LEGAL ETHICS IN COUNSELING FRANCHISE SYSTEMS IN CRISIS

IFA LEGAL SYMPOSIUM

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Franchise companies, like any other, encounter crises at some point in their existence. Crises may arise for any number of reasons: health and safety, such as foodborne illnesses; allegations of misconduct by senior management; insensitive statements by founders or other highly visible officials; financial distress; or any of a host of other problems that may bring the company and the franchise system into the public eye in a negative way.

Indeed, franchisors and franchise systems may be more susceptible to some of these causes of crisis. Franchise companies are often in the business of selling products and services to consumers, and their brand names and associated products and services are often well known to the general public. National or regional brand recognition means that any crisis or concern often draws social and/or traditional media interest. Additionally, the size and scope of many these systems increases the likelihood that an issue will arise, especially given the fact that franchisors don't have the same day-to-day control over the delivery of products and services by their franchisees as company-owned and -operated systems. A foodborne illness, for example, caused by a franchisee's failure to exercise proper control can redound to the detriment of the brand and franchise system as a whole.

When a franchise company, or any other, finds itself in crisis mode, lawyers are often central to managing and resolving the situation. Both in-house lawyers and outside counsel are often called upon to navigate the difficult waters of a company in crisis. Lawyers must be careful to understand and perform their obligations in connection with addressing crisis management in conformity with their ethical obligations, most of which are designed to protect the client and third parties.

This paper will address the ethical concerns that often arise when a lawyer is dealing with a client in crisis. It first addresses the subject of the lawyer's representation of the company as well as individuals in the company, and how a lawyer can deal with employees in the company that she does not represent. It then addresses the related issue of the attorney-client privilege and its applicability in crisis situations in which the lawyer is dealing with individuals in the company.

I. The Lawyer's Role

A lawyer representing an organization, particularly in-house counsel, often plays dual roles of attorney and business counsellor. The Model Rules recognize that a lawyer's role is not limited to rendering strictly legal advice based on applicable law. Rule 2.1 provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

While this rule recognizes that legal advice may be based on different factors, it also tends to blur the distinction between a lawyer's role as lawyer and a lawyer's role as business advisor. The rule implies that advice that is not strictly legal advice may fall within the lawyer's role as lawyer and be subject to the ethical rules.

II. Who is the Client?

Any lawyer with a basic understanding of legal ethics knows that a lawyer representing a corporation or other business entity represents the entity and, typically, not its officers, directors or employees. But, to state this rule is not necessarily the same as understanding or complying with it. Lawyers often fall victim to providing advice and counsel to the people in management with whom they deal every deal, and who often speak for the entity. A lawyer must be careful to consider and understand who her client is when the people in the management of a company may have interests that differ from the company.

ABA Model Rule 1.13 addresses the ethical rules that apply when a lawyer has an organization as a client. Rules 1.13 (a and f) addresses the role of the lawyer representing an organization with respect to the people at the organization. They state:

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

The rule thus imposes an affirmative obligation on the lawyer to "explain" to individuals that he represents the company and not them when there is a conflict. This has been referred to as a "corporate Miranda" warning to employees in order to make clear that the company's lawyer is not their lawyer. The Comments to Rule 1.13 make this clear, but also belie the difficulty in understanding when this rule applies. Comment 10 states:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that,

> when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Comment 11, however, leaves the determination of when such a warning must be given to a case-by-case basis: "Whether such a warning should be given by the lawyer for an organization to any constituent individual may turn on the facts of the case."

The rule does not prohibit the representation of individuals as well as the organization. Rather, it permits dual representation if there is no conflict. Rule 1.13 (g) states:

> (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 1.7 states:

> (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:
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> (1) the representation of one client will be directly adverse to another client; or
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> (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.
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (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 addition, Rule 1.8 provides rules for conflicts with respect to specific situations:

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 judgement 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.

Reading these rules together, a lawyer for the organization can represent an individual as well only when the clients' interests are not adverse to one another and when there is not a significant risk that the dual representation will materially limit the lawyer's obligations to her clients. Subsection (b) permits the lawyer to represent multiple clients even if there is a conflict under certain circumstances including informed consent from all clients.

The representation of individuals as well as the organization requires "informed consent," among other things under Rule 1.7(b). This consent, or waiver of the conflict, is not always upheld. For example, in an Informal Opinion under the old Code of Professional Responsibility, the ABA held that when a conflict of interest between two related companies became apparent after undertaking the dual representation with the informed consent of both, the lawyer could not continue to represent one of them and take positions adverse to the other. The "informed consent" had included an advance consent that the lawyer could continue to represent one adverse to the other; but the ABA determined that such advance consent "would undermine confidence in the legal system and in the legal profession." In contrast, a California appellate court upheld a waiver in similar circumstances. A law firm represented a company that was sued, as well as its agent; the agent signed a consent letter in which the lawyer agreed to inform the agent of any conflicts that because apparent in the future. When a conflict between the two clients came to the attention of the law firm, the law firm so advised the agent, told him that he needed to retain separate counsel, and stated that it would continue to represent the company. The company then asserted a claim against the agent, and the agent moved to disqualify the law from representing the company. The trial court granted the motion, but the court of appeals reversed. The court of appeals held that the agent had given informed consent to the law firm's continued representation of the company if a conflict should arise, and that the ethical rules did not "require that every possible consequence of a conflict be disclosed for a consent to be valid" ; in this case, it was not required that the law firm disclose the possibility that it would file a lawsuit against the agent. *Zador Corp. v. Kwan*, 31 Cal.App.4th 1285, 1301, 37 Cal. Rptr. 754 (1995).

In a recent decision, however, the California Supreme Court held unenforceable a law firm's engagement letter, in which the client agreed to the firm's representation of any

other client, "even if the interests of the other client are adverse" to the client executing the letter. *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.*, 6 Cal 5th 59, 81, 425 P 2d 1, 14, 237 Cal Rptr. 3d 424, 439 (2018). The Court determined that under California's version of Model Rule 1.7, the "consent" of the new client was not "informed" because the firm failed to disclose an actual, existing conflict with another client.

The rules are easier to state than to apply. Certainly, counsel for a company should not represent any employees directly involved in the situation creating the crisis. The obvious examples are crises arising out of statements by an employee, or allegations of misconduct against an employee. That employee is likely to have interests that are adverse to the company's. The employee may be subject to personal liability that differs from the company's liability; the company may wish to discredit the employee; the company may wish to take the position that the employee was acting in her self-interest rather than on the company's behalf; the company may wish to dismiss or otherwise sanction the employee; or a host of other fairly obvious conflicts may exist. Not only must corporate counsel not represent the employee, corporate counsel must explain to the employee that he is not the employee's counsel.

At the outset of a crisis situation, however, it is not always obvious which, if any people, may be culpable, may have relevant information, or may end up being witnesses in a legal proceeding. The safest course of action is for the company's lawyer—both in house and outside—not to represent any officers, directors, or employees, but it may be impractical for the company to retain separate counsel for all relevant employees. Counsel must make a reasonable determination about whether a conflict exists—that is, whether the representation of multiple clients will be "directly adverse" to one another or whether there is a "significant risk" that the multiple representation will cause the lawyer to be "materially limited" in the representation of any of the clients.

Care must be taken with respect to the possibility that the lawyer for the organization has an existing attorney-client relationship with one or more individuals. The most common example is outside counsel representing both the company and individuals who are named defendants in existing litigation. But is it also possible that advice given to an individual, however informal, with respect to the subject matter of the crisis may have given rise to an attorney-client relationship with the individual. [cite] There may have been no conflict in that litigation, but a conflict may arise in connection with the crisis that may impair the lawyer's ability to represent the company in the absence of a waiver with informed consent under the provisions of Rules 1.7 and 1.8.

III. Dealing with Employees Who Are Not Clients

Once the company's lawyer determines that there are employees who are not her clients, the lawyer must exercise care in dealing with those persons. Rule 4.3 states:

> **Rule 4.3 Dealing with Unrepresented Person**
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> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that

> the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Under this Rule, when an employee is not a client, the lawyer must make it clear that the lawyer represents the company and is not "disinterested." Rule 1.13(f) requires the lawyer to "explain" the relationship. And when the employee may have an adverse interest, the lawyer must be careful not to give that person legal advice, other than to seek legal counsel.

Similarly, when an employee *is* represented by counsel, the company's lawyer may not communicate directly with the employee about the subject of the representation. Rule 4.2 states:

> **Rule 4.2 Communication with Person Represented by Counsel**
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> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

IV. Practical Considerations in Dealing with These Rules

The ethical rules present many potential landmines in dealing with a crisis situation. The lawyer must consider the nature of the crisis and who is, or is likely to, be involved or have relevant information. The lawyer must understand who makes the decisions for the company, and who is authorized to act on the company's behalf. If any of these individuals have interests that are potentially adverse to the company, the lawyer is presented with the difficult task of informing them that they may need their own counsel and that the company's lawyer cannot discuss matters relating to the crisis with them. Furthermore, whether interests of individuals are actually adverse to the company may not be apparent at the outset, and the lawyer may have to address conflicts that arise or become apparent after having undertaken representation—knowingly or otherwise—of individuals.

V. Confidentiality and Privilege

The rules relating to representation dovetail with the rules relating to client confidences and the attorney-client privileges. The ethical rules concerning confidentiality are similar to, but different from, the evidentiary rules concerning the attorney-client privilege.

A. The Ethical Rules of Confidentiality

A lawyer has the ethical duty do maintain the confidences of her client. Rule 1.6 of the Model Rules provides:

> (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).
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> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;
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> (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; or
>
> (6) to comply with other law or a court order.

Rule 1.6 is an ethical rule that applies to lawyers. The lawyer cannot disclose any information learned in connection with the representation of a client in the absence of consent or the applicability of an exception. The rule does not protect the disclosure of facts—that is, that a client has disclosed a fact to a lawyer does not make the fact itself confidential; it must still be disclosed in response to a proper discovery request, unless there is an applicable privilege.

B. The Attorney-Client Privilege

The attorney-client privilege is an evidentiary privilege. The details and application of the privilege vary by state, but essentially require: (1) a confidential communication; (2) between a lawyer and client; (3) made for the purpose of seeking, obtaining, or providing legal advice. The comments to Model Rule 1.6 set forth the difference between the ethical rule of confidentiality and the evidentiary privilege:

> **Comment 2**
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> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. … This contributes to the trust that is the hallmark of the client-lawyer relationship.
>
> **Comment 3**
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> The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

The attorney-client privilege protects communications between lawyer and client. The underlying facts are not protected if available from another source. A client stating a fact to a lawyer does not make that fact confidential; only the communication to the lawyer is confidential. And, the lawyer cannot be compelled to disclose it. *See*, Sue Michmerhuizen, Confidentiality, Privilege: A Basic Value in Two Different Applications, Center for Professional Responsibility (May 2007), www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf. The ethical duty of confidentiality is broader than the privilege, in that it protects all information an attorney has as a result of the representation, not simply communications with a client.

1. The Scope of the Privilege

a) With which employees can the lawyer engage in privileged communications?

Because only communications between attorney and client are protected by the attorney-client privilege, the issues of who the client is must be reexamined in this context—and for purposes of the privilege, the answer may be different. When a lawyer is representing a company, the privilege belongs to the company, not to individual officers or directors. But the company can only act through individuals, so the question becomes, which communications with which people are encompassed by the privilege?

In 1981, the Supreme Court rejected the former "control group" rule, which held that only communications with senior management were privileged, because only senior management could "possess an identity analogous to the corporation as a whole." *United States v. Upjohn Co*., 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). The Supreme Court observed that often information needed by a lawyer to understand the facts and circumstances of a case was in the possession of middle and even lower level employees; but if communications with those employees was not encompassed by the privilege, the lawyer is inhibited in gathering the facts. *Upjohn v. United States*, 449 U.S. 383, 394 (1981). The Supreme Court thus held that the privilege applied to communications with lower level employees who were acting at the direction of senior management to provide information to counsel so that counsel could provide the company with informed legal advice. The Court emphasized that the "communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Id.* The Court considered whether "(1) the information helped the attorney provide legal advice; (2) the communications related to the employees' corporate duties; (3) the employees were sufficiently aware that they were being questioned; and (4) communications were considered and kept 'highly confidential.'" *Id*. at 394-95.

The *Upjohn* Court expressly refused to formulate a new "test". *Id*. at 396. As a result, even nearly 40 years later, confusion remains about the scope of the privilege. Furthermore, several states have not followed *Upjohn* and continue to apply the control group test. It is important for any practitioner to understand the scope of the privilege in the state in which she practices and in the forum of any particular matter.[1]

[1] This paper does not purport to be a full exposition on the attorney-client privilege. The post-*Upjohn* decisions on the scope of the privilege as applied to an organization client have been the subject of numerous scholarly articles. Our purpose is to identify this issue and ensure that lawyers are aware of it, rather than to provide a complete analysis. *See, e.g.,* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 Geo.L.J.Legal Ethics 739 (1997).

2. Can a lawyer engage in privileged communications with non-employees?

There are courts that have held that certain non-employees can be considered within the group of people to whom a lawyer can engage in privileged communications. These can include consultants, accountants, investment bankers, and public relations specialists. *See* Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 742 (2009). In the context of crisis management, one class of people to whom some courts have applied the privilege is crises managers.

The theory applied to the inclusion of such consultants within the scope of the privilege is that the consultant is an agent that is functional equivalent of an employee. Nisha Chandler, *The Privilege of PR: Extending the Attorney-Client Privilege to Crisis Communications Consultants*, 2015 U.Ill.L.Rev. 1288, 1291 (2015). Some courts have focused on the timing of the consultant's retention, applying the privilege with respect to consultants hired specifically to deal with the crisis and refusing to apply it with respect to consultants who had performed services for the company regularly prior to the crisis. *Compare Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)(communications with PR firm retained by counsel, which was already doing work for the client, were not privileged) *with In re Grand Jury Subpoenas*, 265 F.Supp.2d 321, 331-32 (S.D.N.Y. 2003)(distinguishing *Wachner* because the PR firm had been retained specifically to address the issues arising after the events at issue, and was not the company's regular PR firm). (We note that this distinction does not appear consistent with the rationale that the consultants are the functional equivalent of employees.)

Some courts have emphasized the nature of the services provided by the crisis consultant. In the *Grand Jury Subpoenas* case, which arose out of the SEC investigation into insider trading by Martha Stewart, the PR firm was brought in by the lawyer to help counterbalance what was believed to be inaccurate reporting about the case, and the court determined that "the ability of lawyers to perform some of their most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants." *Id*. at 329.

This is not to suggest that this is the prevailing rule, or that even courts that have applied would do so in all circumstances. Courts in the same district decided *Wachner* and *Grand Jury Subpoenas*, and reached different results under different facts. *See Grand Canyon Skywalk Devl. LLC v. Cieslakno*, 2015 WL 4773585 at *9 (D. Nev. 2015) ("Courts are divided on whether the attorney client privilege extends to communications between a client's counsel and a public relations consultant. . .."). Many courts have simply rejected the application of the privilege to communications between lawyer and PR firm as not within the scope of the privilege as it is traditionally described. In *In re NY Renu with Moistereloc Products Liability Litigation*, 2009 WL 2842745 at *2 (D.S.C. May 8, 2008), the court held, "communication among attorney, client and public relations agent are not within

the scope of the privilege because a public relations agent is not necessary to the legal representation." *See also Haugh v. Schroder Invs. Management North American, Inc.,* 2003 WL 21998674 at *3 (S.D.N.Y. Aug. 15, 2003)("A media campaign is not a litigation strategy").

3. Is the Lawyer Acting as Lawyer or Business Consultant?

Lawyers, and particularly in-house lawyers, often act as members of the management team and are trusted and valuable business advisors. The distinction between the lawyer's role as lawyer and the lawyer's role as business advisor is often blurred in day-to-day affairs. It is particularly important in the crisis setting that the lawyer understand the role he is playing, as that determination is likely to have consequences.

As discussed above, a lawyer may be subject to ethics rules even if providing advice that is not strictly legal advice in the narrowest sense. The ethics rules contemplate that a lawyer may offer advice based on considerations beyond strictly legal ones, and the fact that a particular piece of advice may include business or practical concerns does not relieve a lawyer of her ethical obligations.

In addition, the attorney-client privilege does not apply to communications between lawyer and client when the lawyer is providing, or being asked for, business advice, rather than legal advice. *Sackman v. Liggett Group, Inc*., 167 F.R.D. 6, 19 (E.D.N.Y. 1996)(documents prepared by counsel were not privileged because "the attorneys were serving a function other than that of a legal advisor….[they] were functioning in a scientific, administrative or public relations capacity."); *SEC v. Gulf & Western Indus., Inc.*, 518 F. Supp. 675, 681 (D.D.C. 1981)("Business and personal advice are not covered by the privilege").

Whether particular advice is legal and privileged, or business and not privileged, is often very difficult and fact-driven. One court emphasized the particular challenge faced when assessing whether advice from an in-house lawyer is privileged:

> [u]nlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose, the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.

* * * *

> Obviously not every communication from staff counsel to the corporate client is privileged. It is equally apparent that no ready test exists for distinguishing between protected legal communications and unprotected business or personal communications . . ..

Rossi v. Blue Cross and Blue Shield, 73 N.Y. 2d 588, 592-93, 540 N.E.2d 703, 705 (1989). (Citations omitted.)

Different jurisdictions apply different tests to address whether a particular attorney-client communication falls within the lawyer's role as legal or business advisor. Some courts apply the "primarily legal" rule, holding that the company asserting the privilege "must prove that all of the communications it seeks to protect were made primarily for the purpose of generating legal advice." *United States v. Chevron Corp.,* 1996 WL 264769 at *3 (N.D. Cal. Mar. 13, 1996*). See also North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1127 (N.D. Cal. 2003) ("Legal advice must predominate for the communication to be protected.").

A recent decision illustrates the risk that legal advice will be held not be privileged. In *RCHFU, LLC v. Marriott Vacations Worldwide Corp*., 2018 WL 3055774 (D. Colo. May 23, 2018), the court refused to apply the privilege to a strategic plan memorandum (the "CGC memorandum") that was prepared, in part, by in-house attorneys and contained legal advice. The court characterized the memorandum as business advice with "in minor contribution, legal advice." Id. at *4. The court rejected Marriott's argument that redaction was appropriate:

> Marriott is a sophisticated corporation with a large and experienced legal team available for consultation. . . . [T]hat team was consulted and tasked with some writing and research regarding the CGC memorandum. . . . **In significant respect, the legal duty to protect the attorney-client privilege falls on the legal department, the in-house counsel, involved. When tasked with the CGC memorandum, their duty was to inform the Corporation of the operation of the privilege and to take steps to protect their advice**. This could have included blocking the advice into separate paragraphs or pages, including it in a confidential addendum or even a separate memorandum. That was not done, perhaps to the ultimate detriment of Defendants who have the burden of establishing the privilege. By so intertwining the legal advice within a majority contribution of business advice, **an implicit waiver of the attorney-client privilege occurred as to that advice** for a

> number of reasons. The document is not explicitly legal advice, in fact it is primarily business advice. The purpose of the meeting/agenda was primarily business related. The information is intertwined so completely that it would be impractical to attempt redaction.

Id. (emphasis added).

In *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp*., 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996), the court applied an even narrower approach to the application of the privilege: whether the lawyer was acting in a "professional legal capacity." The court rejected the claim of privilege of a client whose in-house lawyer, the court found, was acting as a negotiator in a transaction, rather than solely as a legal counsellor, and refused to apply the privilege to protect communications between lawyer and client regarding the negotiations. One commentator has criticized this decision as ignoring the multiple roles played by in-house counsel, and "creating a presumption that communications with in-house counsel will not be privileged." Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 Geo. J. Legal Ethics 393, 402 (1998). The rationale used by the *Georgia-Pacific* has been cited and applied by other courts. *See, e.g., Glazer v. Chase Home Finance, LLC*, 2015 WL 12733394 *4 (N.D. Ohio, Aug. 5, 2015)(client's guidelines of how a retained law firm can negotiate and recommend loss mitigation agreements was not privileged, because it did not relate to legal advice); *Lewis v. United States*, 2004 WL 3213121 * 2 (W.D. Tenn. Dec. 7, 2004)(privilege not applied to a lawyer who acted as corporate Secretary and helped investigate a tax issue by interviewing employees and reporting to the Board "but he did not offer legal advice, as is required for protection under the attorney-client privilege.").

A third test was adopted in *Southern Bell Telephone and Telegraph Co. v. Deason*, 632 So.2d 1377 (Fla. 1994). The Florida Supreme Court focused less on the corporate counsel's role in the particular circumstance, and instead held that a communication is privileged if it is "made in the course of seeking legal services." *Id*. at 1382. The court announced a five-part test:

> 1. the communication would not have been made but for the contemplation of legal services;
>
> 2. the employee making the communication did so at the direction of his or her corporate superior;
>
> 3. the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
>
> 4. the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties, and

5. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 1383. This formulation constitutes a broader concept of the privilege as applied to corporate counsel; it has not been expressly adopted outside of Florida.

4. Waiver of the Privilege

The attorney-client privilege can be waived in many different ways. Waiver, in this context, does *not* mean a knowing and voluntary relinquishment of a known right, as it does in many other contexts. One commentator has suggested that the word "forfeiture" would be a better term. Edna S. Epstein, The Attorney Client-Privilege and the Attorney Work-Product Doctrine, Vol. 1, p. 390 (ABA 5th Ed. 2007).

Waiver can occur when a privileged communication is made to a person outside of the group to which the privilege attaches. So, the disclosure to others can constitute a waiver, even if all concerned believed that the persons to whom disclosure was made came under the privilege umbrella. *See Verschoth v. Time Warner, Inc.,* 2001 WL 546630 (S.D.N.Y. May 22, 2001); *Construction Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 48 (E.D.N.Y. 2001). *See also* Restatement of the Law Governing Lawyers, Section 73(4)(b).

Waiver can also occur when an employee who is a under the privilege umbrella discloses an otherwise privileged communication to someone who is not. Disclosures to third persons, including other employees, consultants, accountants, or other "non-privileged" persons can constitute a waiver of the privilege. *See, e.g.*, *In re John Doe Corp.*, 675 F.2d 482, 488-89 (2d Cir.1982); *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693 (E.D.Va.1987); *North Dakota ex rel. Olson v. Andrus,* 581 F.2d 177, 180-81 (8th Cir.1978).

If a waiver is established, the privilege is generally considered to be waived for all purposes and forever with respect to that communication. *See, e.g., Panter v. Marshall Field & Co.,* 80 F.R.D. 718, 721-23 (N.D. Ill. 1978). But the privilege is likely also waived with respect to all communications on the same subject matter. But, of course, the determination of what constitutes the same subject matter is fact-driven and is determined on a case by case basis. See e.g., Hunter v. Copeland, 2004 WL 2472487 at *2 (E.D. La. Nov. 1, 2004) ("in determining the scope of the waiver, the court must keep a close eye on the legal relevance of the communications that have been disclosed. The goal is to ensure that the opposing party has a fair chance to litigate the contested issues for which those communications are relevant.").

VI. The Need For Preparation

It would be impossible for a lawyer or a company to anticipate every potential crisis that could befall the company, but companies should have procedures in place to deal with crises as they arise. These should include committees tasked with addressing crisis management; outside crisis management consultants on call; insurance coverage and personnel available to deal with insurers; communications expertise; and training programs in place to ensure that relevant personnel are prepared.

Lawyers, too, must be prepared to act quickly and competently. Lawyers, particularly in-house lawyers, should understand the laws in their jurisdiction regarding litigation holds, representation issues, and the complex issues relating to the attorney-client privilege. Once the crisis hits, it is too late for an attorney to educate him or herself about the applicable rules.

The ABA issued a Formal Opinion, No. 482, in 2018 that relates to a lawyer's Ethical Obligations Related to Disasters. The "disasters" addressed are external ones, such as hurricanes, floods, and mass shootings, rather than the kinds of business crises in this paper. Nevertheless, the Opinion underscores the lawyer's need to be prepared for disasters. The Opinion requires lawyers to "take reasonable steps to prepare for a disaster before one strikes." The steps references, in the context of a natural disaster, include providing clients with alternative means of communication with them, keeping abreast of technology to protect clients' documents and other data, and ensuring access to client trust accounts.

The "crisis" context differs from the "disaster" context, but the need for preparation remains the same. The ABA Opinion suggests that the lawyer's preparation to address emergencies implicates the lawyer's duty of competence under Model Rule 1:1. The Opinion notes comment 3 to that rule, which notes that "Ill-considered action under emergency conditions can jeopardize the client's interest."

A lawyer's understanding of the ethical rules is important in any context, but when action must be taken quickly to deal with a client in crisis, there is simply no time for a lawyer to research the appropriateness of representation, the existence of privilege, and the related issues that may arise. Advance knowledge of a lawyer's obligations in these areas is crucial to a lawyer's ability to serve his or her client properly in a time of crisis.