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I'll Have What She's Having: An Exploration of Legal and Ethical Issues When Representing Clients that Compete

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I'll Have What She's Having: An Exploration of Legal and Ethical Issues When Representing Clients that Compete

I. Introduction

Franchise clients turn to franchise attorneys for their unique and specialized experience with franchise law as well as their knowledge of and perspective on the business of franchising. Thus, it is not uncommon for attorneys to represent multiple clients in the same industry, or multiple clients within the same franchise system. Sometimes these clients may have businesses that are directly competitive with one another; in other instances, clients may have different interests at stake or different objectives they are seeking to achieve. Thus, while they may not be in literal "competition," their interests diverge. This paper will consider some of the legal and ethical issues and concerns that may arise when an attorney or law firm represents clients that compete with one another, in either a broad or narrow sense.

A. Benefits to Retaining an Attorney Who Represents Competitors

Businesses may "compete" in a variety of ways. They may be in the same geographic region, they may be in the same industry, or they may have the same pool of potential customers. For both franchisors and franchisees, there are a variety of benefits that can arise from retaining counsel that represents or has represented a client's competitors: there may be efficiencies of scale and synergies in having a single attorney represent multiple clients at the same time or in succession and the attorney may have specialized knowledge of laws and regulations that govern the business. If competitors are in the same geographic region, an attorney that both use may have knowledge of idiosyncrasies about the local market.

An attorney with significant experience representing franchisors may have had an opportunity to observe many different systems in operation and develop a sense of practical solutions to common problems as well as best practices. The attorney will have encountered a wide variety of questions about franchise law and be able to advise the franchisor regarding both obvious and obscure regulatory issues. Moreover, the attorney may have relationships with regulators or others that allow the franchisor to move through the registration process or deal with other regulatory hurdles as quickly as possible.

An attorney with significant experience representing franchisees will also have had an opportunity to observe many different systems in operation, and to develop a sense of what is feasible and what is best for a given system. It is typical for franchisee attorneys to represent multiple clients within the same system, usually because the clients appear to have unified or at least parallel, interests and because of the attorney's familiarity with the franchisor, its FDDs over the years, and the franchise agreement.

In all cases, an attorney with experience representing similar clients will likely be able to provide comprehensive advice and counsel more efficiently because of the repetition of the services and familiarity with the subject matter.

B. Risks to Retaining an Attorney Who Represents Your Competitors

There are risks, however, for the client seeking and the attorney accepting the representation. The client faces a risk that at least some information imparted to the attorney may be shared with the client's competitors, even if it is only general information and shared indirectly. At the same time, however, the sharing of information that might make joint representation efficient and effective may in fact be ethically difficult, if not impossible, and the representation may, therefore, not be feasible. For the attorney, accepting representation of competitors means being extra attentive to client information, to potential conflicts of interest and to the risk of losing one or both clients if a conflict arises.

Representation of multiple clients may raise not only legal conflicts of interest, but also business conflicts. Business conflicts may arise on the franchisor side, if lawyer shared among competitors, has information about a business's future plans, financial information, and personnel and various other policies. Franchisees may have business conflicts with other franchisees when, for example, they are competing for a limited pool of funds or resources. The attorney needs to (a) reach an understanding with the clients as to what business interests are at stake and (b) determine with the help of all the clients whether those business issues present any type of a conflict and if so, how it will be handled.

Because of a stated potential risk of conflict, some larger organizations are using their market power to strictly prohibit competitive representations, or to impose additional obligations on their outside counsel above and beyond what local ethics rules may require. These clients appear to be willing to sacrifice some level of efficiency (and perhaps expertise) for a strong degree of loyalty and increased confidence in the protection of their information.

Client requirements of attorney loyalty raise legal, ethical and business issues. What, exactly, is the scope of the loyalty that the client is demanding? How long does the loyalty last, and what obligations, if any, does the attorney have after the representation is concluded? Does extraordinary loyalty to one client compromise the attorney's ability to zealously represent another? And, finally, is the loyalty reciprocal – *i.e.*, will the client always use that attorney when a matter within the scope of representation arises?

Several years ago, Wal-Mart allowed a portion of its outside counsel guidelines to be published through the Association of Corporate Counsel.[1] Although Wal-Mart is not a franchise company, the guidelines reflect a particular sensitivity to legal and business conflicts, and thus are instructive as to general concerns that may arise when franchise and distribution clients compete.

First, the guidelines require that Wal-Mart be notified of every actual conflict and potential conflict. Under the guidelines "[k]nown and actual conflicts of interest involve a law firm's representation of a client in a matter in which the other client's interests are or become

[1] Sample Pages from Wal-Mart Outside Counsel Guidelines. Available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session2_pages_from_sample_document_walmart_outside.authcheckdam.pdf

adverse to Wal-Mart…. Potential conflicts of interest generally occur when a law firm's representation of a client in a matter, though not actually adverse to Wal-Mart, has the potential of becoming adverse during the course of the law firm's representation." Second, the guidelines flatly deny any advance waivers that would lessen the burden of counsel to get individual waivers: "No general, prospective or unlimited waivers will be considered and should not be requested." Finally, the guidelines specifically require Wal-Mart's consent to the representation of any competitor, apparently irrespective of ethical conflict. Regarding representation of any competitors, the guidelines provide:

> Wal-Mart may conclude that an actual conflict of interest exists if Outside Counsel or Outside Counsel's law firm represents a significant competitor of Wal-Mart or its subsidiaries or affiliates. A list of Wal-Mart's principal subsidiaries is attached as Exhibit D. As a pre-condition of engagement, Outside Counsel must disclose in writing the identity of any national or regional retailers or any significant competitors of Wal-Mart or its subsidiaries or affiliates (see Exhibit E for examples) that the Outside Counsel firm represents, together with a general description of the type of legal services that the Outside Counsel firm provides to such client(s). If Outside Counsel concludes that it would be improper to provide this information to the Company, Outside Counsel should decline the engagement.

Based on the significant additional protection provided by its guidelines, it is clear that Wal-Mart puts a high premium on loyalty and the avoidance of circumstances that might give rise to a conflict. While it is easy to understand why this increased protection would be desirable for organizations, it can also create real difficulties for law firms. For example, the portion of the outside counsel guidelines available does not reflect any commitment by Wal-Mart to provide a certain minimum amount of business to such counsel. The additional restrictions imposed by the guidelines may significantly restrict an attorney's ability to engage new clients without any guarantee that Wal-Mart will provide enough business to offset the loss in new clients.

C. The Scope of Potential Conflicts

Legal conflicts can arise from an attorney's (a) concurrent representation of two clients, (b) representation of a former client, or (c) representation related to prospective clients. This paper will examine each conflict in turn. For every conflict that arises, the lawyer involved will need to assess whether it rises to the level of an ethical conflict. If rules of ethics are implicated, the attorney needs to determine whether the conflict can be waived or resolved in some other fashion.

In today's environment, attorneys need to be keenly aware that potential conflicts may arise under the ethics rules of different jurisdictions. In some cases, attorneys are admitted in more than one jurisdiction; frequently, in litigation, counsel will be admitted *pro hac vice* in a court in which he or she is not otherwise admitted. And, with law firms spanning multiple states, the question arises as to which states' rules will govern. Fortunately, the rules in most states are similar, and most follow the ABA Model Rules of

Professional Conduct ("MRPC"), which this paper will use as a guide, unless otherwise stated.

II. Concurrent Representation

An initial group of issues arises when an attorney is asked to represent clients who may have adverse interests at the same time. This may, for example, involve representation of a franchisor and area developer; a franchisor and its officers; a franchisor and its suppliers; multiple franchisees; or a franchisee association and its members. ABA Model Rule 1.7 governs such "concurrent representation" and provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) The representation is not prohibited by law;
>
> (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) Each affected client gives informed consent, confirmed in writing.

In general, under Rule 1.7 the lawyer must (a) clearly identify the client or clients; (b) identify the lawyers; (c) determine whether a conflict of interest exists; and (d) decide whether the representation may be undertaken despite a conflict based on an ethical screen or a waiver. Otherwise, the lawyer must decline the representation. ABA MRPC 1.7, Comment 2.

A. Who is the Client?

An initial issue is identification of the client or clients. Obviously, if there are written engagement letters, there will be an attorney-client relationship with the client identified in the letter. Less obvious are parties with whom there may not be an express relationship, but with whom the attorney has conferred. Usually, a consultation alone will not lead to an attorney-client relationship that invokes the ethical rules, but an attorney is still bound to keep the prospective client's information in confidence, and therefore must be sensitive to whether disclosure or use of such information will be required in the concurrent representation. A separate issue arises with corporate officers or employees who may have an implied attorney-client relationship due to close and ongoing consultations that cover individual interests as well as corporate issues. *See Home Care Indus., Inc. v. Murray*, 154 F. Supp. 2d 861 (D. N.J. 2001).

Identification of the client also requires attorneys in a firm to determine whether their colleagues or employees represented a "client" or adverse party in prior engagement; while this possibility technically falls under Rule 1.9, dealing with past representation, proper due diligence requires attention to past affiliations. See ABA MPRC 1.9(b).

As a separate matter, in a class action lawsuit, unnamed members of the class are ordinarily not considered clients for purposes of applying the rule. ABA MRPC 1.7, Comment 25.

For franchisees, the question of who the client is comes up frequently with respect to representation of multiple franchisees against a franchisor, and can pose a number of actual or perceived conflicts.

B. Who is the Lawyer?

In addition to identifying the client, it is also important in some cases to identify the lawyers who will be involved in a current matter. In general, the Model Rules provide that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9" unless the conflict is based on the personal interest of a lawyer and would not materially limit the representation, or the conflict is based on the prior association of a lawyer, and that lawyer is timely screened from participation in the current matter. ABA MRPC 1.10. The requirement of timeliness means that law firms have an obligation to identify any potential conflict as quickly as possible, and screen affected attorneys to prevent any potential conflicts.

C. Is there a Conflict?

Once the clients and lawyers have been identified, the next issue is whether there is an ethical conflict. Some situations definitely do *not* present a conflict. For example, a lawyer may take different legal positions in different tribunals at different times on behalf of different clients. The fact that a lawyer may create a precedent adverse to one a client in an unrelated matter does not create a conflict of interest. ABA MRPC 1.7, Comment 24. But does it create a business conflict or raise a question that should be discussed with

the client? While creating a precedent adverse to a client's interests (in an otherwise unrelated matter) is not technically a legal conflict, it is doubtful whether many clients would be happy about such representation. Additionally, there may be an issue whether creating a precedent adverse to a client's interests impairs the attorney's ability to zealously represent existing clients on an ongoing basis.

One circumstance where this may arise is lobbying on behalf of client. Will a successful outcome for one client materially disadvantage another? For example, in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), the Seventh Circuit held that lobbying activity could, under some circumstances create conflicts of interest.

In *Westinghouse*, a national law firm was retained by a trade association to prepare and submit a report on competition in the energy sector, including the uranium industry, in connection with the trade association's lobbying efforts against mandatory divestiture proposals in congress. In the course of the representation, the trade association facilitated contact between the law firm and trade association member oil companies for the purpose of collecting information to be used in the report. Many oil companies submitted information to the firm with the understanding that the information would be used to argue against a breakup of the oil industry, and that confidentiality of the information would be maintained. The report concluded that the energy industry was highly competitive and would likely remain so. However, on the day that the report was released, the same law firm (although different lawyers) filed a lawsuit on behalf of a uranium supplier against three of the trade association members, arguing that there was an anti-competitive conspiracy within the uranium industry. Many of allegations in the complaint directly contradicted the conclusions in the report. The trade association members moved to disqualify the law firm as counsel for the uranium supplier. Ultimately, the Seventh Circuit agreed. In its view, each trade association member "entertained a reasonable belief that it was submitting confidential information regarding its involvement in the uranium industry to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company."

The court was careful, however, not to create a blanket rule that an attorney representing a trade association could never be adverse to its members. In each case, when a trade association is a client, the lawyer's duty to each member organization will depend on the understanding of all parties involved, and whether the lawyer sought or receive information from the member from which it would be appropriate to impute an attorney-client relationship. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978). *Conf. J.G. Ries & Sons, Inc. v. Spectraserv, Inc.*, 894 A.2d 681, 687–88 (App. Div. 2006) (firm not disqualified from suit against trade association member where the firm did not solicit or receive confidential information, and the matter in which the firm was adverse to the trade association member was not related to the matter in which it represented the trade association).

On the other hand, some situations clearly present a conflict, as when the lawyer represents a party directly adverse to an existing client. *See Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415 (D. N.J. July 29, 2008). Representation is directly adverse within the meaning of Rule 1.7(a)(1) when the lawyer acts as an advocate in one matter against

a person the lawyer represents in some other matter even if they are unrelated. The duty of loyalty forbids the lawyer, without the client's consent from acting for a client in one action and against the same client in another. *Bryan Corp. v. Abrano*, 474 Mass. 504, 52 N.E.3d 95 (Mass. 2016) holds that, the lawyer must either give up the representation or obtain an effective waiver. As is typical in the law, however, many possible conflicts cannot be easily categorized – they are in the grey area of whether there is ***a "significant risk" that representation of one client will "materially limit" representation of another client.***

Rule 1.7(a)(2) focuses on the extent of which representation is likely to be limited because of an interest jeopardizing the lawyer's exercise of independent professional judgment. In determining whether representation of one client will "materially limit" representation of another, courts look to whether there is a "substantial discrepancy" between positions or issues, testimony, or settlement prospects. *See Patterson v. Balsamico*, 440 F.3d 104 (2d Cir. 2006); *Miller v. Alagna*, 138 F. Supp. 2d 1252 (C.D. Cal. 2000) (where city lawyers defending city and policy officers knew potential conflicting defenses had access but did not obtain informed consent, they were disqualified from continuing to represent city). A material limitation may arise out of facts, or knowledge of facts, that impede the lawyer's ability to represent the client. *In re Shay*, 756 A.2d 465 (D.C. 2000) (conflict limited lawyer's representation of a couple in estate planning when lawyer knew that the husband was secretly married to another person). *See In re Marshall*, 157 P.3d 859 (Wash. 2007), in which a lawyer represented multiple plaintiffs in a discrimination case without adequately explaining possible conflicts or obtaining waivers.

D. Can the Conflict be Resolved?

Once the lawyer determines that there is a concurrent conflict, Rule 1.7 requires that counsel make two inquiries: (a) whether the conflict is "consentable" – *i.e.*, can the client consent to waive the conflict at all? And (b), if so, is the waiver effective?

As set forth in Rule 1.7(b)(2), some conflicts are not waivable by force of law (*see, e.g.*, *Brown v. Kelton*, 380 S.W.3d 361 (Ark. 2011) (disqualification of attorney affirmed despite waivers, because representation prohibited by law). Other conflicts are not waivable because the clients are directly adverse in the same litigation before a tribunal. This prohibition protects the institutional interest in full development of each party's position in litigation. ABA MRPC 1.7, Comment 17. Compare *Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415 (D. N.J. July 29, 2008); *Worldspan, LP v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (disqualification despite advance waivers); *Galderma Labs, L.P. v. Actavis Mid Atl., LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013); *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003); *Grovick Props., LLC v. 83-10 Astoria Blvd., LLC*, 990 N.Y.S.2d 601 (App. Div. 2014).

If the conflict is waivable or "consentable," then the question arises whether the client has made or can make informed consent. Rule 1.0(e) defines informed consent to mean that the lawyer has communicated adequate information about material risks, as well as reasonably available alternatives to the proposed course of conduct to permit the client to make an independent decision. *See Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc.*, 200 F. Supp. 2d 355 (S.D. N.Y. 2002) (disqualification granted; "it is clear from the documentary

record that counsel knew it had not secured an effective waiver before filing this lawsuit"). Some courts are especially rigorous in requiring that lawyers disclose the nature of all conflicts or potential conflicts relating to the representation of the client's interests and how they could affect the lawyer's exercise of independent professional judgment. *See In re Guardianship of Lillian P.*, 617 N.W.2d 849 (Wis. App. 2000).

Ordinarily, informed consent will require that the lawyer disclose the facts and circumstances giving rise to the conflict, provide any explanation reasonably necessary to inform the client or other person of the material advantages or disadvantages of the proposed course of conduct and discuss alternatives. In some circumstances, the lawyer should advise the client or other person to seek the advice of other counsel. Relevant factors to determine whether information and explanation is adequate include whether the client is experienced in legal matters generally and whether the client is independently represented by other counsel. ABA Rule 1.0, Comment 6. A lawyer cannot assume consent from the client's silence. ABA Rule 1.0, Comment 7.

In the context of multiple-party representation, "informed" consent means that each affected client be made aware of "relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interest of the client." ABA MRPC 1.7, Comment 18. When representing multiple clients in a single matter, the lawyer must disclose the implications of the common representation, including potential effects on loyalty, confidentiality and the attorney-client privilege. ABA MRPC 1.7, Comment 18.

An important factor in determining the appropriateness of common representation is the effect on lawyer-client confidentiality and attorney-client privilege. There are three types of confidential information: privileged communications, secret information and information relating to or gained by the lawyer in the course of representation of its client. *In re Gordon Properties, LLC*, 505 B.R. 703 (Bankr. E.D. Va. 2013). A client's secret information is information gained in the professional relationship that the client has requested be held in private or the disclosure of which would be embarrassing or would likely be detrimental to the client. Rule 1.6, comment 3. *In re Gordon Properties, LLC*, 505 B.R. 703 (Bankr. E.D. Va. 2013). A lawyer may not disclose privileged or secret information and may not use case-related information to the disadvantage of his client unless it has become generally known. Rule 1.9(c)(1). *In re Gordon Properties, LLC*, 505 B.R. 703 (Bankr. E.D. Va. 2013). Under some laws, once an attorney-client relationship has been established, an irrebuttable presumption arises that confidential information was conveyed to the attorney in that matter. *In re Gordon Properties, LLC*, 505 B.R. 703 (Bankr. E.D. Va. 2013).

The ethical duty to preserve a client's confidential information is distinct from the attorney-client privilege. The duty to protect confidential information protects all information relating to the representation and applies at all times. *See Newman v. State*, 863 A.2d 321 (Md. 2004)(confidentiality rule not limited to matters communicated in confidence by the client but also to all information relating to the representation . . . whereas the attorney-client privilege only protects communications between the client and the attorney); *Spratley v. State Farm Mut. Ins. Co.*, 78 P.3d 603, 608 (Utah 2003) (duty of confidentiality

is not coextensive with privilege). Even information imparted during a consultation that is not otherwise privileged is confidential.

If, in a multiple-party litigation, one client asks the lawyer not to disclose information relevant to common representation to other clients, continued representation will almost certainly be inadequate, and a waiver impossible to obtain. 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 the client's interest. At the onset of the common representation the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that the information should be kept from others. ABA MRPC 1.7, Comment 31.

A significant hurdle that may arise with respect to representation of multiple clients in the same matter is whether all clients agree to disclosure to the others of potentially privileged or confidential information. If one client does not consent to the disclosure of information necessary to another client in order to make informed consent, then it may not be possible for the lawyer to provide the information necessary to obtain informed consent from the second client, and the parties will have to obtain separate representation. ABA MRPC 1.7, Comment 19. Another aspect of this issue is that communications between clients is not necessarily going to be privileged. Hence, clients need to be informed, ahead of time, that disclosure of confidential information to other clients will not be protected.

When a client purports to waive a conflict that might arise in the future, the effectiveness of the waiver is determined by the extent to which the client reasonably understands the material risks that might arise in the future. Counsel bears the burden of explaining to the client the actual and reasonably foreseeable adverse consequences of the representation. For example, if the client agrees to consent to a particular type of conflict with which it is familiar, then the consent will ordinarily be effective. If the consent is general and open ended, then it may well be ineffective because it is not reasonably likely that the client will have understood the material risk involved. The result may depend upon the degree of experience that the client has with legal services as well as the scope of the lawyer's prior disclosure and whether the lawyer actually discussed the conflict with the client. ABA MRPC 1.7*, Comment 22*.

In *Celgene Corp. v. KV Pharm. Co.*, 2008 WL 2937415 (D. N.J. July 29, 2008) (not for publication), the court found that a prospective waiver was ineffective to waive a conflict, with the result that counsel was disqualified. In that case, a law firm, Buchanan Ingersoll, had represented Celgene in a securities litigation. At the time that it entered into that engagement, the client signed an engagement letter that contained the following waiver:

> "We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company . . . or (2) would impair the

> confidentiality of proprietary, sensitive or otherwise confidential communications . . .."

Some years later, Celgene filed a patent infringement case against KV, and Buchanan entered an appearance on behalf of KV. Celgene moved to disqualify the law firm. The court first noted that Celgene and KV were adverse parties in the litigation and therefore had a conflict of interest. Buchanan contended that Celgene's advance consent and waiver were effective. The court, citing *Century Indem. Co. v. Congoleum Corp.*, 426 F.3d 675 (3d Cir. 2005), focused on the question of whether the client had given "truly informed consent," and, turning to state law, noted that it was "utterly insufficient" to advise a client that the attorney foresees no conflict of interest and then asks the client to consent to multiple representation. Rather, the attorney must foresee the variety of potential areas of disagreement, and must raise and discuss with the client at least the more common of these. While all eventualities need not be covered, the "more common" of the conflicts should be stated and laid before the client at some length and with considerable specificity. *In re Lanza*, 65 N.J. 347, 352-53, 322 A.2d 445 (1974). In other words, the attorney must provide "meaningful consultation to the client about potential conflicts."

The *Celgene* court went on to address two additional questions: (1) who bears the burden of proving that the attorney obtained truly informed consent; and (2) how does the court determine whether Buchanan obtained truly informed consent from Celgene? With respect to the first question, the court noted that the moving party bears the burden of proof on a motion to disqualify, but in this context, since Celgene had already shown a conflict, the burden shifted to Buchanan to show it had obtained informed consent. Holding that the requirement for informed consent contemplated that the attorney actually consult with the client and impart information reasonably sufficient to permit the client to appreciate the significance of the matter in question, the court held that Buchanan had not obtained informed consent. First, the engagement letters did not communicate a proposed course of conduct with regarding to concurrent conflicts, any explanation of risks of the course of conduct or any explanation of reasonably available alternatives. Relying on Comment 22 to the ABA Model Rules, the court noted that a general waiver was usually not effective prospectively. The court then examined the parties' communications in connection with the engagement letters and found that there was insufficient evidence of any consultation or advice. In light of this, the waiver was held to be ineffective. Buchanan was disqualified.

In *Worldspan, LP v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998), the court held that an advance waiver executed by a client in connection with the law firm's representation of it in tax matters was insufficient to waive a conflict for a tort lawsuit five years later. The court noted that the language of the waiver letter was ambiguous. The court stated that "future direct adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude . . . that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information."

In contrast, in *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003), the court upheld a general waiver when it had been executed by a sophisticated consumer of legal services: "An advance waiver of potential future conflicts . . . is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict." The court also relied on the fact that the law firm had explained to the client that even though there were no present conflicts, there was a significant risk of future adversity because the two companies were major competitors in the credit card processing business. The letter specifically states that the attorney and prospective client "discussed" its past and ongoing representation of the adverse client and its need to continue to represent it.

If the lawyer reasonably believes that no client will be adversely affected, the representation is not prohibited by law and does not involve one client asserting a claim against the other, the lawyer may represent conflicting interests if each affected client gives informed consent, confirmed in writing.

Under Rule 1.6, in the absence of informed consent, the lawyer must not reveal information relating to the representation. The rule of client-lawyer confidentiality applies in situations other than where the evidence is such from the lawyer through compulsion of law. The confidentiality rule applies to all information relating to the representation, whatever its source. ABA Rule 1.6, Comment 3.

The importance of consent is illustrated in a franchise case by *Beilowitz v. General Motors Corp.*, 226 F. Supp. 2d 565 (D. N.J. 2002) where the law firm representing Beilowitz, a General Motors dealer, was simultaneously representing Urban Science, a consulting firm that had done work for General Motors on the very program that Beilowitz was challenging as violating his rights as a dealer. Urban Science, moreover, was to appear at trial as a fact and expert witness for General Motors. General Motors moved to disqualify the firm under Rule 1.7(b), but the court found that there in fact was no conflict. Critical to its finding was a declaration by Beilowitz that he had been informed about the firm's representation of Urban Science and the fact that it might be called as a fact and expert witness in the case. Urban Science also gave a similar consent. These consents eliminated any risk of a conflict.

E. Franchise-Specific Scenarios

1. Franchisee Challenges in Client Identification

Franchisee attorneys frequently represent groups of individual franchisees as well as independent associations. Such representation usually furthers common interests and grievances, and ordinarily does not give rise to conflicts. Conflicts may, however, arise when:

(a) One client has information that is necessary to the representation that it is unwilling to disclose;

(b) One or more clients have claims against other clients or against an association;

(c) The association, a client or a group of clients wishes to take a position that others do not share; or

(d) The association, a client or a group of clients has claims against other clients.

It is unlikely that franchisees are going to anticipate these types of conflicts, so the burden is upon the attorney to identify and deal with them. Ordinarily, the conflicts may be "consentable" and the attorney may be able to obtain a waiver, as discussed below.

If there is a non-waivable conflict, then determining who the client is become critical. Ordinarily, the party first represented by the attorney will be the "client," and in the event of a conflict, the lawyer may have to resign from representation of later-acquired clients. ABA MRCP 1.18. Where associations are involved, the principles governing representation of corporate entities, discussed below, will usually prevail.

A separate concern is with protection of confidential communications. While the clients' communications with the attorney may be protected, communications between diverse clients will not be; accordingly, the attorney should caution the clients about discussions and communications between themselves and establish protocols for ensuring that sensitive information is exchanged only in the presence of an attorney, in order to maintain the privilege.

An attorney disciplinary case raised the question of who the client was in *In re Bristow*, 301 Or. 194, 721 P.2d 437 (1986). There, franchisees consulted an attorney about a nearby breakaway franchisee and how best to enforce the non-compete against it. The attorney suggested obtaining an assignment of that claim from the franchisor to the franchisee clients, which was done, and the attorney filed an action against the breakaway with the initial franchisees as plaintiffs seeking to enforce the non-compete. The franchisees, in the meantime, became disillusioned with the system, and engaged the same lawyer to sue the franchisor, seeking to declare the franchise agreements rescinded and that their non-competes were not enforceable. Thus, the attorney was arguing, simultaneously, that the non-competes were enforceable and not enforceable.

A key question was whether the franchisor was the lawyer's "client" even though the franchisor had assigned the cause of action to the franchisees. The lawyer had in fact considered the question of a conflict, and had concluded that because the assignment, he had no attorney-client relationship with the franchisor. The court, however, found otherwise. There was written correspondence between the lawyer and the franchisor recognizing that the parties would be working together to protect the franchisor's interests and providing legal advice. Thus, even though the lawyer was not placed on retainer, the franchisor and lawyer conferred from time to time regarding enforcement of the non-compete. Because "no magic words are necessary in order to form a lawyer-client relationship," and the lawsuit was still pending, the court concluded that it was a concurrent conflict.

2. Franchisor Challenges in Client Identification

Identification of the client can also be challenging when representing franchisors. Many franchise companies are large corporate entities, and outside counsel may be directed by a wide variety of constituents within the organization such as officers, directors, in-house legal counsel, and other employees. In addition, there may be a number of different affiliates and subsidiaries involved in franchising operations. Some franchise companies have a separate holding company that owns the intellectual property for the whole organization. Other franchise companies have affiliates that operate company-owned locations. In addition, some organizations have been able to take advantage of efficiency of scale by franchising multiple concepts, either directly or through individual entities under a holding company. Interesting potential conflicts issues arise, especially if the brands compete with one another. For example, what happens if an attorney is engaged to represent one brand that has several affiliate brands? What are counsel's duties to protect the brand information as to the other brands in the system? If the attorney is adverse to other brands, is the attorney prohibited from representing the affiliates? If the attorney represents multiple brands, does the attorney have the same duty to sensitive information about one brand as to the other brands in the same system?

In each of these circumstances, specific identification of the clients is important for conflicts purposes. Under the Rules, "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." ABA MRPC 1.7, Comment 34. This means that a lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, *unless* the circumstances are such that the affiliate should also be considered a client of the lawyer; there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. *Id.* The best way to prevent perceived conflicts and uncomfortable conversations is to clearly identify the scope of the representation at the outset of the relationship.

The question of who the client is arose in the franchisor context in *Ramada Franchise System, Inc. v. Hotel of Gainesville Associates*, 988 F. Supp. 1460 (N.D. Ga. 1997). In that case, attorney R, represented a Ramada franchisee in a wrongful termination case involving enforcement of quality standards.

Attorney R had previously represented the franchisor of Days Inn hotels which had gone into bankruptcy; its assets were purchased by HFS Inc. and transferred to a new Days Inn corporation. HSF also owned the Ramada system. Therefore, Attorney R had had an attorney-client relationship with the predecessor of a sister corporation of the adverse party. The court noted that when Days Inn had gone through bankruptcy, the bankruptcy court had required that the new system be operated separately from HFS's other affiliates and that, specifically, it had to maintain a separate quality assurance system.

In the termination case, Ramada moved to disqualify Attorney R under Rule 1.9 (discussed below). Noting that a disqualification motion must be approached with caution, the court first focused upon whether the relationship at issue was an attorney-client relationship. It stated that "the adverse interests at stake . . . do not have to be those of a 'client' in the traditional sense." The Court then observed that the attorney-client privilege had passed from "old" Day's Inn to "new" Day's Inn, and that, as an affiliate, Ramada could assert the privilege.

The next part of the analysis was whether Ramada could be considered a "client" for disqualification purposes. The court carefully considered the relationship between the two companies, balancing the actual exchange of information between them against their existence as separate entities. Focusing on the fact that while HFS owned multiple franchise systems, all of the systems had substantially similar management personnel, headquarters and corporate principles and business philosophy, the court concluded that there was sufficient identity of interest between the new Days Inn Corporation and Ramada to suggest a possible conflict. As discussed below, however, the court found that there was no "substantial relationship" between the old and new matters.

As illustrated in the *Bristow* case above, assignments of claims may lead to conflicts and questions of who the attorney's client is. In *Village of Ridgewood v. Shell Oil Co.*, 289 N.J. Super. 181, 673 A.2d 300 (App. Div. 1996), that issue was presented with respect to a franchisor. There, a village brought an action against a gasoline service station owner, its operators, the franchisor and the state department of transportation for contamination of drinking water wells. The franchisor asserted third-party complaints and cross complaints against the other defendants. After the franchisor settled with the village by paying roughly $800,000, the village assigned its remaining claims against the other parties to the franchisor. The remaining defendants moved to disqualify the franchisor's law firm under Rule 1.7. The court found that the law firm had a directly adverse position in representing both the franchisor's and the village's interests. On the one hand, as counsel for the assignee of the village's claims, its duty was to maximize the gross recovery; as counsel for the oil company, its duty was to minimize the oil company's liability. In the context of the facts of the case, as counsel for the oil company, the law firm would be arguing that the village had had control over the sources of contamination, while as counsel for the assignee, it would reject that position. As a result, the court found that the discovery process might be compromised and that there was an actual conflict and therefore disqualified the firm.

3. Competing Franchisors

Particular issues may arise in the context of representing independent competitive franchise systems. Franchisors often rely on franchise attorneys for industry knowledge. However, if the attorney's "industry" knowledge is gained from representing a competitor, can it be shared with another client? Is there any obligation to explain, when one is using information, factual or legal, that has been developed, or is being developed, for one client to provide advice to a competitive client? There are a variety of competitively sensitive facts that one client might like to have about another (e.g., new products/services; advertising/marketing plans; operational improvements/innovations; strategic plans).

Indeed, there may be some circumstances in which an attorney's representation of one franchise system is the reason a competing client seeks out the representation of the same attorney or firm.

In addition there can be direct conflicts that arise between competing franchise systems for a wide variety of other reasons such as competition for locations, franchisees, and executives, or comparative advertising. These conflicts are even more like when the franchise systems are in the same industry.

A lawyer's duty of loyalty generally means 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). An attorney may be concerned that simply using any information gained during the representation of one client if used to the benefit of a second client could disadvantage the first client vis-à-vis the second client. After all, both clients get the benefit but only the first client spent the time and legal fees to develop the knowledge. However, the Rules do not prohibit such subsequent uses of expertise. For example, the Comments to Rule 1.8(b) provide that "a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients." ABA MRPC 1.8(b), Comment 5. This interpretation allows lawyers to develop and use industry expertise without fear of ethics violations. In franchising, this allows industry knowledge gained from the representation of one franchise client to be used to benefit other franchise clients.

This general principle is illustrated by *Beilowitz v. General Motors Corp.*, 226 F. Supp. 2d 565 (D. N.J. 2002). Although this case involved a franchisor and a vendor, rather than two competing franchisors, the outcome is instructive. As described above, the law firm representing Beilowitz, a General Motors dealer, also represented Urban Science, a consulting firm that had done work for General Motors on the very program that Beilowitz was challenging as violative of his rights as a dealer. Among other things, General Motors also challenged the representation under Rule 1.7(c)(2) as creating an appearance of impropriety. It argued that because of the firm's long-standing relationship with Urban Science, it was in a unique position of being able to rely on knowledge and understanding of its business and practice that no other adversary would possess. But the court rejected this, finding that there was no advantage based on its past representation of Urban Science. The court relied heavily on the fact that the firm did not acquire any proprietary or confidential information relevant to General Motor's program in the course of its representation.

4. Competing Franchisees

Similarly, franchisee attorneys may have expertise representing franchisees in a particular area and industry. As a result the attorney is likely to have access to competitively sensitive information such as potential real estate, successful advertising strategies, pricing and more. The same basic rules apply. "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). Essentially, an attorney can

certainly use its industry knowledge for the benefit of multiple parties. However, the attorney is still constrained by the basic duty of confidentiality.

Rule 1.6 provides that "[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). Moreover, an attorney has an affirmative duty to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

In assessing whether a particular disclosure is permissible, it can be helpful to draw a distinction between legal knowledge gained during the representation of a client and factual information learned in the representation of a client. For example, changes in industry regulations such as employer rules, product labeling, advertising rules, etc. learned while representing one client, can be used for the benefit of multiple other clients. ABA MRPC 1.8(b) Comment 5. However, the disclosure of factual information, such as planned locations, sensitive pricing information or business strategy is much more likely to be a violation of ethics rules.

The Comments to Rule 1.8(b) imply that this distinction is appropriate. As noted above, a "lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients." However, of if "a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer *may not use that information* to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase." ABA MRPC 1.8(b), Comment 5. (Emphasis added). In other words general knowledge gained during the representation may be used to assist other parties, while factual information about client strategy may not be.

A harder question arises if the competitive information is solicited by the client rather than offered by the lawyer. Can a lawyer provide advice on the purchase of real estate if multiple clients are evaluating the same parcel? What disclosure are required or permitted? What if you know that one client is considering poaching an employee from another client? What it one client asks specifically about the practices of another? Each factual scenario will need to be approached with extreme caution.

For lawyers representing franchisees in concurrent representation situations, the ethical rules boil down to a number of practical points:

a. Are all of the clients comfortable disclosing all of their relevant information? If so, then the clients should consent to such disclosure in writing. If not, the attorney should determine what information a client wishes to withhold, whether it is germane to the representation, and whether non-disclosure will impair the representation. If it will impair the representation, then the lawyer should have the other franchisees retain separate counsel.

b. Is there a risk of conflicts arising during the course of the representation and, if so, can an advance waiver avoid them? The case law teaches that in order to have a chance at being effective, the attorney should take the following steps in preparing the waiver:

i. The nature of *all foreseeable potential conflicts* should be identified in writing to the clients.

ii. The nature of the waiver, and the advantages and disadvantages of it should be discussed with the client; that discussion should be memorialized in the waiver.

iii. Alternatives to the waiver or conflict, including separate representation should be discussed, and the discussion should be memorialized.

iv. The client's written waiver should incorporate all of the above.

c. Can information be managed in a way that avoids compromising the representation and the clients? For example, protocols should be established for communication between clients about the subject matter of the representation; as a general rule, clients should not be discussing it amongst themselves in the absence of counsel.

5. Divergent Stakeholders

Organizational clients can present significant challenges for lawyers, as organizations often have multiple stakeholders who may have conflicting goals.

Under Rule 1.13 (f), a lawyer has a duty to clarify that its duty is to the client organization and not the individual stakeholder. However, a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. ABA MRCP 1.13(a). The constituency may not always be clear. In addition, an organization may include authorized individuals or owners with diverging objectives. For example, a franchisor with significant private equity ownership may have authorized individuals that are very focused on maximizing profits and value in the short term due to the investment horizon of the private equity vehicle, while other constituents may be concerned with the long term risk of such actions. Franchisees, particularly multi-unit franchisees that have multiple investors, may also have constituents with conflicting goals. Some owners may be focused on maximizing the potential of existing franchise businesses, while other may be focused on opportunities for growth.

6. Divergent Objectives

Divergent objectives often occur frequently within groups of franchisees. Suppose that a group of franchisees is unhappy with a particular action by a franchisor that they feel is materially damaging their business. Even if all of the franchisees identify the same

problem, they may pursue divergent solutions. Some may desire to sue to obtain damages, while other may desire to simply reform the system.

A significant issue that arises concerns settlement. When a lawyer represents multiple clients there is the risk that one or more will not accept an offer of settlement that others wish to accept. This potential should be discussed before undertaking the representation as part of the process of obtaining an informed consent. ABA MRCP 1.7, Comment 13.

However, it may not be possible to prevent this outcome, since the rules prohibit prospective consent to settlement terms. In *Tax Authority v. Jackson Hewitt, Inc*., Jackson-Hewitt franchisees engaged a lawyer to file suit against the franchisor to recover rebates they believed they were owed. *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 187 N.J. 4, 898 A.2d 512 (2006).[2] They each signed an identical retainer agreement which provided that the plaintiff group would accept any settlement if a weighted majority of the plaintiff group agreed to the proposed settlement terms. Eventually, a proposed settlement was reached with the franchisor, and a weighted majority of the plaintiff group approved the settlement terms. There were 14 plaintiffs that objected to the final settlement terms, and they argued that they should not be bound because the advance waiver was improper under the equivalent of Model Rule 1.8(g).

Ultimately, because this was a novel question of law, the court allowed the settlement to bind all franchisees. However, the court also indicated that such an advance agreement would not be permitted going forward. The court held that the New Jersey equivalent of Model Rule 1.8(g) imposes two requirements on lawyers representing multiple clients. The first is that the terms of the settlement must be disclosed to each client. The second is that after the terms of the settlement are known, *each* client must agree to the settlement. *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 522 (N.J.2006).

Based on *Jackson-Hewitt*, settlements cannot be approved in advance by a majority vote. Because that case appears to be unique, it is questionable whether it would be followed by other courts. Franchisors usually seek to make global settlements with complaining franchisees; thus, the issues posed by *Jackson Hewitt* loom large for franchisee counsel. A similar question may arise earlier in a dispute if an attorney seeks to waive a claim or defense on behalf of a large group of franchisees.

Ethical challenges can also be created when the attorney and its franchisees may have different objective. For example, in Arizona Ethics Opinion 90-06 (July 18, 1990), the Committee concluded that an attorney could not ethically accept a settlement even absent an apparent objection by the client. In that case, a settling franchisor-defendant wanted the franchisees and their attorneys to agree to (1) provide a list of every franchisee that the attorney had contact with concerning potential claims against the franchisor, (2) not solicit or contact any franchisee concerning potential claims against the franchisor, (3) not voluntarily "participate" in any way in any legal action brought by a future franchisee against the franchisor-defendant, and (4) dismiss any and all bar complaints currently pending concerning the lawyers in the case. To determine whether such a settlement

[2] John F. Dienelt, a member of the panel for this presentation, represented Jackson Hewitt in this case.

would be ethically permissible, the franchisee attorney requested an opinion of the local ethics committee. In addition to confidentiality issues (because the identity of a lawyer's clients and potential clients is "information relating to" a representation), the committee determined proposal also was unacceptable because the Rules prohibit settling on terms which restrict a lawyers' rights to represent other clients. See, e.g., ABA MRCP 5.6. The proposed settlement terms pitted the attorney's interest in utilizing the knowledge and expertise gained in this case for the benefit of other clients (and those prospective clients' right to retain counsel with such expertise), against the current franchisee plaintiffs' interests in reaching a settlement by providing non–monetary concessions to the franchisor.

7. Divergent Positions

Often attorneys may have standard provisions in agreements that they use for multiple clients, including competing franchise systems. Accordingly, an attorney representing multiple franchise systems may be required to take divergent positions on the enforceability of identical non-compete or confidentiality provisions.

A similar situation arises when an attorney represents multiple franchisees in the same system. One franchisee may demand that the franchisor enforce its non-compete to protect that franchisee from a former franchisee that is now competing in the current franchisee's area. Another franchisee may retain the same attorney to argue that the non-compete is unenforceable. See, e.g., *In re Bristow*, 721 P.2d 437 (1986) (noting that the attorney was arguing simultaneously that the non-competes in a franchise agreement were enforceable and not enforceable).

As noted above, a lawyer may ethically take different legal positions in different tribunals at different times on behalf of different clients. Moreover, the fact that a lawyer may create a precedent adverse to a client in an unrelated matter does not create a conflict of interest. ABA MRPC 1.7, Comment 24. However, it may significantly undermine the lawyer's credibility, and be detrimental to one or both of the clients if the same lawyer is simultaneously arguing that the exact same language must be enforced in one context, and is unenforceable in a substantially similar context.

III. Representation That Conflicts With Duties to Past Clients

When an attorney has had a relationship with a client, then takes on representation of a new client that may conflict with the past client, the conflict may be sufficient to disqualify him or her.

Many of the issues that arise with respect to former clients are identical to those that arise with respect to concurrent representation, such as who are the clients, whether there is a conflict, and whether there has been an effective waiver. However, once a potential conflict has been identified, the focus should be on whether the current representation is "substantially related" to the prior representation.

ABA Model Rule 1.9 governs an attorney's duties to former clients and provides:

(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, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

A. Was There an Attorney-Client Relationship?

Rule 1.9 provides that a lawyer who has formerly represented a client in a manner shall not thereafter represent another person in the same or a substantially related manner in which that person's interests are materially adverse to the interest of the former client in the absent of informed consent. ABA Model Rules 1.9, Comment 2. This a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against it. *Carlyle Towers Condominium Ass'n, Inc. v. Crossland Sav., FSB*, 944 F. Supp. 341 (D. N.J. 1996).

In applying Rule 1.9, the first question is whether the lawyer and the putative former client ever had formed an attorney-client relationship. While this will be obvious when there is an express relationship between the former client and the lawyer, it is not so obvious in law firms, where there are numerous lawyers, or with respect to representation of organizations, including corporations. For example, in *Stratagene v. Invitrogen Corp.*, 225 F. Supp. 2d 608 (D. Md. 2002), a former associate's limited work on plaintiff's patent application created a lawyer-client relationship; in contrast, in *In re James*, 679 S.E.2d 702 (W. Va. 2009), a lawyer who met with a drunk driving defendant and the defendant's and victim's parents did not form an attorney-client relationship with victim's parents and was not precluded from representing the defendant.

Whether a lawyer may undertake representation adverse to a parent, subsidiary or affiliate of a former corporate client depends on the extent to which the two share operations and interest. Sometimes an implied lawyer-client relationship with an individual officer or employee arises during the lawyer's course of dealings with corporate or organizational client *Home Care Indus., Inc. v. Murray*, 154 F. Supp. 2d 861 (D. N.J. 2001) (implied lawyer-client relationship; dealings between lawyer and corporate constituent had been close, lawyer received confidential information and constituent reasonably believed lawyer was representing him personally).

B. Are the Matters "Substantially Related?"

The second issue is whether the matters are "substantially related." The scope of a particular matter depends upon the circumstances of the particular case. Matters are substantially related if they involve the same transaction or legal dispute or if there is otherwise a substantial risk that confidential factual information would materially advance the client in his position in the subsequent matter, unless the information has been disclosed to the public or to other parties adverse to the former client. ABA Model Rules 1.9, Comment 3. Thus, counsel representing an employer could not represent an employee of the same company in a discrimination case. *Pastor v. Trans World Airlines, Inc.*, 951 F. Supp. 27 (E.D. N.Y. 1996). A law firm that represented a food distributor and processing company in prior litigation could not then represent the processor in an action brought by the distributor. *G.D. Mathews & Sons Corp v. MSN Corp*, 763 N.E.2d 93 (Mass. App. 2002). Incidental similarities, however, between transactions or disputes do not create a substantial relationship. Thus, a firm that a represented an insured in a race discrimination case was not disqualified from representing another insured in a coverage dispute regarding rain damage to cargo. *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 186 F.R.D. 317 (S.D.N.Y. 1999).

In addition, matters are substantially related if the representation of the present client would likely inflict injury upon the former client, or if the former client provided confidence or secrets which would likely inflict injury on the former client, if used in the course of the current matter. Therefore, the rule defines conflicts of interest in terms of specific matters and specific information. *Portland General Electric Co. v. Duncan, Weinberg, Miller & Pembroke, PC.,* 986 P.2d 35, 51 (Or. App. 1999) (interpreting a provision similar to Rule 1.9).

The phrase "substantially related" has been interpreted by some courts to require relationship between the factual issues of the case. One case has held that a substantial relationship between matters exists where adversity between the interest of the attorney's former and present clients creates a climate for disclosure of relevant confidential information. *Carlyle Towers Condominium Ass'n, Inc. v. Crossland Sav., FSB*, 944 F. Supp. 341 (D. N.J. 1996).

Even though matters involved different transactions or disputes, they will be deemed substantially related when there is a substantial risk that protected information from the first representation would materially advance the new client's interest. Courts look to factual and legal similarities between the two matters. Thus, where a law firm represented

a university in employment matters, it could not represent employees suing the university. *Madukwe v. Del. State. Univ.*, 552 F. Supp. 2d 452 (D. Del. 2008). Similarly, a former general counsel for a company who had worked on setting employment policies could not represent an employee of the company in suing it. *Franzoni v. Hart Schaffner & Marx*, 726 N.E.2d 719 (Ill. App. 2000).

In some instances, information can be deemed obsolete due to the passage of time. This doctrine may also apply if there is new management in the company formerly represented. *Valdez v. Pabey*, 2005 WL 3556428 (N.D. Ind. Dec. 27, 2005). Where 25 years had passed between the prior representation and the current representation, the court held that knowledge of the client 25 years before was not relevant. *Niemi v. Girl Scouts of MN*, 768 N.W.2d 385 (Minn. App. 2009).

C. Can a Disqualified Attorney be Effectively Screened?

If the conflict arises from a lawyer's association with a prior law firm, special rules apply. ABA Model Rule 1.10 (a)(2). The rules permit representation if the conflict is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and:

> (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.

ABA Model Rule 1.10 (a)(2). The practice of "screening" is sometimes referred to colloquially as setting up a "Chinese Wall." The Comments to the Rules clarify that the purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. ABA Model Rule 1.10, Comment 9. Screening measures must be implemented as soon as

practical after a lawyer or law firm knows or reasonably should know that there is a need for screening. ABA Model Rule 1.10, Comment 10.

D. Franchise Specific Scenarios

In the franchise context, when a conflict arises based on a former association, courts will typically look to the extent of information shared by the putative prior client in deciding whether an attorney-client relationship existed. As a general rule, mere consultation usually does not usually lead to an attorney-client relationship, but the line can be difficult to draw.

1. Was there an Attorney-Client Relationship Formed?

In *Mindy's Restaurant Inc. v. Watters*, 2009 WL 500634 (N.D. Ill. 2009), a party (who later became a franchisee) and a franchisor met with the lawyer to discuss a potential joint venture. In the subsequent litigation in which the franchisor brought an action to enjoin use of the trademarks by the franchisee, the franchisee sought to disqualify the same attorney for representing the franchisor. The court considered the question of whether there was an attorney-client relationship between lawyer and franchisee, noting that in the Seventh Circuit, it was not required that a formal attorney-client relationship exist for disqualification to be appropriate. Rather, the test was whether the client believed he was consulting a lawyer in that capacity and had manifested intention to seek professional legal advice. In determining that, the court looks to the nature of the work performed and the circumstances under which the confidential information is divulged.

In examining whether there was an attorney-client relationship, the court looked to the fact that the lawyer's involvement was limited to a one-time meeting, the subject matter was limited and that the lawyer did not provide any advice nor receive any confidential information. Because both the franchisor and franchisee were in attendance at the earlier meeting, no confidential information could have been provided to the lawyer. In addition, the court noted that discussion of a joint venture was completely different from enforcement of alleged trademark violations.

Similarly, in *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 479 F. Supp. 465 (E.D. La. 1979), a franchisor sought to disqualify a law firm from representing a franchisee in an encroachment dispute. The law firm had previously represented an association of Holiday Inn franchisees in an antitrust dispute in which Holiday Inns was also a defendant. When the association and Holiday Inns lost that case, the law firm stepped up to represent Holiday Inns on the appeal. When the *Domed Stadium* case arose some time later, Holiday Inns contended that the law firm had represented it in a prior substantially related matter. The court rejected the argument, and focused, rather oddly, on the question whether Holiday Inns had been a "prior client" of the law firm.

At the outset, the court was at pains to find that "absolutely no confidential information" had been received by the law firm from Holiday Inns in the prior litigation and that therefore there was "a real question… whether Holiday Inns, Inc. was a 'former client' of the law firm in the sense meant by the rule." Specifically, all of the law firm's information had come from the association, and the appeal, of course, was based on a public record.

The court also relied on the fact that when the law firm handled the appeal, it was "with knowledge on the part of Holiday Inns that [the firm] [were] still representing the interests of [the association] and would continue to do so." Further, they had no reason to believe that information received from Holiday Inns would be kept confidential from the association. The court's qualification of "in the sense meant by the rule" demonstrates the flexibility that courts will exercise to achieve a result that they perceive as just: the law firm was in fact counsel of record on the appeal in the earlier case, so there was no question that Holiday Inns was a former client.

As an alternative basis, the court noted that under the "substantial relationship" test, the result would not be different because it did not see the interests in the instant case as substantially related to those in the earlier case. The earlier case involved an antitrust issue, and the instant case involved encroachment.

2. Representing a Franchisor Competitive with Former Clients

When a lawyer has represented multiple franchise systems within the same industry, it increases the odds that the lawyer may be asked to represent a franchise system that is directly competitive with a former client.

Under these circumstances, a lawyer may not: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. ABA Model Rule 1.9 (c). This extends to law firms and can create particular challenges when lawyers change firms or in-house lawyers change companies.

Even assuming that there is no conflict of interest in representing a new client that competes with an old client, there are ethical limits on using information obtained in a prior representation in a current representation. Attorneys are not permitted to use information relating to the representation of former to the disadvantage of the former client. ABA MRPC 1.7. In addition, an attorney may not represent a client if there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to a former client. ABA MRPC 1.7.

Attorneys have a duty to advise clients regarding limitations on the attorneys' conduct when clients expect assistance not permitted by rules. ABA Model Rule 1.4(a)(5) requires that an attorney "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." Accordingly, if a lawyer suspects that a client is seeking it services to gain information relating to former representations (as distinct from expertise gained through prior experiences), the lawyer has a duty to inform the client that it cannot provide such information.

3. Representing Franchisees after Representing Franchisors

Representing franchisors and franchisees against each other is a direct conflict prohibited by the Rules. However, interesting questions arise if an attorney that has previously represented a franchisor now seeks to represent a franchisee, and vice versa.

In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. ABA MRPC 1.9, Comment 3. Moreover, information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. ABA MRPC 1.9, Comment 3. Accordingly, an attorney that represented a franchisor may feel more confident accepting an engagement by a franchisee in that system if such engagement occurs five years after the franchisor representation, than if it occurs five months after the representation. In addition, information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. ABA MRPC 1.9, Comment 3. In the franchisor context, this may allow the use of factual information contained in public filing of former clients (such as FDDs) for the benefit of current clients.

The question of the extent of a relationship in the context of a franchise dispute was addressed in *St. Albans Financial Company v. Blair*, 559 F. Supp. 523 (E.D. Pa. 1983). In that case, a lawyer had represented franchisees in an antitrust suit against the franchisor. That suit was settled; in the meantime the franchisees entered into a "buyout" arrangement with a sub-franchisor under which they bought out of their agreements. Subsequently, the sub-franchisor sued the franchisees under the buyout agreements, claiming that they were conspiring to defraud it of its payments. The sub-franchisor hired the lawyer who had represented the franchisees in the antitrust case. The court observed:

> It is clear that the two lawsuits involve different aspects of the agreements; the prior lawsuit challenged movants' relationship with Systems on antitrust grounds while the instant suit concerns the financial buyout arrangement between movants and St. Albans. For the purposes of the code of professional responsibility, these two matters are not separate and distinct.

The court observed that in the prior representation, that the attorney may have discussed the manner in which they would continue their business operations following severance including compliance with the buyout agreements. In addition, the attorney may have learned facts concerning the franchisees relevant to the current allegations. Because of these interrelationships, the matters were substantially related.

In the *Ramada case,* the court found that even though the old and new representations had involved hotel franchises and quality assurance systems and, in fact, the director of quality assurance for Ramada had previously acted for the old Days Inn Corporation, there was no "substantial relationship." The court found that the bankruptcy court's order that Days Inn be maintained as a separate operation effectively nullified HFS's common elements for all of its systems. The court concluded that if HFS followed the bankruptcy

court's orders to maintain separate quality assurance systems, there was no substantial relationship. The cases suggest that once a lawyer changes sides, the chances of avoiding a conflict are thin.

In *Mody v. Quizno's Franchise Co.*, 2012 WL 2912749 (N.J. App. 2011), Quizno's moved to disqualify a firm representing Quizno's franchisees because an attorney moved from Quizno's defense firm to the plaintiffs' firm. Because the lawyer had gone from representing Quizno's to representing franchisees suing Quizno's, the existence of the conflict was not questioned; the only issues presented were whether the attorney had "primary responsibility" for the client and whether an effective screening process had been adopted.

The court turned to the Rules of Professional Conduct Rule 1.10 provides: (c) when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under R.P.C. 1.9 unless:

> (1) The matter does not involve a proceeding in which the personally disqualified lawyer had a primary responsibility;
>
> (2) The personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (3) Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

An initial issue was whether the lawyer had had "primary responsibility" for the Quizno's litigation at the prior firm under Rule 1.10(c)(1). The defense firm submitted affidavits that he had participated in meetings and discussions concerning strategy and settlement positions; that he had regular access to confidential and privileged documents and information of the franchisor; that he had billed nearly 1,000 hours on prior cases involving the franchisor and that he had taken approximately 18 depositions of franchisees. In light of this, the court concluded that he was an attorney with "primary responsibility" in the prior litigation, and that the firm was therefore disqualified.

The court's analysis, while conducted under the rubric of "primary responsibility," reached the conclusion that there was a conflict upon what might be termed a showing of "substantial responsibility." There was no question that the attorney was not the partner in charge; in fact, at the former firm, he was not a partner, but an associate. He sat in on strategy meetings, but was not responsible for formulating strategy; and he contributed to deposition outlines, but did not have ultimate responsibility for their content. The lesson of *Mody,* therefore, is that attorneys cannot always rely upon the literal language of the rule: "primary responsibility" may mean "substantial responsibility."

Even though the court's conclusion made it unnecessary to consider whether the lawyer had been properly screened, the court went on to examine that question. The Court found that the firm's oral screening process was inadequate, and that it had failed to screen in a timely manner, thereby reinforcing the decision to disqualify.

Another case showing a flexible, if unsatisfactory, approach is *Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693 (8th Cir. 2003) in which an attorney for a snowmobile dealer faced a motion for disqualification from the snowmobile manufacturer. The manufacturer, Arctic Cat, had terminated its dealer, Elliot, and replaced it with another dealer, A-Tech. Elliot then sued Arctic Cat and A-Tech. But an associate in Elliot's attorney's office had previously represented an owner of A-Tech in selling his interests in the dealership and obtaining Arctic Cat's consent to the transfer. Citing rule 1.7, Arctic Cat moved to disqualify.

The appeals court noted that the associate had served A-Tech's interests in dealings with Arctic Cat, but deferred to the district court's finding that there had been a waiver of the conflict by the owners of both dealerships. The court, however, cited no specific evidence of the waiver. While it found the attorney's position on appeal that he had not represented A-Tech to be "troubling," it followed the District Court's ruling, observing that disqualification motions should be "subject to particularly strict scrutiny" because of the potential for abuse by opposing counsel. Because the case lacks any clear analysis, or factual basis for its findings, it provides little guidance.

In the *Bristow* case, the court had little difficulty finding that the franchisee's lawyer had previously represented the franchisor, even though the contact between the lawyer and franchisor was solely for the purpose of obtaining an assignment of the franchisor's rights to a franchisee. *Bristow,* perhaps, might best be explained by the fact that the there was a stark contrast in the positions the attorney was asserting on behalf of one franchisee: in one case, he was arguing that the non-compete was not enforceable and in another seeking to enforce it. But, ironically, both positions served the economic interests of his franchisee client.

4. Representing Franchisors after Representing Franchisees

In *Swensen's Ice Cream Co. v. Voto, Inc.*, 652 So.2d 961 (1995), an attorney was retained by Swenson's, the franchisor, to help Voto, the transferee of a Swensen's franchise, persuade the transferor to abide the terms the noncompete in its former franchise agreement with Swenson. In that capacity, the attorney wrote two cease and desist letters to the transferor on Voto's behalf. Unfortunately, the matter was not resolved. Later, in an unrelated matter, Voto asserted claims against Swensen's alleging that Swensen's had breached its franchise agreement with Voto by failing to enforce the very same noncompete against the seller. The same attorney was retained to represent the franchisor defend against Voto's claims. Voto moved to disqualify the firm, upon the ground that the attorney would be called as a witness, but on appeal the court concluded that disqualification was not required. The court found that the matters on which the attorney might be called to testify were undisputed, and that his testimony was unnecessary.

Despite the obvious risks inherent in switching sides, the cases show that in some circumstances courts will toss aside what would appear to be obvious conflicts in order to allow a client the right to be represented by his or her chosen lawyer. Thus, in *Domed Stadium,* the court found that Holiday Inns had not been the law firm's client "in the sense

contemplated by the rule" despite undisputed representation. In *CompUSA,* the court applied what appeared to be an unwritten *de minimis* rule: even though the lawyer was "presumed" to have received the client's confidential information, he had not actually received enough information to warrant disqualification.

IV. Prospective Clients

Conflicts with prospective clients are more likely to arise in niche practice areas like franchising where prospective clients are likely to seek counsel from a discrete number of experienced practitioners. Franchise lawyers must check conflicts early and often before having any substantive conversations with prospective clients, as any information shared during an initial consultations may restrict the attorney's ability to represent a party with adverse interests to the prospect.

ABA Model Rule 1.18 governs an attorney's duties to prospect clients and provides:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

A consultation that does not mature into a lawyer-client relationship does not ordinarily preclude the lawyer from taking on a subsequent adverse representation, unless the lawyer received information that could be harmful in that subsequent matter. Rule 1.118(c) *Factory Mut. Ins. Co. v. APComPower, Inc.*, 662 F. Supp. 2d 896 (W.D. Mich. 2009) (disqualification should be analyzed the same and the motion to disqualify pursuant to former client relationship provided the lawyer got information that contain significantly harmful). At the same time, however, the lawyer must maintain the confidentiality of any information obtained in the course of the consultation.

The Comments to Rule 1.18 explain that in order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. ABA MRPC 1.18, Comment 4.

Importantly, under Rule 1.18, in order to disqualify a lawyer from representation adverse to a prospective client, the information received must have been 'significantly harmful' within the context of that matter. "[D]isclosure of that information cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive." *O Builders & Assocs. Inc. v. Yuna Corp.*, 19 A.3d 966 (N.J. 2011).

A. Franchise Specific Scenarios

In the franchise context, courts look to the extent and scope of the initial consultation to determine the attorney's duty to that prospective client.

1. Disqualification Required Because Confidential Information Disclosed

The challenge is illustrated by *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc., 980 P.2d 371 (Cal. 1999),* in which the court considered whether disqualification was required when a party unknowingly consulted an attorney "of counsel" to the law firm representing the party's adversary in the subject of the consultation. In *SpeeDee Oil*, the California Attorney General sued SpeeDee Oil and others alleging various violations of the California Franchise Investment law. Several SpeeDee Oil franchisees intervened as plaintiffs in the action, and brought in Mobil Oil as an additional defendant. Due to the scope of the action, the solo practitioner that was longtime attorney for the franchisees formally affiliated with a larger firm to help him litigate the franchisee plaintiffs' claims.

The law firm was a smaller firm with about 14 lawyers listed on their letterhead, with 4 additional attorneys listed as "of counsel."

Around the same time, Mobil and its counsel were also seeking advice and assistance regarding the case. Without any knowledge of the franchisees' representation by the larger firm, Mobil's counsel set up meeting with an attorney that was "of counsel" in the same firm. The specific attorney involved in the meeting was unaware of the firm's involvement in the case, and spent a significant amount of time with Mobil's counsel discussing the substantive allegations in the case, procedural status, and Mobil's legal theories. Although Mobil did not directly retain the lawyer that day, they expressed interest in using his services, and the attorney agreed to perform some additional research regarding the matters discussed. However, before the parties could move forward, Mobil learned that the firm was already representing the plaintiffs. Mobil moved to disqualify the law firm as counsel for plaintiffs based on the conflict presented by its consultation with the attorney. The law firm argued that no disqualification was necessary.

Model Rule 1.8 (b) provides that "even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." In concluding that disqualification was proper, the California reaffirmed the ethical rules regarding prospective clients embodied in the Model Rules. "A formal retainer agreement is not required before attorneys acquire fiduciary obligations of loyalty and confidentiality, which begin when attorney-client discussions proceed beyond initial or peripheral contacts. An attorney represents a client—for purposes of a conflict of interest analysis—when the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result." *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 380 (Cal. 1999). Here, the attorney consulted on multiple occasions with the prospective client, and had substantive communications about the legal strategies and theories that the prospective client intended to employ in the case in which the firm was representing a directly adverse party. Accordingly, disqualification was required.

2. No Disqualification Required Because No Confidential Information Disclosed

The rule that consultations do not give rise to attorney-client relationships was addressed in the franchisor context in *COC Services, Ltd. v. CompUSA, Inc.*, 2002 WL 1792479 (Tex. App. 2002)(not for publication). In that case, Attorney V met with COC, a prospective franchisee of CompUSA while at employed at a law firm. The meeting took two hours, during which the franchisee revealed confidential information. COC then engaged Attorney V's law firm in connection with the documentation of its acquisition of a franchise for Mexico.

Subsequently, a dispute arose and COC sued CompUSA. Attorney V's law firm did not represent COC in the trial but was part of its appellate team. Shortly after the notice of appeal was filed, Attorney V left his firm to become a shareholder of the firm that had

represented CompUSA at trial and was representing it in the appeal. When COC learned that Attorney V had become a shareholder of its adversary's firm, it moved to disqualify the firm under Rule 1.9.

The court rejected the motion. It found that Attorney V had not performed any work, and had not provided any services with respect to the franchise agreement. While it found that there was a technical violation of Rule 1.09(a) and that Attorney V was presumed to have knowledge of COC's confidential information, the court found that disqualification was not required. Attorney V had attended only a single two-hour meeting three years before the appeal. At no time did he perform billable work or render other services for COC. He had not disclosed any client confidences. Further, because only an appeal was at issue, the issues the on appeal "must come from the cold record. Information contained in that record is public information." Accordingly, the policies behind Rule 1.9 were not invoked and disqualification was not warranted.

V. Conclusion

After reviewing the various cases in this area, the authors' view is that courts will often determine whether ethical issues exist based on the equities and the court's sense of the right outcome in a particular case. Certainly when apparent conflicts have arisen on appeal of a case, the fact that an appeal is confined to argument upon a public record virtually eliminates the risk of disclosure of client confidences, with the result that courts declined to find conflicts in both *Domed Stadium* and *CompUSA*. In contrast, where a lawyer changes sides, courts give the case much greater scrutiny, as illustrated in the *Quizno's* case and the *Ramada* case.

Current trends in franchising also exacerbate the challenges for franchise practitioners. For example, ethical conflicts are highly likely to arise when there is private equity investment in multiple franchise concepts, or in franchisee organizations with more than one concept. Both of these circumstances increase the number of stakeholders to consider, and increase the kinds of business and legal conflicts that may arise.

APPENDIX

Rule 1.0 Terminology

Rule 1.6 Confidentiality Of Information

Rule 1.7 Conflict Of Interest: Current Clients

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

Rule 1.9 Duties To Former Clients

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

Rule 1.13 Organization As Client

Rule 1.18 Duties To Prospective Client

Rule 1.0: Terminology

Client-Lawyer ***Relationship***

Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "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.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.6: Confidentiality of Information

Client-Lawyer ***Relationship***

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer ***Relationship***

Rule 1.7 Conflict Of Interest: Current Clients

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Rule 1.8: Current Clients: Specific Rules

Client-Lawyer ***Relationship***

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) 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 of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, 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 or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 - Duties to Former Clients

Client-Lawyer ***Relationship***

Rule 1.9 Duties To Former Clients

(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, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10: Imputation of Conflicts of Interest: General Rule

Client-Lawyer ***Relationship***

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(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.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.13: Organization as Client

Client-Lawyer Relationship

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

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

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other 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.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.18: Duties to Prospective Client

Client-Lawyer ***Relationship***

Rule 1.18 Duties To Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.