

A View of Professionalism

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At February's ABA Forum on Franchising Governing Committee meeting, I had an insightful conversation with two committee members about the subject of professionalism, specifically within the Forum.

As many of you know, I come from a background in intellectual property law. There, it is not unusual for lawyers to represent a wide variety of interests on both sides of a particular issue. However, irrespective of what side of a particular issue on which you may be, it has been my experience that opposing lawyers generally treat each other with respect and exhibit great professionalism.

My introduction to the legal world of franchising was not nearly as sanguine. In my early days of the Forum, I had the impression that there was some polarization between those who represented franchisors and those who represented franchisees. Because of the predominance of those who represented franchisors (I count myself in that camp although I have represented franchisees on some occasions), my impression of many early Forum, as well as IFA legal symposium, programs I attended was that they were skewed more toward the views of franchisors. This perception was reinforced by the first Forum program where I made a presentation. The topic was proper franchise termination, and I was tasked with outlining the franchisee view. Although in many termination situations franchisors have the upper hand, I identified some authority in which franchisors had not been successful. During my presentation, I discussed how franchisees might be able to develop arguments based on that authority to attack further a franchisor's justification for termination.

After the first of my two presentations, I was confronted by a lawyer who had represented the franchisor in one of the cases that I discussed (in which the franchisor had been less than successful) and was told that the case "was an aberration" and that I "should not be giving franchisees ideas on how to pursue these kinds of cases successfully." I have to admit being taken aback by this attack. First, the goal of my presentation was to educate *both* franchisee and franchisor lawyers so that they would be better able to anticipate and address the issues I raised in system terminations. But I was even more surprised at the suggestion that I should not present anything that might educate franchisees about arguments they might be able to make. I suppose in the view of my critic, I should have stood up, announced that I agreed



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that the franchisor was always right and that the franchisee would always lose, and sit down.

Fast-forward to 2011. We have come a long way toward leveling the playing field in the Forum. Ron Gardner, a prominent franchisee lawyer, is the current chair of the Forum. Franchisee lawyers occupy a number of leadership positions on the ABA Governing Committee and *Franchise Law Journal*. ABA Forum on Franchis-

ing programs are, to my eye, far more balanced. The positions of franchisee lawyers are valued and serve the overarching goal of making everyone more informed. A perfect example of the current state of affairs is the program that I attended at last year's Forum entitled "Bet the System Litigation," presented by Ron Gardner, Jack Dunham, and Jim Goinea. The presentation focused on an open and frank discussion of litigation tactics and strategies. The presenters were courteous toward each other and showed great respect (if not admiration) for each other's position. I have no doubt that Ron and Jack will oppose each other in future litigation matters in which each zealously represents his respective client. However, when they do so, I know that their mutual admiration and respect for each other will carry over and result in the litigation being handled with the highest degree of professionalism.

It is greatly reassuring to me that the Forum has continued to evolve toward a true forum for open and frank dialogue in which franchisor and franchisee viewpoints and participation are equally welcome and valued. The situation that I encountered with my presentation critic from many years ago appears to have been the aberration.

This issue features several very interesting and detailed articles. Leading off is an article by Barry Block and Matthew Ridings on the U.S. Supreme Court's landmark decision in *American Needle v. National Football League*. Next, Joyce Mazero and Suzanne Loonam Trigg provide a thorough analysis of the issues that arise in franchising in non-traditional venues. James Denison examines case law and statutes relating to operation manuals and the inherently conflicting goals of ensuring franchisee compliance and confidentiality and minimizing franchisor liability. Finally, Joseph Adler and Michael Laidhold review and compare franchise disclosure materiality requirements in the United States and Canada.

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