



54TH ANNUAL IFA LEGAL SYMPOSIUM



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INTERNATIONAL FRANCHISE ASSOCIATION

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**Ethics of Joint Representation of the Franchisor, the Franchisee, and
Their Officers, Employees, and Affiliates**

Introductions



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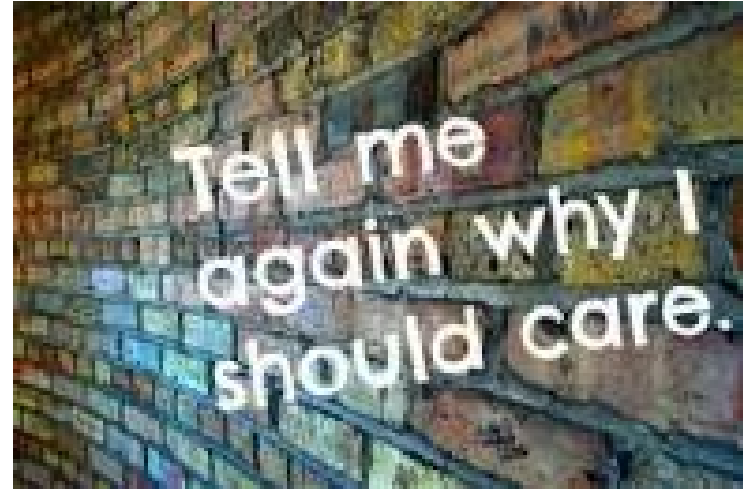
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Joint Representation in Franchise Matters

Why should I care?

- Common issue for franchise counsel
- Important to clients
- Affects both franchisor and franchisee counsel
- Easy to make a mistake
- Big consequences



Legal Framework

When do conflicts arise?

- Identification of clients, prospective clients, and attorneys is a threshold inquiry in any conflicts analysis.
- Engagement agreements can help define the scope and terms of a client relationship, but a relationship may be implied from the circumstances.





What kinds of conflicts might arise from a joint representation?

- Joint representations may involve a **concurrent conflict**, which occurs when a lawyer simultaneously represents multiple clients with adverse interests.
- A lawyer representing some but not all formerly joint clients may be restricted by a **successive conflict**.



When can conflicts be waived?

- **Informed consent** is effective to waive many conflicts when **given in writing** and **signed**.

- Some conflicts cannot be waived.
 - Representation of clients with opposing interests
 - Inability to disclose information necessary to obtain informed consent


Weighing Benefits and Risks

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POTENTIAL BENEFITS

- Reduced legal fees
- Consistency of legal arguments
- Avoidance of future conflicts
- Presentation of a unified front
- May allow for engagement of attorney with subject matter expertise



Weighing Benefits and Risks

RISKS

- Development of unforeseen conflicts
- Possibility of conflicting testimony
- Divergent perspectives or objectives with settlement
- Possible development of conflicts where one client asks the attorney not to share or divulge information or confidential information to the jointly represented client



***Abdo v. Fitzsimmons*, No. 17-cv-851, 2020 WL 4209246 (N.D. Cal. July 22, 2020)**

- Involved issue of withdrawal of counsel where a conflict of interest arose during the course of a joint representation.
- Law Firm was engaged to represent multiple defendants.
- Fee Agreement – if conflict arose, firm would withdraw from representation of the party with the conflict and continue representing the other clients.
- Conflict arose and firm requested execution of new conflict waiver if they wished for the firm to continue with the representation.

***Abdo v. Fitzsimmons*, No. 17-cv-851,
2020 WL 4209246 (N.D. Cal. July 22,
2020)**

- One client refused to sign the new waiver
- Firm sought withdrawal and client opposed withdrawal citing the financial burden and prejudice in having to engage new counsel 80 days before trial
- Court held withdrawal was mandatory



Defining Terms of the Client Relationship

Key issues to consider/document

- Fee arrangements
- Privilege considerations
- Confidential information
- Settlement
- Trial



Each affected client gives informed consent, confirmed in writing

- Benefits of Joint Representation
- Risks of Joint Representation



Potential Consequences

Later arising conflicts

- Can any representation continue?
- Advance waivers
- Mandatory withdrawal



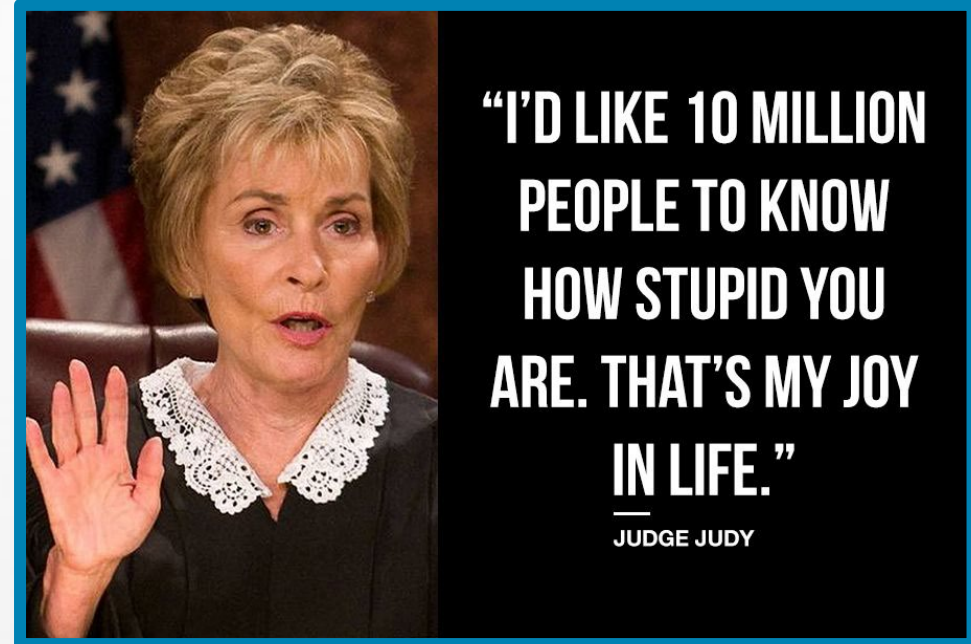
Joint representations may harm clients with or without a conflict.

- The client's lawyer may be
- disqualified from representation.
- Even where no conflict exists, jointly represented clients may be disadvantaged by loss of evidentiary confidentiality protections.



Lawyers also suffer consequences from conflicts of interest.

- Courts may deny or disgorge fee collection.
- Conflicts are a frequent basis of malpractice claims.



- Lawyers who violate conflicts rules may be subject to bar discipline.

Guidance for Lawyers Representing Franchisors and Franchisees



Guidance for Franchisor Counsel:

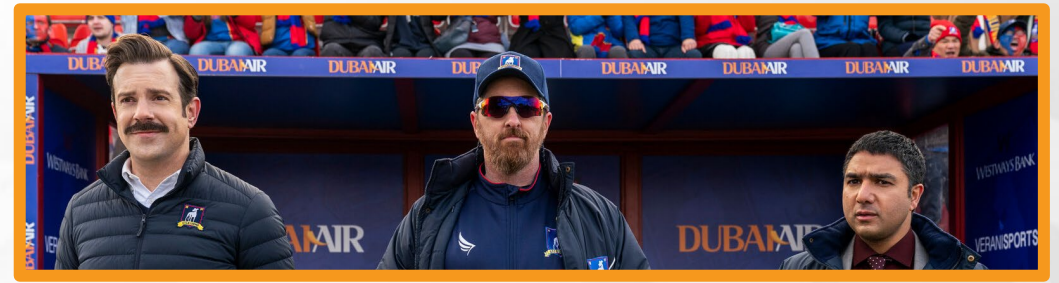
- Representation of Franchisor Executives/Employees
- Vicarious Liability Cases
- Government investigations

Guidance for Franchisee Counsel

- Confidentiality
- Issues between jointly represented clients
- Competitors
- Franchisee Associations



Hypothetical #1



Franchisee Roy has operated a franchise of **Kent's Candies** for fifteen years. Ten years ago, new competitor **Jamie's Tarts** came on the scene. Five years later, Roy and Kent's Candies retained Welton Jones to jointly represent them in a trademark infringement action against Jamie's Tarts after Jamie's Tarts started using a logo very similar to the long-term Kent's logo. The case settled when Jamie's Tarts agreed to stop using the mark after a mediation.

Before joining **your law firm**, partner **Ted Lasso** was an associate at **Welton Jones, P.C.** and worked on the trademark dispute involving Franchisee Roy, Franchisor Kent's Candies, and third-party Jamie's Tarts. Franchisee Roy has now approached your firm requesting representation in a new dispute—this time with Franchisor Kent's Candies. Kent's Candies terminated Roy's franchise agreement after an alleged series of unauthorized partnerships between Roy's franchised business and Jamie's Tarts. Kent's Candies is now demanding that Roy de-identify his business.

1. Would the contemplated representation be substantially related to the trademark dispute handled by Ted Lasso and Welton Jones, P.C.?
2. If Welton Jones would be unable to represent Roy in the new matter, would that conflict be imputed to your firm? How can this be avoided?
3. Assume Roy will only retain your firm if Ted Lasso assists with the representation. Can the conflict be waived?

Hypothetical #2

- Franchisee BEST BEAUTY SALON LLC is multi-unit franchisee of who is developing multiple locations of a beauty salon services franchise. At this time, BEST BEAUTY SALON LLC is current in its development obligations and has developed 5 of its 10 locations.
- The Franchisor mandates that its Franchisees sign 12-month Membership Agreements with its customers (which the Franchisor has prepared and that Franchisees may **not** modify). The Franchisor has also implemented a policy that Franchisees may **not** issue refunds to customers if the customer wishes to cancel prior to the expiration of the 12-month term in the membership agreement.
- BEST BEAUTY SALON LLC has a customer who signed a Membership Agreement and the customer wishes to cancel the contract after 4 months and obtain a refund.
- Customer is denied a refund by Franchisee so she demands a refund from the Franchisor, which is also denied by the Franchisor.
- Customer initiates a class action lawsuit against the Franchisor and Franchisee alleging violations of California law.
- As Franchisor's or Franchisee's counsel, can you represent both Franchisee and Franchisor in this action?

Hypothetical #3

- Counsel represents ten large franchisees of the franchisor. The franchisor has terminated their franchise agreements, which has been upheld by the courts. However, the franchise agreements also require, upon termination, that the franchisor pay a “fair price” to the franchisees for their businesses. Not surprisingly, there is a dispute between the franchisor and the franchisees regarding this value. One central issue is whether the businesses should be valued as going concerns operating in the franchise system, or whether the value is simply in the assets and customer lists.
- To avoid an unruly trial involving the valuation of ten separate businesses, and at the court’s urging, the franchisees select one of their number to serve as a “test case” for valuation purposes. Unbeknownst to the others, however, the “test” franchisee has transferred ownership of his business to his children several years ago and, to limit gift taxes, valued the business significantly lower than the franchisees’ expert is now asserting.
- The low gift tax valuation comes out at the end of discovery. The other franchisees want to ditch the test case and proceed with a stronger plaintiff. The test franchisee wants to go to trial and get whatever he will get as soon as possible; he doesn’t think the jury will care about some gift tax return.
- Who, if anyone, can the franchisees’ attorney continue to represent?
- What steps should she take to protect herself and her clients?

Questions



Thank You



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