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

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I. INTRODUCTION

The ethical rules governing the relationship between lawyer and client in many respects are premised on a single lawyer/single client model. In this context, the lawyer's fundamental duties to the client – zealous representation, loyalty, confidentiality, etc. – are comparatively straightforward. In the real world, however, the economic and other benefits of a lawyer representing multiple clients in a matter frequently suggest and sometimes effectively compel joint representation. Particularly with today's billing rates, clients with aligned interests often will be unwilling or unable to fund duplicative efforts. Moreover, wholly apart from economics, joint representation offers strategic and tactical benefits, with coordinated strategy and consistent messaging that avoid the inconsistencies that may be exploited by a regulator, counterparty, or skilled adversary.

Because joint representation in legal practice is a reality, courts and rule makers have developed an extensive body of law to govern it. The applicable rules establish, most importantly, the circumstances in which joint representation may be ethically permissible and when it is precluded. The rules and interpretive cases also provide guidance as to the disclosures and informed consents that are required. Even if joint representation appears permissible, however, there are other factors that lawyers should consider in determining whether joint representation is advisable. It is essential at the outset to determine the ground rules for the representation, particularly with respect to matters such as information sharing, maintenance of the attorney-client privilege, control over the litigation, and fees. There is also a separate but related body of law governing representations in matters related to former clients.

The rules governing joint representation obviously are not franchise-specific. But the nature of franchising means that the practices of lawyers representing industry participants are particularly affected by those rules. Franchising has a unique legal framework where numerous issues (*e.g.,* disclosures, terminations, the implied covenant of good faith and fair dealing, vicarious liability, encroachment, joint employer) are litigated repeatedly. Because standard agreements are the norm, contractual interpretation questions often have broad applicability. The meaning of a disputed term may affect the businesses of the franchisor and hundreds of franchisees, if not more. Some state franchise statutes include provisions extending liability for violations to corporate officers in certain circumstances, potentially expanding the scope of cases beyond the contracting parties. For all of these reasons, it is not unusual to have multiple parties in a franchise case on both sides of the "v." At the same time, however, franchise disputes typically have not been subject to formal class action treatment, with an appointed class representative and formal class counsel. *See* FED. R. CIV. P. 23 (stating procedures for class actions, including appointment of class counsel).

Similarly, for counsel who represent franchisors, joint representation issues arise most commonly where a franchisee or group of franchisees files a claim against the

franchisor and one or more of its officers or employees. Franchisor counsel may also represent both the franchisor and franchisee in cases involving alleged liability to third parties, including suppliers, employees, or customers. Franchisor interactions with non-franchise regulators, where franchisor and system interests are generally aligned, may also trigger a joint representation. Franchisor counsel may also represent multiple systems in the same industry, either simultaneously or seriatim. All of these situations require consideration of existing and potential conflicts.

Counsel who represent franchisees often likewise bring claims against a franchisor on behalf of multiple franchisees, groups of franchisees, or franchisee associations. Joint representation may be particularly important in these situations, where individual franchisees may lack sufficient resources to hire experienced franchise counsel on their own. While the franchisees may be aligned with respect to the particular legal issue that triggers the dispute, business and other interests may diverge among group members. Counsel in such cases need to be aware of potential conflicts arising during the course of the representation, particularly with respect to decision-making, information sharing, and fees.

Given the complexity of the issues and the consequences of a mistake, it is important for counsel considering a joint representation or a new representation related to a prior matter to think through the issues systematically and to consider as thoroughly as possible the issues that might arise. This paper is intended to catalog and explain the issues and to present a road map for practitioners considering such a representation. The first step in the analysis is the identification of the prospective client(s) and any related parties such as former clients. A second step is to determine whether the rules permit the intended representation. Some conflicts are deemed by the rules not to be waivable, even if all parties are willing to consent.

If a conflict is waivable, then it is essential that all necessary parties provide their informed consent, which generally involves a specification of the risks and benefits of the intended joint representation. Even if parties are willing to provide a lawful consent, however, the lawyer should carefully consider whether conflicts that are likely to arise would render a continued joint representation untenable. In these situations, it is often better not to commence the joint representation than to have to attempt to exit from it, particularly insofar as the extrication process may involve the court where the matter is pending.

If a joint representation is going to proceed, documentation of its terms is essential to avoid subsequent disputes and misunderstandings. Matters such as confidentiality, the sharing of information, and the nature of the attorney-client privilege should be documented at the outset. Confidentiality may be a particular matter of concern among parties that have aligned legal interests but are or perceive themselves as business competitors. All parties need to understand that they have a responsibility to maintain the privilege and do not have authority to waive privilege for privileged group communications even if, for example, they later leave the group. Decision-making with respect to litigation strategy, settlement, and other critical matters should also be addressed. However, the

agreements that the parties may reach with respect to these matters are not entirely unbounded. For example, the rules generally do not allow a party to cede control over its own settlement.

While some of the rules governing joint representation seem arcane or indifferent to financial and other incentives facing clients and lawyers alike, the consequences of a mistake can be substantial. Either voluntary or compelled removal from an improper or failed joint representation can be difficult and costly for both lawyer and client. For clients, even in a best-case scenario, loss of the existing lawyer and retention of a new, non-conflicted lawyer may result in significant additional expense.

Depending on when the issue arises, the substitution of new counsel may also cause a tactical disadvantage and compromise the client's litigation position. The consequences can be even worse for a lawyer, particularly if he or she is determined to be at fault or to have violated the duties established in the rules of professional conduct. Among other sanctions that have been imposed, courts have disqualified counsel and denied or ordered disgorgement of fees, and suspended a lawyer's license to practice law. In addition, conflicts are among the most common sources of malpractice claims. For all of these reasons, franchise lawyers should take caution when entering into joint representations and document all aspects of the relationship appropriately.

II. LEGAL FRAMEWORK

Lawyers are obligated to maintain confidential information related to client representations and to pursue their clients' interests despite any obstruction or inconvenience. MODEL RULES OF PRO. CONDUCT r. 1.3, 1.9(a), 1.3 cmt. 1 (AM. BAR ASS'N 1980) [hereinafter MRPC]. The obligation applies to both joint representations—where a lawyer represents multiple clients in the same matter—and successive representations—where a lawyer initially represents one client and subsequently represents a different client in a related matter after the initial representation ends. Rules defining conflicts of interest limit joint and successive representations where a lawyer's duty of loyalty or duty of confidentiality would be substantially compromised. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. b. (2000) [hereinafter RESTATEMENT (THIRD) L. GOV. L.]. The restrictions aim to protect both clients and the profession from perceived and actual impropriety, but they also necessarily curtail the general principle that a party should be free to retain a lawyer of their choosing. *Road King Dev., Inc. v. JTH Tax LLC*, 540 F.Supp. 3d 554, 558-61 (E.D. Va. 2021). The costs of avoiding conflicts of interest and a strong policy in favor of allowing clients to engage their preferred counsel dictate that "[p]rohibition of conflicts of interest . . . be no broader than necessary." RESTATEMENT (THIRD) L. GOV. L. § 121 cmt. b. (2000).

As discussed above, the symbiotic relationship shared by franchisors and franchisees presents many scenarios for joint representation to come into play. For example, it is common for both the franchisor and franchisee to be brought into litigation together. And, in the transactional context, franchisee associations and individual franchisees may have a common interest in negotiation. Situations also arise with the

representation of separate, but competing, franchise systems. These scenarios are ripe for joint representation considerations, including whether there is conflict, the protection of confidential information, and privilege, to name a few.

A. Identification of clients and attorneys is a threshold inquiry in any conflicts analysis.

An essential first step in avoiding conflicts is recognizing which interactions give rise to an attorney-client relationship and, when a relationship is formed, identifying the client. If no representation of a particular party is undertaken, a conflict cannot exist as to that party. *See, e.g.*, *In re Bristow*, 721 P.2d 437, 440 (Or. 1986) (en banc) (per curiam) ("The first step in th[e conflict of interest] framework is the determination of whether a lawyer-client relationship ever existed."); *Road King*, 540 F.Supp. 3d at 561 ("[T]he moving party [on a motion for disqualification of counsel] must establish . . . that an attorney-client relationship existed [with] the alleged former client."). Franchise attorneys must know the identity of their clients in order to recognize conflicts and decide whether to seek a waiver or decline or terminate a representation.

Lawyers working with members of the franchising community should take care not to undertake unintentional representations. Clients often sign formal engagement agreements recognizing the existence and terms of a lawyer-client relationship, but the beginning of an attorney-client relationship can be implied from the circumstances of a lawyer's interactions with a party. *In re Bristow*, 721 P.2d at 441. In *Bristow*, an attorney representing franchisees of a barter-trade business was found to have formed an attorney-client relationship with the franchisor when the attorney sent the franchisor a letter providing legal advice, describing attorney fees and other arrangements, and stating that the franchisees were willing to collaborate to protect the franchisor's interests. *Id.* The Oregon Supreme Court ultimately held that a conflict related to simultaneous representation of franchisees and franchisor existed for reasons discussed below. *See* Section II.C.1.a. Had the lawyer taken care not to initiate an attorney-client relationship, no conflict would have existed. Franchise attorneys representing organizational clients should also avoid interactions with an entity's directors, shareholders, and other constituents that could imply an attorney-client relationship with those individuals and take steps to preempt unwanted representations. *See Home Care Indus., Inc. v. Murray*, 154 F.Supp. 2d 861, 867-68 (D.N.J. 2001); *see also* MRPC r. 1.13(f) (AM. BAR ASS'N 1980) ("In dealing with an organization's . . . constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.").

Franchise lawyers must also take note of entities or individuals whose close associations with a known client bring them within the representation's scope. A 2015 South Carolina trial court decision is instructive on this point. In that case, Plaintiff North American Title Loans, LLC ("Title Loans") sought disqualification of defendant entities' counsel Greenberg Traurig, LLP ("Greenberg"), which had previously represented Title Loans' close affiliate Select Management Resources, LLC ("SMR"). *N. Am. Title Loans, LLC v. TitleMax of S.C., Inc.*, No. 2014-CP-1004494, 2015 WL 13333323, at *1-3 (S.C. Com. Pl. Mar. 18, 2015). The court explained that the identification of a client is based on

a practical approach that considers the related entities' operations, management, financial interdependence, business philosophies, and legal departments. *Id.* at *4. Although Greenberg's engagement agreement with SMR did not contemplate a representation of Title Loans, Title Loans and SMR had common ownership, kept combined financial books and records, and shared a president, legal department, and management personnel. *Id.* at *1. The court accordingly held that Greenberg had previously undertaken a representation of Title Loans because Title Loans shared an "identity of interest" with Greenberg client SMR. *Id.* at *4.

Just as representations may extend to individuals or entities not mentioned in an engagement agreement, conflicts extend to all lawyers associated with an attorney in a firm even where not all of the attorneys contribute to the representation. MRPC r. 1.10(a), 1.0 cmt. 2 (AM. BAR ASS'N 1980). Unless lawyers in a firm are properly screened, their conflicts are generally imputed to other firm lawyers who would otherwise not be conflicted out of a representation. *See id.* r. 1.10(a).

The client-relationship inquiry's significance arises out of the rules' interest in maintaining confidentiality of client information. "[O]nce an attorney-client relationship has been established, an irrebuttable presumption arises that confidential information was conveyed to the attorney." *Road King*, 540 F.Supp. 3d at 559 (quoting *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F.Supp. 724, 734 (E.D. Va. 1990) (alteration in original). As explained in more detail below, a client's disclosure of confidential information alone is not sufficient to create a conflict of interest as to other clients. But lawyers should not take for granted the high degree of trust and confidence associated with client representations.

B. A lawyer owes duties to prospective clients even where no attorney-client relationship forms.

Standards of professional conduct also prohibit lawyers from disclosing information obtained from prospective clients or using that information against them. MRPC r. 1.18(b) (AM. BAR ASS'N 1980). Confidentiality is the primary interest protected when a lawyer's fiduciary relationship is extended to reach interactions with prospective clients. *See People ex rel. Dept. of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 379-80 (Cal. 1999). When a lawyer obtains confidential information that gives rise to a conflict, the lawyer must be disqualified from any affected representation unless (1) the prospective client and the affected client give informed consent in writing or (2) the lawyer took reasonable steps to avoid learning the disqualifying information and provides written notice to the prospective client of timely and appropriate screening measures. MRPC r. 1.18(c)-(d) (AM. BAR ASS'N 1980). For this reason, lawyers must take great care to prevent prospective clients from divulging potentially disqualifying information and evaluate the risk of conflicts associated with a prospective client's confidential information.

When speaking with a prospective client, a lawyer must also assess whether a conflict already exists as to the prospective client. A lawyer must decline the representation in these cases unless the affected parties properly give informed consent. MRPC r. 1.7 cmt. 3 (AM. BAR ASS'N 1980).

C. A lawyer planning to initiate or continue a client representation must be aware of rules defining conflicts of interest.

A lawyer cannot properly advise a client who is unwilling to provide information relevant to a matter fully and freely. Rules of professional conduct guarantee minimum standards of confidentiality and loyalty necessary to assure clients that their lawyer will not disclose confidential information or use it against the client's interests. *Road King*, 540 F.Supp. 3d at 558. Given their purpose to facilitate disclosure of information necessary for effective representations, the rules allow waiver of certain conflicts.

1. Joint representations often create concurrent conflicts.

A concurrent conflict occurs when a lawyer simultaneously represents two clients with adverse interests or cannot effectively represent a current client on account of the lawyer's personal interests or responsibilities. Concurrent conflicts may arise even when commonly represented clients share fully aligned interests at the start of a representation. Comments to Model Rule 1.7 warn that "[u]nforeseeable developments . . . might create conflicts in the midst of a [joint] representation" and impair the lawyer's ability to comply with the essential duties of loyalty and independent judgment owed to each client. MRPC r. 1.7 cmt. 5 (AM. BAR ASS'N 1980); *see id.* cmts. 1, 4.

a. Model Rule 1.7(a) identifies two kinds of concurrent conflicts.

The Model Rules of Professional Conduct identify two types of conflicts that may arise in concurrent representations. A direct adversity conflict exists when a lawyer represents a client in one matter against any other current client regardless of whether the lawyer's representation concerns an identical or different matter. MRPC r. 1.7(a)(1), cmt. 6 (AM. BAR ASS'N 1980). A material limitation conflict exists when a lawyer's personal interests or responsibilities owed to another client, former client, or third party create a "significant risk" that the representation will be less effective or result in disclosure of a client's confidential information. MRPC r. 1.7(a)(2), cmts. 8, 30 (AM. BAR ASS'N 1980).[1]

Simultaneous representation of clients with competing interests is strongly disfavored by the model rules. "Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent." MRPC r. 1.7 cmt. 6 (AM. BAR ASS'N 1980). In *Bristow*, discussed supra, the Supreme

[1] The full text of Model Rule 1.7(a) is:

> 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.

MRPC r. 1.7(a) (AM. BAR ASS'N 1980).

Court of Oregon held that a conflict existed where a lawyer's representation of both franchisees and franchisor adversely affected his ability to render effective assistance to any client without harming the interests of another. *Bristow*, 721 P.2d at 442-43. Given the strict rules prohibiting direct adversity conflicts without informed consent, the analysis in *Bristow* was fairly straightforward.

Where direct adversity conflicts tend to be easy to spot, material limitation conflicts require more thoughtful analysis of a lawyer's ability to render independent professional judgment on behalf of each client. The relevant inquiry looks for more than a mere possibility of subsequent harm and instead considers both the likelihood that a limitation will come to pass and whether it will materially interfere with the lawyer's ability to explain and pursue favorable opportunities for each client. MRPC r. 1.7 cmt. 8 (AM. BAR ASS'N 1980). Model Rule 1.8 sets out additional circumstances giving rise to material limitation conflicts. *See* MRPC r. 1.8 (AM. BAR ASS'N 1980).

b. Concurrent conflicts are waivable in certain circumstances.

Concurrent conflicts are waivable only when the requirements set forth by Model Rule 1.7(b) are met. A representation may proceed despite a conflict when (1) the lawyer reasonably believes that diligent representation of each client is possible; (2) the representation is permitted by law; (3) there is no claim by one client against another client in the same proceeding before a tribunal; and (4) each client provides informed consent in writing. MRPC r. 1.7 (AM. BAR ASS'N 1980).

2. Successive conflicts may arise from representations of former clients.

The Model Rules of Professional Conduct also prohibit client representations where a current client's interests are materially adverse to the interests of the lawyer's former client "in the same or a substantially related matter." MRPC r. 1.9(a) (AM. BAR ASS'N 1980).[2] To determine whether a past representation is "substantially related" to the current representation, courts may weigh factors related to various aspects of representation. *See Road King*, 540 F.Supp. 3d at 562. These factors include the similarity of facts, legal issues, and legal theories involved in each representation, the time elapsed between representations, the timing of underlying events, and the identity of parties involved in each matter. *Id.* Like conflicts affecting joint representations, conflicts arising from a lawyers' prior representation are generally waivable.

[2] The full text of Model Rule 1.9(a) is:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

MRPC r. 1.9(a) (AM. BAR ASS'N 1980).

a. Whether a prior matter is substantially related to a current matter is a critical aspect of successive conflicts.

The existence of a conflict arising from a lawyer's prior representation most often turns on whether the lawyer obtained confidential information in a prior matter substantially related to the current representation. Matters involving the same legal dispute or transaction as well as those carrying a serious risk that confidential information obtained from a former client will be used to materially advance a current client's position are "substantially related." MRPC r. 1.9(a) cmt. 3 (AM. BAR ASS'N 1980). Courts may also consider additional, case-specific information to determine whether matters are substantially related. *See, e.g.*, *Road King*, 540 F.Supp. 3d at 561. This issue was the central inquiry in two cases that reached opposite results as to the existence of a conflict arising from a lawyer's past representation of a franchise party.

In *Road King Development, Inc. v. JTH Tax, LLC*, the Eastern District of Virginia concluded that an attorney's ("Davis") ongoing representation of plaintiff area developers Road King Development, Inc. and ZeeDee LLC (together, "ADs") and prior representation of defendant franchisor ("Liberty Tax") did not give rise to actual or serious potential conflicts. *Id.* at 557, 566-67. As an initial matter, the court broke down the Virginia equivalent of Model Rule 1.9(a) into four elements: (1) existence of a prior attorney-client relationship; (2) adversity of interests between former and current client; (3) whether the current matter is substantially related to matters in which the lawyer represented the former client; and (4) lack of informed consent. *See id.* at 561. Because the only contested issue concerned the relationship between past and present matters, the court focused its analysis on factors for (1) similarity of facts, legal issues, and legal theories involved in each representation, (2) the time elapsed between representations, (3) the timing of underlying events, and (4) the identity of parties involved in each matter. *Id.* at 561-62.

Three factors weighed heavily in the court's refusal to recognize the existence of a successive conflict. First, the court noted that seven years had elapsed between the end of Davis's representation of Liberty Tax and the beginning of ADs' dispute concerning Liberty Tax's area development agreements. *Id.* at 565. Although Davis had seen similar agreements while representing Liberty Tax, he had not seen the specific agreements at issue nor been exposed to Liberty Tax's relevant legal theory. *Id.* Second, Liberty Tax acknowledged that Davis did not represent Liberty Tax as to many of the issues involved in the ongoing litigation with ADs, and that ADs did not benefit from any confidential information in Davis's possession because the remaining issues concerned only contract interpretation under state law. *Id.* Finally, ADs provided evidence that Davis had been siloed from any potentially confidential information related to the ongoing litigation during his former representation of Liberty Tax. *Id.* at 566.

The Eastern District of Pennsylvania reached the opposite result in a decision disqualifying counsel for plaintiff and former franchise owner St. Albans Financial Co. ("St. Albans") where one of St. Albans's lawyers ("Scher") had previously represented the disqualification movants ("movants"), who were also defendants and former franchisees

of Colonial Village Meat Market Systems, Inc. ("Systems"). *See St. Albans Fin. Co v. Blair*, 559 F.Supp. 523, 523-24, 526 (E.D. Pa. 1983). St. Albans's underlying dispute with movants concerned buy-out agreements that obligated movants to make periodic payments and restricted disposal or transfer of movants' store assets. *Id.* at 524. Scher had assisted movants in anti-trust litigation and related settlement arrangements that resulted in termination of movants' franchise relationship with Systems. *Id.* Because Scher likely advised movants about the consequences of severing their franchise relationship with Systems under the terms of their buy-out agreements with St. Albans, he would have and learned related confidential factual information. Id at 525. The court therefore held that the prior representation was substantially related to the lawsuit concerning the buy-out agreements. *Id.*

These cases illustrate important lessons for franchise attorneys. First, conflicts may be avoided through timely termination of a representation. In *Road King*, the court placed great weight on the passage of time and refused to impute knowledge of confidential information obtained by attorney Davis's former associates after his representation was terminated. 540 F.Supp. 3d at 565. Second, the substantial relationship test is generally permissive and tends to allow successive representations unless advice given to a current client is informed by confidential information or legal theories made known to the lawyer in a nearly identical prior representation. Where the *St. Albans* court was concerned that attorney Scher could exploit knowledge obtained through his prior rendering of analysis on the buy-out agreements to his former clients' disadvantage, the *Road King* court was comfortable that the passage of time and the nature of the legal question removed any serious risk that Davis could use knowledge form the past representation against Liberty Tax. *St. Albans*, 559 F.Supp. at 526; *Road King*, 540 F.Supp. 3d at 565-67.

b. Successive conflicts are generally waivable.

Successive conflicts put a former client's confidential information at risk because a current client's interests are materially adverse to the interests of the former client "in the same or a substantially related matter." MRPC r. 1.9(a) (AM. BAR ASS'N 1980). Because the prohibition on successive conflicts is designed to encourage clients to disclose confidential information without fear that it will later be used against them, the rules permit these conflicts when a former client is informed of the risks associated with the new representation and consents in writing. MRPC r. 1.9(a), cmt. 9 (1980).

3. Joint representations can produce both concurrent and successive conflicts.

It is natural to associate joint representations with a risk of concurrent conflict, which prevents a lawyer from effectively representing multiple clients at once. But franchise attorneys should be aware that joint representations can produce both concurrent *and* successive conflicts of interest even where attorney-client privilege protections fall away. *Brennan's, Inc. v. Brennan's Restaurants, Inc.* is a helpful example. Brennan's, Inc.—plaintiff in a trademark infringement and unfair competition case against various individual and corporate defendants—moved to disqualify Mr. Edward Wegmann

("Wegmann") as counsel for defendants. *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 170-71 (5th Cir. 1979). Before the events giving rise to the lawsuit, members of the Brennan family owned and controlled independent legal entities as part of a family business. *Id.* at 170. The family hired Wegmann to prosecute federal trademark registrations that were ultimately issued in the plaintiff's name. *Id.* A family dispute subsequently arose and was resolved when the Brennan entities' stock was divided between opposing family groups. *Id.* Wegmann then terminated his representation of entities and family members associated with the group that owned the eventual plaintiff entity in order to continue representing the eventual defendants. *Id.* Both groups later claimed ownership of and right to the marks, and plaintiff sued. *Id.* a 171. Wegmann continued to represent Defendants in the trademark litigation and challenged the validity and ownership of the trademarks he initially prosecuted on behalf of both plaintiff and defendants. *Id.* Defendants pointed to the waiver of attorney-client privilege in joint representations and argued that no conflict existed because "no confidences can arise as between joint clients." *Id.*

The Fifth Circuit held that Wegmann's representation of defendants in the trademark litigation conflicted with his prior joint representation of plaintiff and defendants. *Id.* at 172. In reaching its conclusion, the court distinguished the attorney-client privilege from the scope of the confidentiality protections contemplated by the rules of professional conduct. *Id.* at 171-72. The court relied on the word "information" in the equivalent of Model Rule 1.9(c)(1) to find that a lawyer's obligation not to use knowledge obtained from a prior representation against a former client continues even if another party knew the information as a result of joint representation. *Id.* at 172. The Eastern District of Pennsylvania agreed with this principle in *St. Albans*, which involved franchise parties and is discussed supra. *See* 559 F.Supp. at 526.

In franchise practice, lawyers may be asked to assist multiple franchisees, franchisors, area developers, franchise associations, and other parties who share an immediate common goal. *Brennan's* illustrates the breadth of lawyers' confidentiality obligations and highlights the particular risk of successive conflicts that may arise long after a joint representation terminates. Indeed, lawyers taking on joint representations must look beyond evidentiary privilege rules to avoid both concurrent and successive conflicts. The risk that clients with a common objective in a non-litigated matter will not contemplate the risk of conflicting interests prompted a reminder in the Third Restatement of the Law Governing Lawyers directing lawyers to evaluate the risk of conflicts in such representations and obtain informed consent when necessary and appropriate. *See* RESTATEMENT (THIRD) L. GOV. L. § 130, cmt. c. (2000). Due to the risk of future litigation, a lawyer who proceeds with a joint representation should advise commonly represented clients that the attorney-client privilege will not protect communications between them and the lawyer even if lawyer is later prohibited from representing one or more of the commonly represented clients. MRPC r. 1.7 cmt. 30 (AM. BAR ASS'N 1980).

4. In the absence of appropriate screening, conflicts encumbering one lawyer will be imputed to and follow other attorneys in the lawyer's organization.

Any lawyers associated with other attorneys in the same organization must be aware of the need to implement appropriate screening measures where conflicts would otherwise exist by imputation. As a threshold matter, the model rules include within the definition of a "firm" associations of lawyers beyond the traditional law firm structure. *See* MRPC r. 1.0(c) (AM. BAR ASS'N 1980) ("'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."). Conflicts are imputed within a law firm based on the legal fiction—and clients' expectation—that a law firm is essentially a single lawyer whose loyalty to a client cannot be divided. MRPC r. 1.10 cmt. 2. (AM. BAR ASS'N 1980). The model rules proscribe certain representations where lawyers' current or former associations would suggest or allow impropriety. As a result, lawyers may not knowingly represent a client when another lawyer in their firm could not undertake the same representation on account of a concurrent or successive conflict. MRPC r. 1.10(a) (AM. BAR ASS'N 1980).

When a lawyer leaves a firm, any new representations by that attorney must satisfy a test similar to the successive conflict inquiry specified by Model Rule 1.9(a). A lawyer who leaves a firm is barred from representing a client with interests materially adverse to the interests of a client previously represented by the lawyer's prior firm in the absence of informed consent from the prior firm's former client. MRPC r. 1.9(b). Rules 1.9(a) and 1.9(b) employ similar language and protect similar interests, but Rule 1.9(b) creates a conflict imputation overlay that requires careful attention from lawyers who leave a firm.

There are three exceptions to the conflict-imputation rules affecting lawyers who have ever worked in association with other lawyers.

First, no conflict is imputed when the conflict arises from the personal interest of the disqualified individual lawyer and does not present a risk of limiting other firm lawyers' representation of the client. MRPC r. 1.10(a)(1) (AM. BAR ASS'N 1980). No screening is necessary under these circumstances.

Second, a disqualified lawyer's conflict arising from the lawyer's association with a prior firm is not imputed to the lawyer's new firm colleagues when (1) that lawyer is timely screened from the matter; (2) prompt and sufficient written notice of the screening mechanism is given to the affected former client; and (3) the firm certifies compliance with the rules of professional conduct and the screening procedures sent to the former client. MRPC r. 1.10(a)(2) (AM. BAR ASS'N 1980).[3] A lawyer is sufficiently "screened" when a firm

[3] The full text of Model Rule 1.10(a)(2) is:

> [T]he prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

implements procedures that adequately prevent any opportunity to participate in a matter or share confidential information. MRPC r. 1.0(k) (AM. BAR ASS'N 1980). But screening alone is not enough. In *Mody v. Quiznos*, a New Jersey court of appeal disqualified a law firm representing a Quiznos franchisee in part because it provided only oral notice of its screening procedures as applied to a firm lawyer who had represented Quiznos before joining the firm. No. L-3633-11, 2012 WL 2912749 at *1, 5 (N.J. Super. Ct. App. Div. July 18, 2012) (unpublished op.). Absent the required written notice, there is no assurance that a former client's confidential information was timely protected from improper disclosure. MRPC r. 1.10 cmt. 10 (AM. BAR ASS'N 1980).

Third, the affected former client's informed consent removes the conflict's imputation. MRPC r. 1.10 cmt. 6 (AM. BAR ASS'N 1980). To be effective, the informed consent must meet the requirements for waiver of a concurrent conflict under Rule 1.7(b), discussed infra. MRPC r. 1.7(b), 1.10 (AM. BAR ASS'N 1980).

D. A client's informed consent is often sufficient to waive conflicts affecting both concurrent and successive representations.

Informed consent is sufficient to waive conflicts described above when each affected client is sufficiently made aware of the reasonably foreseeable ways that their interests could be harmed by waiver of confidentiality and efficacy protections. MRPC r. 1.7 cmt. 18 (AM. BAR ASS'N 1980). Provisions allowing representations to continue with informed consent despite the existence of certain conflicts accommodates the general principle that clients should be free to select counsel of their choosing. *See Road King*, 540 F.Supp. 3d at 58. Lawyers should be aware, however, that not all conflicts are waivable due to the nature of the conflict or where a lawyer is unable to disclose information sufficient for a client to provide informed consent. MRPC r. 1.7 cmt. 19 (AM. BAR ASS'N 1980).

But there are no doubt limitations on a client's ability to waive conflicts of interest. For example, a direct adversity conflict arising from representation of clients with opposing interests in the same litigation is "[t]he most egregious conflict of interest" and "suggests to the clients—and to the public at large—that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences." *SpeeDee Oil*, 980

> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
>
> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

MRPC r. 1.10(a)(2) (AM. BAR ASS'N 1980).

P.2d at 824. Such conflicts are thus not waivable. MRPC r. 1.7(b)(3) (AM. BAR ASS'N 1980).

Informed consent is not effective to overcome a conflict if it is not given in writing and signed. *See* MRPC r. 1.0(n), 1.7(4), 1.9(a), 1.9(b)(2) (AM. BAR ASS'N 1980). However, the model rules permit such a writing to take various forms. The record of informed consent may be a tangible or electronic instrument created by the client or memorialized by the lawyer following the client's verbal consent, and the signature may include symbols, recorded sounds, and other marks so long as the client intends to and does execute the writing. MRPC r. 1.0(n) (AM. BAR ASS'N 1980).

III. WEIGHING BENEFITS AND RISKS

As detailed above, the ethical rules are directed at determining when and under what circumstances it is possible to jointly represent clients. However, even though the rules may permit such representation, the question is whether the benefits of the potential representation exceed the risks.

There are a number of benefits of joint representation, including reduced legal fees, consistency of legal arguments, the avoidance of future conflicts and the presentation of a unified front. In the franchise context, joint representation may permit individual parties to jointly engage counsel with subject matter expertise when one or more parties may not otherwise be in a position to engage such an attorney on their own. The advantages of joint representation are most apparent in the litigation context. In litigation, joint representation may create economies in connection with discovery, research, pleadings and court proceedings.

However, representation of multiple clients in a single matter presents several risks as well. If a perceived conflict arises from joint representation, clients may initiate a malpractice claim or otherwise register a disciplinary complaint against the attorney. Therefore, it is critical that lawyers carefully analyze the facts and apply the Rules of Professional Conduct before agreeing to a joint representation.

In the joint representation of multiple clients, there is a risk that an unforeseen conflict may arise during the course of representation or that the attorney will be limited in its representation of an individual client. Jointly represented clients may offer conflicting testimony, develop different perspectives or objectives in connection with settlement, or provide lawyers with conflicting instructions, such as advancing incompatible legal arguments. Conflicts may also arise if one client asks the attorney not to share certain confidential information with other jointly represented clients.

Prior to undertaking a joint representation, counsel must carefully explain to each client the effect of the joint representation on the attorney-client privilege. The attorney must specifically disclose that there is no attorney-client privilege between jointly

represented clients during the pendency of the matter and must also explain the implications that arise from the absence of any such privilege.

Attorneys are best advised to provide disclosures concerning confidentiality and the possibility that withdrawal may be required in the future if untenable conflicts arise during the course of representation. There is no individual confidentiality when a joint representation exists. In light of this, information shared by one co-client that is necessary for the representation of the other joint clients will be shared with the other co-clients. Consequently, clients should be advised that all information provided by them in connection with the representation will be available to the other clients and that the normal confidentiality obligations of the lawyer do not apply as between the jointly represented clients. However, this creates risk and the possibility of a conflict because if one joint client instructs the attorney not to share confidential information with other joint clients, a conflict is created that may require the lawyer's withdrawal from the joint representation.

The development of an untenable conflict is a significant risk of joint representation. If such a conflict arises during the representation, the attorney may be forced to withdraw from representation of one or more of the clients. In such event, a party will likely be forced to incur substantial additional cost in connection with the engagement of new counsel. Likewise, withdrawal of counsel may cause delay in connection with the representation.

The recent case of *Abdo v. Fitzsimmons*, No. 17-cv-851, 2020 WL 4209246 (N.D. Cal. July 22, 2020) dealt with the issue of withdrawal of counsel where a conflict of interest arose during the course of a joint representation. In *Abdo*, the law firm was engaged to represent multiple defendants in a joint defense. *Id* at *1. The initial fee agreement addressed the possible conflicts in connection with the joint representation, providing that, if a conflict developed, the firm would withdraw from representation of the party with the conflict and continue representing the rest of the clients involved. *Id*. During the course of the joint representation, a conflict arose, and the attorney handling the joint representation consequently advised the clients that it would not be able to take certain positions or advance various defenses. *Id.* In addition, the attorney requested that the clients execute a new conflict waiver if they wished to continue with the representation. *Id.* While certain of the clients engaged new counsel, one client stopped participating in the case and refused to sign a new conflict waiver. *Id.* at *2. The attorney advised the client that if the client did not sign a new conflict waiver, the firm would need to withdraw from representation of the client due to the conflict of interest. *Id.* In response, the client asserted that he had never been advised of the conflict and opposed the motion to withdraw. *Id.* Even though there was no trial date set, the client argued that retaining new counsel would cause him substantial prejudice. *Id.* at *4 The client argued that identifying and retaining new counsel would impose a significant financial burden and that it would be impossible to bring a new lawyer up to speed in order to participate in the case and meet the upcoming deadlines for dispositive motions in 80 days. *Id.* Notwithstanding the client's arguments alleging prejudice, the court found that withdrawal was mandatory because otherwise the firm would be in violation of the California equivalent of Model Rule 1.7. *See id.* at *2-4. The court also found that the California equivalent of Model Rule

1.16(b) (discussing circumstances under which an attorney may withdraw) applied, and that withdrawal was warranted because the client's conduct in refusing to participate in the case made it unreasonably difficult for the lawyer to continue with the representation. *See id.*

In the event a conflict arises during the course of an ongoing representation, the attorney must comply with all applicable ethical obligations. A new conflict waiver may be obtained by the attorney if it is appropriate. However, in the event that the clients cannot reconcile their conflicts, or where a waiver is prohibited, the attorney must seek withdrawal in a manner that does not prejudice the client.

If a decision has been made that concurrent representation is permitted and advisable, the attorney is required to provide various explicit disclosures prior to undertaking the representation and should form the relationship to protect everyone's respective interests to the extent possible.

IV. TERMS OF RELATIONSHIP

A. Documenting Concurrent Representation

Where a waivable conflict exists, Rule 1.7(b)(4) requires that "each affected client gives informed consent, confirmed in writing." Comment 18 to the Rule explains what this means:

> Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

The best practice for obtaining informed consent is a discussion preceded or followed by a confirmation letter that identifies and is countersigned signed by all of the represented clients. This protects both the clients and the lawyer. The effects of joint representation on matters such as confidentiality, loyalty, and the attorney-client privilege are not necessarily intuitive, particularly to clients who are not experienced litigants. The nature of the engagement should also be described specifically. While this is always important, it has added significance in the context of multi-party representations.

B. Fee Arrangements

From the client's perspective, one of the key benefits of joint representation almost always is that the attorney's fee will either be paid by someone else (for example, a

franchisor paying the legal fees of an executive sued as an individual defendant) or shared (for example, among franchisees asserting a common claim against their franchisor). Rule 1.8(f) provides that:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence or professional judgment or the attorney-client relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Comment 13 to this rule suggests that receiving "compensation for representing a client from one other than the client" includes situations where clients are sharing fees:

> [A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Consistent with Rule 1.8(f) and the accompanying Comment, the engagement letter should specify who is paying the attorney's fee or whatever the fee-splitting arrangements will be among the clients. If clients are sharing fees and a pro rata assessment appears inequitable or unsustainable for one reason or another, it may be appropriate to establish some other mechanism by which fees will be allocated. Regardless of the method chosen, however, it is critical that it be agreed upon and documented at the outset.

C. Privilege Considerations

It is critical that all persons involved understand the effects of joint representation on the attorney-client privilege. The attorney has a privileged relationship with each of the jointly represented clients. That does not mean, however, that the privilege shields all

communications among group members, even when the communications concern the matter at issue in the representation. Further, in the event that a dispute arises between one or more group members with respect to the subject matter of the representation, the lawyer's communications with group members may no longer be treated as privileged. Comment 30 to Rule 1.7 states:

> A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

On the other hand, mere withdrawal from the joint representation generally will not give the withdrawing party the right to disclose or waive privilege with respect to the joint representation. While ordinarily the client may waive privilege in its own discretion and to suit its own purposes, that principle does not apply in the context of joint representations. Thus, one co-defendant in a case cannot, as consideration for a low-cost or no-cost settlement, agree to divulge all privileged communications with group counsel.

D. Treatment of Confidential Information

The handling of confidential client information typically represents one of the most difficult areas of joint representation. As noted above, while joint clients' interests by definition must be generally aligned, jointly represented clients are not always on the best terms personally (*e.g*., a former executive of a franchisor), or they may consider themselves to be business competitors (*e.g.,* franchisees operating in the same market). As such, there may be a reluctance to share information freely. At the same time, the attorney needs to have all relevant information concerning the matter of the representation, and cannot withhold that information from the other clients who are entitled to equally knowledgeable and effective representation. Comment 31 to Rule 1.7 explains why this is the case:

> As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of

> obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.

As noted in the Comment, it is important for the lawyer to set appropriate expectations in the engagement letter. At the same time, however, not every sentence uttered by the client is necessarily material to the representation. And there may be some types of information (for example, financial information supporting a client-specific claim for damages) that might not pertain directly to the other represented parties. On the other hand, absent agreement among the jointly represented parties, and potentially even when there is an advance agreement, the withholding of information material to the representation at the request of one represented party to the detriment or potential detriment of another creates a substantial and potentially insolvable problem for the attorney and the continued joint representation. In these circumstances, withdrawal may be the only solution.

E. Considerations Regarding Settlement

Like confidentiality, the consideration of settlement offers is a particularly fraught area for lawyers who are representing multiple clients. The general principle is that each client has ultimate control over its own decision as to whether or not to settle and on what terms. Model Rule 1.8(g) provides (with criminal-related clauses omitted):

> A lawyer who represents two or more clients shall not participate in the making of an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

In explaining the import of this rule, an ABA Formal Opinion (No. 06-438) has stated that the lawyer is required to specify for each client:

> 1. the total amount or result of the settlement or agreement;
>
> 2. the amount and nature of each client’s participation in the settlement or agreement, including:

a. each client's contribution to or receipt from the settlement proceeds (be it monetary or nonmonetary); and/or

b. the resolution of each client's criminal charges;

3. the fees and costs to be paid to or sought by the lawyer, including which client(s) and/or others are going to pay those fees and costs; and

4. the method by which costs are to be apportioned between each client.

The fact that each client controls its own settlement creates a difficult dynamic that potentially can be exploited by an opponent (for example, by picking off certain parties to weaken the group). Or, one or more holdouts may scuttle a settlement that a majority of the group believe is in the group's interest, when the opposing party demands an "all-or-none" settlement.

In theory, one way to address at least the latter concern would be a pre-suit agreement among group members to be governed by a vote as to whether to settle. Such an agreement, even if lawful, would itself raise a number of issues, including determination of voting rights. Would voting be "one party – one vote"? Would it be based on some damages-related calculation (so the party with the greatest loss would have a greater say)? Would voting rights be suspended if a party had failed to pay its litigation assessments?

While interesting, these questions are mostly theoretical insofar as courts have not been inclined to find such agreements enforceable. Most notably, in *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, the New Jersey Supreme Court, affirming a lower court decision, held that a pre-suit agreement among franchises mandating a majority-rule acceptance of settlement was unlawful and unenforceable. 898 A.2d 512, 518-22 (N.J. 2006). The Court found that the agreement at issue was not consistent with the New Jersey equivalent of Model Rule 1.8(g) quoted above. *See id.* Thus, while pre-suit discussions involving the joint clients and counsel about potentially acceptable settlement terms are beneficial in terms of setting expectations and avoiding unnecessary disputes, both counsel and jointly represented parties should be aware that the ability to resolve the issues conclusively at the outset is limited at best.

F. Later Arising Conflicts

Notwithstanding the good faith and best efforts of all involved, there are times when an unanticipated and unwaivable conflict will arise between or among the parties in the joint representation. This disruption may be caused by external factors, such as new facts uncovered in the course of discovery that cause certain parties to become adverse to one another or that affect the parties' cases in materially different ways such that joint

presentation of a case is no longer feasible. Disruption of the relationship may also be caused by internal factors such as a dispute over litigation strategy or settlement.

In either situation, the lawyer likely will need to extricate himself or herself from all or at least part of the joint representation. Ideally, this issue will be addressed in the engagement letter. For example, if the lawyer is representing the franchisor and one of its former employees, and facts are later discovered that leads to the latter not being able to be part of the represented group, then the engagement letter may provide that the employee will retain separate counsel at his or her own expense and that the franchisor's lawyer will continue to represent the company (which, more than likely, has been paying the fees for the entire group). But such advance waivers may or not be enforceable "informed consent," depending on the circumstances, and the lawyer retains ethical duties to the former client that may preclude continued representation.

G. Trial Issues

It is a common lament of litigators everywhere that not enough cases go to trial. Some cases do go to trial, however, and when the lawyer is representing multiple clients, there are added complexities that must be considered.

One advantage of joint representation is that a consistent theme can be presented to the jury (or judge or arbitrator). At the same time, however, a lawyer representing multiple clients must ensure that each client's case is presented to the trier of fact. Time limits for opening and closing are likely to be cumulative for jointly represented parties, so the lawyer will have to be particularly mindful of time constraints and avoiding a focus on one client's case to the detriment of another. Similarly, while direct examinations may not be problematic, cross-examinations will need to cover all topics essential to each client's case, which may dilute the impact of the examination.

These issues may become particularly acute if one client has a defense that is not available to another. For example, in a negligence case regarding an injury that occurred at a franchisee's location, the franchisor will almost invariably defend against a claim of vicarious liability by asserting that it lacked the requisite control over the relevant aspect of the franchisee's operations. At least through summary judgment, this defense is unlikely to be inconsistent with the arguments that the franchisee is likely to advance. At the trial stage, however, there is a much finer line to walk, and separate counsel may be necessary. It is incumbent upon the lawyer to consider these issues sufficiently in advance that neither client is left in a bind on the eve of trial.

V. POTENTIAL CONSEQUENCES OF CONFLICTS/OTHER ISSUES

Failure to decline or withdraw from a representation encumbered by a conflict of interest can bring about significant consequences for both attorney and client. As a practical matter, "where there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients . . . the employment should be refused." *Bristow*, 721 P.2d at 205 (internal citations removed).

Although courts tend to be less stringent, the serious consequences that may attend a conflict of interest warrant careful adherence to the rules of professional conduct.

A. Lawyers must inform clients of potential costs and alternative arrangements when a conflict is possible.

Clients focused on their immediate legal needs are unlikely to comprehend the full extent of potential costs they may face by engaging counsel who may be subject to a nonwaivable conflict. Where conflicts are waivable, a client cannot give informed consent without being informed of the material risks involved. The Model Rules of Professional Conduct obligate lawyers to consider the costs and disadvantages that a client might incur from possible conflicts and inform the client of those risks and available alternative arrangements, including screening. MRPC r. 1.0(e), 1.18 cmt. 8 (AM. BAR ASS'N 1980).

1. Courts are hesitant to disqualify counsel, but the costs of disqualification are great.

Because attorney disqualification often disrupts a representation after a lawyer gains familiarity with the matter in question, courts tend to grant motions to disqualify counsel only when a conflict actually exists or is seriously likely to exist. Courts may accordingly place a high evidentiary burden on those seeking to prove that a conflict necessitates disqualification. *See, e.g.*, *Road King* 540 F.Supp. 3d at 561, 567. But even when a court is concerned that disqualification will cause harm to one party or provide a tactical advantage to another party, proof of a conflict that harms a lawyer's past or current client will compel disqualification. *See St. Albans*, 559 F.Supp. at 526. Although the disqualification remedy is often reserved for more obvious conflicts, lawyers should equip their clients to make appropriately informed decisions about a representation when the client is aware of the range of disqualification's financial and tactical costs whenever a conflict is possible.

2. Even when representations are allowed by the rules of professional conduct, clients may be disadvantaged by a joint representation.

The evidentiary attorney-client privilege is an important aspect of every legal representation and is designed "to encourage full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The prevailing rule, however, is that parties agreeing to a joint representation waive the protections of the attorney-client privilege as to the commonly represented parties even where a conflict does not prohibit the representation. MRPC r. 1.7 cmt. 30 (AM. BAR ASS'N 1980). A lawyer undertaking a joint representation should assume litigation will eventually result and inform the clients of the possible consequences. *Id.*

B. Like other forms of professional misconduct, conflicted representations expose lawyers to liability and penalties.

In addition to impairing clients' interests, non-waived conflicts of interest expose lawyers to financial losses and reputational harm. When a lawyer undertakes a representation without resolving a conflict, they risk forfeiture of fees, malpractice liability, bar discipline, and loss of trust.

1. Courts may deny or disgorge fee collection

When an attorney charges fees for a representation encumbered by a conflict that is not waived, a court may deny collection or order disgorgement of fees paid. These remedies find their origin in the general rule prohibiting lawyers from charging or collecting an unreasonable fee. *United States ex rel. Luke v. HealthSouth Corp.*, No. 2:13-cv-01319, 2020 WL 116939, at *3 (D. Nev. Mar. 11, 2020); *see* MRPC r. 1.5(a) (AM. BAR ASS'N 1980). Fee denial or disgorgement is particularly likely if the client's interests were harmed by the conflict, but such a finding is not necessary for barring collection of fees. *See So v. Suchanek*, No. 08-2091, 2010 WL 11448175, at *1 (D.D.C. May 6, 2010), aff'd in part and remanded in part (670 F.3d 1304) ("The [client] did not adduce proof of damages or injury and need not have done so: a lawyer's conflicted representation of a client is enough without more to support a disgorgement remedy.").

2. Conflicts are a frequent basis of attorney malpractice claims

Conflicts expose lawyers to malpractice liability under the negligence laws of most jurisdictions. *See, e.g.*, *AmBase Corp v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434 (N.Y. 2007); *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). Conflicts are particularly noteworthy malpractice liability risks because clients bring malpractice claims based on alleged conflicts of interest more often than they bring any other type of claim for malpractice liability. Insurance Journal, "Law Firms and Their Insurers Feel the Pain of Bigger Malpractice Claims" (May 17, 2021) https://www.insurancejournal.com/news/national/2021/05/17/614643.htm (last visited Feb. 13, 2022); Andrew Strickler, "Big Legal Malpractice Claim Payouts Up as Volume Stays Flat," Law360 (June 25, 2018) https://www.law360.com/articles/1056899/big-legal-malpractice-claim-payouts-up-as-volume-stays-flat (last visited Feb. 13, 2022). Lawyers can most effectively limit their exposure to malpractice claims by checking for conflicts at all stages throughout a representation and by seeking informed consent when necessary.

3. Lawyers may face bar discipline in addition to other consequences.

Bar discipline may be ordered in addition to or in the absence of other penalties against a lawyer who represents a client despite a conflict of interest. Sanctions differ by jurisdiction and take various forms ranging from private reprimand to disbarment and ordered restitution. *See, e.g.*, STATE BAR OF TEXAS, PUNISHMENT FOR PROFESSIONAL MISCONDUCT, https://www.texasbar.com/

Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/MisconductPunishment.htm (last visited Feb. 12, 2022).

Tribunals with disciplinary authority for lawyer misconduct often have discretion to impose an appropriate sanction. Sanctions may be rendered based on the seriousness of the professional misconduct, injury to clients, harm to the profession, need to assure the public that the misconduct will not occur again, and the attorney's motive, among other factors. *Id.* A lawyer who recognizes the existence of a conflict after opportunities for correction have passed may minimize the consequences of their misconduct (for both themselves and the clients involved) by making the conflict known and cooperating with all parties—and possibly the bar—to mitigate any resultant harms. In *Bristow*, the court credited a lawyer for seeking assistance from the Oregon Bar upon allegation of a potential conflict and for cooperating in the investigation that followed. *Bristow*, 721 P.2d at 440, 444. As a result of his cooperation, the lawyer avoided sanctions beyond a formal reprimand. *Id.* at 444-45.

VI. GUIDANCE FOR LAWYERS REPRESENTING FRANCHISORS

Lawyers who represent franchisors frequently are asked to represent officers or employees of the franchisor who are also named as defendants in litigation. As a general matter, the joint representation can be efficient and beneficial for all parties, at least so long as the franchisor does not intend to direct blame for the matters at issue towards the officer or employee. Most commonly, a unified defense will be most effective. On the other hand, it is imperative that the lawyer explain the potential risks and benefits of the joint representation and obtain informed consent from each of the clients as required by Rule 1.7(b)(4).

In considering whether joint representation is appropriate, the lawyer should attempt to anticipate to the extent possible how the litigation is likely to play out and whether it is foreseeable that future conflicts are likely to develop. The franchisor's assertion of a cross-claim against the officer or executive would preclude joint representation. *See* Rule 1.7(b)(3) (allowing concurrent representation in certain circumstances, including where "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"); *see also Ballew v. City of Pasadena*, No CV 18-0712 FMO (ASx), 2020 WL 4919384 *10 (C.D. Cal. Apr. 13, 2020) ("where, as here, the alleged conflict is simultaneous representation, the conflict does not primarily implicate the duty of confidentiality, but rather the attorney's duty – and the client's legitimate expectation – of loyalty") (cleaned up).

As stated above, it is far better to anticipate such scenarios before commencing the joint representation rather than at some later point. Among other reasons, the withdrawal process can be difficult and expensive for all concerned if it occurs later in the litigation. In addition, even post-withdrawal, at a minimum there would be a substantial risk that representation adverse to the former client would not be permissible and might be subject to a successful motion for disqualification. As in other circumstances,

withdrawal would not end the lawyer's continuing duties to maintain confidentiality and refrain from using information learned in the course of the representation to the client's detriment. *See* Rule 1.6(a) (duty not to reveal information relating to the representation of the client); Rule 1.8(b) ("A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent"); *see also Ballew v. City of Pasadena*, 2020 WL 4919384 at *10 ('Where the potential conflict is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality." (cleaned up).

The requirements of Rule 1.9 related to former clients also may not permit continued representation in these circumstances. Under Rule 1.9(a), "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, in writing." In these circumstances, consent would be unlikely, and there would be questions regarding whether any advance consent could be deemed "informed."

In some situations, a lawyer may be engaged to represent both the franchisor and one or more of its franchisees. Historically, as referenced above, the most frequent scenario of this type involves injuries or other losses that occur at the franchisee's business location due to alleged willful misconduct or negligence. In these situations, the franchisor is often alleged to be vicariously liable to the plaintiff. More recently, however, claims have been brought alleging system-wide wrongdoing, particularly with respect to employment matters (*e.g.,* wage-and-hour claims, joint employer claims, and antitrust and other claims related to anti-poaching provisions). These issues may arise as civil claims or through government investigations or enforcement action.

Where the franchisor's potential liability is purely vicarious, at least in theory the availability of an additional defense to the franchisor should not create a conflict that would preclude joint representation under Rule 1.8. All of the factors noted above should be considered, and the informed consent to the joint representation properly documented as required by Rule 1.7(b)(4). Again, it is critical to consider how the issue may play out if the case proceeds to trial. The worst-case scenario is for evolving trial strategy to necessitate last-minute substitution, most likely for both franchisor and franchisee.

The situation is somewhat different with respect to government investigations and system-based civil claims. Generally, the franchisor and its franchisees are closely aligned with respect to these issues, at least so long as the matter concerns system requirements or attributes and is not focused on individual implementation or deviation. The recent flurry of anti-poaching class actions is illustrative. In those cases, the plaintiffs for tactical reasons sought to focus attention on system-wide matters (*e.g.,* the inclusion of anti-poaching provisions in the form franchise agreement) as opposed to whether or not the provisions were actually used in local markets. *See, e.g., Deslandes v. McDonald's USA, LLC,* No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) (order denying class certification). As always, however, it is important to document consent to

the concurrent representation and to consider in advance the extent to which later-arising conflicts might cause issues in the representation.

Finally, lawyers and firms that specialize in representing franchisors in litigation almost always represent multiple systems, both simultaneously and over time. Not infrequently, the franchisors may participate in the same industry. These situations generally do not present a conflict of the type governed by the rules, at least insofar as the franchisors are engaged in litigation against their own franchisees. Generally, this works to the benefit of both clients, who have counsel with greater industry knowledge and experience. Particularly with respect to factual information learned from a client, however, counsel must keep in mind the duty to maintain any such information in confidence as required by Rule 1.6(a). Likewise, to the extent that the franchisors ever come into conflict with respect to a matter, the provisions of Rule 1.7 (current clients) or 1.9 (former clients) must be followed.

VII. GUIDANCE FOR LAWYERS REPRESENTING FRANCHISEES

When evaluating whether to represent a group of franchisees or a franchisee association, franchisee attorneys must be mindful of issues that can arise in joint representation. While groups of franchisees or franchisee associations are usually formed with the intention of addressing common concerns, claims, issues and grievances, during the course of such representation, conflicts and divergent interests may exist or arise.

For example, conflicts may arise if one of the franchisee clients has information that is relevant to the representation that it is unwilling to disclose or that it cannot disclose based on confidentiality agreements. Similarly, clients who are seeking to be jointly represented may have claims against one another that may preclude joint representation. Furthermore, the positions that some of the members of the group or association wish to advance against the franchisor may be at odds with those of other members.

It is incumbent upon the attorney representing a group of franchisees or an association to anticipate these types of issues at the outset of the representation because, in the event of a conflict, the lawyer may have to resign from representation of later-acquired clients. ABA MRCP 1.18. In preparing the waiver to be executed by members of the group or association, a lawyer should make certain that:

i) all foreseeable, potential conflicts are identified in writing to the clients;

ii) the nature of the waiver and its advantages and disadvantages should be discussed with each prospective member of the group, with such discussion memorialized in the waiver; and

iii) alternatives to the waiver or conflict, including separate representation, should be discussed with each prospective member of the group, and also memorialized in writing.

When representing a group of franchisees or a franchisee association, it is also possible, depending on outlet location, that those participating franchisees are competitors despite being franchisees of the same brand. Consequently, the possibility exists that the attorney may have access to franchisees' sensitive competitor information. In such instance, the ethical rules still apply and state that: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent." ABA Model Rules 1.8(b). As such, the fundamental duty of confidentiality set forth in Rule 1.6(a) applies "(A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation." ABA MRPC 1.6(a).

For lawyers representing franchisees in concurrent representation situations, the attorney should take steps to ascertain whether all of the clients are agreeable to disclosing all of their relevant information. If not, the attorney must work to determine what information a client wishes to withhold. If such information is material to the representation and non-disclosure will impair such representation, those franchisees should be advised to retain separate counsel.

Despite the potential benefits obtained by affiliating with other franchisees, lawyers should evaluate potential conflict issues which that may arise from such a representation and which should be evaluated at its outset and on an ongoing basis.

VIII. CONCLUSION

Joint representation presents a host of issues and considerations for clients and attorneys alike. While the economic and other benefits of a lawyer representing multiple clients in a matter may compel joint representation, careful attention must be paid to the applicable rules which establish when joint representation may be ethically permissible and when it is precluded.

Once counsel identifies the prospective client(s) and determines whether the rules permit the intended joint or successive representation, it is essential that all necessary parties provide their informed consent when a conflict would otherwise exist. If a joint representation is going to proceed, documentation of its terms at the outset is essential and should address matters such as information sharing, maintenance of the attorney-client privilege, control over the litigation, and fees. Memorialization of these issues is critical to avoid subsequent disputes and misunderstandings. As detailed above, the failure to properly address these issues can result in substantial consequences for both the lawyer and client.

Franchise lawyers in particular should exercise caution when entering into joint representations. There are many practical and economic benefits of joint representation, but careful adherence to the rules of professional conduct will ensure protection of both franchise lawyers and their clients.

Professional Biography for Andrew P. Bleiman

Andrew is a partner with Marks & Klein, LLP in Northbrook, Illinois. Andrew works with franchisors and franchisees on franchise-related matters including the preparation and review of franchise disclosure documents, franchise agreements, area development agreements and similar documents. He also represents his clients in litigation and arbitration actions involving breach of contract, fraud, unfair competition, trademark infringement and trade secret claims. His practice also includes dealing with franchisee termination issues and the enforcement of post-termination covenants. Andrew co-founded the Northern Illinois Franchise Association ("NIFA") (www.northernilfranchise.org). The NIFA dedicates itself to supporting individuals and businesses in franchising at the franchisor, franchisee and supplier levels and is committed to promoting, enhancing, and fostering the success of franchisors and franchisees in Illinois through communication, political advocacy, networking, support services and educational programs. Andrew is a member of the American Bar Association, the Illinois State Bar Association and the Small Business Advocacy Council. He serves as a member of the Illinois Attorney General's Franchise Advisory Board. Andrew has been named by Franchise Times as one of its "Legal Eagles" each year since 2014.

Professional Biography for Sally Dahlstrom

Sally is a solutions-oriented trial lawyer who counsels clients in complex commercial litigation matters. Sally obtained her B.S., cum laude from Texas Christian University and graduated with Honors from University of Oklahoma College of Law. Sally regularly represents clients in multimillion-dollar lawsuits in state and federal courts and arbitrations across the country.

She has handled disputes on a variety of topics ranging from franchise and distribution networks, oil and gas transactions, trademark infringement, trade secrets, contracts, fraud, defamation, business disparagement, and disputes about the sale of major businesses. Sally's diverse group of clients include major hotels, restaurant groups, food and beverage franchisors and distributors, major oil and gas companies and privately-owned independents, and media/entertainment groups.

Sally routinely defends claims by individual franchisees, under franchise statutes, for rescission, breach of the duty of good faith and fair dealing, misrepresentation and interference, enforcing terminations, and bankruptcy litigation. Sally has particular experience in the area of injunctions, especially regarding trademark infringement and enforcement of restrictive covenants against franchisees, dealers, distributors, or licensees.

Sally takes a common-sense, business-oriented approach to each case whether it requires a strongly-negotiated settlement, or the aggressive defense or prosecution of her client's claims. An accomplished litigator, Sally realizes that the best result – an early victory – is often obtained through motion practice. For example, she recently won complete dismissal of a breach of contract and fraud suit against a major hotel franchisor and obtained summary judgment against sellers of a business to a major work wear manufacturing company for fraud which was then mutually settled.

Sally is a frequent speaker and writer on franchise related topics. Sally is a co-author of the Franchise Law section for the SMU Annual Texas Survey. She also serves on the board for the Dallas Bar Association, Franchise Law and Distribution Section and serves on the American Bar Association Forum on Franchising Litigation and Alternative Dispute Resolution Committee.

Professional Biography for Michael Sturm

Michael is a partner in Lathrop GPM's Franchise & Litigation group based in Washington, D.C. He has more than three decades of experience litigating on behalf of franchisors in federal and state courts across the country and in arbitration proceedings. His experience includes virtually every type of substantive claim that arises in the course of the franchise relationship, including alleged violations of statutory disclosure and relationship obligations, claims of physical and internet encroachment of exclusive territories, claims of fraud and nondisclosure, claims with respect to supplier payments, alleged violations of antitrust laws, contractual disputes, and claims under the implied covenant of good faith and fair dealing. Michael also has extensive experience with the jurisdictional and procedural issues that arise frequently in franchise litigation, including litigation with franchisee associations and multi-party litigation. Outside of the courtroom, Michael is a Franchise Times "Legal Eagle," has published in the Franchise Law Journal and Franchise Lawyer, and has spoken at IFA's Legal Symposium and at the annual ABA Forum on Franchising. He is a graduate of the College of William & Mary and Harvard Law School.