

ALSTON & BIRD

The Final Ethics Rose – Who Will Get It?

California Minority Counsel Program CLE

Tuesday, January 23, 2024



2024 CMCP “IN SESSION”

JANUARY 23, 2024 | VIRTUAL | 11:00 AM – 12:00 PM

Legal Ethics Gameshow: “The Final Rose”

1 Hour Legal Ethics Credit



KIMBERLY BERNSTEIN
global Legal Director,
Litigation, Labor and
Employment
Taco Bell



LISA L. GARCIA
Senior Associate
ALSTON & BIRD LLP



DEBBIE JONES
partner
alston & Bird llp



AYESHA MAHAPATRA
Vp, Assistant General Counsel,
Republic National
Distributing Company



NOAH ROSENTHAL
ASSISTANT GENERAL
COUNSEL
FENWICK & WEST LLP



2024 CMCP “IN SESSION”

ALL OPINIONS EXPRESSED BY PARTICIPANTS ARE SOLELY THEIR CURRENT OPINIONS AND DO NOT REFLECT THE OPINIONS OF CMCP, THEIR RESPECTIVE EMPLOYER, PARENT COMPANIES, LAW FIRMS, OR AFFILIATES.

IN THE INTEREST OF PROVIDING A SPACE FOR ROBUST CANDID CONVERSATION AND DISSENTING VIEWS ON SENSITIVE TOPICS, WE RESPECTFULLY ASK ATTENDEES TO EXERCISE RESPECT FOR OTHERS AND TO MAINTAIN CONFIDENTIALITY DURING AND AFTER THIS SESSION.



Scenario 1

Emily gets an early call from Jason, a junior lawyer in the department who has been working remotely. He just finished a Zoom meeting with a Company employee; they were discussing confidential and privileged information. Jason complains to Emily, “My nosy father-in-law is in town. I can’t get any privacy. I was just in a Zoom meeting, and I could tell he was eavesdropping the whole time. He thinks I can’t see him peeking around the corner from the other room. I can’t wait until that in-law suite is finished.”

Scenario 1 – Poll

QUESTION

- Does Jason's work-from-home situation implicate any ethical rules?



Scenario 1

Who will get the final rose?



Scenario 1

FOLLOW UP

- Did Jason's father-in-law's eavesdropping jeopardize the attorney-client privilege?



Scenario 2

ABC COMPANY has been in a long-running dispute with a former employee, Will Worker. After trying to settle the claims without a lawyer, Will hired Larry Litigator to represent him in his negotiations with ABC COMPANY. After the last round of settlement discussions, Larry threatened to sue ABC COMPANY on Will's behalf.

It's been several months since ABC COMPANY has heard from Will, but just now, ABC COMPANY's in-house lawyer, Laura Lawyer received a call directly from Will. Will says he's tired of how long this is taking and wants to settle the case today. Will mentions nothing about Larry or whether Larry still represents Will.

Scenario 2 - Poll

QUESTION

- Can Laura speak with Will?



Scenario 2

Who will get the final rose?



Scenario 2

FOLLOW UP

- What if Will had called Polly, a corporate executive (a non-lawyer officer) at ABC COMPANY, who relayed the message to Laura instead? Would Laura have to tell Polly to inquire whether Will was still represented?



Scenario 3

The CEO of ABC Company, Bob Bright, calls the company's in-house lawyer, Jennifer directly.

Bob: Hi Jennifer, we're doing this acquisition of BlueCo, and I'm worried about the target's CFO. I heard that he lives an extravagant lifestyle. What if he's stealing from the company? How can we find out about him without hiring a PI? They're so sleazy.

Jennifer: There is so much good information we can dig up on all the social media platforms out there. Like Instagram, Snapchat, TikTok, Facebook. My daughters have shown me soooo much stuff. We can probably get a lot of information from his various accounts, if he has them – especially the private accounts. You wouldn't believe what some folks put on the internet. The CFO knows my name from the deal, but I can get my friend, a paralegal who used to work here, to "friend" the CFO on the private accounts and get access. Then we wouldn't have to identify the company and could find out what's there.

Bob: Let's do it!

Scenario 3 – Poll

QUESTION

- Can Jennifer ethically have someone else “friend” the CFO?



Scenario 3

Who will get the final rose?



Scenario 3

FOLLOW UP

- When is a “friend” not a friend?
- What about the public accounts?
Are they fair game?



Scenario 4

George is in-house counsel in the litigation department at The Dry Seal, a huge retail clothing store company. “Oh, no,” he says as he suddenly remembers that his outside counsel, Frank, had sent him a set of document requests that the plaintiffs served in a big data-breach lawsuit. The complaint alleges that The Dry Seal fell out of compliance with certain data security standards. During the document review, the team identified a compliance memo that The Dry Seal’s Chief Compliance Officer, Jill Jackson, had drafted. Jill has a J.D., a fact noted in her email signature. Frank had asked George whether the compliance memo and drafts featuring Jill’s comments are attorney work product or attorney-client communications. George vaguely remembers discussing the memo with Jill, and there may have been some email traffic between George and Jill as the memo was drafted.

George wonders about how to treat the compliance memo and related drafts.

Scenario 4 – Poll

QUESTION

- Does George have to produce all of the drafts?



Scenario 4

Who will get the final rose?



Scenario 5

Jennifer has a mentoring call with Ron, one of Wonka's best young in-house counsel. Due to some personal life events, Ron and his family need to move to Maine. Ron wants to stay at Wonka, but his whole practice will have to be remote. He isn't licensed in Maine, but he would continue to practice in jurisdictions where he is licensed.

Jennifer knows Wonka does not want to lose Ron, and she thinks the company would accommodate a fully remote practice. But she is concerned about Ron's being physically located in a jurisdiction where he is not licensed.

Scenario 5 – Poll

QUESTION

- Can Ron practice remotely from Maine even though he's not licensed there?



Scenario 5

Who will get the final rose?



Scenario 5

FOLLOW UP

- If so, does Ron have to limit his activities in Maine?



Scenario 6

Laura's good friend Chris is a mid-level ABC COMPANY executive. Laura joins a Zoom meeting with about 30 other ABC COMPANY employees and receives a Zoom chat message from Chris about a legal question. Laura offers Chris some legal advice using the chat feature. A few minutes later, Laura looks at the chat notifications to find that Chris had pasted Laura's legal advice into a chat message to all participants "to keep everyone in the loop."

Laura sighs with frustration. Laura regularly provides Chris with both legal and business advice. Chris often copies other employees on emails to Laura and sometimes forwards information from Laura to other employees. He's recently started sharing Laura's advice within Zoom chats.

Scenario 6 – Poll

QUESTION

- Should Laura be concerned about waiving the attorney-client privilege?



Scenario 6

Who will get the final rose?



Scenario 6

FOLLOW UP

- What should Laura do?



Scenario 7

On his way back to the office, James receives a call from Jackie, another ABC Company lawyer:

“James, as you requested, I’ve updated the list of bar information for all lawyers in the ABC Company legal department. I found out that Steven’s license seems to have lapsed when he was working remotely and apparently wasn’t reinstated when he came back to work in the Fresno headquarters. It looks like a notice was sent to the office while Steven was working from home, but the notice was never forwarded. I’ve already talked to him about getting his license reinstated, and he’s working on that. He thought the licensure requirements were suspended due to the pandemic.”

Scenario 7 – Poll

QUESTION

- Is there any reason to worry that Steven hasn't been licensed to practice in any jurisdiction for the last year and a half?



Scenario 7

Who will get the final rose?



Scenario 8

Lee and Mary are attorneys in the litigation department at The Law Firm. Lee sees Mary, a junior lawyer in the department, rushing through the office.

Lee: “Hey, Mary, how’s your day going? It can’t be much worse than mine.”

Mary: “I’m not so sure about that. We’re in the middle of a two-week antitrust trial. I was having lunch with in-house counsel and the VP who had been called for cross-examination by the Plaintiff. Well, we heard the Plaintiff talking to his lawyer in the next booth. The lawyer said, ‘I worked that VP pretty good this morning, but wait until you see what I have after lunch. Here’s the outline of my cross. . .’”

Lee: “Mary, how awkward! What happened?”

Mary: “I looked at the in-house counsel and started to say something about maybe moving when the VP growled, ‘Shut-up, this is REALLY IMPORTANT FOR ME TO HEAR! It is the difference between winning and risking a nine-figure verdict!!’”

Scenario 8 – Poll

QUESTION

- Did Mary have any legal or ethical obligations to move or speak up?



Scenario 8

Who will get the final rose?



Scenario 8

FOLLOW UP

- Could Mary discuss what she overheard with her client?



Scenario 9

As Chloe makes her way through her email, she recalls that her daughter, who is obsessed with TikTok, had shown her a video where a snazzy lawyer explained to viewers their rights during a traffic stop.

Chloe had been looking for a way to give back to the community, and Acme doesn't have any type of formal pro bono program to help her do that. So, she decided to join in on the so called #LawyerTikTok trend. Lee cracked open some of her old law school books, paid her daughter \$20 to choreograph and film, and started making videos.

In just a few hours she had videos covering tenant-landlord disputes, employee rights, and even how to form an LLC. Chloe thought the videos would get a few views and that would be it. But suddenly Chloe is getting thousands of views a day! Many of the viewers were experiencing legal issues and would leave Chloe questions in the comments.

Scenario 9 – Poll

QUESTION

- Do Chloe's Tik Tok videos raise any ethics concerns?



Scenario 9

Who will get the final rose?



Scenario 9

FOLLOW UP

- Is there anything that Chloe should include in her videos or on her profile?
- Do the videos themselves create attorney-client relationships with the viewers?
- Would responding to the questions in the comments create one?



Scenario 10

Several months ago, ABC COMPANY received a federal subpoena in an ongoing investigation of potential Food, Drug, and Cosmetic Act violations involving several ABC COMPANY employees, including three top executives. The investigation relates to the sale of allegedly defective medical devices.

Luke, a lawyer on Laura's team, is assigned to prepare a low-level employee, Martin, for a DOJ interview tomorrow. A few days ago, Luke met with Martin to understand what Martin might say. Luke is now meeting with Martin again, but Martin is now telling Luke a very different story.

Martin now claims that his managers had directed him to lie about quality issues with the devices but that the top executives knew nothing about those lies. Martin says, "I'm worried I'll get fired if I tell the truth. ABC COMPANY could lose millions."

Scenario 10 – Poll

QUESTION

- Should Laura have agreed to let Luke represent Martin?



Scenario 10

Who will get the final rose?



Scenario 10

FOLLOW UP

- Can Luke continue to represent Martin?



Scenario 11

Earlier in the day, Lindsay called Kathleen, one of the in-house lawyers in ABC Company's New York office. Kathleen is licensed in Minnesota:

Lindsay: “Kathleen, one of our IT people has been subpoenaed to give a deposition in a trade secret case pending in a California state court but the deposition is proceeding by Zoom in which the company is not a party. The deposition shouldn't be adversarial and shouldn't last long. We don't have anyone to cover the deposition but luckily, it's by Zoom. Would you appear for the company and represent the witness?”

Around 4 PM, the deposition becomes contentious because the witness can't answer some of the questions. After Kathleen lodges several objections and directs the witness not to respond to a handful of questions, the examining lawyer asks Kathleen, “are you even licensed to practice in California?”

Scenario 11 – Poll

QUESTION

- Does Kathleen have a problem with the California Bar?



Scenario 11

Who will get the final rose?



Scenario 11

FOLLOW UP

- Has [In-House Counsel] aided and abetted the unauthorized practice of law?



Scenario 12

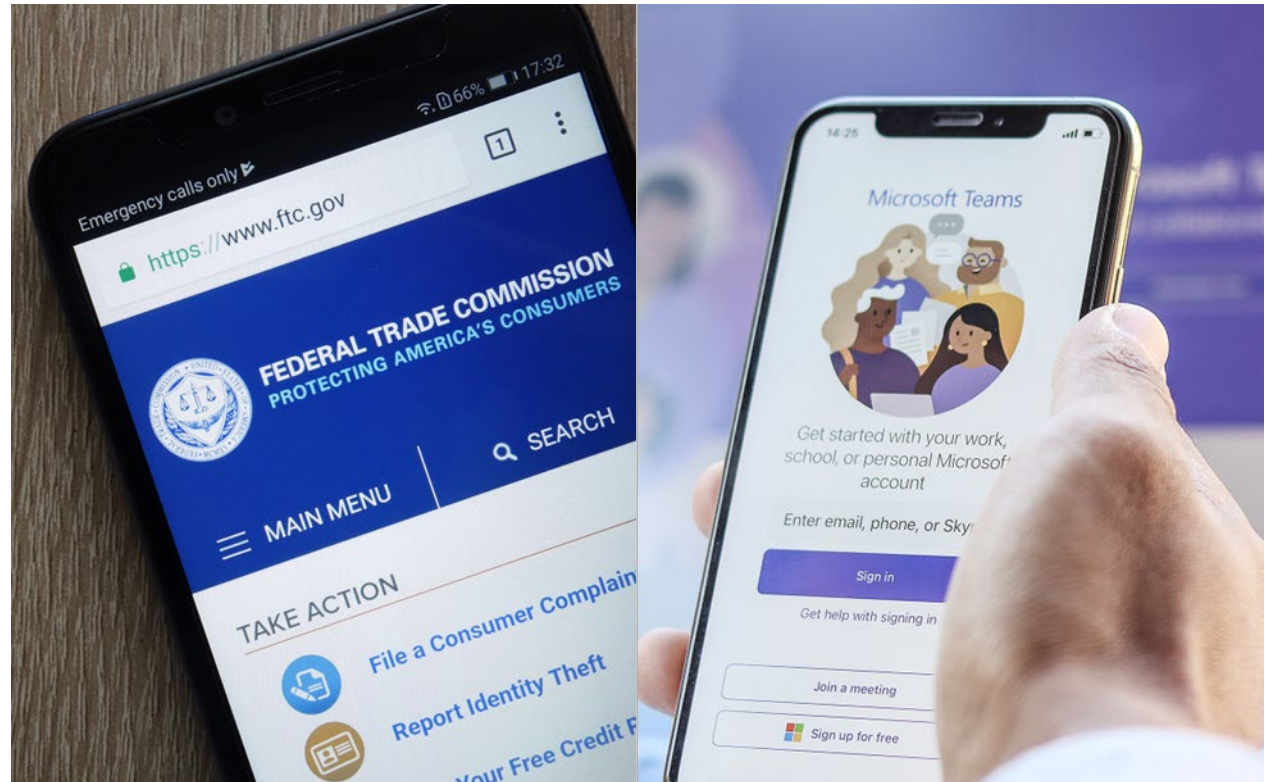
It's near the end of the day for Sarah, an in-house lawyer at the The Health Company, but someone in Washington is still at work. Sarah receives copy of a Civil Investigative Demand from the Federal Trade Commission, which seeks a broad set of documents, data, and communications relating to The Health Company's pharmacy benefit management business. The Health Company closed on the acquisition of Canoe, a small pharmacy benefit management entity today. Employees at Canoe use Microsoft Teams messaging to communicate throughout the day. The Health Company does not use Teams (or any other chat or messaging programs) and is working to integrate Canoe's legacy systems to The Health Company's systems.

Sarah needs to put a legal hold in place to cover the FTC CID.

Scenario 12 – Poll

QUESTION

- Does the legal hold need to cover Microsoft Teams messaging and chats?



Scenario 12

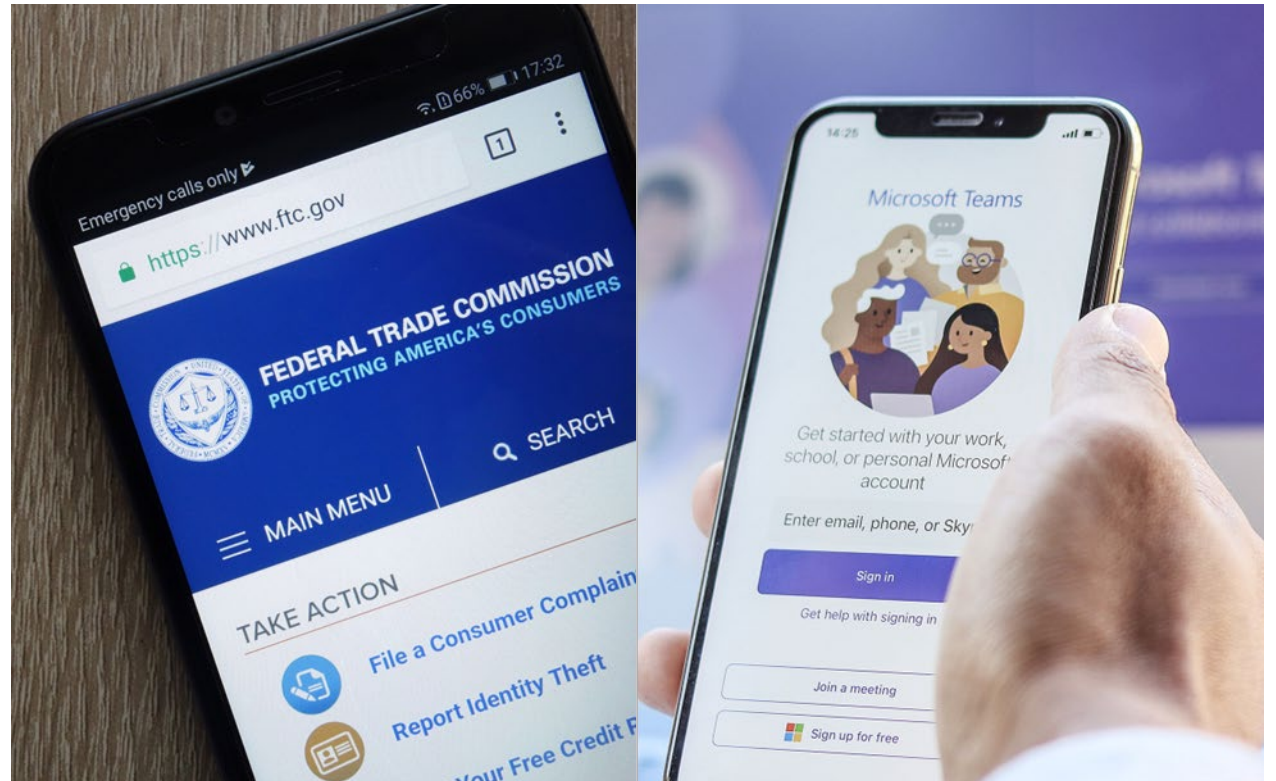
Who will get the final rose?



Scenario 12

FOLLOW UP

- Should the hold go to The Health Company and legacy Canoe employees?



Presenters



Ayesha Mahapatra
Corporate Vice President and
Assistant General Counsel,
Republic National
Distributing Company
Ayesha.Mahapatra@RNDC-
USA.COM
+ 1 714 508 1946



Kimberly Bernstein
Legal Director
Taco Bell
Kimberly.Bernstein@yum.com
+ 1 949 863 5200



Debbie Jones
Partner
Alston & Bird
debbie.jones@alston.com
+1 213 576 1084



Noah Rosenthal
Assistant General Counsel,
Fenwick & West LLP
nrosenthal@fenwick.com
+ 1 415 875 2026



Lisa Garcia
Senior Associate
Alston & Bird
lisa.garcia@alston.com
+1 213 576 1147