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Pros and Pitfalls of Legal Collaboration between Franchisees and Franchisors

Presented by:

Jacqueline Lee

Vice President, General Counsel
Flynn Restaurant Group
San Francisco, California

Savannah Franklin

Chief Legal Officer,
Pizza Hut U.S.
Dallas, Texas

Amanda D. Dempsey

Shareholder, Co-Chair of Franchise and Distribution Group
Saxton & Stump LLC
Malvern, Pennsylvania

Alden J. Parker, Sr.

Partner, Co-Chair of National Hospitality Industry Group
Fisher Phillips LLP
Sacramento, California

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I. Introduction

The franchise model offers a unique opportunity for both brand owner and operator. Franchisors have an opportunity to develop their brands rapidly, while franchisees benefit from the knowledge and experience of a proven business model, which can reduce the risk of failure. During the term of the franchise relationship, franchisees can provide valuable feedback to the franchisor on the development of brand standards and the pursuit of cutting-edge initiatives, while franchisors continue to add value through their experience supporting numerous franchisee businesses in many demographics and can leverage their bargaining power to create a more robust system. There can be a significant “upside” for both parties as the interests of franchisors and their franchisees are often aligned.

Collaboration between franchisor and franchisee is a crucial component of a successful franchise relationship. The symbiotic relationship between franchisor and franchisee also creates the potential for ethical risks for the attorneys representing each side. Successful collaboration between franchisor counsel and franchisee counsel (or at times, unrepresented franchisees) is essential for both parties to work together to build trust, communicate effectively, and address conflicts in a fair and equitable manner. However, because of the contractual nature of the relationship, there is the potential for conflict or diverging of interests. With the parties often working so closely with one another, for months and years at a time, the lawyers navigating the relationship must keep ethical duties top of mind.

This paper will discuss the many instances in which a long-term contractual relationship, like we see in franchising, can be both beneficial and risky for counsel representing both sides. It will also discuss some of the ethical quandaries that are implicated when the parties’ interests diverge. We begin with a review of the Model Rules of Professional Conduct (Am. Bar Ass’n 2015) (the “Model Rules”), the Restatement (Third) of the Law Governing Lawyers (2000) (the “Restatement”), and some states’ individual ethical rules. We then assess how these ethical guidelines are implicated in the litigation and dispute resolution context.

II. Establishing the Attorney-Client Relationship and Maintaining Duties to Clients when Collaborating with Opposing Counsel or Unrepresented Parties

A. Establishing (and Avoiding) the Attorney-Client Relationship

The relationship between attorney and client is a special one, premised on open communication and confidentiality. It is a relationship based on the understanding that the client will provide truthful and accurate information to the attorney, thus allowing the attorney to provide full and fair legal advice and representation to the client. *See, e.g., Delaney v. Dickey*, 242 A.3d

257, 268 (N.J. 2020) (noting that a “client places trust and confidence in the attorney, expecting that the attorney will use his or her superior expertise, knowledge, training, and judgment for the client’s benefit”). This relationship is generally established through mutual assent – the client seeks legal advice, and the attorney provides or agrees to provide the legal guidance necessary to protect the client’s interests. An attorney-client relationship may be expressed and memorialized by the signing of a formal engagement letter or implied from the circumstances of the attorney’s interactions with the client. *See* Restatement § 14; *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W. 2d 686, 693 (Minn. 1980) (finding an attorney-client relationship present where the attorney did not qualify the legal advice or urge plaintiff to seek advice from independent counsel, and plaintiff relied upon such advice in failing to pursue a claim).

In much the same way, the payment of a fee is not dispositive in determining whether an attorney-client relationship exists. *See id.* An attorney-client relationship can also be established inadvertently, such as during a consultation or initial conversation between a prospective client and the attorney, or when an attorney simply provides legal advice to a third party and that third party relies on such advice. *See* Restatement §§ 26, 51. In determining whether an attorney-client relationship exists, courts consider whether the client believed such a relationship exists, or whether the client confided in the attorney or relied upon the attorney’s professional judgment. *Id.* at § 14(c).

Notably, “once an attorney-client relationship has been established, an irrebuttable presumption arises that confidential information was conveyed to the attorney.” *Road King Dev., Inc. v. JTH Tax LLC*, 540 F.Supp. 3d 554, 559 (E.D. Va. 2021) (quoting *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F.Supp. 724, 734 (E.D. Va. 1990)). Accordingly, an attorney must be careful not to provide legal advice inadvertently until an attorney-client relationship has been established.

1. Unintentional Representation in the Franchise Context

Unintentional representation is a particularly important consideration in the franchise context. The role of a franchisor’s attorney often involves direct communication with franchisees, some of whom are not represented by counsel. The franchisor has an overarching interest in maintaining brand standards and ensuring compliance with the terms of the franchise agreement. Regardless of whether the franchisor’s attorney is in-house or outside counsel, it is common to be asked to provide advice to franchisees concerning the more common issues that franchisees in that system experience, which can include legal questions. *See* James Mulcahy & Douglas Luther, *Walking the Line: When Are the Franchisor’s In-House Counsel’s Communications or Advice to a Franchisee an Ethical Violation?*, 37 FRANCHISE L.J. 571 (2018). In many instances, it would be quite easy for franchisor’s counsel to answer a franchisee’s legal question, and also more efficient. Franchisor’s counsel may have experienced the same issue dozens of times before. However, counsel must also ask itself whether doing so would create an attorney-

client relationship with franchisee, reveal confidential information of the franchisor-client, and if doing so has the potential of becoming a conflict for the franchisor in the future. As counsel to a franchisor, providing advice to a franchisee is a situation that requires careful consideration. To limit liability, an attorney should refrain from providing specific advice to a nonclient and should, at all times, make clear that he or she does not represent the nonclient.

2. Ethical Duties to Nonclients

In addition to one's duties to its clients, attorneys also have certain ethical obligations to the general public. Counsel must consider their ethical duties to nonclients when approached for advice. An attorney's liability under the Model Rules attach upon the representation of a client; however, an attorney also owes a duty to third parties to avoid false statements of material fact and fraudulent omissions. Model Rule 4.1 (an attorney must not knowingly "make a false statement of material fact or law to a third person" in the representation of a client or "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client"). It is professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Model Rule 8.4(c).

Misrepresentations and material omissions to third parties open the door to an attorney's liability for negligent misrepresentation, fraudulent concealment, and aiding and abetting. *See* Alexander M. Meiklejohn, *UFOCs and Common Law Claims Against Franchise Counsel for Negligence*, 25 *FRANCHISE L.J.* 45, 61 (2005).

These concerns are heightened in communications with unrepresented nonclients, as they may be more prone to rely on the advice of an attorney, whether or not they have formally engaged the attorney. Unrepresented franchisees, for example, may lack independent counsel or only retain counsel for specified engagements. According to Restatement § 51, an attorney owes a duty of care to nonclients when and to the extent that "(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection." Restatement § 51(2). Due to the close relationship between franchisors and franchisees, an unrepresented franchisee may believe the franchisor's attorney has their best interests in mind, and is acting on their behalf. However, zealous advocacy to the franchisor-client necessitates that any advice franchisor's counsel provides to it at least implicitly benefits the franchisor. Model Rule 1.3.

Model Rule 4.3 requires an attorney to be proactive in informing unrepresented parties of their role as counsel for a specific client: "in dealing . . . 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.”

As a result, where franchisor's or franchisee's counsel is seeking advice from the other party, the attorney must comply with the ethical guidelines concerning communications and providing legal advice to third parties, while at the same time protecting the confidential information of its own client. Model Rule 4.1. For example, franchisor's counsel may run the risk of making false statements to a franchisee or a material omission, in counsel's attempt to keep certain client information confidential. As difficult as it may be, in situations where both of counsel's ethical duties cannot be upheld, the attorney may be forced to cease communications, citing its obligations to its client, or refer the franchisee to another person within the organization that may be able to assist.

B. Maintaining Ethical Duties to Clients when Collaborating with Opposing Counsel

As mentioned above, the common interests of franchisor and franchisee can give rise to situations where legal counsel for franchisors and franchisees work together. These instances may be transactional, like engaging with a new supplier, or litigation events, with franchisor and franchisee as co-plaintiffs or co-defendants.

While the parties' interests may be aligned at the outset, attorneys representing both parties must ensure they maintain the ethical duties owed to their individual clients. Among these duties are loyalty, confidentiality and zealous representation.

1. Duties of Loyalty and Zealous Advocacy

When parties collaborate on legal issues, an essential first step is to consider the potential for conflicts of interest. Attorneys have a duty of loyalty to their clients, which includes the obligation to act in the client's best interest and avoid any conflicts of interest. Model Rule 1.7 Comment 1. This duty is a fundamental principle of the attorney-client relationship and is essential to maintaining the client's trust and confidence.

The Model Rules defining conflicts of interest limit a lawyer's representation where the lawyer's duty of loyalty or duty of confidentiality would be substantially compromised. Model Rule 1.7(a)(2); Restatement § 121 Comment b. Attorneys are obligated to avoid conflicts of interest that could interfere with their ability to represent their clients effectively, including avoiding representing clients whose interests conflict with one another, as well as avoiding any personal interests that could interfere with their representation of the client. Model Rule 1.7, 1.7 Comment 1. The Model Rules warn that “[u]nforeseeable developments . . . might create conflicts in the midst of a representation” and impair the lawyer's ability to comply with the duties of

loyalty, confidentiality, and independent judgment owed to each client. Model Rule 1.7 Comment 5; Rule 2.1.

The duty of loyalty obligates attorneys to disclose a conflict of interest if one arises and obtain the client's informed consent before continuing to represent the client. Model Rule 1.7, 1.7 Comment 2. This aims to protect the client and attorney from actual impropriety and also the perception of impropriety.

Additionally, attorneys must provide competent representation. Attorneys owe to their clients the duty to render legal advice and counsel with a degree of skill, care, and diligence as expected of a reasonably competent attorney under the same or similar circumstances. Model Rule 1.1. Attorneys must act as advisor, exercise independent professional judgment, and render candid advice free from external pressures or interests. Model Rule 2.1. This includes keeping the client informed about the progress of their case and zealously advocating for the client's interests throughout the legal process. Model Rule 1.3, Comment 1.

At times, providing zealous and competent representation for a client may mean collaborating with counsel for another party. Where counsel for franchisor and franchisee believe it is in their clients' collective best interests to work together on a legal matter, counsel for each party should first:

- 1) make it clear to both its client and the other party who each lawyer represents;
- 2) explore the benefits of a collaborative legal strategy in this instance with both clients, which may include revealing confidential information to the collaborating attorney;
- 3) consider the potential for conflicts of interests, or instances where the parties' interests might diverge as the matter progresses;
- 4) explain the limits or scope of the collaborative representation and the fee structure; and
- 5) obtain both clients' informed and written consent for the attorneys to collaborate.

In all cases, counsel must keep its duties of loyalty and zealous representation at the forefront of their decision-making and counsel. If those duties begin to get conflated, counsel's ethical obligations to its client may require that collaboration cease.

2. The Risks of Representing Clients That May Be or Become Adverse

The above section includes just a few examples of instances where counsel for franchisor and franchisee may choose to collaborate. At times, counsel for franchisor or franchisee may even tender their representation to the other, and counsel for either franchisor or franchisee may represent both clients.

Generally, an attorney is not prohibited from representing clients with *potentially adverse* interests, so long as they are not in direct conflict. The Restatement begins with the assumption that most conflicts are capable of being waived, in large part because there exists strong policy that a client engage an attorney of their choosing. Restatement § 121. However, more often than not, representing clients with differing interests makes it challenging for the attorney to maintain its other ethical duties to both clients, as if they were individual clients.

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.

As discussed above, parties’ interests may seem aligned at the outset and may diverge during the scope of the representation. If such an occurrence would impair the lawyer’s ability to

comply with the duties of loyalty, confidentiality, and independent judgment owed to each client, counsel is ethically obligated to inform the clients immediately and cease concurrent representation. Model Rule 1.7 Comment 5, 2.1.

Generally, if a conflict of interest arises “[w]here more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client.” Model Rule 1.7 Comment 4; *See* Model Rule 1.9 Comments 5 and 29. A lawyer is at least presumptively privy to the confidential information of the former client and cannot use any of that information to the advantage of the remaining client. Model Rule 1.9(c).

The risk of being unable to represent one’s original client (or either client) if the concurrent representation breaks down may deter counsel from pursuing concurrent representation. If the client relationship is established and on-going, but concurrent representation is in the best interest of both parties, counsel may be required to recommend that the parties seek a third party to represent the clients in the concurrent matter, while each retaining their own separate counsel.

3. Maintaining Confidentiality when Collaborating with Opposing Counsel

Counsel must not disclose its client’s confidential information without first obtaining the client’s consent. Model Rule 1.6. Except in limited circumstances, attorneys are obligated to maintain confidential information related to client representations and to pursue their clients’ interests despite any obstruction or inconvenience. Model Rule 1.3, 1.6, 1.3 Comment 1. This duty is based on the principle that clients should be able to share all information related to their case with their attorney without fear of it being disclosed to others. Additionally, a lawyer may not use information relating to representation of a client, including to the advantage, unless the client gives informed consent, except as permitted or required by the Model Rules. Model Rule 1.8(b).

Practically, when counsel for franchisor is collaborating with franchisee counsel or unrepresented franchisees, this can be extremely challenging. Oftentimes, counsel may have day-to-day interactions with franchisees and their counsel. Especially when interests are aligned and certain facts would assist everyone’s shared objectives, it may even seem beneficial to your client to reveal certain confidential information. However, counsel must always keep in mind the possibility that interests may diverge as the representation continues. The client must always provide permission before such information is disclosed, even if it is burdensome to obtain such consent each time. Additionally, counsel should be mindful of whether it is in the client’s best interest to reveal such confidential information, even if the client agrees, and should provide the client with counsel’s advice regarding the same. Would it be in the client’s best interest that such

information was shared if the parties' interests became adverse later? Clients are often eager and optimistic when collaborating, and counsel should be mindful to point out the risks associated with revealing information if the parties later become adverse. Also, as discussed above, there is always a presumption that confidential information has been revealed when two clients are represented concurrently. One cannot "unring the bell" if a conflict of interest arises, and thus, counsel may be ethically barred from continuing to represent either client in that instance.

While counsel's ethical duties to its clients always remain, there is some variance regarding what types of advice are entitled to attorney-client privilege, however. In franchising, legal and business decisions are often very closely affiliated, and it is common for counsel to also contribute as strategic business advisors. When counsel gets involved, it may be difficult to distinguish where an attorney's legal advice ends, and business advice begins. Advice most often shares more than one purpose—both legal and business. Known as dual-purpose communications, U.S. Circuit Courts are divided regarding whether those communications are entitled to attorney-client privilege.

As it stands, the Second, Fifth, Sixth, and Ninth Circuits apply a version of the "primary purpose" test, which protects confidential attorney-client communications made for the primary purpose of giving legal advice. *See In re County of Erie*, 473 F.3d 413 (2d Cir. 2007); *United States v. Robinson*, 121 F.3d 971 (5th Cir. 1997); *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558 (6th Cir. 2015); *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020).

In contrast, the D.C. Circuit applies the "significant purposes" test, in which courts ask whether obtaining or providing legal advice was "one of the significant purposes of the communication." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). If so, the entire communication is entitled to privilege.

Recently, the United States Supreme Court had an opportunity to resolve the circuit split and to decide whether, under federal law, a communication involving both legal and nonlegal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the purposes behind the communication. *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021). The Court granted certiorari and heard oral arguments on January 9, 2023, but ultimately dismissed the writ of certiorari as improvidently granted, and leaving the circuit split unresolved.

Despite the circuit split, there seems to be some acknowledgement from the courts that legal advice and business advice are at times, inextricably linked. In franchising, business and legal issues are often made with careful consideration of the other. The pure business advice that an attorney may opine on is not always entitled to privilege. While parsing through what is legal versus business advice can be difficult, collaboration with co-counsel or counsel for opposing

parties regarding business decisions seems to involve less risk of breaching counsels' ethical duties to their clients.

III. Specific Litigation and Dispute Resolution Considerations

While there are many examples of legal department collaboration in the day-to-day business operations of franchise brands and in transactional matters, litigation events present some heightened ethical quandaries when franchisor and franchisees collaborate or tender representation to one another.

A. Dual or Joint Representation

Joint or dual representation refers to the practice of a single attorney or law firm representing both the franchisor and the franchisee, or several franchisees. Joint representation of clients in a litigation scenario is quite common in franchising. For example, counsel for franchisor may represent both franchisor and franchisees in an action involving liability to third parties or regulators. Oftentimes, the franchisor may be improperly named as a defendant in a suit, in which it may be practical to use a single attorney to defend, if the facts are straightforward. Other times, both franchisor and franchisee may be named defendants in the same suit, through a theory of vicarious liability. Both could be sued under the theory of system-wide wrongdoing. Joint representation may also occur when counsel represents multiple franchisees of the same system in an action against the franchisor.

In all of these instances, there are pros and cons to joint representation. This section will discuss when joint representation is permissible, the initial formation of the relationship, the benefits and risks of joint representation, and considerations when fully tendering representation to counsel for one of the parties. This section will also present case law as examples of ways to best manage joint representation situations, particularly when interests may change as the representation evolves.

1. When Dual Representation Permissible and Formation of the Joint Representation Relationship

Joint representation may occur in many ways. One common scenario is when counsel for one "Party A" may tender representation to counsel for "Party B", allowing Party B's counsel to provide representation for the matter. In other instances, both Party A and Party B may choose a third attorney to jointly represent their common interests, and maintaining their own individual counsel for other matters. As we discussed above, both of these types of joint or dual

representation should be undertaken only when the representation of one client is not directly adverse to another client and the attorney's representation and ethical obligations are not materially limited. Model Rule 1.7(a). Even in the face of a concurrent conflict, the attorney may represent the clients 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.

Id. at 1.7(b).

Deciding whether you will jointly represent your client and another interested party, whether to recommend that your client tender representation to another party's attorney, or whether to retain independent joint-counsel is highly fact-specific. The decision involves not only ethical considerations, but also practical considerations involving areas of expertise, experience, availability and the correct "fit" for the representation. At times, the best practical choice may be limited by the ethical risks of disclosing very sensitive, confidential information that your client wishes to keep private. You also may run the risk of encountering an unwaivable conflict of interest which limits your ability to represent or advise other party. We discuss some of the "pros" and "cons" below.

When considering commencing joint representation, several key decision points are vital to the formation and structure of the relationship. First, the attorney representing both the franchisor and franchisee must obtain the informed consent of all parties, which includes outlining the risks of such representation, the expectations, and fee arrangement (*i.e.*, identity of payor and fee-splitting). To manage the clients' expectations and decrease the potential for future conflicts, the attorney should define terms of the representation such as confidentiality, privilege, and the co-sharing of information. At this time, it also behooves the attorney to inform the clients of the costs of alternative arrangements should a nonwaivable conflict arise. Model Rule 1.0(e).

It should be communicated to clients that attorney-client privilege exists between a lawyer and each client in a joint representation. Third parties may obtain privileged information only if all clients in the joint representation waive attorney-client privilege. However, and this may not be

clear to the clients themselves, there is no attorney-client privilege between jointly represented clients, meaning information pertinent to the representation must be shared with co-clients.

2. Dual/Joint Representation “Pros” and “Cons.”

There can be substantial advantages to collaborating with co-counsel in litigation matters where the parties’ interests are clearly aligned. Joint representation presents a cost-savings opportunity. If counsel has experience representing the franchisor and/or franchisee, they can use this expertise to protect the joint clients’ rights more efficiently. This may be particularly attractive for franchisees who often operate on more limited budgets compared to franchisors. For example, joint clients may save on attorneys’ costs in preparing pleadings and motions and conducting discovery. Joint representation also allows the parties to present a unified front against the adverse party.

However, at times, the substantial risks or “pitfalls” that may arise in joint representation may outweigh the benefits. As indicated throughout, joint representations can produce both concurrent and successive conflicts. Franchisors and franchisees may initially share a common interest in the matter at hand, however, potential conflicts often arise during the representation. Interests may diverge in certain, crucial areas such as decision-making regarding fee arrangements, claims, defenses, settlement, and appeal. Counsel must zealously advocate on behalf of both clients, which includes presenting both clients’ arguments in a compelling way and allotting time appropriately. Model Rule 1.3.

In a situation where franchisor and franchisee are not aligned on indemnification obligations, for example, joint representation may not be feasible. Many if not all franchise agreements contain provisions in which franchisees agree to indemnify and hold franchisors harmless for claims arising out of the operation of the franchised business. If, at the conclusion of litigation or settlement, franchisor seeks to enforce this provision and is met with resistance, the attorney must navigate the ethical landscape of this dispute between once-aligned parties. Other “unwaivable” conflicts may arise due to unforeseen circumstances, such as when facts are uncovered through discovery or when litigation strategies differ. Model Rule 1.7 Comment 5, Rule 2.1. These types of situations may require voluntary or even mandatory withdrawal from representation that could add cost or delay to the litigation.

Additionally, the attorney continues to have certain duties to the former client after termination of an attorney-client relationship. Model Rule 1.9. An attorney who formerly represented a client in a matter may not represent another client in the same or a substantially similar matter in which the client’s interests are materially adverse. *See id.* Thus, if an attorney

jointly represents both franchisor and a franchisee, the attorney may be prohibited from representing franchisor in another matter against franchisee, for example, if one were to arise.

Importantly, the fact that franchisee and the franchisor routinely share counsel could later impact a court's determination of whether there is a joint employer relationship. Courts will consider a variety of factors in making this determination, such as whether the franchisor and franchisee both participate in hiring, firing, and supervising employees, or whether they share or co-determine the essential terms and conditions of employment. Joint representation is becoming an increasingly important consideration in joint employer analysis.

B. Cautions Relating to Avoiding the Formation of a Joint Employer Relationship

The franchise model seeks to set a clear distinction between the business of a franchisor and a franchisee. Where the franchisor is the owner of the brand, and the franchisee operates as a distinct legal entity that controls the day-to-day operations of a location or locations, and, importantly, controls its employment relationship with its staff.

In many jurisdictions, the franchise model is being reviewed and potentially altered in significant ways. For example, in California, the FAST Act and AB1228 seek to statutorily establish a joint employer relationship and hold franchisors responsible for many employment-related issues that were formerly the sole responsibility of franchisees. However, until such a joint employer relationship is established by statute, franchisors, franchisees and their attorneys should exercise caution when the collaboration involves employee management and human resources issues. A franchisor's insight into national trends and best practices, and its desire for brand uniformity and protection may make collaboration with the franchisee tempting. In some instances, that collaboration may impact a court's decision regarding whether the franchisor and franchisee are joint employers.

In analyzing whether a joint employer relationship exists, "courts look to the 'economic realities of the relationship between the worker and the putative employer' and consider six factors:

- (1) the degree of control that the putative employer has over the manner in which the work is performed;
- (2) the worker's opportunities for profit or loss dependent on his managerial skill;
- (3) the worker's investment in equipment or material, or his employment of other workers;
- (4) the degree of skill required for the work;

(5) the permanence of the working relationship; and

(6) the degree to which the services rendered are an integral part of the putative employer's business.”

McFeeley, 825 F.3d at 241 (quoting *Schultz*, 466 F.3d at 304-05); *see also Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 139, 150 (4th Cir. 2017) (noting that these “Silk factors,” now applied as the “economic reality” test, first were discussed in *United States v. Silk*, 331 U.S. 704, 715 (1947)).

None of these factors is dispositive on its own, and “courts look at the totality of the circumstances” instead of “applying these factors ‘mechanically.’” *Herman v. Mid-Atlantic Installation Servs., Inc.*, 164 F. Supp. 2d 667, 671 (D. Md. 2000); *see also Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir.1991) (“[T]he determination of the employment relationship does not depend on isolated factors but rather upon the ‘circumstances of the whole activity.’” (quoting *Rutherford Food*, 331 U.S. at 730)).

The joint employer standard applied by the National Labor Relations Board and U.S. Courts has been re-examined on several occasions over the past decade, as political administrations and their objectives change. Regardless of the flux in the standard, franchisors should carefully consider which types of litigation it controls or joins on behalf of its franchisees, and how often. While the franchisor certainly has an interest in the reputation of the brand, consistency, and uniformity, it must also balance those interests with overstepping into franchisees' employment relationships.

C. Best Practices and Tips in Joint Representation Situations

Given the above issues and risks associated with joint representation, below are some tips and best practices for tendering representation or representing clients in a joint representation situation:

- Evaluate the likelihood of conflicts arising before agreeing to joint representation. If conflicts are likely to arise between franchisor and franchisee, it may be best to avoid commencing joint representation because it is often easier than the extrication process.
- Consider issues such as timing and control of litigation up front to avoid them impacting the parties at an inopportune time.

- If the parties view themselves as competitors (*i.e.*, two or more franchisees), representation may be improper even if the parties have aligned legal interests.
- Establish and document joint defense/common interest privilege early for situations in which a common attorney is not feasible, but collaboration is desirable – the common interest privilege allows one group of clients and their counsel to communicate confidentially with another group of clients and their separate counsel. Use caution, however, as the common interest privilege is only available when the parties are engaged in a common defense of litigation or threatened litigation.
- Consider the level of risk associated with joint employer issues that is presented by the specific scope of the joint representation.

D. Case Studies: Illustrative Situations of When a Court May Consider Franchisor and Franchisee Joint Employers

Scenario 1

Franchisor runs a national training facility, where employees of the Franchisee attended a training program. Franchisor’s employees travel to New Mexico to assist with the first Franchisee stores’ openings in Albuquerque; Franchisor’s employees and attorneys offered advice and guidance to the Franchisee over the telephone; and Franchisor distributes manuals prepared by its employees and reviewed by its attorneys detailing operational guidelines.

Some courts have suggested that this type of interrelation of operations, by itself, will not result in franchisor and franchisee classification as a single employer. These courts observe that many franchisors exhibit concern over conformity between restaurant locations, and franchisors involvement in setting operational standards generally will be insufficient to satisfy the economic realities test. *See Hunter v. PLB Enterprises, Inc.*, CIV. No. 98-0077 JP/JHG (D.N.M. Oct. 18, 2000).

Scenario 2

Franchisor mandates Franchisee use certain POS and payroll systems. Franchisee implements the required POS and payroll systems with various modifications regarding wage & hour questions for employees to answer at the time they clock out at the end of the day.

Courts find these requirements may suggest a joint employer relationship is present. *See Elsayed v. Family Fare LLC*, 1:18-cv-1045 (M.D.N.C. Aug. 10, 2020). Others have found that franchisor may, consistent with its maintenance of uniform brand standards, require its franchisees

to use its payroll systems without suggesting a joint-employment relationship. *See Gessele v. Jack in the Box, Inc.*, No. 3:14-CV-1092-BR, 2016 WL 7223324, at *13 (D. Or. 2021); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 690 n.6 (D. Md. 2010); *see also Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1030 (9th Cir. 2019) (“McDonald’s involvement in its franchises is central to modern franchising and to the company’s ability to maintain brand standards, but does not represent control over wages, hours, or working conditions [under California law].”)

Scenario 3

Franchisor has a detailed “Guiding Principles” and “Code of Conduct,” created by their employees and attorneys, that they require all franchisees and franchisee employees to follow. In addition, the Franchisor, through their employees and attorneys, assisted in the construction of a website portal used by applicants for employment with Franchisees. Finally, the Franchisor’s attorney prepared a statement regarding unionization that was made available to all Franchisees to use in their onboarding packet.

Courts will permit complaints to survive motions to dismiss where policies, created by Franchisors and their attorneys, may impact the day-to-day employee relationship. *See Shupe v. DBJ Enters. LLC*, NO. 1:14-CV-308, 2015 WL 790451, at *4 & n.2 (M.D.N.C. Feb. 25, 2015) (noting that facts might later show an insufficient relationship but denying franchisor’s motion to dismiss because the plaintiff had alleged “significant control over day-to-day operations through the ‘Guiding Principles’ and ‘Code of Conduct’ that they required all franchisees and franchisee employees to follow”).

However, other courts see policies or systems as standard setting and oversight, concluding this type of activity does not rise to the requisite level of control to constitute joint employer status. *See Patterson v. Domino’s Pizza, LLC*, 333 P.3d 723, 726 (Cal. 2014) (“It is the franchisee who implements the operational standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior.”); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 690 n. 6 (D. Md. 2010) (“Courts evaluating franchise relationship[s] for joint employment have routinely concluded that a franchisor’s expansive control over a franchisee does not create a joint employment relationship.”); *See In re Jimmy John’s*, 2018 WL 3231273, at *15 (finding no power to hire when franchisor did not directly hire employees but provided interview forms, instructed franchisees to hire additional staff, and implemented restrictions on who could be hired); *see also Patterson*, 333 P.3d at 728 (finding no power to hire when the record was clear that Domino’s did not receive applications nor participate in interviews).

IV. Conclusion

Collaboration between franchisor and franchisee counsel is a crucial and unavoidable component of a successful franchise relationship. Attorneys, especially those in franchising, should familiarize themselves with the ethical obligations owed to clients and nonclients in establishing and maintaining the attorney-client relationship provided how closely franchisor and franchisee counsel work together. Franchisor counsel should take extra precaution in communications with unrepresented franchisees, as they may be more prone to rely on the advice of the attorney. Such reliance could create an unintentional attorney-client relationship and trigger the attorney's ethical obligations beyond those already owed to third parties under the Model Rules.

Attorneys owe to their client a duty of loyalty and zealous advocacy, in which they are obligated to act in the client's best interest, maintain confidentiality, and avoid any conflicts of interest. To uphold these duties when working with nonparty counsel, the attorney should always make clear who the attorney represents, explain the limits and scope of the collaborative representation, and obtain the clients' informed consent when appropriate.

Similarly, litigation and dispute resolution situations present heightened ethical questions. Clients may seek dual or joint representation in the franchise context when their interests are aligned for the cost and efficiency benefits. However, these situations are ripe for conflicts of interest if the interests of franchisor and franchisee diverge, such as in disputes relating to litigation strategy or settlement offers. Dual representation also presents the possibility that a court will view franchisor and franchisee as joint employers, thus opening the door to potential future liability.

Counsel for both franchisors and franchisees should navigate the relationship carefully, while keeping their ethical duties top of mind. Transparency and boundary-setting is essential for collaborative counselling to benefit both parties and for counsel to maintain its ethical obligations to its clients and non-clients.

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