American Bar Association
34th Annual Forum on Franchising

JOINT REPRESENTATION OF FRANCHISORS, THEIR OFFICERS, EMPLOYEES AND AFFILIATES IN LITIGATION

Leslie Smith
Foley & Lardner, LLP
Miami, Florida

and

Eric L. Yaffe
Gray Plant Mooty
Washington, D.C.

October 19 – 21, 2011
Baltimore, Maryland

©2011 American Bar Association
TABLE OF CONTENTS

I. INTRODUCTION ..............................................................................................................1

II. DECIDING WHETHER TO OFFER JOINT REPRESENTATION .........................1
    A. Rule 1.13 of the Model Rules .................................................................................1
    B. Rule 1.7 of the Model Rules ....................................................................................2
       1. Affiliated Companies .........................................................................................4
    C. Joint Representation and Privilege .......................................................................5

III. OBTAINING CONSENT TO JOINT REPRESENTATION ..................................6
    A. Discussion with Current Franchisor Client Regarding Joint Representation .........6
    B. Discussion with Franchisor’s Officer or Employee Regarding Joint Representation ..................................................8
    C. Written Agreements ............................................................................................9
       1. Joint Representation Letters and Conflict Waiver Letters ..................................9
       2. Treatment of Privileged Communications .........................................................10
       3. Joint Defense/Common Interest Agreements ....................................................11

IV. COMMUNICATING WITH NON-REPRESENTED PARTIES ............................13

V. JOINT REPRESENTATION DURING DISCOVERY AND AT TRIAL ...............14
    A. Jury Instructions to Avoid Inconsistent Verdicts ..................................................15
    B. Effect of Litigation Strategy ..............................................................................15

VI. JOINT REPRESENTATION IN SETTLEMENT .................................................16
    A. What if One Party Wants to Settle but the Other Does Not? .........................16
    B. Can the Settlements Be Done Separately? ............................................................17
    C. What if the Other Party Will Only Resolve Globally? ........................................18
Joint Representation Of Franchisors, Their Officers, Employees And Affiliates In Litigation

I. INTRODUCTION

When franchisees sue franchisors, they often name the franchisor's officers, employees, and affiliates as co-defendants. In these situations, counsel representing the franchisor must determine, in consultation with the franchisor client, whether to jointly represent the franchisor and other named defendants. There are a number of practical, legal, and ethical issues for counsel to consider. As a practical matter, joint representations are generally more efficient and cost-effective than representations of the defendants by multiple counsel. On the other hand, depending upon the interests of the various defendants, joint representations can cause legal and ethical problems for the franchisor client and its counsel. This paper discusses the competing practical, legal and ethical issues that all counsel involved in potential joint representations must consider. It also discusses the tools that counsel may utilize to protect their clients, both in joint representations and representations of the franchisor when others are representing officers, employees and affiliates.

II. DECIDING WHETHER TO OFFER JOINT REPRESENTATION

Franchisor counsel often represent affiliated companies and officers and employees in litigation. Although in some instances the parties' interests may clearly be aligned and joint representation will help rather than harm them, nevertheless it is important at the outset for counsel to consider whether joint representation is advisable. This will depend upon a number of factors, including whether the parties' interests, even if currently aligned, could diverge in the future, whether the parties may have different interests should settlement negotiations occur, and whether counsel can provide competent representation to all of the parties. In considering a multiple representation engagement, counsel should carefully review the ABA Model Rules of Professional Conduct, the Canons under the Code of Professional Responsibility, and variations of the professional standards in the local jurisdiction involved. There is significant variation among jurisdictions in the standards governing conflicts of interest; however, since the ABA Model Rules have been adopted, in varying degrees, by virtually all jurisdictions, we discuss those rules here.

A. Rule 1.13 of the Model Rules

Rule 1.13(2)(g) of the Model Rules states: “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.”

---

1 The authors wish to acknowledge the able assistance in the preparation of this paper provided by Dineo Mpela-Thompson and Mai Der Yang of Foley & Lardner.

2 Forty-nine states, the District of Columbia, and the Virgin Islands have adopted the Model Rules, often with significant modifications. California has its own set of unique professional rules which differs significantly from the ABA rules in structure and context.
Counsel does not, by representing the franchisor, automatically have an attorney-client relationship with the franchisor's officers, directors, shareholders, or other third parties affiliated with the franchisor. Rather, "[a]n attorney employed by a corporation owes his allegiance to the corporate entity and not to a stockholder, director, officer, employee or other parties connected with the corporation."³ Accordingly, unless it is otherwise made clear that franchisor counsel is representing officers, directors, or employees, the presumption is that counsel is representing the franchisor's interests, not the individuals' interests, in any communications with them.⁴ Rule 1.13, however, makes reference to Rule 1.7, which provides counsel with guidance concerning whether and when it may be advisable to represent multiple parties.

B. Rule 1.7 of the Model Rules

ABA Model Rule 1.7 states:

Rule 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client 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 in the same litigation or other proceeding before a tribunal; and

---


⁴ See, e.g., United States v. International Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997). A corporate officer or employee has the burden of showing that communications with counsel were intended to be personal and should be protected by the attorney-client privilege. There are a number of factors, often referred to as the "Bevill factors," that are often considered by courts in determining whether an employee communicated with an attorney in an individual capacity rather than in a capacity as an officer or employee of the corporation. Under the Bevill test, employees must first show that they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that they made it clear to counsel that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must show that counsel communicated with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. Fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company. See In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986).
(4) each affected client gives informed consent, confirmed in writing.

Comment 23 to Rule 1.7, entitled “Conflicts in Litigation” sets forth important considerations for counsel in weighing whether to represent multiple parties as co-defendants: “...simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.”

In franchise cases there may be occasions when the franchisor’s and co-defendant’s interests are plainly adverse. For example, an officer of the franchisor may have taken action against a franchisee that was not authorized by the franchisor and was contrary to its internal policies. Thereafter, when the franchisee sues both the franchisor and officer, the franchisor may need to disassociate itself from the officer’s actions, and may even consider bringing a cross-claim against the officer. In the circumstances, it would be difficult, if not impossible, for counsel to represent both the franchisor and the officer. Counsel has a duty of loyalty to each client, and cannot be in a position where, in the same matter, she is taking contrary positions on behalf of different clients: “The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively.” In addition, under Rule 1.7(b)(3), an attorney cannot represent multiple parties if one of them is asserting a claim against another in the same litigation.

Direct adversity is not the only reason a lawyer may not be able to represent multiple parties in litigation. Under Section (a)(2) of Rule 1.7, counsel should not represent multiple parties if there is a “significant risk” that the representation of one client will be materially limited by the lawyer’s responsibilities to one or more other clients. Assume, for example, that a franchisor and franchisor’s officer have been sued by a franchisee who alleges that the franchisor, through its officer, engaged in criminal fraud by extracting monies from the franchisee to which it was not entitled. The franchisor and officer agree that the officer never engaged in the alleged activity, and the positions of the two parties are aligned. Nevertheless, at some point the officer may be deposed to testify. While the franchisor would like the officer to explain the events as part of the defense strategy, the officer may wish to assert his right against self-incrimination and not testify. It may be difficult for franchisor counsel to represent both the franchisor and officer effectively in these circumstances.

Under Rule 1.7(b), even if a conflict of interest exists, the lawyer may still represent multiple parties if the multiple representations are not prohibited by law, the lawyer believes she can represent all parties competently, and the lawyer obtains the informed consent of all affected parties in writing. Issues concerning client consent are addressed in Section III.C., below.

As a general matter, in determining whether to represent not only the franchisor but also co-defendants in a matter, counsel should consider, among other things, whether counsel:

---

5 Model Rule 1.7, Comment 6.
1. will end up using confidences obtained from one client against another;

2. will be better off representing the interests of one client rather than multiple clients who may have differing interests;

3. could be disqualified later if the clients represented end up having adverse interests;

4. should obtain separate counsel for individual officers and employees to help distance them from the franchisor in a manner that may prove beneficial to the franchisor in the litigation;

5. should jointly represent the parties to significantly lessen the cost to the franchisor and enable the clients to more effectively develop a coordinated strategy and share information; and

6. should jointly represent the parties so as not to create any concerns on the part of the individuals who would be separately represented that they are being isolated from and not supported by the franchisor.

1. Affiliated Companies

Attorney-client privilege in connection with a parent/affiliate representation can be particularly troublesome. For example, if one of the affiliates were to become involved in a lawsuit, information shared between the parent and affiliate through their attorneys may not be considered a confidential communication subject to the attorney-client privilege. Several cases stand for the proposition that the privilege is not waived by communications that extend throughout a corporate structure encompassing a parent corporation, subsidiaries and affiliates. On the other hand, a case in the District of Columbia came to the opposite conclusion, finding there to be a sufficient adversity of interests between the parent and subsidiary/affiliate to destroy the privilege. In a footnote, the court observed, "This is not to say that privileged documents may not be exchanged between a parent and a subsidiary. However, the cases that have discussed such communications are careful to note that the privilege is only preserved when the parent and the subsidiary have a strong identity of interests."

Additionally, when a subsidiary is sold to a new owner, courts have held that both the prior parent and the current owner are entitled to the entire file from the period of dual representation. One Third Circuit case, however, has held that parent corporations only have to produce documents to the extent that the parents and subsidiaries were jointly represented by the same attorneys on a matter of common interest that was the subject matter of those documents. The conclusion from these cases is that if an

---


8 Id. at 252 n. 7.


10 In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007).
affiliate were ever sold, there could be implications for documents created by in-house counsel or outside counsel previously subject to attorney-client privilege, especially if the joint representation is not adequately limited.

Similarly, if the affiliates were ever to undergo voluntary or involuntary bankruptcy, the bankruptcy trustee could also waive the privilege over the objection of the former parent if the entities had previously been jointly represented by the same in-house counsel. ¹¹

Accordingly, franchisor counsel should always be careful in considering whether to take on the representation of an affiliated company in litigation. In many instances, the parties’ interests will be fully aligned and the franchisor and affiliated company will be defending against a common foe. There will be substantial efficiencies in a joint representation. Nevertheless, it is important that counsel ensure that there is no adversity of interest between the franchisor and affiliate, and that counsel fully understand the nature of the relationship between the franchisor and affiliate, before agreeing to take on the representation: “By taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to separate counsel on matters in which subsidiaries are adverse to the parent . . . counsel can maintain sufficient control over the parent’s privileged communications.” ¹²

C. Joint Representation and Privilege

A lawyer who represents multiple clients in the same case owes each client a duty of loyalty, competency and confidentiality. The attorney-client privilege protects the confidential communications between each client and counsel, affording free and open communications between the client and counsel during the course of the representation. When a lawyer represents multiple clients, a joint client or common interest privilege ensues. The attorney-client privilege is not waived by the sharing of a privileged communication among persons who have a common legal interest. ¹³

Are there any confidences among joint clients represented by the same counsel? Courts have determined that the information shared among joint clients is not considered privileged and confidential if the parties eventually enter into litigation against one another. In Simpson v. Motorist Mut. Ins. Co., ¹⁴ for example, an assignee of an insured and an insurance company had a common interest and one attorney. The assignee was permitted to use the communications between the insured and the attorney in an action against the insurance company; the statements made by the parties to the attorney were not deemed to be privileged in the later litigation. ¹⁵ Thus, clients may utilize and have


¹² In re Teleglobe Communications Corp., 493 F.3d at 374.

¹³ See Moore’s Federal Practice – Civil § 808.05 (2011).

¹⁴ 494 F.2d 850 (7th Cir.), cert. denied, 419 U.S. 901 (1974).

¹⁵ See also, e.g, Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Group, 285 B.R. 601, 649 (D. Del. 2002) (“Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences . . . will remain secret from each other, and those confidential communication[s] are not within the privilege in subsequent adverse proceedings between the co-clients”).
equal access to the information if they have adversarial positions; they cannot, for example, preclude the testimony of a joint client on an issue that they shared before suit was filed.

The mere fact, however, that an attorney represents multiple clients who end up in litigation against each other does not mean that the attorney-client privilege is waived. If the matters on which the attorney represents the clients are different and the clients do not share a common interest, then the clients’ communications with the attorney are protected. In Eureka Inv. Corp, N.V. v. Chicago Title Ins. Co., 10 a client communicated with an attorney concerning potential litigation with another client of the same attorney. The other client sought to use the communication between the client and the attorney in later litigation. The court found that the parties did not have a common interest in the matter concerning the communication and that, thus, the conversation was privileged and protected.

As the Eureka case shows, however, joint representation can be used as a sword to pierce the attorney-client privilege in later litigation between the parties. Accordingly, counsel must be vigilant in making clear who she is and is not representing in litigation and non-litigation matters. Courts will look at a number of factors, including engagement letters, fee arrangements, and communications, to determine whether an attorney-client relationship exists. At times, the issue is one of when rather than whether the attorney-client relationship existed. 17

III. OBTAINING CONSENT TO JOINT REPRESENTATION

Once counsel has determined that joint representation may be permissible, counsel must next obtain the consent of both clients. In addition to discussing the advantages of joint representation, it is important that the possible disadvantages of joint representation also be fully explained so that an informed decision can be made. Although these possible disadvantages exist, the franchisor may still prefer joint representation because of the benefits of having more control over the course of the litigation and the reduction in legal fees. Likewise, the franchisor’s officer or employee may still prefer joint representation because of the perceived benefits of being aligned with the franchisor and not shouldering the legal expenses. With Model Rules 1.7 and 1.13 as guides, a frank discussion with the franchisor’s representative and its officer or employee can ensure that counsel safely navigates the potentially turbulent waters of joint representation.

A. Discussion with Current Franchisor Client Regarding Joint Representation

When a franchisor finds itself, along with one of its officers or employees as defendants or investigative targets, one of the first questions in-house counsel often asks its outside counsel is, “Can you represent both of us?” While the natural response may be, “Yes, of course,” the more reasoned response is “Let’s discuss the benefits and

10 743 F.2d 932 (D.C. Cir. 1984).
17 See In re Colocotronis Tanker Sec. Litig., 449 F. Supp. 828 (S.D.N.Y. 1978) (where there was no evidence that the same attorneys represented the various participant banks prior to the work-out period, no attorney-client relationship would be implied for that period based on the joint representation in the work out stage).
drawbacks of joint representation before reaching a decision." Due to the complexity of
the potential issues involved in representing a franchisor and its officer or employee, it is
important that the discussion with the franchisor is thorough. Having an in-depth
discussion with the franchisor regarding the prospective pitfalls of joint representation
will help preserve the relationship by setting the expectations for the representation.
Additionally, a thorough discussion will assist in minimizing the risk of ethical violations
stemming from the joint representation.

The discussion with the franchisor should be documented as required by Rule
1.7(b)(4). Confirming the franchisor's informed consent in writing, in either the joint
representation or waiver letter, will establish that consent was indeed given should an
issue arise regarding whether consent to joint representation was ever obtained. When
discussing the joint representation with the franchisor, several topics should be
addressed.

First, counsel should review the franchisor's bylaws and determine whether the
franchisor is permitted to engage in joint representation with its officers or employees
and whether certain procedures must be followed if joint representation is permitted.
Counsel should also confirm whether joint representation must be approved and by
whom it must be approved. Approval may need to be obtained from the Board of
Directors, in which case, counsel may have to assist the franchisor in obtaining board
approval of the joint representation before proceeding.

Second, counsel's role in the joint representation should be explained to the
franchisor. This discussion should entail explaining counsel's duty of loyalty and
independent judgment to both the franchisor and its officer or employee, the effect
potential conflicts may have on that duty, and how that is balanced by the advantages of
the multiple representation. Counsel should explain that counsel will not be able to keep
in confidence from the officer or employee the work counsel is performing for the
franchisor on the matter involved in the joint representation. For example, if counsel
receives information from the franchisor which counsel believes the officer or employee
should have in order to make an informed decision regarding an issue, counsel will be
free to share that information with the officer or employee, and vice versa.

Counsel should also explain that they may have to withdraw from representing
both the franchisor and its officer or employee if a conflict arises. Although no conflicts
may exist at the present time, conflicts may arise as the case progresses. Should
counsel have to withdraw, this will likely result in additional legal fees, which should also
be explained to the franchisor.

Third, counsel should discuss with the franchisor who will bear the legal fees
and costs of the joint representation. The ethics rules permit third parties to pay legal
fees; however, the fee arrangements must be disclosed, approved by the client, and
cannot compromise counsel's independent professional judgment or the attorney-client
relationship. Often, it is the franchisor that pays the legal fees and costs of the joint
representation. Whether payment by the franchisor will extend to cover any adverse

\footnote{See Model Rule 1.9 (prohibiting a lawyer from representing a client in the same matter substantially
related matter in which the client's interests are materially adverse to the interests of the former client,
unless the former client gives informed consent in writing).}

\footnote{See Model Rule 1.8.}
judgment against the officer or employee should be discussed as well. Counsel should also review any indemnification agreements to learn the terms to which the franchisor may have agreed, and should review applicable state laws to see if they impose any relevant restrictions on indemnification. For example, section 8.75 of the Illinois Business Corporation Act allows a corporation to indemnify anyone named in an action by reason of his or her being a director or officer of a corporation, with the exception of derivative actions.\[21\]

B. Discussion with Franchisor's Officer or Employee Regarding Joint Representation

If after a thorough discussion with the franchisor, counsel is asked to represent both the franchisor and its officer or employee, counsel must undertake a similarly in-depth discussion with the officer or employee. Informed consent must also be obtained from the officer or employee of the franchisor that is being jointly represented. Counsel must discuss in detail with the officer or employee the scope and nature of the representation and what the officer or employee can expect from counsel. This will help to clarify the officer's or employee's role and his or her expectations of counsel and the joint representation.

It is important that counsel explain that conflicts may arise as the case progresses which may require counsel to withdraw from representing either one or both the franchisor and the officer or employee. If the intention is for counsel to continue representing the franchisor after a conflict arises, then this must be discussed with the officer or employee and written consent must be obtained from all the parties involved. Counsel should also explain to the officer or employee that joint representation may restrict or limit his or her claims if the officer or employee agrees not to take a position that conflicts with the franchisor's position. Illustrations of possible limits on the officer's or employee's claims due to a conflict with the franchisor's position may be helpful when discussing this so that the officer or employee has an understanding of the possibilities. The officer or employee should also be made aware of the possibility that there may be a disruption in time and additional costs should there be a need for one party or both parties to obtain separate counsel after joint representation has begun.

Counsel must also discuss with the officer or employee how confidential information will be handled during the joint representation. The corporation and the officer/employee alike should be informed that although prior communications between the corporation's counsel and its officer or employee are privileged, once dual representation commences, the privilege belongs to both.

Additionally, counsel should explain to the officer or employee who will bear the legal fees and costs of the joint representation. As discussed above, Model Rule 1.8 requires that counsel obtain informed consent from the client if a third party, such as the franchisor, is paying the legal fees and costs associated with representing the officer or employee. If the franchisor's payment undertaking will not extend to paying an adverse judgment against the officer or employee, that should likewise be disclosed and

---

20 If the franchisor maintains Directors' and Officers' liability coverage, the insurer should be placed on notice at the earliest possible date so that a determination of coverage can be obtained.

21 805 ILCS 5/8.75.
discussed. As a result, counsel should describe their ethical obligations to the officer or employee if the franchisor is going to bear the expense of the joint representation. Counsel should explain that the franchisor’s payment of the legal fees will not interfere with counsel’s independent professional judgment or with the attorney-client relationship between counsel and the officer or employee.

C. Written Agreements

Having a written joint representation agreement and conflict waiver with the franchisor and the officer or employee is vitally important. Model Rule 1.7(b)(4) requires that each client affected by the joint representation give informed consent in writing. Moreover, it is prudent to confirm client consent to joint representation in writing given that the burden will be on counsel to establish that consent was given should issues arise concerning the joint representation.

1. Joint Representation and Conflict Waiver Letters

The joint representation conflict waiver letter to the franchisor and its officer or employee should memorialize the discussion counsel had with each party regarding the joint representation. The letter should confirm that the parties are waiving any conflict and giving informed consent to the joint representation. The letter should also state that if any conflicts arise during the progression of the litigation, counsel may need to withdraw from representing either one or both of the clients. The letter should state that if an unforeseen conflict develops during the course of the litigation, one client (typically the officer or employee) consents to counsel withdrawing from representation and consents to counsel’s continued representation of the other client (typically the franchisor).

Furthermore, the letter should include a discussion of the attorney-client privilege and how it works in a joint representation, explaining that counsel may disclose confidential information communicated between counsel and the officer or employee to the franchisor and vice versa. Counsel should also reiterate in the letter that although communications between counsel and the officer or counsel and the employee are privileged, they may be shared with the other jointly represented party. The letter should further state that the officer or employee agrees not to waive the privilege intentionally without first consulting with counsel and obtaining written consent and not to take any actions that would disqualify counsel from jointly representing the franchisor and the officer or employee.

---

22 While most franchisors maintain Directors’ and Officers’ Liability insurance coverage that may respond to a judgment, these policies frequently contain exclusions for intentional acts such as fraud, and counsel should fully explain and document what payment obligations the franchisor or its insurer will undertake.

23 The corporation and its officer or employee may wish to agree that as between them, certain confidential communications, such as communications between counsel and the corporation related to the corporation’s financial information, will not be shared by counsel.

24 See sample Joint Representation and Conflict Letter, attached as Appendix A.
2. Treatment of Privileged Communications

Not surprisingly, counsel representing multiple clients in a franchise dispute will likely face a number of issues and dilemmas surrounding attorney-client and work product privileges. The Model Rules require that a lawyer not reveal information pertaining to the representation of the client unless the client gives informed consent. This rule is underscored by the comment to this rule, which explains how informed consent reinforces the trust that is the crux of the attorney-client relationship by encouraging frank discussion between the attorney and client. However, counsel's duty to the franchisor necessarily requires revealing detrimental information divulged by franchisor's officer or employee so that the franchisor can undertake an investigation, and enforce any disciplinary actions even though this will obviously have an adverse impact on the officer or employee. What this ultimately means is that counsel risks having to withdraw from a joint representation — along with the added costs that are likely to follow the withdrawal — where the privilege rights of each client actually conflict. Many of the attorney-client privilege issues that arise within a joint representation can be resolved using joint representation agreements. Even so, counsel taking on multiple representation duties should be aware of potential privilege hazards to ensure that the joint representation agreement is not breached.

Once counsel has taken on the representation of a franchisor as well as the franchisor's officer or employee, it is most prudent that counsel map out an agreement that outlines: 1) whether confidential information will be shared and, if so, what type; 2) who controls the privilege regarding confidential information; 3) how the attorney-client privilege will function in the event a dispute arises between the clients; and 4) whether counsel will continue to represent the franchisor even if a conflict develops between the franchisor and the individual officers. A joint representation agreement may provide that any communications made by one client can be shared with the other. This would clearly mitigate the dilemma faced by counsel when a privilege conflict surfaces.

On the other hand, counsel's duty to exercise independent judgment for each client may require the attorney to advise either one or all clients not to waive attorney-client privilege at all. In this regard, a joint representation agreement can be used to maintain the privilege where each client has agreed in advance not to waive attorney-client and/or work product privilege throughout the course of the lawsuit.

As alluded to earlier, without such an agreement a privilege conflict much like the hypothetical case scenario outlined above will result in counsel having to withdraw from the joint representation altogether if one client refuses to allow counsel to disclose

---


28 Id. at 49.
information that is essential to a co-client’s representation. The privilege may be retained if both the individual officer or employee and the franchisor acquire separate counsel. There would be several downsides to this, however: 1) the litigation cost savings that make a joint representation ideal are lost to the clients; 2) the initial counsel could be placed in the awkward spot of being called as a witness in a later lawsuit by the franchisor against its officer or employee; and 3) the financial loss due to counsel’s failure to retain the current matter, as well as the risk of never being retained again by either client -- especially the franchisor. Moreover, note that in some jurisdictions courts have required attorneys to disgorge all legal fees for any work that preceded a withdrawal. Thus, it is in both the clients’ and counsel’s best interest to engage in a joint representation agreement that most diligently outlines how the joint representation will operate should privilege disputes, among other conflicts, arise.

3. Joint Defense/Common Interest Agreements

Typically, disclosure of an attorney-client confidence to a third party waives the attorney-client privilege. If, however, parties enter into a “Joint Defense” or “Common Interest” agreement, then the disclosure of confidences among parties to the agreement will not waive the privilege. Under these arrangements, multiple clients facing a common opponent in litigation or an investigation have separate rather than identical counsel. The parties agree, in order to share information and mount a joint defense, to maintain the confidentiality of all information exchanged. In general, the privilege can be asserted if: 1) the communications were made in the course of a joint defense/common interest effort; 2) the communications were designed to further the effort; and 3) the privilege has not been waived.

The joint defense privilege has several tentacles of which counsel must be aware. For example, communications among joint defense clients or defendants without counsel present are generally not protected by the privilege. Accordingly, any such communications can be the subject of examination by opposing counsel in a deposition or at trial. Additionally, the common interest among the clients must be legal as opposed to purely commercial in nature. Thus, if the clients merely discuss the prospect of litigation, or other information of a business nature that does not concern legal strategy, the shared communications will not be deemed confidential and protected.

A joint defense agreement can be oral or in writing. Generally, it is preferable for the agreement to be in writing, so that any misunderstandings concerning the nature and scope of the agreement can be avoided. Typical provisions in a joint defense agreement will include, among other things, a statement that the parties have common interests or issues; a description of the subject matter of the investigation or case and that the agreement will cover any related matter; the identification of the information (such as documents, communications, and other materials) to be shared; a provision under which

---

29 See Model Rule 1.7 cmt. 31.

30 See, e.g., Hendry v. Pellard, 73 F.3d 397 (D.C. Cir. 1996).

31 In re Bevill, Bresler & Shulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986).


the parties agree that no shared information will be revealed to any third party without
the prior consent of all parties to the agreement; a provision that if a party is subpoenaed
or otherwise demanded to produce information subject to the agreement, it will
immediately notify the other parties and their attorneys; a provision that any party may
withdraw from the agreement provided that it returns all materials and documents
obtained under the agreement; a provision that any party who settles will immediately
notify the other parties and withdraw from the agreement; an understanding that the
attorneys for the parties may still orally examine other parties to the agreement as
necessary during the course of the litigation; a provision that any breach of the joint
defense agreement will cause irreparable harm for which there is no adequate remedy at
law; and a clause stating that any amendment or modification to the agreement must be
in writing and agreed to by all parties.\footnote{See sample Joint Defense Agreement, attached as Appendix B.}

There are a number of advantages and disadvantages for franchisor counsel to
consider in determining whether to enter into a Joint Defense Agreement. Through the
sharing of information with others, counsel can obtain a better understanding of the
plaintiff's case and theory and thereby put forward a more robust defense for the client.
Counsel can develop -- with others in the joint defense group -- a common and
potentially more coherent legal strategy. Finally, significant cost savings can occur
through the joint defense arrangement. The sharing of information can enable counsel
to reduce investigation costs and possibly research and other costs that would likely be
incurred absent the joint defense arrangement.

On the other hand, there is always the risk that the confidential communications
shared will be used against counsel's client at a later point in time. Since there is no
obligation for the attorneys or their clients to share information, some clients may use the
arrangement to learn facts helpful to their case while withholding information from other
participants in the joint defense. In addition, privileged information or documents may
be inadvertently disclosed to the plaintiff or third parties.

Parties, for any number of reasons, may choose to withdraw from the joint
defense arrangement. They are generally required to inform the other parties of their
decision. Unlike a joint representation (where one counsel represents multiple parties),
in Joint Defense Agreements the communications divulged will remain privileged even if
one or more parties withdraw from the Agreement.\footnote{See United States v. Salvagno, 306 F. Supp. 2d 258, 273 (N.D.N.Y. 2004).}

A party who enters into a Joint Defense Agreement, however, may later choose
to waive the privilege for any communications with its own attorney. Thus, a franchisor
officer who has been sued could agree to cooperate with the franchisee as part of a
subsequent settlement even though the cooperation may involve divulging communications made to the joint defense group. But the officer's waiver would not affect the privilege for communications by other members of the joint defense group to his counsel.\footnote{In Re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975).} The joint defense privilege can only be waived if all parties to the
agreement consent.\footnote{In re Grand Jury Subpoena, 902 F.2d 244, 249 (4th Cir. 1990).}
IV. COMMUNICATING WITH NON-REPRESENTED PARTIES

Franchisor counsel may need to address issues with persons in the organization who are not represented by counsel individually. Typically, in-house counsel and higher level executives with whom counsel communicates understand that counsel is representing the organization and not them personally. There may be circumstances, however, in which franchisor counsel must communicate with employees who are or may become parties to the litigation but are not represented by counsel. Indeed, counsel may wish to communicate with these individuals to determine whether it would be prudent to represent them as well as the franchisor. Model Rule of Professional Conduct 4.3 and case law provide guidance on how counsel should approach these situations.

Rule 4.3 states:

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 the rule, a lawyer must tread carefully when communicating with an unrepresented individual. If the individual’s interests are or may be adverse to the client’s, the lawyer cannot give any legal advice to the individual other than advice to secure counsel. There is a distinction, however, between communicating with an unrepresented party whose interests may be adverse to the client’s, and providing legal advice to the person. Counsel often needs to communicate with employees to develop further facts that may be useful to the franchisor client in the investigation or litigation. Case law has developed that provides guidance to counsel who wishes to communicate with unrepresented persons during the course of counsel’s investigation.

In *Upjohn v. United States*, the Internal Revenue Service sought to obtain documents and communications exchanged between the attorneys for Upjohn and Upjohn’s employees during the course of an internal investigation conducted by Upjohn’s attorneys. The IRS contended that the communications were not subject to the attorney-client privilege because the employees were not within the “control group” — individuals who were in a position to control the determination of corporate action in response to the legal advice. Upjohn resisted the IRS and sought to protect as privileged all communications made to counsel by its employees. The Sixth Circuit rejected Upjohn’s argument, finding that the privilege applied only to the control group. The Supreme Court reversed and rejected the control group test, finding that the communications between counsel and the employees were protected by the attorney-client and work product privileges. The Court set forth general guidelines for

determining when the privilege applies to communications with employees: 1) whether the communications were made by corporate employees at the direction of superiors for the purpose of obtaining legal advice; 2) whether the communications contained information necessary for counsel; 3) whether the matters communicated were within the scope of the employee’s corporate duties; 4) whether the employee knew that the communications were for the purpose of the corporation obtaining legal advice; and 5) whether superiors ordered the communications to be kept confidential. id. at 394-396. The Supreme Court determined that counsel for the corporation must often communicate with employees who are not part of the control group yet possess information important for counsel to understand in order to represent its client adequately. 39

Upjohn has led most counsel for corporations to provide a series of warnings, often called “Upjohn warnings,” to unrepresented employees when interviewing them in connection with a corporate investigation. These warnings generally include, at a minimum: 1) a description of the subject matter of the investigation; 2) a statement that the attorney represents the corporation and does not represent the individual; 3) a statement that the attorney-client privilege belongs to the corporate client; and 4) disclosure that the corporation could elect to waive the privilege in the future, and thus the communication could be revealed to third parties, such as the government. These warnings are given to ensure that the employee understands the purpose of the interview and to prevent any confusion about whom the attorney represents. If the warnings were not given, an employee could believe that counsel represents her, and counsel could be disqualified from representing either party if it later turns out that the parties’ interests are adverse. 40

V. JOINT REPRESENTATION DURING DISCOVERY AND AT TRIAL

Occasionally, counsel will undertake a joint representation where the circumstances of the representation change causing a conflict of interest to emerge. Conflicts sometimes arise because counsel fail to learn the truth from their clients before trial, or because new unforeseen testimony arises causing a major shift in the relationship between the clients. Consider the following: after all the necessary disclosures, counsel accepts a joint representation of a corporation and an officer of the corporation with the caveat that they will have to withdraw should an actual conflict of interest arise. As litigation progresses, during discovery the officer reveals an illegal act he committed that is inconsistent both with what the officer revealed at the initial interview with counsel and the corporation’s legal position. At this juncture counsel must assess whether they have a duty to disclose this detrimental information to the corporation. Conversely counsel must assess whether counsel has a duty not to reveal

---

39 See also Shriver v. Baskin-Robbins Ice Cream, 145 F.R.D. 112, 114 (D. Colo. 1992) (memorandum written by a management-level employee based on legal review with the attorney advising the Board as to a litigation matter with a franchisee was protected by the attorney-client privilege).

40 Many courts have concluded that the Upjohn privilege extends to communications which occurred during the course of an individual’s employment with the company, but not to communications with counsel for the former employee in preparation for or during the former employee’s deposition. See, e.g., Infosystems, Inc. v. Coridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000); Peralta v. Cendant Corp., 190 F.R.D. 38, 41 (D. Conn. 1999). Whether the communications between counsel and the former employee are protected may depend, in part, on whether the former employee had responsibility for the matters at issue. See Dubois v. Gradco Sys., 136 F.R.D. 341 (D. Conn. 1991).
the information to the corporation. The provisions of the parties’ joint representation agreement may help counsel address this dilemma.

A. Jury Instructions to Avoid Inconsistent Verdicts

A disadvantage that is often under appreciated at the onset of a joint representation is the possible cloud of guilt by association that may be cast upon either client. If a jury believes that one party, and not the other, is responsible for the alleged misconduct it may still render a verdict that punishes both parties.41 The consequences could, as a result, be more dire for an individual client who, unlike the franchisor, is less likely to have insurance coverage or extensive resources to cover a large verdict.42 Conversely, if a jury believes that only the individual client is responsible for the alleged misconduct, even where the law provides for joint liability, insurance that might otherwise respond to a claim may go unaffected. As a result, when joint representation is undertaken during trial, counsel should be mindful of the need for jury instructions to prevent inconsistent verdicts. Jury instructions that could result in a judgment against the franchisor, but not its officer or employee, or vice-versa, could have significant consequences.43

B. Effect on Litigation Strategy

While the economic efficiencies of joint representation make it almost irresistible, clients may also not realize the significant limitations that joint representation may place on counsel’s zealous advocacy. Namely, counsel may not wish to dwell on any variations in the clients’ conduct that would accent a particular defendant’s impropriety.44 A judge or jury could hold all directors personally liable for a breach of fiduciary duty, even if the malfeasance was only committed by one, just because the directors chose to present a unified front via joint representation and counsel, consequently, could not present the evidence in a way that allowed the court to evaluate each director’s conduct separately.45 Conversely, there may be an advantage of using a blame-shifting defense strategy if defendants choose not to be represented by the same counsel.46 Ultimately, clients’ and counsel’s desire to embark on a joint representation thereby presenting a unified legal position could aggravate the potential limitations on zealous advocacy, confidentiality, and litigation efficiencies.

---

41 “Defending An Alleged Workplace Harasser”, 40 The Brief 44, 45.
42 id.
43 See e.g., Southern Management Corp. v. Taha, 836 A.2d 627 (Md. Ct. App. 2003)(improper jury instructions on theory of respondeat superior led to judgment against corporation but not its employees).
44 See e.g., Krasner v. Moffett, 826 A.2d 277, Part III.A.1.
45 9 Del. L. Rev. 213, 227 (discussing Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)).
46 See e.g., In re Emerging Communications, Inc. Shareholders Litigation, C.A. No. 16415, 2004 WL 1305745 (Del. Ch. 2004).
VI. JOINT REPRESENTATION IN SETTLEMENT

A. What if One Party Wants to Settle but the Other Does Not?

Unfortunately, the Model Rules do not address whether lawyers may continue a multiple representation in cases where clients disagree on an aggregate settlement. General guidance on this issue has been that the lawyer cannot resolve a settlement conflict by continuing to represent some clients, after withdrawing from representing the dissenting clients. Consequently, the general rule requires that an attorney dealing with clients in a settlement dispute who chooses to withdraw should withdraw from representing all the clients. If the attorney, after disagreement, wishes to continue forward with representation, the Restatement provides that she must obtain renewed consent from each client.

One way that lawyers have tried to avoid settlement disputes is to have the clients, when counsel is retained, enter into a pre-settlement agreement where they decide to accept an aggregate settlement offer by majority vote i.e., “Majority Rule Agreements.” However, a key decision on this issue, Tax Authority, Inc. v. Jackson Hewitt, Inc., has held that ethics rules forbid such agreements.

In Tax Authority, a franchise case, franchisees claimed that the franchisor breached their franchise agreements by failing to forward rebates to the franchisees. The franchisees collectively retained counsel to bring a consolidated action against the franchisor. Soon after counsel was retained, the franchisees agreed in advance that a settlement could be agreed to by majority vote. After the suit was filed, the franchisor proposed a settlement offer, which was presented to the franchisees. Animosity grew among a number of the franchisees due to the few opposing the offer. The majority of the franchisees, nevertheless, accepted the settlement. Counsel thereafter moved to withdraw from representing the dissenting franchisees, while the franchisor moved to enforce the settlement agreements against all the franchisees according to the majority rule agreement. The New Jersey Supreme Court affirmed the Court of Appeals’ decision not to enforce the settlement agreement, holding that the agreement violated Model Rule 1.8(g) by denying the franchisees the right to decide whether to accept the settlement.

---


48 Id. at 13 (citing cases).

49 Restatement (Third) of the Law Governing Lawyers § 128 cmt. d(i).

50 Supra, n. 46, at 11.

51 898 A.2d 512 (N.J. 2006).

52 898 A.2d at 515.

53 Model Rule 1.8(g) requires attorneys representing multiple clients not to “participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”
As this decision illustrates, it is imperative that counsel manage clients’ expectations by fully explaining that a settlement offer could require consent from all the clients and that even just one dissenter could block the entire settlement. Counsel is not ethically barred from discussing the advantages and disadvantages of a global settlement, or even going so far as to ask prospective clients tentatively to agree to follow a majority vote so long as the prospective clients understand that they are not legally bound to make such an agreement. In fact, a more ethical option regarding pre-settlement agreements is to have the clients agree in advance to accept a specific total settlement without committing to a particular allocation of the funds. This type of pre-settlement agreement would strengthen a group of franchisees’ overall bargaining power while not running afoul of ethics rules for it is no different from a client giving firm instructions about its bottom line for all considered offers in a negotiation.

B. Can the Settlements Be Done Separately?

An attorney representing multiple clients should expect the opposing party to try to exploit the joint representation by offering a group settlement. It is very common for lawyers to propose an aggregate settlement in hopes of obtaining a more comprehensive resolution of all related claims. Aggregate settlements typically entail an “all or nothing” offer that will only go through if all, or a significant majority, of opposing counsel’s clients in the matter accept the offer. Aggregate settlements may also take a variety of forms. For instance, an aggregate settlement offer could involve a sum of money offered to multiple clients with or without specifying the amount paid to each client. Exactly how the amount of the settlement is apportioned among the claimants is typically of little to no consequence to the offering party. The actual total amount is usually based on an express or implied “matrix” of damages.

Although not inherently unethical, there are ethical implications surrounding aggregate settlements. For example, one risk of aggregate settlements is that an attorney may be inclined to settle a group of as many claims as possible and collect a substantial fee, without dealing with the burden of diligently developing each of the clients’ individual claims. However, settling a group of claims en masse without the consent of each individual client is patently unfair where the attorney benefits from a speedy resolution and payment of fees to the detriment of the clients – some of whom likely suffer a decreased recovery award. This unfairness is the foundation of actions for breach of fiduciary duty and is the force behind Model Rule of Ethics 1.8(g).

55 Hazard and Hodes, The Law of Lawyering, § 12.16.
57 Hazard and Hodes, The Law of Lawyering, § 12.16.
58 ABA Formal Opinion § 1201:166.
59 ABA Formal Opinion § 1201:166, p. 6; fn 8.
C. What if the Other Party Will Only Resolve Globally?

In the event opposing counsel insists on a global settlement, the use of a confidential settlement agreement may be the best tool to achieving settlement without disclosing any specific terms and conditions of the agreed-upon resolution of the claims.

VII. UNIQUE ISSUES ARISING IN INTERNAL AND GOVERNMENT INVESTIGATIONS

Franchisors may occasionally conduct internal investigations to determine whether wrongdoing has occurred within the organization, or may need to respond to a government inquiry or investigation concerning their conduct. In such circumstances, the franchisor must be careful in determining whether its counsel should represent multiple parties.

As a threshold matter, the franchisor should consider whether its usual counsel should represent it in the investigation. Counsel that typically represents the franchisor may have an interest in the outcome of the investigation, and may have given advice in connection with matters bearing on the investigation. The franchisor must have counsel that can exercise independent judgment at all times and thus needs to consider whether to retain new counsel to conduct the investigation.

Regardless of who represents the franchisor, representation issues will arise in any significant investigation. Assume, for example, that counsel represents a quick service restaurant chain. The chain supplies certain products to its franchisees nationwide. An issue arises whether the franchisor supplied sub-standard product to its franchisees, which resulted in an outbreak of illnesses among consumers. The government subpoenas the franchisor for documents, and wishes to interview several of the franchisor’s employees. Some of the employees may have known about the sub-standard product and permitted it to be shipped to the franchisees for sale.

At the outset, counsel for the franchisor may seek to interview the officers and employees in order to obtain information to use in providing advice to the franchisor. If counsel does so, adequate Upjohn warnings should be given. Counsel may learn, through the interviews, that several employees have information but clearly were not involved in any wrongdoing. Nevertheless, these employees will need counsel to guide them through the interview process with the government and generally provide them with advice during the investigation. Franchisor counsel may be reluctant to take on the representation of the employees. Further facts could develop that may create an adverse relationship between the employee and the franchisor. The employees, although not implicated directly in any wrongdoing, may not wish to be interviewed or testify. The franchisor may wish them to do so. In an investigation that may have criminal implications, counsel for the franchisor may wish to take a conservative approach and not represent any of the employees.

On the other hand, obtaining separate counsel for all of the employees could lead to extraordinary expense for the franchisor if it is required under indemnification law (or merely deems it prudent) to pay for the representation of its employees. Thus, franchisor’s counsel may advise the franchisor to seek to obtain one counsel for several employees whose interests appear to be aligned. This would lead to cost savings and efficiencies for the franchisor.
There are other reasons why counsel may seek separate attorneys for individual employees in a government investigation. The government may view the franchisor as trying to obstruct the investigation if everyone is represented by the same attorney. The government will often perceive the multiple representations as a tactic employed by the corporation to ensure that the witnesses’ versions of events are consistent. To avoid any such perception, prudent counsel may wish to talk to the prosecutor and government agents to elicit their views on whether any conflict would exist if multiple persons were represented by the same attorney. The government should know more about its own investigation and strategy than counsel for the corporation, and may be in a position to provide counsel with useful information on the representation issue.

Joint Defense Agreements are common in government investigations. Often, multiple attorneys will represent individuals who are witnesses or targets of the investigation. Moreover, in criminal matters, it is rare that one attorney will represent multiple defendants: “The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.”61 In order for the attorneys to best understand the government’s case, and mount an effective defense, it is often useful for them to work together and share information.

Franchisors and other companies, however, need to think carefully about whether to enter into Joint Defense Agreements. For example, if the company obtains information from an employee pursuant to the Joint Defense Agreement, it may be precluded from divulging the information to the government as part of its cooperation.62 Absent full disclosure, the government may be reluctant to give the company credit for cooperation, which could affect the government’s view of whether to prosecute the company or what sentence the company deserves. Moreover, if the interests of the company and one or more individuals diverge at some point, the company’s counsel could be disqualified due to a conflict of interest.63

VIII. CONCLUSION

The principles concerning joint representation are nuanced. Counsel must thoroughly familiarize themselves with the Model Rules and the ethical rules and case law in the applicable jurisdiction when considering whether to undertake joint representations. They must weigh a variety of factors, including cost, potential conflicts, the nature of the case, settlement issues, and privileges, in determining whether to represent multiple parties. Each case is different, and counsel needs to assess the circumstances of each case carefully to make an appropriate decision concerning joint representation.

61 Comment to Model Rule 1.7.
63 United States v. Henke, 222 F.3d 633 (9th Cir. 2000) (counsel disqualified because of his inability to use confidential information to cross-examine an individual who was part of a joint defense group when he testified at trial).
APPENDIX A

Franchisor Client
100 Main Street
Anytown, USA
10101

And

Franchisor Employee
10 Shady Lane
Anytown, USA
10101

Re: Engagement Letter Agreement

Dear Franchisor Client and Franchisor's Employee:

Thank you for selecting XYZ LLP (the "Firm") to represent Franchisor Client (the "Company") and Franchisor's Employee ("Employee"). We strive to deliver high quality, cost effective legal services and to work in your best interests, subject to our duties of professional responsibility. Please do not hesitate to contact us if you have any concerns. Although we regret the length and formality of this Engagement Letter Agreement ("Agreement"), it is important that we have a clear understanding of our working relationship going forward.

1. Scope of Engagement

This Agreement confirms the terms of this matter. As we discussed, the scope of our engagement will be limited to representation of the Company and the Employee in connection with the defense of the Company and the Employee against the claims of the ABC Franchisee, Inc. (the "Matter"). The Company and the Employee shall be collectively referred to herein as "the Clients."

   a. As we have discussed, one way to proceed with the Matter is for each of you to have separate counsel. There are issues where you may have potential conflicts such as, for example, contribution, indemnification and the desirability of settlement, just to name a few. Nevertheless, you have each indicated that you want us to represent all of you in order to, among other things, reduce legal costs. We do not believe that there are currently any conflicts in your position and, as a result, we do not believe our representation of one of you will be affected by our representation of the other.

   b. If you disagree on issues going forward or if your interests in the litigation should for whatever reason no longer be common, everyone agrees that we may continue to represent the Company in the Matter, and Employee will make arrangements to obtain separate counsel.

   c. You agree that the Finn may disclose and discuss confidential or otherwise privileged information obtained in the course of its representation with each of the Clients being represented by the Finn in the Matter. However, all confidential information from each of the Clients being represented by the Finn in the Matter shall be treated as confidential with respect to any third party, and all communications between the Finn and each of the Clients it represents in the Matter shall be deemed protected from disclosure to
d. third parties by various privileges and immunities as applicable, including, without limitation, the attorney-client privilege and the doctrines of attorney work product, joint defense, and community of interest, or any other protections which would normally exist with respect to any third party.

2. Conflicts of Interest

We have checked our records based on the information the Company and you have provided to us at this time. Our search also included the names of business entities, if any, about which you have informed us of an affiliation that could give rise to significant concerns if we should be involved in matters for other clients directly adverse to such business entities. We have determined that there is no conflict of interest with other Finn clients that prevents us from working on the Matter.

As between the Company and the Employee, we believe that we can accept this representation if each of you consents. We believe this representation will not be compromised by our prior relationship with the Company in litigation matters. "While this Matter is not substantially related to any matter in which our Finn is representing the Company, if during the course of our representation of the Company in this Matter, becomes substantially related to any matter in which our Finn is representing the Company, and if the interests of the Employee become directly adverse to those of the Company in relation to the Matter or to such other matter, then we may withdraw from representing the Employee and may continue to represent the Company in such other matter.

This Agreement creates an attorney/client relationship only between the Firm, the Company and the Employee. Therefore, the Company and the Employee agree that this engagement does not create an attorney/client relationship between the Firm and any business entities with which you are affiliated unless subject to a separate engagement Agreement. The Company and the Employee will not provide the Finn with any confidential information about any of its other Affiliations, unless the Finn represents such Affiliations. The Company and the Employee agree that our representation of them will not create any conflicts of interest in the event that other clients of the Finn are adverse to Affiliations of the Company and the Employee, unless that Affiliation also is represented by the Firm.

3. Advance Waiver of Conflict

a. The Company and the Employee agree that the Finn may represent current or new clients in work directly adverse to the Company and the Employee and may be adverse to business entities with which you are affiliated, provided such work is not substantially related to the Matter and the Finn does not use any of your confidential information in representing such clients. This consent includes our being trial counsel in litigation adverse to you. In addition, the Company and the Employee agree that, even though the Finn represents the Company and the Employee in this Matter, the Firm may represent in the future other parties who are adversely involved in the Matter, or who may later become involved in the Matter, as long as that representation of other clients is substantially unrelated to the Matter. By way of examples only, and assuming such representations are not substantially related to the Matter, we may represent one or more parties in bankruptcy cases that may have interests adverse to the Company and the Employee, or we may represent clients in contract or other business disputes adverse to the Company and the Employee. The Finn agrees that it will not use any of the Company's
and the Employee's confidential information in representing such other clients and, when
needed, we will establish an ethical wall to assure that confidential information is not
exchanged between those working on the Matter and those working for such other clients.

b. Our Firm policy requires that any advance waiver of future conflicts be in
writing, and by signing and returning a copy of this Agreement, the Company and the
Employee agree to this advance waiver.

4. Fees and Billing

The Company agrees our prior engagement letter dated January 1, 2010, will control the
issue of fees and billing. The Company will also compensate the Firm for the fees and expenses the
Firm incurs in connection with its representation of the Employee.

5. Termination of Representation

a. Either one of us may terminate this Agreement at any time for any reason by
written notice. The Firm is subject to applicable rules of professional conduct when
terminating a client engagement. If we terminate the engagement, the Firm will take all
reasonable and practical steps to protect the Company's and the Employee's interests in the
Matter and, at their request, suggest possible new counsel. We will provide new counsel with
any papers the Company and/or the Employee has given us. If permission from the court is
necessary for withdrawal, we will promptly apply for it, and the Company and/or the
Employee, will engage new counsel to represent the Company.

b. Unless previously terminated, our representation of the Company and the
Employee in the Matter will end when we send our final invoice. After the Matter ends, there
might be changes in laws or regulations that might affect the Company's and/or the
Employee's future rights and liabilities, but the Finn does not have an obligation to continue
to advise the Company or the Employee about future legal developments, unless the
Company and/or the Employee engages us to do so.

6. Disposition of Files and Records

a. Following the conclusion of the Matter, we will maintain the confidentiality of any
of the Company's and/or the Employee's confidential information provided us in accordance
with applicable rules of professional conduct. Any documents provided by the Clients, or
provided by a third party, will be returned to the Clients unless the Company and/or the
Employee authorize destruction of them.

b. We will retain our own files pertaining to the Matter, including material prepared
by or for the internal use of our attorneys. These include the Finn's administrative records,
time and expense reports, personnel and staffing materials, credit and accounting records,
internal attorneys' work product (such as drafts, notes, internal memoranda and legal and
factual research), written and electronic communications, pleadings, and investigative
reports. The Firm has internal policies that determine the retention periods for closed
representation files. Therefore, if the Company and/or the Employee do not request return of
this file material, the Finn reserves the right to destroy it at the end of the defined retention
period. Upon the Company's and the Employee's reasonable request, the Firm will provide
such portions of these file materials to the Clients as required by the applicable rules of
professional responsibility or other legal requirements. Unless applicable rules of professional responsibility require an earlier return, we may retain such file material pending receipt of payment of any outstanding fees or costs.

Please confirm the Company's and the Employee's approval of this Agreement by signing and returning the enclosed duplicate copy in the envelope provided. If the Company and/or the Employee have any questions, or if this Agreement does not accurately set forth our arrangement, please let me know.

We look forward to working with you on this Matter.

Very truly yours,

By: ___________________
Lawyer

AGREED AND ACCEPTED:

Franchisor Client

(Authorized Signature)

(Title)

(Date)

Franchisor Employee

By: ____________________________
Individually

(Date)
APPENDIX B

PRIVILEGED AND CONFIDENTIAL
JOINT DEFENSE COMMUNICATION

JOINT DEFENSE AND CONFIDENTIALITY AGREEMENT

This Joint Defense Agreement ("Agreement"), by and between the undersigned counsel (individually, "Counsel," collectively, the "Defense Group"), acting for themselves and on behalf of their respective clients, will memorialize the understandings of their Clients concerning the investigation currently being conducted by the United States Attorney's Office.

The Defense Group agrees that their respective Clients share a mutuality of interest in a common defense in connection with the Government Investigation. In this regard, the Defense Group wishes to continue to pursue separate but common interests and avoid any claim or suggestion of waiver of privileges enjoyed by their respective Clients. Accordingly, it is the intention and understanding of the Defense Group that the communications among its members, including the existence of this Agreement, are confidential and protected from disclosure to any third party by the attorney-client, common interest, and work-product privileges (unless disclosure is otherwise compelled by court order or legal compulsion). Nothing in this Agreement shall be construed to affect the separate and independent representation of each Client by his, her or its respective Counsel according to what Counsel believes to be in the Client's best interest.

The undersigned believe that communications among the Defense Group are matters of common interest and concern essential to the effective representation of our respective Clients. Consequently, those disclosures are covered by the joint defense doctrine or the common interest rule recognized in such cases as In re Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244 (4th Cir. 1990); United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989, on remand, 738 F. Supp. 654 (E.D.N.Y. 1990), affd, 924 F.2d 443 (2d Cir. 1991); LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc, 209 F.R.D. 112 (D.Md. 2002); Minebea Co., Ltd. v. Papst, 228 F.R.D. 13 (D.D.C. 2005); Intex Recreation Corp. v. Team Worldwide Corp', 2007 U.S. Dist. LEXIS 2122 (D.D.C. Jan. 5, 2007).
_PRIVILEGED AND CONFIDENTIAL
JOINT DEFENSE COMMUNICATION

No information obtained by any Defense Group member as a result of this Agreement shall be disclosed to any third party without: (a) the express written consent of the Defense Group member who provided the information; or (b) a final order from a court or arbitrator of competent jurisdiction. This limitation shall survive any settlement of any charges or claims against the Client of a Defense Group member, the withdrawal of any Defense Group member from this Agreement, the termination of this Agreement, and/or the termination of the Government Investigation.

Any Counselor Client that is a party to this Agreement may, for whatever reason, choose not to share any particular information with other Counselor Clients. The failure of any Counsel or Client to disclose information to other Counselor Clients shall not in any way affect the validity of the Agreement or the application of its terms.

To serve the mutual interests of the Clients and to provide for a common defense as to all or certain issues, the undersigned agree that any and all of the following "Privileged Joint Defense Material" relating to the Government Investigation, regardless of how disclosed to the Defense Group or to their respective Clients, shall be covered by this Agreement: (a) witness interviews and statements; (b) memoranda of law; (c) briefing and debriefing memoranda and conversations: (d) summaries; (e) transcripts; (f) notes; (g) outlines; (h) tape recordings; (i) transcripts of tape recordings; (j) correspondence; (k) factual analyses and mental impressions; (l) documents or conversations containing plans or theories for mutual, separate or joint defense and representation; and (m) any documents, electronic data or information which would otherwise be protected from disclosure to third parties under any privilege, doctrine or theory. Privileged Joint Defense Material shall not include information that is or later becomes part of the public domain, provided that it does not become part of the public domain in any way contrary to the terms of this Agreement.

Privileged Joint Defense Material may be used only according to this Agreement and only for the purpose of preparing a defense to possible charges or other adverse proceedings arising from the Government Investigation. The Defense Group agrees that the disclosure of Privileged Joint Defense Material among the Defense Group shall not waive any applicable privilege or protection.
The Defense Group and their respective Clients will use their best efforts to ensure that the confidentiality of Privileged Joint Defense Material is maintained at all times, and that no disclosure is made that would result in a waiver or loss of any privilege or protection otherwise available. In particular, neither Counsel nor their Clients will voluntarily disclose Privileged Joint Defense Material received from each other, or the contents thereof, to anyone except their respective Clients, attorneys within their firms or their employees, unless they have first obtained the consent of duly authorized Counsel to the Client from whom the materials were obtained. In addition, if any Client or employee of any Client engages an attorney other than a signatory to this Agreement or a non-attorney consultant to represent him, her or it in connection with the Government Investigation, said attorney or consultant shall acknowledge and confirm in writing that he or she agrees to be bound by the terms of this Agreement by executing this Agreement, or the attached Agreement to be Bound by Joint Defense and Confidentiality Agreement, before any Privileged Joint Defense Material may be shared with that attorney or consultant.

It is expressly understood that nothing contained in this Agreement shall limit the right of any Defense Group member to disclose to third parties, in any fashion such member and his Client sees fit, any documents or information obtained exclusively from that counsel's Client or any information which has been obtained independently by such Counsel.

In the event that any Counselor Client receives a request or demand, by subpoena or otherwise, from any person (including other parties to this Agreement) or a court order that appears to call for the disclosure or production of Privileged Joint Defense Material, such Counselor Client shall, in addition to preserving and invoking any applicable privilege or other protection, immediately notify, unless prohibited by law, the Defense Group members and provide to the Defense Group members copies of any writings or documents, including subpoenas, summonses or other papers, which relate to the attempt. The Defense Group member who received the request to secure or obtain Privileged Joint Defense Material covered by this Agreement shall not voluntarily surrender any Privileged Joint Defense Material (except those originated by such Counselor Client) without providing, to the extent legally permissible, all affected Counsel and Clients a reasonable opportunity to protect their respective interests in an appropriate court.
Prior to the exchange of Privileged Joint Defense Material, the producing party should mark the materials in a prominent manner with a designation such as: "PRIVILEGED AND CONFIDENTIAL -- JOINT DEFENSE MATERIALS." Failure to so designate Privileged Joint Defense Material shall not constitute a waiver by the producing party or any other Counselor Client of any applicable privilege or protection.

The Defense Group agrees on behalf of their Clients not to enter into any settlement or agreement with a third party which would require or result in disclosure of Privileged Joint Defense Material covered by this Agreement.

If any Client ceases to have a common interest sufficient to support a joint defense privilege with the other members of the Defense Group, that Client agrees to promptly notify all other Defense Group members in writing of that fact: but shall continue to protect all communications and information, including Privileged Joint Defense Material, covered by this Agreement. Immediately upon demand by any member of the Defense Group, the Client which ceases to have a common interest sufficient to support a joint defense privilege and his Counsel shall return all Privileged Joint Defense Material and copies thereof.

Any member of the Defense Group may, on behalf of his Client, withdraw from this Agreement at any time by giving written notice to all other members of the Defense Group, in which case this Agreement shall no longer be operative as to the withdrawing Defense Group member or his Client. The withdrawing Defense Group member and his Client shall continue to protect all communications and information, including Privileged Joint Defense Material, covered by this Agreement and disclosed to the withdrawing Defense Group member or his Client prior to the notification of his intent to withdraw. Immediately upon demand by any member of the Defense Group, the withdrawing Defense Group member and his Client shall return all Privileged Joint Defense Material and copies thereof.

This Agreement may be terminated at any time by agreement of the Defense Group members, but the confidentiality and nondisclosure provisions of this Agreement shall survive termination.
Each Defense Group member specifically acknowledges that he or she is representing the interests of that member's Client and not the interest of any other member of the joint defense agreement. Each Defense Group member further acknowledges that any Client may become a witness, whether voluntarily or otherwise, in connection with this matter. In the event that any Client's employee becomes a witness, nothing in this Agreement shall create a conflict of interest so as to require the disqualification of any Counsel from the representation of their respective Clients, based upon the existence of this Agreement or any sharing of Privileged Joint Defense Material. By entering into this Agreement, each Client and their respective Counsel knowingly and intelligently waive any conflict of interest or other objection that might otherwise be available based upon the sharing of information pursuant to this Agreement. In waiving such conflict of interest or other objection, each Client specifically is aware of the fact that this Agreement does not require him or her to share any particular piece of information, and that it will be the option of the Client's Counsel, acting upon the Client's authority, to contribute or withhold any particular information from the other parties to this Agreement.

Disclosure of any communication in violation of this Agreement by a Defense Group member will cause irreparable harm to the other Defense Group members and their Clients for which there is no adequate legal remedy. Each Defense Group member acknowledges that immediate injunctive relief is an appropriate and necessary remedy for violation of this Agreement. This Agreement shall be governed by District of Columbia law.

This Agreement shall continue in effect notwithstanding any conclusion or resolution as to any client of the Government Investigation or any pending or future administrative or judicial proceedings arising from or relating to the Government Investigation. Counsel and their Clients agree that they will continue to be bound by this Agreement following any such conclusion or resolution or following withdrawal from this Agreement. This Agreement shall also continue in effect with respect to any employee of any Client who for any reason ceases to be employed by that Client and who received any Privileged Joint Defense Material prior to the termination of his or her employment.

In the event that any provision or term of this Agreement should be held to be void, voidable or unenforceable, the remaining portions of this Agreement shall remain in full force and effect.
Any waiver in any particular instance of the rights and limitations contained herein shall not be deemed, and is not intended to be a general waiver of any rights or limitations contained herein and shall not operate as a waiver beyond the particular instance.

This Agreement may be modified only in writing signed by all parties. By signing this Agreement, the undersigned Counsel certify that: each is fully authorized to enter into and execute this Agreement on their own behalf and on behalf of their respective Client; each has explained the contents of this Agreement to his respective Client; and that each Counsel and each Client agrees to be bound by the terms of the Agreement and the understandings contained in it.

This Agreement may be signed in counterparts and each signed counterpart shall be deemed an original hereof.

By: ______________________  Date: ____________________

By: ______________________  Date: ____________________

By: ______________________  Date: ____________________
ERIC L. YAFFE

Eric L. Yaffe is the Managing Officer of the Washington, D.C. office of Gray Plant Mooty. Mr. Yaffe is Co-Chair of the firm’s White Collar and Investigations Team and is a member of the firm’s Franchise and Distribution Practice Group. He currently is a member of the District of Columbia Board on Professional Responsibility and serves on the Board’s Rules Committee.

Mr. Yaffe’s practice includes the representation of franchisors in civil litigation in federal and state courts across the country. He has handled lawsuits on behalf of franchisors and distributors involving class actions, contract disputes, trademark and trade dress matters, false and deceptive advertising under the Lanham Act, vicarious liability, tax fraud, tortious interference, defamation, real estate matters, antitrust claims, disclosure violations, employment-related disputes, fraud and misrepresentation, and covenants not to compete. Mr. Yaffe also has represented corporations and individuals in government investigations of alleged criminal and/or civil misconduct involving conflicts of interest, campaign finance violations, false statements, import-export matters, the Foreign Corrupt Practices Act, mortgage fraud, health care fraud (including qui tam actions), obstruction of justice, conspiracy, and ethics violations. Mr. Yaffe previously worked for nine years as a federal prosecutor, first as an Assistant United States Attorney in Washington, D.C., and then as a Trial Attorney with the Public Integrity Section of the U.S. Department of Justice. He has tried more than 50 cases.

Mr. Yaffe received his B.A. in economics and government from Oberlin College in 1981 and his J.D. from the University of Chicago Law School in 1986. He is a member of the bars of the District of Columbia, Massachusetts, and Minnesota.
MARY LESLIE SMITH

Mary Leslie Smith is a partner with Foley & Lardner LLP, a member of the firm’s Distribution & Franchise Practice Group. She is chair of the firm’s Miami, Florida litigation department. Ms. Smith litigates a range of commercial matters at both the trial and appellate levels in both federal and state courts. Her franchising and distribution practice provides clients with counseling and litigation services, from initial negotiations through resolution, including mediation, arbitration and trial. She has represented franchisors in a variety of commercial disputes involving trademarks, trade secrets, covenants not to compete and vicarious liability claims. Ms. Smith has been recognized in the trade press, most recently by her peers as one of Franchise Times Legal Eagles 2011, and the 2010 edition of The International Who’s Who of Franchise Lawyers. Chambers USA: America’s Leading Lawyers for Business also recognized her as one of the top franchise attorneys nationwide (2010 and 2011). Currently, Ms. Smith serves as the Vice-President of the Dade County Bar Association, the largest voluntary bar association in the State of Florida. Ms. Smith is also the co-author of Annual Franchise and Distribution Law Developments 2004 published by the American Bar Association.

Ms. Smith earned her J.D., with honors, from the University of Florida, an M.A. from the London School of Economics, and a B.A., cum laude, from Southern Methodist University.