IFA’s 45th Annual
LEGAL SYMPOSIUM
Competition
Competence
What is competence?
ABA Model Rules of Professional Conduct

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Preambles

• “rules of reason”
• “simply provide a framework for the ethical practice of law”

Our Goal

• Learn the Rule
• Discuss the Rule
• Apply the Rule to some hypos
Why discuss competency and the role of in-house counsel together?

• in-house counsel is a lawyer
• must tackle a variety of legal issues (maybe more than your average lawyer)
• often works in isolation or a small department
• usually only one client (stakes are higher)
• highly regulated industry
• expected to be a jack of all trades
### Competency and In-House Counsel

5. In your role as in-house counsel, have you ever felt pressured to give advice in an area of law that you are unfamiliar with?

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answered question: 39

skipped question: 0
State of Nebraska v. Orr
277 Neb. 102, 759 N.W.2d 702 (2009)

Orr approached by barista to assist in franchising business model
State of Nebraska v. Orr

• Orr was a general practitioner with 40 years of legal experience and a few instances of franchisee representation (reviewed some FDDs and FAs)

• Orr did not review state or federal franchise law prior to or during representation

• Orr was warned by a colleague that franchise law was a specialized field

• Orr did not seek assistance (until it was way too late)
State of Nebraska v. Orr

- Orr drafted an FDD
- Many barista franchises sold in many states
- Things went south and franchisees sued
- Orr called out on poor work, revised FDD, and gave barista the go-ahead to sell again
- More sales, more lawsuits and an FTC investigation
Comment on Rule 1.1
Comment on Rule 1.1
To determine competency, look at:
1) the complexity and specialized nature of the issue
2) the lawyer’s general experience
3) the lawyer’s special training and experience
4) the lawyer’s preparation and study
5) whether the lawyer consults with another lawyer for help
Comment on Rule 1.1

May establish competency by:

1) Using fundamental lawyer skills (analysis of precedent, evaluation of evidence, legal drafting, identifying legal problems)

2) Preparation and studying

3) Associating with another lawyer

4) Limiting the scope of representation
Comment on Rule 1.1

In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
Back to Orr
The Court in Orr

“As a lawyer who has been practicing law for 40 years, Orr should have been aware that he was not competent to represent franchisors, and he was warned by another attorney that franchise law was a specialized area.”
The Court in Orr

“At the very least, Orr should have done the research necessary to become competent in the area of franchise law. The fact that Orr did little or no research into state or federal franchising law until long after he first received notice that there was a problem with the franchising documents is inexcusable.”
The Court in Orr

“We take this opportunity to caution general practitioners against taking on cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas.”
So what can I take home?
Practical Considerations

1) Size up the issue
2) Study
3) Involve outside counsel
   – Have OC send you a “primer”
   – Keep an ongoing list of questions
4) Limit the scope of representation
5) Don’t be afraid to back pedal
IFA’s 45th Annual
LEGAL SYMPOSIUM

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LEGAL SYMPOSIUM
WHO IS THE CLIENT?
The ABA Model Rules of Professional Conduct, Rule 1.13(a)

• “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

— The client is your employer.
And The Survey Says...

6. In your role as in-house counsel have you ever been asked to perform legal work for an employee or executive in his or her individual capacity?

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answered question: 39
skipped question: 0
And The Survey Says....

4. In your role as in-house counsel, have you ever been solicited for legal advice from a franchisee?

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answered question 39
skipped question 0
Who Is Your Client?

• Why Does This Matter?
  – Malpractice Liability
  – Attorney-Client Privilege
  – Conflict of Interest
Malpractice Liability

• Can an attorney ever be liable for malpractice to a party other than the client?
Malpractice Liability

  - **Facts:**
    - Attorney represented franchisor called Baristas & Friends
    - Attorney negligently drafted FDDs
    - FTC awarded $242,000 judgment on basis of negligent FDDs
    - Officers and directors of Baristas & Friends brought malpractice action against the attorney
Malpractice Liability

  
  – Did the attorney who drafted the FDDs have a duty of care to the officers and directors of the franchisor?
  
  • YES!
  
  • “The modern trend in the United States is to recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract.”
Malpractice Liability

  
  – Balancing Factors- Third Party Liability
    • (i) the extent to which the transaction was intended to affect a third party
    • (ii) the foreseeability of harm
    • (iii) the degree of certainty that the third party suffered injury
    • (iv) the closeness of the connection between the attorney’s conduct and the injury suffered
    • (v) the policy of preventing future harm
    • (vi) whether recognition of liability under the circumstances would impose an undue burden on the legal profession
Malpractice Liability

• Takeaway Point:
  – BEWARE of “Third Party Clients!”
Attorney-Client Privilege
Attorney-Client Privilege

• Oldest Legal Concept in Western World
  – Dates back to Roman Law and the oath of loyalty where advocates could not testify against their clients

• Why do we have it?
  • To encourage candor between attorney and client
Attorney-Client Privilege

• The Basics
  – The attorney-client privilege protects communications between attorneys and their client from compelled disclosure.
  – The privilege is held by the client and may only be waived by the client.
Attorney-Client Privilege

– The privilege applies if:
  • It’s a communication
  • Made between privileged persons
  • In confidence
  • For the purposes of obtaining or providing legal advice
Attorney-Client Privilege

  
  – Facts: Ms. Crabb, a KFC employee, brought a wrongful discharge claim against KFC and a jury verdict was issued in KFC’s favor.
  
  • Should a confidential memorandum that was drafted by KFC’s legal department have been admitted as evidence?
Attorney-Client Privilege

  - The confidential memorandum was:
    - Disseminated to a KFC subsidiary
    - Inadvertently Leaked to Ms. Crabb
    - Yet marked as “Confidential”
  - Is the memorandum privileged?
Attorney-Client Privilege

  – The memorandum was privileged.
  • The fact that the memorandum was disclosed to a subsidiary did not destroy the privilege.
  • Given restrictions were placed on the dissemination of the memorandum, the fact that Ms. Crabb had access to the memorandum was immaterial.
Attorney-Client Privilege

• The privilege applies to corporate management

• Does the privilege apply to communications with non-management employees?
    • SCOTUS held that communications with non-management employees were privileged
    • The control test “frustrates the very purpose of the privilege.”
### Attorney-Client Privilege

#### Question: Has your parent company ever decided to sell or divest a subsidiary?

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- **Answered Question:** 39
- **Skipped Question:** 0

**IFA's 45th Annual Legal Symposium**
Attorney-Client Privilege

• *In Re Teleglobe Commc’ns Corp.*, 493 F.3d 345 (3rd Cir. 2007).
  – “[b]y taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to separate counsel on matters in which subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent’s privileged communications”
Attorney-Client Privilege

• International Considerations - EU Competition Law

• Communications are not privileged UNLESS:
  – (i) the communication is connected with the client’s rights of defense
  – (ii) the communication is with an independent lawyer
Attorney-Client Privilege

- *Akzo Nobel Chemicals Ltd. and Akcros Chemical Ltd. v. Commission of the European Communities (C-550/07 P)*
  - Communications with in-house counsel were not privileged because in-house counsel were not considered independent counsel.
  - The European Court emphasized the economic dependence of in-house counsel on their client.
Attorney-Client Privilege

• Takeaway Points:
  – Although counsel might not represent management and non-management employees, they may be privileged persons.
  – Dissemination of a privileged document to a parent, subsidiary, or an affiliate does not constitute waiver of the privilege.
  – In order to preserve privilege in a corporate divorce, in-house counsel should limit the scope of joint representation and seasonably separate counsel.
  – In-house counsel have no right to professional legal privilege in cartel investigations carried out by the European Commission.
DUAL REPRESENTATION ISSUES

• Who is the client?
• What internal adverse relationships/conflicts could exist?
• State relationship laws complicating factor
• Duty to report
ORGANIZATION AS CLIENT

• ABA Model Rule 1.13(a)
  “A lawyer employed or retained by an organization represents the organization acting through its duty authorized constituents”
WHAT DOES THAT MEAN AS A PRACTICAL MATTER?

• Your loyalty/duties are to the Franchisor Organization
• To the extent “authorized constituents” disclose information to you—you must use that in representing the Franchisor
• Conflicts can arise between Franchisor and its constituents
• May need to disclose to Franchisor information disclosed “confidentially” to you by a co-worker
INDIVIDUAL LIABILITY OF EMPLOYEES

• Most relationship laws impose liability on individuals who are active wrongdoers
  – Indiana: Liability for “any person who materially aids or abets.” Ind. Code § 23-225-29
  – Iowa: “A person who violates this chapter ... is liable for damages caused by the violation.” Iowa Code § 523H.13
Some Acts go farther:

Minneapolis Franchise Act

Subd. 2. **Joint and several liability.** Every person who directly or indirectly controls a person liable under subdivision 1, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as such person, unless the person who would otherwise be liable hereunder had no knowledge of or reasonable grounds to know of the existence of the facts by reason of which the liability is alleged to exist.

Minn. Stat. § 80C.17, subd. 2.
INDIVIDUALS WITH POTENTIAL LIABILITY

- Control person: “Every person who directly or indirectly controls a person liable”
- Partner: “Every partner in a firm so liable”
- Principal executive officer: “Every principal executive officer”
- Director of a corporation
- Person occupying a similar status:
  - “Every principal executive office or director of a corporation so liable, every person occupying a similar status or performing similar functions”
CAVEAT ON LIABILITY

• **Subd. 2. Joint and several liability.** Every person who directly or indirectly controls a person liable under subdivision 1, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions and every employee of a person so liable who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as such person, unless the person who would otherwise be liable hereunder had no knowledge of or reasonable grounds to know of the existence of the facts by reason of which the liability is alleged to exist.

• What does that modify?
HOW COULD CONFLICTS ARISE?

• Franchisor and Individual:
  – Different view of facts
  – Different view of law
  – Different view on settlement
RULE 1.7 MODEL RULES
PROFESSIONAL CONDUCT

Client-Lawyer Relationship

Rule 1.7 Conflict of Interest: Current clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
WHEN MAY REPRESENT BOTH:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

Rule 1.7(b) Model Rules
WHAT TO DO IF CONFLICTS ARISE

(1) Identify
(2) Disclose to individual(s)
(3) Determine if waivable
(4) Even if waivable, is joint representation advisable?
(5) Either:
   (a) inform will need separate counsel, you do not represent; or
   (b) inform of choice, offer joint representation and confirm in writing
DUTY TO DISCLOSE TO CORPORATION

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

ABA Model Rule 1.13(b).
12. In your role as in-house counsel have you ever felt the duty to report corporate malfeasance?

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answered question 39
skipped question 0
STEP BY STEP

• Has a violation of an obligation or act occurred?
• Is the violation likely to result in substantial injury to Franchisor?
• Do you reasonably believe it is not necessary in the best interest of the corporation to disclose?
  (a) Seriousness of violation
  (b) Apparent motive of person involved
  (c) Policies of Franchisor

• If must disclose, to whom?
CHECKLIST

(1) Does the information create potential liability for Franchisor?

(2) Does it trigger your duty to disclose to the corporation?

(3) Does the information create liability for any employees/officers/directors of the Franchisor?

(4) If so, does it create any potential conflicts?

(5) If so, advise and take action.