



# RAISING THE BAR

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# Legal Ethics in Counseling Franchise Systems in Crisis

## Managing a Franchise System through Crisis

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*The views expressed in this program and the materials are those of the panelists and not necessarily of their companies or firms.*

# Hypothetical No. 1

- Colonel Mustard’s Hot Dogs, Inc. (the “Franchise Company”) franchises hot dog stands selling hot dogs with the Colonel’s proprietary mustard. Franchisees are required to buy the mustard from the franchisor’s affiliate, the Colonel’s Mustard Company (the “Mustard Company”). Both companies are wholly owned by the Colonel.
- One day, news breaks of an outbreak of listeria traceable to hot dogs purchased from several Col. Mustard stands in the D.C. area. Col. Mustard convenes an emergency meeting of the executive team, including the General Counsel, Sarah Scarlett.

# WHAT DOES THE COMPANY WANT TO ACCOMPLISH?

## REPUTATION RECOVERY

**“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently.”**

**-Warren Buffett**

# Reputation Recovery

Three “always do” reminders for reputation management :

- **Be Transparent**
  - No spin.
- **Take Accountability**
  - Take the Heat – leader first – almost always the CEO.
  - Conduct an investigation – independent, if necessary.
- **Be Authentic**
  - Act with a sense of urgency
  - Analyze and publicize what went wrong and how we are ensuring it won't happen again.

# Business Continuity

Business continuity is a structured, preplanned process to ensure quick business recovery when a critical and sustained business interruption occurs

- The primary goals include:
  - Prioritize people concerns/issues
  - Effectively communicate
  - Stabilize core business functions
  - Execute and Expedite key decisions
  - Protect and/or Recover business

# Business Continuity

## Continuing Maintenance Best Practices

- Periodic Department Plan Updates
- Archived Plans for Remote Access
- Periodic Simulation Drills
- Periodic Media Training for CEO, Board Chair and Other Key Representatives
- Annual Program Maintenance Roadmap/Calendar

# Additional Pre-Planning Thoughts

- Proactive and well thought out messaging
- Standard communication templates
- Dark website?
- Alternative marketing calendars
- Alternative products

# Legal Issues to Consider in Any Event

- Review facts/documents – investigation, if needed
  - Involve outside counsel and other experts early
- Assess disclosure requirements
- Consider communication with stakeholder groups
- Coordinate with risk management on notice to insurance broker(s)
- Participate in strategic planning and provide responsive counsel
- Litigation Hold

# Meeting Issues

- Proactive brand messaging
  - Guest directed, crew talking points
  - Commitment to guest, product quality, high supplier standards
- Press Release, if public facing is needed – leader or follower?

# Role of In-House General Counsel

- What is in-house counsel's role in meetings?
- Is there a duty to make clear the in-house counsel's role?
- The lawyer's multiple roles (Model Rule 2.1).
- Who is present?
- Privilege Concerns – How important?

# Hypothetical No. 2

- During a break in the meeting, the Director of Purchasing, Gary Green, pulls Ms. Scarlett, the GC, aside and says “I know franchisees are supposed to buy only from our approved suppliers, but the D.C. franchisees asked me if they could buy from a local supplier who had better prices. I told them it would be okay on a trial basis. I wish I had looked into this supplier more closely, you know, done some quality testing on their products. Please don’t tell anyone! I could be in real trouble! What should I do?”
- What should Ms. Scarlett, the GC, say?

# ABA Model Rule 1.13

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

\* \* \* \* \*

(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.”

# ABA Model Rule 1.13

## Comments

### Comment 10

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.

# ABA Model Rule 1.13

## Comments

### Comment 11

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.

# ABA Model Rule 1.13

“(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.”

# Hypothetical 2A

Is the answer to 2 different if Green says, “The supplier is owned by my brother-in-law, and he promised me a percentage of the sales. I had no idea he was selling bad meat.”?

# Hypothetical No. 3

Ms. Scarlett calls outside counsel, Wanda White, to bring her up to speed on this crisis and to obtain her counsel. She informs Ms. White of Mr. Green's comments. Ms. White reminds Ms. Scarlett of the pending unrelated litigation in which Ms. White represents the Franchise Company, as well as the Mustard Company and the two individual defendants, Col. Mustard and Mr. Green. She has obtained an advance waiver from all the defendants that if any conflict arises, she can continue to represent the Franchise Company.

Can Ms. White represent the company in this crisis?

# Role of Outside Counsel

- Rules are the same
- Conflict issues may arise differently  
(ea. representation of individual in litigation)
- Model Rule 1.7.

# Conflict Issues

- Advance consent
- May not be upheld, especially if blanket, open-ended consent
  - Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg Co., Inc., 6 Cal. 5<sup>th</sup> 59, 81, 425 P. 2d 1, 14, 237 Cal. Rptr. 3d 424, 439 (2018) (blanket consent in engagement letter not enforceable when firm had actual conflict that it did not disclose).

# Hypothetical No. 4

Col. Mustard pulls Ms. Scarlett aside and says, “I’m very concerned about this. I think the franchise company is at risk, and I want to make sure the Mustard Company is insulated – that’s where the real money is. Take a look and see what we need to do about the existing agreements and structures of the companies to ensure the Mustard Company is protected. Oh, and call outside counsel and ask her too.”

- Can Ms. Scarlett do this?
- Can Ms. White?
- Is the answer different if Col. Mustard is not the sole owner of the Franchise Company?

# Attorney-Client Privilege

- Ethical duty to Keep Client Information Confidential vs Attorney-client privilege
- Model Rule 1.6

## Comment 2

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

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.

# Attorney-Client Privilege

- The privilege belongs to the client (e.g., the client has the right to waive any protection)
- Encompasses confidential communications between attorney and client for the purpose of request or providing legal advice
- What employees of a company constitute the “client”

# Scope of the Privilege

- “Control Group”
  - Rejected by Supreme Court - United States v. Upjohn
  - Some States still allow
- No definitive test, but factors
  - Whether the information helped the attorney provide legal advice
  - Communications related to employees corporate duties
  - Employees were aware that they were being questioned
  - Communications kept “highly confidential”

# Hypothetical No. 5

A meeting is convened to discuss the continued resolution of the crisis. In the meeting are Col. Mustard, Mr. Green's assistant Bud Black, Ms. Scarlett, and two outside consultants – Professor Plum, a foodborne illness expert, and Ivanka Peacock, a crisis consultant. Col. Mustard begins the meeting by saying, “Glad to have Ms. Scarlett with us for her legal perspective and of course her presence makes our discussions privileged.”

- Are the discussions of this meeting privileged?

# Non-employees

- Some courts hold communications to be privileged
  - Crisis consultants
  - Accountants
  - PR specialist

# Non-employees

- Factors include:
  - Whether consultant is functional equivalent of an employee
  - Whether consultants was hired specifically to deal with the immediate crisis or do ongoing work?
  - Whether consultant helped lawyers perform legal functions
- Privilege is not the prevailing rule; courts are split.

# Hypothetical No. 6

At the conclusion of the meeting, Col. Mustard says to Ms. Scarlett, “Please write up the recommendations we made at this meeting, including your legal opinions, as well as any other advice you may have. You took good notes, as any real lawyer would. And, of course, if you write the memo it will be privileged.”

- Is the memo privileged?

# What is Legal Advice?

- Not everything a lawyer says or writes is privileged
- Business advice is not privileged.
- “Mere participation of an attorney [does not] seal off disclosure.”
  - Rossi v. Blue Cross and Blue Shield, 73 N.Y. 2d 588, 592-93, 540 N.E.2d 703, 705 (1989).

# Legal vs. Business Advice: Tests

- “Primarily Legal”
- “Professional legal capacity”
- “In the course of seeking legal services” – Florida

# Caution to In-House Counsel

“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. . . . 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 . . . .”

- RCHFU, LLC v. Marriott Vacations Worldwide Corp., 2018 WL 3055773 (D. Colo. May 23, 2018)

# Waiver of the Privilege

- Disclosure to someone outside the group of persons to whom privileged communications can be made
- Need not be knowing and intentional
- Scope of waiver

# Duty to be Prepared

- ABA Formal Opinion No. 482 (2018)
- Duty of competence

# Pre-Planning

- Enterprise Risk Management Process
  - Ongoing cross-functional risk mitigation
- Business Continuity – Crisis Management Plan
  - Periodic drills with updates to incorporate learnings
  - Periodic department updates to stay current
  - Contact list

# Other Hypothetical

1. The case of the “face of the company” engaging in improper behavior?
2. The marketing co-op issues – obligations to franchisees
3. The CEO directs counsel not to produce or to destroy documents.