

Retaining Separate Counsel for a Hospitality Employee and Potential Criminal Charges

Presenters

Banks Brown



- Banks Brown is a partner in McDermott Will & Emery LLP, where he serves as head of the New York Trial Practice, and also serves as the General Counsel for the American Hotel & Lodging Association and the Hotel Association of New York City, Inc.
- He is the 2006 recipient of the Anthony G. Marshall Award for Pioneering and Continuous Contribution to Hospitality Law and the 2010 Recipient of Distinguished Service Award by the Academy of Hospitality Industry Attorneys .
- He is co-author of a recognized treatise on hospitality law entitled "Understanding Hospitality Law." Banks graduated from Harvard College in 1974 and from the University of Virginia's School of Law in 1977. He was admitted to Bar of the State of New York in 1977.

Richard Keating



- Richard J. Keating, Jr. is a partner at Swanson, Martin & Bell, LLP. His practice focuses on tort litigation, premises liability defense, general liability matters, criminal defense, incident investigations, security issues, and wage garnishment claims.
- Rich represents restaurants, concert venues, amusement venues, health clubs and retail businesses. In addition, Rich represents several hospitals and healthcare entities. Prior to joining Swanson, Martin & Bell, LLP, Rich was a criminal prosecutor for the Cook County State's Attorney's Office for nine years.
- Rich routinely combines his litigation and criminal prosecution experience with his understanding of corporate business objectives to advise his hospitality clients about various potential and existing legal concerns.

James O. Eiler



- Partner, Kaiser Swindells & Eiler
- Hospitality Litigation Attorney. National & Regional Monitoring Counsel for Hotels, Restaurants and Resorts.
- Presenter and Active Member of Several Hospitality Industry Associations including Global Alliance of Hospitality Attorneys, AH&LA; CH&LA and Academy of Hospitality Industry Attorneys.

HOSPITALITY EMPLOYEES NEED, OR ARE ENTITLED TO, SEPARATE REPRESENTATION

Types of Situations

- Occurs more frequently than one would think
- Not seeking to make employer insurer for all employees' actions on the job
- Analysis of the criminal case and the expected civil case
- Typical scenarios
- Security guards charged with battery
- Drivers charged with traffic citations or involved in accidents
- Dram shop cases

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Course and Scope Analysis

- Can vary by state
- Usually based on agency principles
- Agency principles also have a stated exception
- This analysis will require a factual investigation and determination quickly

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Course and Scope Analysis (continued)

- The fall back position is normally that employee's crime is outside the course and scope of employment, and therefore not authorized by the employer. In those situations, the employer will normally not get involved in a criminal defense
- Some easy examples of actions that would fall outside the scope and course where the employer would not provide counsel include
- In these situations, the decision on whether the employee is entitled to criminal representation provided by his or her employer is easy. The only involvement the employer should have is to cooperate fully with the police and prosecutor

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Course and Scope Analysis (continued)

- Unfortunately, what is considered within the course and scope of employment is not always clear-cut
- Often times, the determination turns on the facts of the case
- Course and scope determination will have an impact on how any criminal charges against your employees are handled
- If the employer is likely to be named in a civil suit down the road, this question will need to be examined at some point
- If the action appears to be within the course and scope of employment, then the issue of representation during the criminal case is at issue

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Providing Representation to the Employee in a Criminal Case

- Different stakes than civil
- Employee's liberty
- Ability to maintain future employment
- Criminal fines and fees to be paid
- Providing a criminal defense can serve many purposes.
- Criminal case will likely occur months, if not years, before a civil suit

HOSPITALITY EMPLOYEES NEED, OR ARE ENTITLED TO, SEPARATE REPRESENTATION

Can the Employer's Lawyer Represent the Employee Criminally

- To determine if a conflict exists, must presume not only the possibility of a companion civil suit, but must also predict the likely allegations
- Negligent hiring/retention
- Negligent training/supervision
- Respondeat superior claims for actions of employee
- This early analysis should guide in choosing criminal counsel
- Most states address this issue in the Rules of Professional Conduct

HOSPITALITY EMPLOYEES NEED, OR ARE ENTITLED TO, SEPARATE REPRESENTATION

When is Separate counsel is Necessary

- Is there a conflict of interest between the employee and the employer now or potentially in the future
- Must conduct an independent evaluation to determine what type of civil suit is likely, even if one may not be filed for several years.
- Then must determine the possible outcomes in the criminal prosecution, and analyze its effect on the employee both long term and short term

HOSPITALITY EMPLOYEES NEED, OR ARE ENTITLED TO, SEPARATE REPRESENTATION

ARE THE INTERESTS OF THE EMPLOYEE IN DEFENDING THE CRIMINAL CASE SIMILAR ENOUGH TO THE LONG TERM INTERESTS OF EMPLOYER? IS WHAT'S BEST FOR THE EMPLOYER LONG TERM THE SAME AS WHAT IS BEST FOR THE EMPLOYEE IN DEFENDING THE CRIMINAL CASE? OFTEN, NOT.

HOSPITALITY EMPLOYEES NEED, OR ARE ENTITLED TO, SEPARATE REPRESENTATION

**LESSON TO BE LEARNED: DO NOT WAIT FOR THE
CIVIL SUIT TO EXAMINE THESE ISSUES.
DETERMINE THE AREAS OF POSSIBLE
CONFLICT**

Representation of Officers, Directors and Employees with Respect to Allegations of Fiduciary Breach, Security Laws' Violations

Fundamental Issues Are the Same in All Cases

- The issue is whether you can, and if so, whether you should, represent both the company and the officer, director and employee
- The question of whether you can undertake the representation is resolved under the ethical standards applicable in your jurisdiction, and applicable case law, if any. There appears to be little disagreement in the law from jurisdiction to jurisdiction

Representation of Officers, Directors and Employees with Respect to Allegations of Fiduciary Breach, Security Laws' Violations

The Issue of Whether You Can Represent With the Officers, Directors or Employers (on the one hand) Along With the Company (on the other)

- The Ethical Rule
- The **first fundamental rule** is that you cannot represent clients with conflicting interests unless you fall within a relatively narrow exception
- Rule 1.7 Conflict Of Interest: Current Clients

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The Issue of Whether You Can Represent With the Officers, Directors or Employers (on the one hand) Along With the Company (on the other) (continued)

- The Exception:
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

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The Issue of Whether You Can Represent With the Officers, Directors or Employers (on the one hand) Along With the Company (on the other) (continued)

- Client-Lawyer Relationship
- Rule 1.7 Conflict Of Interest: Current Clients – Comment
- The **second rule** is that you cannot use information obtained in representing a client adversely to that client without written consent. This rule plays into the situation where a lawyer is representing clients which have waived a particular potential conflict, but the conflict then erupts and the clients part ways.

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The Issue of Whether You Can Represent With the Officers, Directors or Employers (on the one hand) Along With the Company (on the other) (continued)

- Client-Lawyer Relationship
- Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules
- A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

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The Issue of Whether You Can Represent With the Officers, Directors or Employers (on the one hand) Along With the Company (on the other) (continued)

- **The third rule** is a rule that attempts to give guidance where an “organization” is a client.
- Client-Lawyer Relationship
- Rule 1.13 Organization As Client
- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- The following comments to this Rule put it in context
- Clarifying the Lawyer's Role

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The Issue of Whether You Can Represent With the Officers, Directors or Employers (on the one hand) Along With the Company (on the other) (continued)

- Dual Representation
- [12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.
- Derivative Actions
- [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization.
- [14] The question can arise whether counsel for the organization may defend such an action.

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Practical Guidance on Applying These Rules

- Each instance is wholly situational, and dependent upon your honest judgment as to whether you can provide adequate and fair representation to all clients involved.

Cases tend to fall into discernable categories

- The first category is civil cases alleging that the alleged wrongdoing was accomplished through authorized corporate channels, such as by the Board of Directors or authorized committees.
- The second category of cases is governmental investigations indicating a suspicion or a charge (such as an indictment) by an enforcement agency that officers, directors, or employees have acted unlawfully.

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Two Final Words – Documented Clarity

- The key to all such situations is complete clarity to all clients and potential clients and non-clients about their exact position, the risks involved in their position, their rights in the situation, and their right to seek independent legal advice as to all such issues. Say it, say it again, put it in writing and get them to acknowledge it by counter signature.

Session Evaluation



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