

# Responding to Discovery and Suggestions on Protecting the Brand

And

# Franchisors responsible for Acts of franchisees an Overview

# Presenters

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- James O. Eiler
- Partner, Kaiser Swindells & Eiler, Long Beach, California
- Litigation Counsel to hotels, spas, resorts and restaurants on their operational, risk and claims management issues, including monitoring outside counsel in other states representing hospitality clients in litigated matters
- B.S. Hotel and Restaurant Administration, University of Nevada, Las Vegas; JD Western State University College of Law

# Responding to Discovery and Brand Protections

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## 1. Introduction

A. Plaintiffs Attorneys Sharing Data and Discovery

B. Sample Cases

1. The Life Saving Equipment Case
2. The Negligent Security Case
3. The Foreign Objects in Food Case
4. The Tripping Hazard Case

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## 2. Discovery

### A. Purpose of Discovery

1. Discovery of relevant facts and evidence in support of contentions of liability and damages;
2. Safeguards against surprise;
3. Narrows issues to be tried;
4. Helps to evaluate a case for settlement and to prepare for trial.

# Responding to Discovery and Brand Protections

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## 2. Discovery

### B. Scope of Discovery

1. Quite broad in most jurisdictions;
2. Limited to “relevant” subject matter;
3. Not Privileged matters;

### C. Fishing Trips are allowed

1. Admissibility at Trial not the test

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## 2. Discovery

### D. Methods of Discovery

#### 1. Written Discovery

#### 2. Depositions

- a. Party or party affiliated witness;
- b. Person Most Qualified—PMQ ;
  - 1. On behalf of the company who is truly most qualified?

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## 2. Discovery

### D. 2. c. Apex Depositions—Corporate Officers

1. Protective Orders;
2. Doctrine not available in all states—Florida;
3. Who is an Apex Member of Corporation?
  - a. Direct decision maker?

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## 2. Discovery

### D. 2. d. Two Part test Re Apex Motions

1. Does the official have “unique or superior knowledge of relevant facts”
2. After a good faith effort to obtain the discovery from other less intrusive means;
  - a. A reasonable indication that the officials deposition is calculated to lead to admissible discovery,
  - b. That less intrusive methods of discovery are insufficient or inadequate



# Responding to Discovery and Brand Protections

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## 3. Protecting the “Brand” by Limiting Discovery

### A. Timely, Proper and Detailed Objections;

1. Watch the “YOU” Definition—  
Who truly is being called upon to respond to the discovery?
2. Attorney Client Work Product—  
Apply to TPA’s and Investigators?

# Responding to Discovery and Brand Protections

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## 3. Protecting the “Brand” by Limiting Discovery

- A. 3. Tailored Objections, not Boilerplate Objections or Cut and Paste Objections;
  
- B. Stipulations regarding Confidential or Trade Secret Information;
  - 1. Don't forget Courts Order
  - 2. Don't forget to retrieve the documents

# Responding to Discovery and Brand Protections

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## 3. Protecting the “Brand” by Limiting Discovery

### C. Protective Orders

1. Don't wait, apply timely
2. Monitor Compliance with documents and depositions;
3. How will the Protective Order work for Trial, Third Parties and Experts?

# Responding to Discovery and Brand Protections

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4. Special Considerations Regarding Discovery Involving Franchise Operations
  - A. Has the Franchisors Tender of Defense been Accepted?
    1. By Carrier or by Franchisee?
  - B. Who is the Franchisor? Are They a Party? Is the Parent Corporation or Affiliated Entity a Party?

# Responding to Discovery and Brand Protections

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## 5. Recommendations to Control Discovery and Help Protect Brand

A. Prepare for both Law Departments and Risk Management detailed Outside Litigation Guidelines that Address Discovery and Brand Protection

B. Designate a “Point Person” to Receive, Review and Assist in Preparation of Discovery Responses

# Responding to Discovery and Brand Protections

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## 5. Recommendations to Control Discovery and Help Protect Brand

C. Outside Counsel Should Prepare Draft Responses with Enough Lead Time to Properly Respond

D. Maintain Bank of Corporate Employees Depositions

E. Maintain a Brief Bank

F. Retrieve All Documents Produced Subject to Protective Order

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## 5. Recommendations to Control Discovery and Help Protect Brand

G. Insurance Defense Counsel Should Be Apprised of Corporate Discovery Requirements to Protect the Brand

H. Obtain Dismissal of Incorrect Entities

I. Be Careful of the “YOU” Definitions

J. Be Mindful of Whomever Executes the Discovery Verifications is Subject to being Deposed

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## 5. Recommendations to Control Discovery and Help Protect Brand

- K. If Franchisee is sued and Discovery Served on Franchisor, The Franchisor Counsel Should Prepare Responses or Monitor What the Franchisee Attorney prepares on Behalf of Franchisor.



# Franchisor Liability For Acts of Franchisee-An Overview

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1. Litigation Involving the Franchise Agreement
  - A. Forum Selection Clauses-An Update
  - B. Choice of Law Clauses-An Update

# Franchisor Liability For Acts of Franchisee-An Overview

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2. Litigation Involving the Franchisee  
Wherein the Franchisor is Brought in as  
Defendant
  - A. Vicarious Liability to Third Parties
    1. Actual Agency-An Update
      - a. Cumpston v McShane-  
Delaware
      - b. Lawson v Schmitt Boulder Hill,  
Inc-Illinois

# Franchisor Liability For Acts of Franchisee-An Overview

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2. Litigation Involving the Franchisee  
Wherein the Franchisor is Brought in as  
Defendant
  - A. Vicarious Liability to Third Parties
    2. Apparent Agency-An Update
      - a. Reasonable Belief—Simons  
v Starwood Hotels & Resorts  
Worldwide, Inc-New York

# Franchisor Liability For Acts of Franchisee-An Overview

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## 2. Litigation Involving the Franchisee Wherein the Franchisor is Brought in as Defendant

### B. Tenders of Defense to Franchisee and or Carrier on Behalf of Franchisor

1. Who is the franchisor or Party  
Being Sued?

2. Is the Franchisor an Additional Named  
Insured?

# Franchisor Liability For Acts of Franchisee-An Overview

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2. Litigation Involving the Franchisee Wherein the Franchisor is Brought in as Defendant
  - C. Does The Franchisor Insurance Cover it for Franchise Operations
  - D. Does the Express Indemnity Obligations Under the Franchise Agreement Give Rise to Coverage Under Franchisee Policy?
  - E. Does the Franchise Agreement Require Franchisee to Purchase the Correct Insurance that Covers all Operations?

# Franchisor Liability For Acts of Franchisee-An Overview

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Conclusion-Questions and  
Answers

Thank You