies will subject them to disciplinary action, up to and including termination of access to the company's information systems or disciplinary action, including termination of employment or association with the company. An employer will stand on stronger ground in court if it can prove the employee was on notice and aware of the company's policies.

Conclusion

Employers must take affirmative steps to protect confidential information and trade secrets. Failure to do so could cause a court to question whether the information warrants the issuance of injunctive relief. Confidentiality agreements and corporate policies must place individuals on notice of the consequences of improper use or removal of such information. In light of the *Saavedra* decision, employees also are on notice that they may be subject to criminal prosecution for unlawfully taking confidential documents. While the legal landscape continues to develop with new technologies, companies must ensure they constantly review and monitor the measures that are in place for protecting valuable intellectual property and trade secrets that are vital to business operations.

Martin W. Aron is a shareholder and litigation manager in the Morristown office of Jackson Lewis P.C. Allison J. Vogel is an associate of the firm.

Endnotes

1. N.J.S.A. 56:15-1, *et seq.*
2. *Id.* 56:15-2.
3. *Id.*
4. *Id.*
5. N.J.S.A. 56:15-3 and 56:15-4.
6. N.J.S.A. 2A:38A-3.
7. 18 U.S.C.S. § 1030.
8. *Quinlan v. Curtis-Wright Corp.*, 204 N.J. 239 (2010).

9. *Id.* at 244.
10. *Id.*
11. *Id.* at 260.
12. *Id.* at 261.
13. *Id.* at 269-71.
14. *Id.* at 272.
15. *Id.*
16. *Id.* at 273.
17. *Id.*
18. For example, in *West Hills Research and Development, Inc. v. Wyles*, 2015 Cal. App. Unpub. LEXIS 5009 (Cal. Ct. App. 2d Dist. July 17, 2015), the court held that a former employee's taking of his former employer's confidential information in order to prepare for filing a shareholder derivative lawsuit was not protected activity under California's anti-SLAPP statute.
19. *State v. Saavedra*, 2015 N.J. LEXIS 641 (S. Ct. June 23, 2015).
20. *State v. Saavedra*, 433 N.J. Super. 501 (App. Div. 2013).
21. *Saavedra*, 2015 N.J. LEXIS 641, at *23.
22. *Id.* at 50.
23. *Id.*
24. *Id.* at 54.
25. *Id.*
26. *Id.* at 55.
27. *Id.* at 61.

U.S. v. Hoskins and Possible Limitations in the FCPA's Ever-Expanding Global Reach

by Trisha L. Smith

Now more than ever, it is critical that global enterprises implement effective anti-bribery policies and procedures as part of their compliance policies, as well as oversee effective day-to-day internal controls to ensure compliance with such policies. Corporate counsel merely needs to point their global clients to the recent case of *United States v. Hoskins*[1] to illustrate the extent to which the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) continually seek to expand the global reach of the Foreign Corruption Practices Act[2] (FCPA).

By way of background, the FCPA prohibits bribery of foreign officials:

1) Where a "domestic concern" or U.S. "issuer" of securities, or any officer, director, employee, or agent thereof (regardless of their nationality) makes use of U.S. interstate commerce in furtherance of a corrupt payment;
2) Where a U.S. citizen, national, or resident acts outside the U.S. in furtherance of a corrupt payment, regardless of whether they make use of U.S. interstate commerce; and
3) Where any other person, while in the territory of the U.S., acts in furtherance of a corrupt payment, regardless of nationality and the use of interstate commerce.[3]

United States v. Hoskins

In *Hoskins*, defendant Lawrence Hoskins served as senior vice president for Alstom UK's Asia region, working out of Alstom UK's Resources Management S.A. office in France.[4] On behalf of Alstom UK's various subsidiaries, Hoskins oversaw hiring consultants to get new customers and to keep existing customers in Alstom's Asia market.[5] One of Alstom UK's subsidiaries was located in Windsor, Connecticut (Alstom, U.S.).[6]

The DOJ alleged, among other things, that Hoskins participated in a bribery scheme to secure for Alstom U.S. a $118 million project to build power stations for Indonesia's state-owned and state-controlled electricity company, Perusahaan Listrik Negara, known as the Taharan Project.[7] Specifically, in its second superseding indictment the DOJ charged that Hoskins acted on behalf of Alstom U.S. as an agent of a domestic concern within the meaning of the FCPA because Hoskins was responsible for approving and authorizing payments to consultants retained for the purpose of "pay[ing] bribes to Indonesian officials who had the ability to influence the award of the Tarahan Project."[8]

In 2014, Hoskins moved to dismiss the DOJ's allegations, arguing he did not act as an agent of a domestic concern because he worked for an Alstom subsidiary outside of the U.S. and, therefore, he was not among the class of persons subject to the FCPA.[9] Regarding the second indictment, and in a separate decision, the court denied Hoskins' motion, reasoning that the "existence of an agency relationship is a 'highly factual' inquiry" and that it was up to a jury to decide whether Hoskins acted as an agent for Alstom, U.S.[10]

The DOJ then altered its charge language in a third superseding indictment, replacing the 'agent of a domestic concern' language and instead alleging Hoskins should face criminal liability under general rules of conspiracy and accomplice liability statutes because he conspired with Alstom U.S. (a/k/a the domestic concern) to bribe Indonesian foreign officials[11] Hoskins argued that if he did not act as an agent of a domestic concern, then Congress could not have intended for him to be liable directly under the FCPA. The court agreed with Hoskins.

No 'Back Door' Conspiracy or Accomplice Liability

Following the Supreme Court's *Gebardi* principle,[12] the *Hoskins* court held that where Congress chooses to exclude a class of individuals from liability under a criminal statute, the government cannot evade congressional intent by charging those individuals with conspiring to violate the same statute.[13] The court reasoned that

because the *Gebardi* principle also applies to aiding and abetting liability, Congress did not intend for conspiracy liability to attach to individuals like Hoskins, who were not otherwise directly liable under the FCPA.[14] Citing the extensive legislative history of both the FCPA (as originally enacted) and its 1988 amendments, the court noted that although the history contains little discussion of accomplice liability, "that which does exist is consistent with what the plain text and structure of the final enactment implies regarding the limits of liability for non-resident foreign nationals."[15] When Congress listed all the persons or entities who could be prosecuted under the FCPA, it "'intended that these persons would be covered by the Act itself, without resort to a conspiracy statute."[16] The court explained that the FCPA as enacted predicated an agent's liability on a finding that the domestic concern had itself violated the statute.[17] In fact, as the court pointed out, the FCPA's final bill excluded "foreign affiliates" of U.S. companies in recognition of "the inherent jurisdictional, enforcement and diplomatic difficulties raised" by such an inclusion.[18]

The court further noted that Congress had considered imposing individual liability based on concepts of accomplice liability, "but instead chose to do so directly and carefully delineated the class of persons covered to address concerns of overreaching."[19] Finally, the court pointed out that, even in the absence of an explicit discussion of accomplice liability in the FCPA's legislative history, "the carefully-crafted final enactment evinces a legislative intent to cabin such liability."[20]

Based on the FCPA's text, structure, legislative history, and its amendments, the court concluded Congress did not intend to impose accomplice liability on nonresident foreign nationals who were not subject to direct liability.[21] In other words, if the DOJ cannot charge a nonresident foreign national *directly* and through the FCPA's front door—either as an agent of a domestic concern or for acts committed while physically present in U.S. territory—then the DOJ cannot reach through the FCPA's back door and grab that same nonresident foreign national with the jurisdictional arm of *indirect* accomplice or conspiracy liability.

A Few Takeaways for Global Companies Doing Business in the U.S.

While courts, criminal attorneys and scholars try to sort out whether and to what extent a foreign national acts as an agent of a domestic concern in violation of the FCPA, global companies doing business in the United States may want to heed a few takeaways after *U.S. v. Hoskins*:

Notwithstanding the *Hoskins* court's efforts to limit the FCPA's jurisdictional reach, the DOJ and the SEC remain steadfast and committed to expanding their respective FCPA enforcement efforts, and have stepped up their efforts to bring criminal actions against not only companies, but individuals as well.[22]

From a risk-mitigation perspective, once a company's army of attorneys finds itself toe-to-toe with the DOJ or the SEC—dueling it out over who qualifies as an agent of a domestic concern in violation of the FCPA—then arguably, it is regrettably late in the risk-mitigation process. Indeed, the company may have a difficult time explaining to its stakeholders why the organization's anti-bribery and corruption risks have not been mitigated in a more timely and cost-effective manner.

FCPA liability is not the only anti-bribery game in town. Although employees like Hoskins may never set foot on U.S. soil, their companies face an ever-increasing litany of overseas liability.[23]

Implementing and Maintaining Effective Anti-Bribery Policies and Procedures

Any organization can draft and post on its website a compliance policy. However, compliance policies may not be worth the paper or pixels used to compose them if they fail to mitigate compliance risks. It may come as no surprise that several of the DOJ's and the SEC's most recent FCPA enforcement actions involved companies with very detailed compliance policies that expressly prohibited bribing foreign officials.[24]

What went wrong? How can companies develop and implement effective compliance policies that will help them avoid FCPA liability and other legal and commercial risks inherent in corrupt overseas practices?

Although a thorough discussion about how to develop an effective compliance policy is beyond the scope of this article, companies and their counsel can reference several useful and practical resources to create compliance programs or enhance their current compliance practices. For example, the DOJ and the SEC have issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (FCPA resource guide) that includes "Hallmarks of Effective Compliance Programs"[25] The FCPA resource guide explains who and what is covered by the FCPA, different types of civil and criminal resolutions

available, and why maintaining an effective compliance program can help a company when the DOJ and the SEC are deciding whether to bring an enforcement action against the company.[26]

At a minimum, a compliance program should include anti-bribery policies and procedures that maximize the prevention and detection of wrongdoing, minimize corruption and related enforcement risks, and can be tailored to a company's unique operational needs. It should include:

1) **Detailed Meals, Entertainment, Gifts and Travel Guidelines.** Expenses should require pre-approval and should include detailed cash receipts for reimbursement to ensure that expenditures are reasonable, comply with applicable law, directly relate to company business, are not offered with a *quid pro quo* exchange that favors or benefits the company, and do not improperly influence any official decision.
2) **Hiring/Engagement Practices.** Conduct careful background due diligence, interviewing, negotiating and selection of any employees, contractors, consultants and third-party intermediaries that will conduct foreign business on behalf of the company, and the ability to terminate these relationships quickly.
3) **Training Programs.** Create effective and practical training programs for employees that: 1) emphasize the importance of complying with the company's anti-bribery policies and related laws, 2) explain the legal and commercial consequences of noncompliance, 3) show employees the company is listening to their questions, concerns and feedback, and 4) reward employees for their compliance efforts.
4) **Recordkeeping and Document Management.** Keep accurate books and records, including detailed accounts of payments or expenses that can be supported by receipts, and maintain updated documentation that demonstrates the company's efforts to comply with anti-bribery laws, including training programs, certifications, due diligence efforts in hiring and contracting, audits, compliance reviews and internal investigations.
5) **Reporting Procedures.** Provide employees with a clearly designated person or office that; 1) fields questions or concerns about possible compliance risks, 2) offers employees anonymous and user-friendly reporting procedures, 3) gives employees prompt and practical advice about how to handle risks, 4) promptly processes violations reported by employees, and 5) follows up with employees about corrective measures undertaken.
6) **Audits and Internal Investigations.** In addition to regular testing and updating of a company's compliance programs, internal and external auditing can help mitigate potential corruption risks for high-risk activities such as cash disbursements, entertainment, meals, gifts, travel, consultant and third-party intermediary contracts and payments, tax payments and customs transactions. If the company learns about a possible anti-bribery law violation, an internal investigation spearheaded by in-house counsel can help to maintain the attorney-client privilege and protect sensitive documents and communications.
7) **Self-Reporting.** Both the DOJ and the SEC encourage companies to self-report FCPA violations.[27] The FCPA resource guide states that "[w]hile the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any action, to take, both the DOJ and the SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."[28]
8) **Culture of Compliance and the 'Tone from the Top.'** A company's culture of compliance often mirrors: 1) the degree to which senior management visibly and actively embraces, encourages and exemplifies compliance and ethical behavior, and 2) the degree to which the company—promptly and with an even hand—rewards employees for following compliance procedures, or metes out consequences for not doing so.[29]

Risk-Based Assessments are Key to Identifying and Managing Corruption Risks

Developing and maintaining sound anti-bribery practices always hinges on thorough risk-based assessments that identify and manage corruption risks for different operational segments of a company, and for each and every country and jurisdiction where a company does business.[30] Some business practices and some locales are riskier than others, and often raise corruption red flags.[31] When performing corruption risk assessments, companies can consult the Corruption Perceptions

Index (CPI) developed by Transparency International.[32] The CPI ranks 180 countries for perceived levels of corruption, from "highly clean" to "highly corrupt." Additionally, examples of corruption risk red flags might include (to highlight a few):

- Using consultants, contractors, agents or other third-party intermediaries to act as a company's go-between with foreign officials;
- Entertaining or 'gifting' foreign officials;
- High commissions, permit 'fees' or local 'taxes';
- The business or industry is highly regulated and/or dependent upon government approvals; and
- The country or region has a culture or history of grafting, bribery and corruption (*i.e.*, it's the proverbial 'cost of doing business/getting things done').

Engaging local counsel familiar with local laws, cultural customs and norms can also help companies identify corruption risks and mitigation strategies, and enhance compliance efforts.

Trisha L. Smith is the founder of the Law Office of Trisha L. Smith. Her practice focuses on business compliance and ethics solutions.

Endnotes

1. No. 3:12cr238, slip op. (D. Conn. Aug. 13, 2015).
2. Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §78dd-1, *et. seq.* (amended 1998).
3. FCPA, 15 U.S.C. §§ 78dd-1, 78dd-2 and 78dd-3. The FCPA defines a "domestic concern" as "an individual who is a citizen, national, or resident of the United States" and "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. §78dd-1-2(h)(1).
4. *U.S. v. Hoskins*, No. 3:12cr238, slip op. at 1(*citing* the Third Indictment at ¶3).
5. *Id.* (*citing* the Third Indictment at ¶¶3, 13).
6. *Id.*
7. *Id.*
8. *Id.* (*citing* the Second Indictment at ¶¶7-8).
9. *Id.* at 1.
10. *U.S. v. Hoskins*, 73 F. Supp.3d 154 (D. Conn. 2014).
11. *U.S. v. Hoskins*, No. 3:12cr238, slip op.at 2 (*citing* the third indictment at ¶26(a)). Generally, theories of accomplice liability under the federal conspiracy statute and aiding and abetting statute impose liability on persons who conspire with or aid and abet in the commission of any federal crime. *See* 18 U.S.C. §371 (conspiracy), and 18 U.S.C. § 2 (aiding and abetting).
12. *Gebardi v. U.S.*, 287 U.S. 112 (1932). *See also, United States v. Bodmer*, 342 F. Supp.2d 176, 181 n. 6 (S.D.N.Y. 2004). ("In *Gebardi*, the Supreme Court held that where Congress passes a substantive criminal statute that excludes a certain class of individuals from liability, the Government cannot evade Congressional intent by charging those individuals with conspiring to violate the same statute."); *U.S. v. Hoskins*, No. 3:12cr238, slip op. at 2 (*citing U.S. v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987).
13. *Id.* at 3 (*citing U.S. v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991); *U.S. v. Bodmer* at 181 n.6.
14. *Id.* (*citing U.S. v. Amen* at 381).
15. *Id.* at 4. The Court stated that "[t]he clearest indication of legislative intent is the text and structure of the FCPA, which carefully delineates the classes of people subject to liability and excludes nonresident foreign nationals where they are not agents of a domestic concern or did not take actions in furtherance of a corrupt payment within the territory of the United States." *Id.* at 2.

16. *Id*. (*citing U.S. v. Castle* at 836). The Court noted that in *U.S. v. Castle*, the Fifth Circuit applied the *Gebardi* principle and concluded that foreign officials who accepted bribes could not be prosecuted for conspiracy to violate the FCPA. Foreign officials were not subject to liability as "principles" under the FCPA, and the statute's 1977 legislative history showed that the FCPA excluded the foreign bribe recipients because Congress was concerned about "the inherent jurisdictional, enforcement, and diplomatic difficulties" raised by the application of the bill to non-citizens of the United States." *Id.* (*citing U.S. v. Castle* at 835 (*quoting* H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4121, 4126)).
17. *Id*.
18. *Id*. at 3 (*citing* H.R. Conf. Rep. No. 95-831 at *14).
19. *Id*. at 6. The DOJ argued that Congress enacted the FCPA's 1998 amendments to ensure that the United States was in compliance with its treaty obligations under the newly ratified Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (entered into force on Feb. 15, 1999) (currently signed by 41 countries and ratified by 30 countries) ("OECD Convention"), available at oecd.org/corruption/oecdantibriberyconvention.htm; International Anti-Bribery and Fair Competition Act of 1998, Pub.L. No. 105-366, 112 Stat. 3302. The DOJ argued that because the OECD Convention required each signatory country to "take such measures as may be necessary to establish that it is a criminal offence under its law for any person to intentionally" bribe foreign officials, then the 1998 amendment's expanded jurisdiction should cover "any persons over whom U.S. courts have jurisdiction" should also extend federal accomplice liability and conspiracy statutes to foreign internationals. To read the 1998 amendments otherwise would place the U.S. in violation of its treaty obligations under the OECD Convention. The Court disagreed, noting "OECD's reference to 'any person' is cabined by Article 4 of the Convention, addressing jurisdiction, which provides that each signatory 'shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official wen the offense is [1] committed in whole or in part in its territory)... or [2] by its own nationals while abroad." *U.S. v. Hoskins*, No. 3:12cr238, slip op.at 6. Based on OECD Article 4's language, the Court concluded that the OECD did not require the United States to prosecute foreign bribery committed abroad by non-resident foreign nationals who conspire with United States citizens. *Id.*
20. *Id.* at 5-6.
21. *Id.* at 7.
22. Tiffany Robertson, SEC Looks to Increase Focus on Enforcement of FCPA Accounting Provisions, *Thompson Reuters Compliance Learning* (April 17, 2014), available at jdsupra.com/legalnews/sec-looks-to-increase-focus-on-enforceme-67373/. *See also, In the Matter of Vicente E. Garcia*, Order Instituting Cease-And-Desist Proceedings (Release No. 75684) ("Garcia Order"), available at sec.gov/litigation/admin/2015/34-75684.pdf. In the Garcia Order, Vicente Garcia, a former vice president of global and strategic accounts for SAP SE, agreed to pay $92,395 to settle charges he violated the FCPA by bribing Panamanian government officials through an intermediary to procure software license sales.
23. *See, e.g.* United Nations Convention against Corruption, art. 1, G.A. Res. 58/4, U.N. Doc. A/58/422, 3249 U.N.T.S. 41 (entered into force Dec. 14, 2005) (ratified by the United States on October 30, 2006 and signed by 140 countries as of Oct. 19,2012, available at unodc.org/unodc/en/treaties/CAC/index.html; Council of Europe's Civil and Criminal Conventions on Corruption, Nov. 4, 1999, ETS Np/ 174 (1999), available at conventions.coe.int/Treaty/EN/Treaties/Html/174.htm; (adopted Nov. 4, 1999); Bribery Act of 2010, c. 23 (U.K.) (in force as of July, 2012), available at legislation.gov.uk/ukpga/2010/23/contents; Xing f [Criminal Code] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) ch. Ill, § 1, arts. 163, 164, ch. VIII, arts. 385, 386, 389 (China), *translated in* Criminal Law of the People's Republic of China (Jan. 15, 2013) available at cecc.gov/pages/newLaws/criminalLawENG.php.

24. *See, e.g.*, *Securities Exchange Commission v. The Bank of New York Mellon Corp.*, Order Instituting Cease-And-Desist Proceedings (Release No. 75720 Aug. 18, 2015) (BNY Mellon Order), available at sec.gov/litigation/admin/2015/34-75720.pdf. BNY Mellon agreed to pay $14.8 million to settle charges it violated the FCPA by providing valuable student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund. In the BNY Mellon order, the SEC found that BNY Mellon lacked sufficient internal controls to prevent and detect the improper hiring practices. Although the company did have an FCPA compliance policy, it maintained few specific controls around the hiring of customers and relatives of customers, including foreign government officials. *See also, Securities Exchange Commission v. BHP Billiton Ltd. and BHP Billiton Plc,* Order Instituting Cease-And-Desist Proceedings (Release No. 74998 May 20, 2015) (BHP Billiton order), available at sec.gov/litigation/admin/2015/34-74998.pdf. BHP Billiton agreed to pay a $25 million penalty to settle charges it violated the FCPA when it sponsored the attendance of foreign officials at the Summer Olympics. In the BHP Billiton order, the SEC found that although BHP Billiton put some internal controls in place around its Olympic hospitality program, the company failed to provide adequate training to its employees on how to evaluate bribery risks of invitations extended to guests (including foreign officials), and the company did not implement procedures to ensure its employees properly prepared, reviewed and approved invitations.
25. Criminal Div. of the U.S. Dep't of Justice and the Enf't Div. of the U.S. Sec. and Exchange Comm'n, , *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 57-68 (2012). For a comprehensive and practical source for developing an effective ethics and compliance program, *see The Ethics and Compliance Handbook: A Pracitcal Guide from Leading Organizations* (The Ethics and Compliance Officer Association Foundation 2008) (ECOA Handbook). *See also* Bonnie K. Arthur, Foreign Corrupt Practices Act Compliance Checklist, Westlaw (database updated Sept. 2015).
26. *Id.*
27. *See, e.g.,* Jonathan S. Feld, *DOJ's Focus on Corporate Cooperation and Self-Disclosure*, Law.com (January 16, 2015), available at law.com/sites/articles/2015/01/16/dojs-focus-on-corporate-cooperation-and-self-disclosure.
28. *FCPA Resource Guide* at 54. Voluntary disclosure, self-reporting and cooperation under the FCPA remains a complex and difficult decision for many international companies. *See* Ben Hanley and Jennifer Saperstein, Pleasure or Pain? Voluntary FCPA Disclosure and Cooperation, *The FCPA Blog*, (March 9, 2015) ("The voluntary disclosure calculus remains a difficult one"), available at: fcpablog.com/blog/2015/3/9/pleasure-or-pain-voluntary-fcpa-disclosure-and-cooperation.html. Even so, the cost of FCPA noncompliance can be staggering. *See,* Jaime B. Guerrero, The High Cost of an FCPA Violation, *The National Law Review*, (Sept. 2, 2015), *available at* http://www.natlawreview.com/article/high-cost-fcpa-violation.
29. *See ECOA Handbook* at 51, 54. *See also*, Hilary Johnson, FCPA Costs Highlight Need for More Than Tone from the Top, *FierceCFO*, (May 2, 2014), available at fiercecfo.com/story/fcpa-costs-highlight-need-more-tone-top/2014-05-02.
30. Andrea Bonime-Blanc, *The Reputation Risk Handbook* 38 (D (is this correct?) Sustainability 2014); *See also* Andrea Bonime-Blanc, Risk and Opportunity: The Role of Stakeholder Trust, *Ethical Corporation Magazine*, (May 8, 2014), available at ethicalcorp.com/stakeholder-engagement/globalethicist-risk-and-opportunity-role-stakeholder-trust.
31. *See ECOA Handbook* at 13-33, 164.
32. Available at transparency.org/research/cpi/.

In My Opinion... Ethical Considerations of Third-Party Legal Opinions

by Lydia C. Stefanowicz

The issuance of a third-party legal opinion as a condition to closing has become such a common practice in certain types of business transactions, most notably financing transactions, that lawyers rarely stop to consider the ethical considerations related to this practice. The third-party legal opinion is an expression of a lawyer's professional judgment on the matters covered therein relating to his or her client and the subject transaction, as of the date of the opinion letter, for the benefit of the opinion recipient. Since the opinion recipient is not the lawyer's client, such an opinion letter is commonly known as a 'third-party legal opinion.' In an adversarial legal system such as ours, a situation where an attorney has, among other duties, a duty of loyalty and care to his or her client, as well as a duty to be fair and objective to the third-party legal opinion recipient,[1] appears to create an ethical anomaly.

The practice of issuing third-party legal opinions can only be reconciled with a lawyer's ethical considerations if the issuance of the third-party legal opinion is consistent with the lawyer's duties to his or her client. Rule 2.3(a) of the New Jersey Rules of Professional Conduct (NJRPC) allows a lawyer to "provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." This rule is the ethical basis of third-party opinion practice. However, it was only in 1983 that a version of NJRPC 2.3(a) was initially adopted by the American Bar Association (ABA) as part of the ABA Model Rules of Professional Conduct. It was the first ethics rule to recognize specifically the practice of third-party legal opinions, and was adopted in response to the need for some common ethics ground rules for providing information about a client to a third party while representing the client.

What are some of the ethical considerations implicated by third-party legal opinions?

First, the client should consent to the issuance of the legal opinion. That consent may be express, as, for example, pursuant to an engagement letter, or implied. NJRPC Rule 1.2(a) states that a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Thus, when a client executes a financing commitment letter or an agreement that requires the delivery of a third-party legal opinion as a condition of closing, the client has implicitly consented to the issuance of the third-party legal opinion on its behalf by its counsel in that transaction.

However, when a lawyer is engaged to act as local counsel in a transaction primarily for the purpose of issuing a legal opinion in its jurisdiction, the lawyer-client relationship may be remote. For example, the local counsel may be contacted initially by lead counsel, and may communicate only with lead counsel throughout the course of the transaction. In other cases, the local lawyer may be engaged by the opinion recipient to provide a legal opinion about a document or entity status as if it is being provided on behalf of the subject of the opinion. In those circumstances, unless the lawyer has been expressly engaged by the opinion recipient on its own behalf (in which case the lawyer will be rendering a direct opinion, not a third-party legal opinion), a lawyer would be well-advised to treat the subject of the opinion letter as its client and to confirm that by asking its client to execute an engagement letter, whereby its consent to the opinion letter will be express.

NJRPC Rule 2.3(b) requires a lawyer to obtain the *informed consent* of a client if the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely. This could occur, for example, if opinion negotiations would reveal to the opinion recipient that the transaction documents as drafted do not provide a material remedy to the opinion recipient. The informed consent of the client requires the lawyer to consult with the client and

to describe to the client in writing the conditions of the evaluation, including disclosure of any confidential client information.

Where a third-party legal opinion covers multiple parties (*e.g.*, a borrower and one or more guarantors), there is a possibility that the interests of the parties may not be aligned in every instance. Under such circumstances, the lawyer also should consider whether a conflict of interest may arise in that context and, if so, seek the informed consent of each client involved in the transaction.

Second, as mentioned above, a third-party legal opinion may involve disclosure of confidential client information. Similar to NJRPC 2.3(b), Rule 1.6 of the NJRPC provides that disclosure of confidential information requires client consent after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except in certain other limited circumstances not pertinent to legal opinions.

Third, NJRPC 1.4 requires a lawyer to keep a client reasonably informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. This rule may be challenging to comply with in the context of opinion practice. Clients frequently have little interest in and patience for the details of opinion letter negotiation, where the issues are perceived to be esoteric, a source of unnecessary delay and of little direct value to the client's interests in the transaction.

Finally, the rules of professional conduct relating to dealings with third parties are also relevant to third-party legal opinions. NJRPC 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal, criminal or fraudulent. NJRPC 4.1 prohibits a lawyer from knowingly: 1) making a false statement of material fact or law to a third person, or 2) failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client. Thus, including in an opinion letter that will be relied upon by the opinion recipient a legal conclusion or an assumption the lawyer knows is not true is a violation of professional ethics. In addition, while the scope of a lawyer's investigations in connection with the issuance of an opinion letter may be limited, any such limitations that are material to the legal conclusions should be clearly described in the opinion letter. Omission of a material action, or departure from what may be customarily or reasonably expected of the lawyer issuing the opinion, may constitute misrepresentation if the limitation or departure is not stated for the opinion recipient to take into consideration in accepting and relying upon the opinion letter.

While the issues described in this article are some of the primary ethical considerations in opinion practice, they are not necessarily the only ones. Lawyers should be mindful of the rules of professional responsibility and ethical principles generally in the context of opinion practice as much as in other aspects of client representation.

Lydia C. Stefanowicz is a partner in the firm of Greenbaum, Rowe, Smith & Davis LLP.

Endnote

1. See Restatement (Third) of the Law Governing Attorneys, Section 95, Comment c (2000).