THE RESPECTIVE ROLES OF THE FRANCHISE CONSULTANT AND THE FRANCHISE LAWYER IN STRUCTURING THE FRANCHISE SYSTEM

Michael H. Seid
Michael H. Seid & Associates LLC
and
Leonard D. Vines
Greensfelder, Hemker & Gale, P.C.

October 10 – 12, 2007
JW Marriott Desert Ridge
Phoenix, AZ

©2007 American Bar Association
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>I.</th>
<th>INTRODUCTION ........................................................................................................................................</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>II.</td>
<td>THE “PRACTICE OF LAW” AND THE UNAUTHORIZED PRACTICE OF LAW .........................................................</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>A. What is the Practice of Law? ...........................................................................................................</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>B. Unauthorized Practice of Law ...........................................................................................................</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>1. Multi Jurisdictional Practice ..........................................................................................................</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>2. Provision of Legal Services by Consultant .....................................................................................</td>
<td>5</td>
</tr>
<tr>
<td>III.</td>
<td>RISKS OF PROVIDING NON-LEGAL ADVICE ....................................................................................................</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>A. Loss of Privilege ...............................................................................................................................</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>B. Non-Coverage Under Malpractice Insurance ....................................................................................</td>
<td>8</td>
</tr>
<tr>
<td>IV.</td>
<td>PROFESSIONAL STANDARDS ......................................................................................................................</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>A. Attorney’s Duty ....................................................................................................................................</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>B. Qualifications of a Consultant ..........................................................................................................</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>C. Liability to Third Parties ..................................................................................................................</td>
<td>11</td>
</tr>
<tr>
<td>V.</td>
<td>OTHER ETHICAL ISSUES ...............................................................................................................................</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>A. Referrals and Fee-Splitting ..................................................................................................................</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>B. Multi-Disciplinary Practice ................................................................................................................</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>C. Representing Competitors ....................................................................................................................</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>D. Solicitation and Advertising Issues ....................................................................................................</td>
<td>17</td>
</tr>
<tr>
<td>VI.</td>
<td>ROLES INVOLVED IN THE DEVELOPMENT OF A FRANCHISE SYSTEM .........................................................</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>A. Relationship Between Lawyer and Consultant in Providing Services to New and Existing Franchisors ..................................................................................................................</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>B. Consultant’s Conduct of the Feasibility Examination ........................................................................</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>C. Development of the Terms of the Franchise Offering (Strategic Planning) ........................................</td>
<td>22</td>
</tr>
<tr>
<td>VII.</td>
<td>CONCLUSION ...............................................................................................................................................</td>
<td>24</td>
</tr>
<tr>
<td>APPENDIX A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>APPENDIX B</td>
<td></td>
<td></td>
</tr>
<tr>
<td>APPENDIX C</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
I. INTRODUCTION

Although some may view a lawyer’s primary role in representing franchisors as simply drafting legal documents, a lawyer representing a franchisor will also likely provide advice and assistance far beyond that of a mere scrivener or reader. Within the franchising field, it is nearly impossible for an attorney to avoid giving both business and legal advice. Indeed, it is not unusual for law firms to provide services beyond what is considered pure legal advice, including providing strategic business planning. The lawyer’s role may not only involve giving a combination of business and legal advice, but may also include areas that have traditionally been reserved for a franchise consultant.

The primary role of the business consultant is to address the client’s business issues. In the case of an emerging franchisor, for example, the business consultant’s advisory services would include advice on the design, development, expansion and management of the franchise. While the consultant’s primary role does not include providing legal advice to clients, most business consultants will use his or her knowledge of the law in providing client services. Otherwise, it would be impossible to provide adequate services given regulation hurdles in the franchising environment.

For instance, if a potential franchisor asks either a lawyer or a consultant whether a concept is suitable or ready for franchising, the answer will depend on a combination of various business and legal issues. Under the U.S. regulations, there are not many business barriers and the main barrier for entry in a franchising business is complying with the registration and disclosure requirements. There are virtually no regulatory restrictions or financial requirements that prevent a business from embarking on a franchise program before it has had even one unit in operation, has achieved acceptance of their products, or has demonstrated the profit potential of an existing, prototype location.

While a Uniform Franchise Offering Circular (“UFOC”) – which is referred to in the Amended FTC Rule as the Franchise Disclosure Document – is required in order to become a franchisor and sell franchises, merely having a UFOC does not equate to being a successful franchisor. Both an attorney and a consultant may not believe that a client is ready to franchise for a number of reasons, such as lack of experience, lack of capital, lack of infrastructure, or poor past performance. A reputable lawyer, like the reputable consultant, would likely provide business counsel to the client when advising on whether to franchise or not even though it is outside of a lawyer’s primary legal duty. However, the ultimate business decision should be left to the client. While certainly there have been success stories of franchisors with little or no franchise experience, the attorney or the consultant has the ability to continue to represent the client or can also decline representation or withdraw from the engagement.

This paper will address some of the ethical issues that can arise with lawyers and consultants in the context of franchising and their relative roles during the process of representing a franchisor. From the viewpoint of the business executive, the same principles are, in many respects, applicable to situations in which both lawyers and consultants represent a franchisee or prospective franchisee. A prospective franchisee will often ask an attorney whether to invest in a franchise, but as in most cases, the lawyer would generally point out the pros and cons without making a business judgment.
References will be made to the ABA Model Rules of Professional Conduct, which will be referred to as the “Model Rules”.\(^1\) On February 5, 2002, the ABA House of Delegates adopted the recommendations of the Commission on Evaluation of the Rules of Professional Conduct (the Ethics 2000 Commission), which made significant changes to the existing ABA Model Rules of Professional Conduct that were originally adopted in 1983. With its adoption, the amendments to the Model Rules became effective as ABA policy, but are not binding on lawyers unless and until they are adopted by the particular jurisdiction in which the attorney practices.\(^2\) The rules governing an attorney’s professional conduct differ from state to state. Practitioners are cautioned to review the rules for professional conduct adopted by their state and should note that the ethical standards generally apply to all attorneys, even if not licensed to practice in that state.

II. THE “PRACTICE OF LAW” AND THE UNAUTHORIZED PRACTICE OF LAW

A. What is the Practice of Law?

The distinction between legal and business advice is blurry, and there is no universal definition of what constitutes the practice of law. The concept is typically governed by state statues, which vary and contain broad qualifications that are not particularly clear and concise.

The ABA Task Force (“Task Force”) proposed The Model Definition for the Practice of Law in 2003.\(^3\) Undoubtedly, formulating a standard definition for the practice of law that could be used in every jurisdiction was a very difficult task. Ultimately, the ABA did not adopt this model definition, and instead imposed a duty on each jurisdiction to create and adopt its own version of the definition.\(^4\) Even The Federal Trade Commission and Department of Justice spoke to this dilemma and the proposed Model Definition in its comments to the Task Force:

Courts and bar agencies struggling to define the somewhat amorphous concept of the practice of law have come up with several different tests. For example, the “commonly understood” test defines the practice of law as composed of activities that lawyers have traditionally performed. There are a number of exceptions to this test, such as permitting nonlawyers to perform activities usually performed by lawyers if those activities are incidental to the profession or business of the nonlawyer. Another exception to the “commonly understood” test allows lay people to provide services that are commonly understood to be the practice of law as long as those services do not involve difficult or complex questions of law. Another test used to define the practice of law focuses on the existence of an attorney-client relationship. Other tests are based upon the client’s belief as to whether he or she is receiving legal services, whether the activity involves the application of legal knowledge to the


\(^2\) As of July 10, 2007, 33 states and the District of Columbia have adopted revised rules (AZ, AR, CO, CT, DE, DC, FL, ID, IN, IA, KS, LA, MD, MN, MS, MO, MT, NE, NV, NJ, NC, ND, OH, OK, OR, PA, RI, SC, SD, UT, VA, WA, WI, WY). Nine states have circulated proposed rules (AK, CA, IL,KY, ME, MI, NH, NY, VT). Seven states have committees that have not yet issued a report (GA, HI, MA, NM, TN, TX, WV). One state is not considering the recent revisions (AL). The status is updated on the ABA Website at: [http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf](http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf).

\(^3\) Task Force on Model Definition of the Practice of Law, published on the ABA website at: [http://www.abanet.org/cpr/def/home.html](http://www.abanet.org/cpr/def/home.html).

specific situation of an individual, and whether the services provided affect the recipient’s legal rights.\textsuperscript{5}

The many unanswered questions concerning the definition for the practice of law were the subject of a law review article which highlighted the dilemma:

What is the practice of law? To focus on the licensing of lawyers, who are authorized to practice law, and the corollary unauthorized practice of law, begs a fundamental question. If those authorized to engage in the practice of law provide legal services, then what services are legal and what are not? Any services provided by a lawyer? Any services provided by a lawyer, where the lawyer was engaged because legal training and experience added perceived value? Almost any list of tasks that are typically performed by lawyers finds an analog in tasks performed by nonlawyers. Beyond a professional monopoly to represent others in court, there is little consensus about what work, if any, should fall exclusively within the purview of lawyers. This lack of clarity makes it virtually impossible to define what constitutes the practice of law.\textsuperscript{6}

Many questions similar to those posed above are equally applicable in the franchise context. One in connection with a lawyer’s role as counselor is whether the lawyer is practicing law or giving business advice. This can be an issue with many of the business and legal decisions about which an attorney advises a franchise client. Some examples include; the selection of the trademark; formation of the business entity; structuring of the relationship; determination of the focus, which either will be in single or multiple units; selection of the fees that will be charged; establishment of an advertising fund; determination of the franchisor’s readiness (i.e., is he or she adequately equipped to start a franchise program); and analysis of dispute resolution provisions and non-competition agreements; etc. Oftentimes, legal advice will overlap with business advice. Indeed, Model Rule 2.1 recognizes that attorneys are often involved in giving business advice, and the commentary for that Rule notes that “the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.”\textsuperscript{7}

The Model Rules also draw a distinction between legal services and “law-related services.”\textsuperscript{8} Model Rule 5.7 defines the term “law-related services” as services “that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”\textsuperscript{9} This Rule lists the limited circumstances under which an attorney can provide law-related services: providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation and patent, medical or environmental counseling.\textsuperscript{10}

\textsuperscript{5} Federal Trade Commission and Department of Justice Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law, \url{http://www.ftc.gov/opa/2002/12/lettertoaba.shtm} (Dec. 20, 2002) (Footnote citations omitted).
\textsuperscript{7} Id. R. 2.1 (2004).
\textsuperscript{8} Id. R. 5.7(b).
\textsuperscript{9} Id.
\textsuperscript{10} Id. R. 5.7, cmt 9.
Lawyers are subject to the Rules with respect to providing law-related services if such services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.11

Thus, the Model Rules apply to the attorney’s provision of both legal and law-related services, unless the attorney has made it clear that there is a separation in these types of services.

As noted earlier, the distinction between business and legal advice is far from clear, and the analysis will often focus on whether the advice that predominates is business or legal.12 “Traditionally, legal advice has been defined as advice or counsel given to a client by a lawyer who has been consulted for the purpose of providing that advice or counsel in his professional capacity. If the services were of a type that could be undertaken by someone who is not a lawyer, those services traditionally have been defined as being outside the scope of legal advice.”13

B. Unauthorized Practice of Law

1. Multi Jurisdictional Practice

One of the goals of a franchise system is to expand both regionally and nationally. As a result, clients rely on the advice of their attorneys to assist them in understanding the various state laws, most notably those dealing with registration, disclosure, and the franchise relationship. It is unrealistic to think that lawyers representing franchisors will never advise their clients on laws outside the attorney’s jurisdiction. Franchise lawyers routinely represent clients located outside of their home state and often meet with their clients at their places of business – which may also be outside of the lawyer’s home state. However, as written, Model Rule 5.5 does not adequately recognize this reality, and attorneys engaged in multi-state activities could be exposed to ethics violations for engaging in the unauthorized practice of law, even though these laws are rarely enforced in such situations.14 Nevertheless, when attorneys engage in the practice of law outside of the jurisdictions where they are licensed, there is a risk that such

---

11 Id. R. 5.7(a)(1)(2).
12 See Olson v. Accessory Controls and Equipment Corp., 757 A.2d 14, 25 (Conn. 2000) (must look at whether business advice or legal advice predominates a communication to determine if advice constitutes protectable “legal advice”) (citing Cuno, Inc. v. Pali Corp., 121 F.R.D. 198, 204 (E.D.N.Y.1988)). See also Khanna v. McMinn, 2006 Del.Ch.LEXIS 86 (Del. Ch. 2006)(not released for publication) (stating “[L]egal advice that is merely incidental to business advice may not be protected [by the attorney-client privilege]”). The California State Bar has produced a formal opinion defining “non-legal service” as services not performed as part of the practice of law and which may be performed by nonlawyers without constituting the practice of law. Cal. State Bar, Formal Op. No. 1999-154 (1999) (stating that an attorney providing both legal and non-legal services continues to be bound by applicable ethical rules with respect to both types of services rendered).
activities could be viewed as the unauthorized practice of law. One of the significant risks of such a characterization is that in some states, an attorney may not be able to collect fees, at least for that work physically done outside of the state in which the attorney is licensed. In the litigation arena, this problem may be resolved by the ability of the attorney to obtain admission into the court of another state through a procedural process called pro hac vice. However, such clear guidance is not necessarily available in other situations, such as arbitration proceedings or transactional matters. In any event, a lawyer should consult the state’s laws before practicing in the jurisdiction.

The use of Model Rule 5.5, which permits an attorney to provide legal services on a temporary basis in unlicensed jurisdictions under certain circumstances, can be one way to address the problem. According to the Comments to this Rule:

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

A 2002 ABA Forum paper addressed the issues relating to Multi-Jurisdiction Practice in detail and noted that licensing and regulation of lawyers have not changed with the times. That paper also pointed out that laws restricting lawyers who are not licensed in a particular state might result in a lawyer being “guilty for activities that could be performed by lawyers with impunity.”

Consultants, on the other hand, routinely practice in several jurisdictions and are not generally subject to the same constraints that govern attorneys.

2. Provision of Legal Services by Consultant

Perhaps the most significant case that faced the issue of the unauthorized practice of law by a franchise consultant is Francorp, Inc. v. Siebert. Francorp is a consulting firm that specializes in helping businesses form, design, develop, and implement a franchise program. It also advises clients about the advantages and disadvantages of franchising and prepares documents such as franchise agreements, offering circulars, licensing agreements, sub-franchise agreements, earnings claims and state registration documents. Francorp advised clients to consult with an attorney and to submit, “any documents drafted for the client to that

---

15 Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1, 10 (Cal. 1998). (But see, Colmar, Ltd. v. Fremantlemedia N. America, Inc., 344 Ill.App.3d 977, 989 (Ill.App. Ct. 2003) (Illinois has declined to follow this ruling stating, “However, both the Restatement and ABA Commission have criticized Birbrower as creating too harsh a result. We agree and, therefore, decline to follow it. [FN2] FN2. We find it interesting that following Birbrower, California adopted a pro hac vice type provision for out-of-state attorneys involved in arbitration. See Cal.Civ.Proc.Code § 1282.4 (West 2002)").
16 Model Rules of Prof’l Conduct R. 5.5(c) (2004).
17 Id. R. 5.5, cmt 6.
19 Id.
20 211 F.Supp.2d 1051 (N.D.II. 2002).
21 Id. at 1053.
22 Francorp, 211 F.Supp.2d at 1051
attorney.”

Touting itself as a “one-stop shop,” Francorp had licensed attorneys on its staff who would critique legal documents prepared by other attorneys and work in tandem with Francorp’s clients’ independent attorneys. Francorp’s former president, who had started a competing franchise consulting company, brought a counter-claim against Francorp, claiming that Francorp’s preparation of franchise documents constituted the unlawful practice of law, which constituted an unfair trade practice under the Illinois Uniform Deceptive Trade Practices Act.

The court determined that “one who reviews documents produced by a lawyer, critiques them, and advises another of their legal consequences is practicing law.” The court also stated, “[n]o matter how knowledgeable the lay person, or how inexperienced the lawyer, however, Illinois has rendered its judgment that certain tasks are to be performed only by licensed attorneys directly engaged by the client.” The court also noted that the activities conducted by Francorp’s in-house attorneys, involving drafting documents and critiquing documents drafted by other attorneys, were the type of activities that lawyers typically perform for their clients. The court thus made it clear that an in-house attorney can only perform legal services for their employer and not for his or her employer’s clients.

Based on the findings that drafting franchise agreements and offering circulars and executing registration certificates constitute the practice of law, and that the evidence suggested that Francorp was doing significant legal work with independent outside counsel doing only a cursory review of the documents, the court refused to grant summary judgment against Francorp on the issue of Francorp’s unauthorized practice of law. This was so because the precise division of responsibilities between Francorp and independent counsel was unclear and very much in dispute. No reported decisions followed; however, the ruling indicates that a consultant who creates legal documents, even through a licensed in-house attorney, would likely be treading on thin ice. The case did not address whether legal advice generally provided by consultants, as part of their services, would constitute an unauthorized practice of law by the consultant.

As discussed elsewhere in this paper, there are clearly areas of professional services which should not be provided by consultants to clients regardless of whether or not these services are supervised by legal counsel. These include the drafting of disclosure documents, franchise and ancillary agreements. Other services, including the discussion of what may be considered “legal advice” may be dependent to a great extent on the experience and expertise of the individual consultant.

Integrated into consultant’s services to emerging franchisors will be determinations of business strategies and the terms of the franchise offering. Almost certainly, the consultants will be, to some extent, basing their recommendations on their understanding of the law. In reviewing the conclusions reached by the client and their consultant, legal counsel should also review these decisions as they relate to issues concerning the law.

23 Id.
24 Id.
25 Id.
26 Id. at 1057.
27 Id. at 1056.
28 Id. at 1057.
29 Id.
30 Id.
31 Id.
While the regulatory issues must be addressed to legally offer franchises, it is the structure and terms of a franchisor’s business offering that are truly essential to creating a solid business foundation. The lawyer’s primary role is to ensure that their client meets its regulatory obligations and to draft contracts and other documentation that protects the client’s legal interests. It is the primary role of the business consultant to assist the client in making the determinations that form the business foundation and the business terms included by the lawyers in the legal documentation.

Lawyers are rightfully concerned when business consultants prepare any of the legal documentation required by franchisors or where they provide legal advice to complicated legal issues. Business consultants are equally concerned where the legal documentation is prepared by lawyers using terms not based upon a sufficient knowledge and evaluation of the underlying business issues or drawn primarily from lengthy questionnaires they provide to their clients. This is especially true when the client has limited knowledge of franchising and may not fully understand franchising or the options available to them when answering the lawyer’s questionnaire. When any professional views the franchisor’s business as inter-changeable with other similar businesses, and the terms of the underlying agreements are based primarily on what other franchisors provide in their legal documents, both the client and its future franchisees are potentially placed at risk.

It is the role of the professional business advisor to provide their clients with the required business analysis and recommendations based upon that client’s unique business model. In doing so, as in any consulting engagement, regardless of the industry, business consultants must factor into their advice not only their business knowledge but their knowledge of the laws that impact the client’s business and industry. In fact, the importance of a basic understanding of business law is evidenced by the inclusion of questions dealing with business law on the Certified Public Accountant examination.

III. RISKS OF PROVIDING NON-LEGAL ADVICE

A. Loss of Privilege

The sanctity of privilege, although subject to some exceptions, is ingrained in the legal profession. However, the relationship between a consultant and a client shares no such protection, and there is no privilege in communications between business consultants and their clients.

When an attorney predominantly provides non-legal advice, the communication of such advice to a client is not protected by the attorney-client privilege. The work product doctrine protects an attorney’s research, impressions, conclusions and opinions from discovery and typically arises in the context of litigation. However, like the attorney-client privilege, the work product doctrine may not extend to a lawyer’s findings and analysis if the predominant purpose was to provide business rather than legal advice. Some courts have held that a claimant must show that the communication would not have been made “but for” the claimant’s need for legal advice.

33 Id.
34 Id.
In *U.S. v. Wilson*, the First Circuit found a damaging memo written by the purported client to an attorney was not protected by the attorney-client privilege when that attorney had not been engaged by the “client” and had not provided any legal services to the “client” – the only services provided were those of a messenger. The court recited the elements for when the privilege applies: (1) that the client was or sought to be a client, (2) that the lawyer acted as a lawyer, (3) that the communication relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding, and (4) that the privilege was not waived.

The difficulty of distinguishing between business as opposed to legal advice was described in *Note Funding Corp. v. Bobian Inv. Co.* Describing the “blurry line” between the two, the court noted that attorneys are often required to assess specific tactics in structuring transactions or shaping the terms of commercial agreements, all while taking into account the commercial needs of the client, the financial implications of alternative strategies, and the legal issues. The court stated, “If the attorney’s advice is sought, at least in part, because of his legal expertise and the advise rests ‘predominantly’ on his assessments of the requirements imposed, or the opportunities offered, by applicable rules of law, he is performing the function of a lawyer,” and, hence, the attorney-client privilege will apply. Furthermore, a New York district court in *U.S. v. Int’l Bus. Machs. Corp.* noted that a lawyer’s advice must be predominately legal, and “not solely, or even largely, business advice” in order to be protected by the privilege. Similarly, in *Borase v. M/A Com, Inc.*, the court found, “when a lawyer acts merely to implement a business transaction or provides accounting services, the lawyer is like any other agent of the corporation whose communications are not privileged.” Additionally, in *Cuno, Inc. v. Pall Corp.*, the court found that if a lawyer is providing a combination of business and legal advice, the communication is privileged only if the problems addressed by the communication “can fairly be characterized as predominantly legal.”

**B. Non-Coverage Under Malpractice Insurance**

Most attorneys rely on their malpractice insurance to defend and pay claims for professional negligence. However, if an attorney predominantly gives non-legal advice, there is a potential risk of malpractice for professional negligence, for which some traditional malpractice insurance policies will not provide coverage. Malpractice policies are not uniform, and the scope, coverage, and exclusions can differ significantly based upon the policy language. However, malpractice policies typically cover “professional services,” with varying definitions. Attorneys who are involved in providing business advice, particularly when such advice is not predominantly legal, should carefully review their policies and obtain appropriate insurance for their actions.

An example of the interplay between an attorney giving non-legal advice and malpractice is noted in the following excerpt from a law review article:

---

36 *U.S. v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986).
37 *Id.* at 512.
38 No. 93 CIV. 7427 (DAB), 1995 WL 662402 (S.D.N.Y. Nov. 9, 1995).
39 *Id.* at *2.
40 *Id.* at *3.
A client might retain an attorney to provide the client with tax advice regarding estate and trust issues, and in the course of that representation, the attorney provides financial advice about what particular investment vehicles the client should use for the trust assets. Because the tax advice is presumably the purpose of the retention, the general purpose approach would hold that the attorney could be liable for legal malpractice for the financial advice but that it would be covered under his legal malpractice insurance as incidental advice related to the tax advice. In contrast, if the attorney rendered the advice in a separate and distinct setting, . . . the California approach would view the investment advice as not incidental to the legal services provided; and the attorney would not be liable for legal malpractice for such advice. Furthermore, a court might not hold the attorney liable for legal malpractice for such advice if the court adopted a fact-based “nature of the undertaking” approach; the court might consider the financial advice as not within the scope of the attorney’s duty to his client.45

It should be noted that an ethical violation does not always give rise to a malpractice claim,46 and a malpractice claim does not always involve an ethical breach.47

IV. PROFESSIONAL STANDARDS

A. Attorney’s Duty

An attorney is required to provide competent representation and must recognize his or her limitations when practicing in an area beyond his or her realm of expertise.48 Model Rule 1.1, which addresses that duty, notes that such representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”49 That is, if an attorney does not have the requisite level of competence in franchising generally—not just legally—to properly represent a client, or if there are certain areas that the attorney is not capable of handling, the attorney should refer the client to someone who possesses the requisite expertise. This point is also noted in the comment to Model Rule 2.1:

Matters that go beyond strictly legal questions may also be in the domain of another profession…Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.50

45 Larry O. Natt Gantt, II, More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations, 18 GEOJLE 365 (Spring 2005) (Footnotes omitted).
46 ABA Model Rules of Professional Conduct: Preamble and Scope, Scope No. 20 http://www.abanet.org/cpr/mrpc/preamble.html (Specifically recognizing: “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.”)
49 Id.
50 Id. R. 2.1, cmt. 4.
Additionally, Model Rule 1.4 states, in part, that a lawyer shall, “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”51 One commentator has suggested that although Rule 1.4 does not require a lawyer to offer franchise business advice, the Rule may require the lawyer to recommend that the client seek such advice, and has compared drafting a UFOC to drafting a business plan.52

One of the issues faced by the business consultant is whether the non-legal services provided by a lawyer are conducted with the same professional rigor exhibited by consultants or other business professionals, and whether the lawyer has a duty to recommend to their clients the use of those professionals.

B. Qualifications of a Consultant

A serious weakness in business consulting firms may be an apparent lack of mandated professional standards. Unlike lawyers who are required to meet professional standards, consulting professional who are also not CPAs do not have such a requirement. The selection of professional business advisors therefore needs to be based upon the experience and qualifications of the practitioner.

There are however, published standards for consultants who are members of the AICPA and other professional organizations.

The American Institute of CPA (AICPA) provides in its Statement on Standards for Consulting Services No. 1 (SSCS) adopted on January 1, 1992:

“4. This SSCS and any subsequent SSCSs apply to any AICPA member holding out as a CPA while providing Consulting Services as defined herein.”53

The Institute of Management Consultants USA (IMC USA) has proposed to adopt a Statement on Standards for Management Consulting Services (SSMCS) which is substantially identical to the AICPA’s SSCS.

The Midwest Society of Professional Consultants (MSPC), a regional association and member of the IMC USA has adopted SSMCS effective June 2, 2004 and provides that the standards apply to:

“7. This Statement on Standards for Management Consulting Services (SSMCS) and any subsequent SSMCSs apply to all consultants providing Consulting Services as defined herein.”54

While it can be argued that the AICPA, IMC USA and MSPC are membership organizations without the authority to set universal standards for all management consultants, non CPA consultants that do not meet the benchmarks set by SSCS or other consultants that

51 Id. R. 1.4.
52 Anita K. Blair, Counseling A Start-Up Franchisor (From the Franchise Lawyer’s Point of View), ABA Forum on Franchising, October 1993. Michael Seid, the co-author of this paper, was also co-author of the referenced chapter.
54 Id.,(emphasis added)
do not meet the benchmarks set by SSMCS may be at risk for claims of malpractice by their clients if they do not meet the SSMCS published standards.

The Standards for Consulting Services as provided by the SSMCS and SSCS, which only apply to CPA’s and their firms, are nearly identical. The major distinction may be that the SSMCS broadly includes all consultants. The SSMCS is included in Appendix A of this paper.

In 1991, the International Franchise Association Educational Foundation established the designation of Certified Franchise Executive for franchisors, franchisees and suppliers who have completed a course of study offered by or through the IFAEF. While the IFA and the IFAEF encourages members of the IFA to complete the course of study and achieve the certification, there are no requirements by the IFAEF that the CFE designation be required of franchisors, franchisees or suppliers. Obtaining a CFE is not a requirement for providing management consulting services.

The overriding issue is that both the lawyer and the consultant should be providing advice in a professionally competent manner and have the requisite background to competently provide that advice.

C. Liability to Third Parties

Traditionally, a third party who has no privity with an attorney has no cause of action for legal malpractice against the attorney. This general premise has, however, been eroded in some instances. For example, attorneys who are involved in preparing offering circulars, under certain circumstances, may face a claim of liability from those relying on the offering circular. California has been at the forefront of expanding potential liability to non-clients. For example, a California federal district case, *In re Rexplore*, determined that if it was foreseeable that a client would use an attorney’s advice in obtaining investors, the attorney could be liable to the investors. Another California case, *Courtney v. Waring*, dealt specifically with an attorney’s liability to third parties. In upholding the non-clients right to bring an action, the court found that the plaintiffs stated a cause of action based on allegations that (a) the attorneys negligently prepared a franchise prospectus which failed to disclose material information; (b) the attorneys knew that the prospectus contained false and misleading information; (c) the non-client plaintiffs did not know that the prospectus contained false and misleading information; and (d) the attorneys knew that the false and misleading prospectus would be used to induce the non-client plaintiffs to buy franchises.

Additionally, engaging in business services that are not predominantly legal could expose an attorney to greater risk to third parties. In giving non-legal counsel, “the attorney may not only find that his or her communications and written work are discoverable.” The attorney also could be named as a defendant in, for example, a suit alleging interference with economic advantage or inducing breach of contract if the client relied on the attorney’s business advice, and in so doing, harmed a third party. The lawyer may also be in trouble if the work performed by the lawyer was not within the parameters of legal services. Under those circumstances,

58 *Id*. at 1443-4.
courts have permitted non-clients to assert claims against lawyers for ordinary negligence. This could be a particular concern in the franchise context. For example, a disgruntled franchisee could sue the franchisor and the franchisor’s attorney, and may have a greater chance of recovery against the attorney who provided business advice, instead of legal advice, to the franchisor.

It is unclear if a third party would have the right to assert a claim for negligence against a consultant. While some states allow a claim against a consultant, other states limit the situations to which this claim may be used. Several courts have allowed a cause of action to be asserted against a consultant by a party that is not in privity with the consultant. Generally, these cases have involved situations that “sufficiently approached” privity such as a case in which the consultant made a misrepresentation that a third party relied upon to its detriment. In Williams Controls, Inc., for example, the court noted that accounting consultants knew their work would be relied upon in a transaction involving third parties. The Williams court held that, as the consultants were aware of the impact of their work upon these third parties, privity was not required in a claim of negligent misrepresentation.

Many states, however, have limited third party liability to only those situations in which the parties to the contract intended to confer a benefit directly upon the third party bringing the suit for damages. Therefore, according to these courts, a third person cannot maintain an action merely because that person would receive some benefit from its performance or because they are injured by a breach of the contract.

V. OTHER ETHICAL ISSUES

A. Referrals and Fee-Splitting

It is a fact of life that people refer business to those from whom they receive business, and lawyers and consultants are no exception. Franchise lawyers will often refer business to consultants or brokers with the expectation that the favor will be returned. Often, if a client seeks a recommendation, an attorney will give the client several names so that the client has a choice. If an attorney and consultant have a cross-referral arrangement, the client should be made aware of it. The ethical rules relating to referrals, fee-splitting and multi-disciplinary practice are in many ways interrelated.

Model Rule 7.2 makes it clear that lawyers cannot share fees with nonlawyers:

60 Id.
62 Id.; see also, Board of Managers of Alfred Condominium v. Carol Management, 214 A.D.2d 380, 382-383 (N.Y. App. Div. 1995) (finding a lack of privity between New York City and architecture consultants did not prevent City from bringing suit against consultants as relationship approximated privity).
63 See Levine v. Selective Ins. Co. of Am., 462 S.W.2d 81, 83 (1995) (citing Virginia Code § 55-22 which allows a person who is not a party to a contract to maintain an action if they are not named in the contract only if they show that the parties to the contract clearly and definitely intended to confer a benefit directly upon that person); City of Tampa v. Thornton-Tomasetti, P.C., 646 So.2d 279, 281-282 (Fla. App. 2 Dist. 1994) (noting that in limited circumstances, professionals can be held liable to noncontractual parties for economic damages arising from professional negligence. However, liability is extended only to the “distinct third parties whose reliance upon documents or information furnished by the professional constituted the end and aim of the [underlying] transaction.”).
64 Copenhaver v. Rogers, 384 S.E.2d 593, 596 (1989); see also Trout v. General Sec. Serv. Corp., 8 S.W.3d 126, 132 (Mo. Ct. App. 1999) (holding the contracting parties must have intended to benefit the third party before the third party may maintain a cause of action for breach of contract against the parties).
A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may...(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.66

The Commentary to this Rule notes:

(8) A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services...Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such referral arrangements are governed by Rule 1.7... Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules.66

The question of whether lawyers can collect referral fees from nonlawyers depends on the jurisdiction. Because rules differ, lawyers and consultants should consult the jurisdiction’s rules and ethics opinions regarding fee-splitting.67 The annotations to Model Rule 5.4 note that some jurisdictions strictly prohibit lawyers from collecting referral fees from nonlawyers, even with the client's consent,68 while others allow it with the client’s consent.69 Some states permit fee-splitting that meets certain criteria, such as requiring the attorney to have a supervisory role over the nonlawyer,70 while others only permit such a sharing arrangement with the client’s consent when the nonlawyer is part of an ancillary business and other criteria are met.71

Referrals should not be taken lightly. A referral to someone who is not competent and qualified to handle the matter could subject the referring party to an action for negligent referral.72 A New Jersey Federal Court noted that when referring matters to another attorney, a lawyer must exercise ordinary care and skill, and liability against the referring attorney could arise from his knowledge of certain facts that should have put him on notice that the attorney to whom the referral was made had been involved in unethical conduct.73 This principle would seem equally applicable to an attorney referring a matter to a consultant and vice versa. The standard of care in making referrals is not easily defined and likely depends on the facts and

65 Model Rules of Prof'l Conduct R. 7.2(b) (2004).
66 Id. R. 7.2, cmt 8 (emphasis added).
73 Id. at 1170.
circumstances of each situation. However, when it comes to the attorney-client relationship, the best interest of the client should be paramount. Common sense should prevail, and the referral should be because the person is truly qualified and not simply because the referring party will derive some tangible or intangible benefit by making the referral.

A referral to an unqualified source might also be a fertile area for raising questions of a conflict of interest. For example, an attorney who refers a matter to a consulting firm who is also a client could, in certain circumstances, be placed in a situation where a conflict-of-interest exists or is likely to arise. The Comment to Model Rule 1.7 notes that an attorney’s loyalty and independent judgment are essential to the attorney-client relationship, and that it is incumbent on the lawyer to clearly identify the client and to determine whether a conflict of interest exists and if the conflict is one that can be waived by the client. Some conflicts by their nature are not waivable; but, for those that are, the Model Rules require that the attorney clearly explain the material risks and available alternatives to the client in order to obtain “informed consent.”

Similarly, informal relationships between attorneys and consultants could result in liability against an attorney for breach of fiduciary duty. Although legal malpractice actions are most often based on an attorney’s failure to provide reasonable representation, they may also arise out of claims that a lawyer breached his or her fiduciary duty to a client or former client. The law of agency applies to the attorney-client relationship, and the attorney owes the client a duty of loyalty and confidentiality. The attorney must act solely for the client’s benefit in matters connected with the agency, as a fiduciary relationship is created between the attorney and client as a matter of law. The fiduciary duty requires the attorney to treat the client’s interests as paramount. An attorney must safeguard the client’s confidences, avoid impermissible conflicts of interest, deal honestly with the client, adequately inform the client, follow instructions of the client, and not employ adversely to the client powers arising from the attorney-client relationship. In the franchise context, for example, an attorney that receives referrals from a consultant from whom he receives a steady source of business could conceivably risk putting the consultant’s interests above those of the client, and hence run the risk of breaching the fiduciary duty.

B. Multi-Disciplinary Practice

The Multi-Disciplinary Practice of Law (“MDP”) is somewhat related to the issue of fee-splitting. The ABA Commission on multidisciplinary practices, which has since been disbanded, defines an MDP as:

A partnership, professional corporation or other association or entity that includes lawyers and nonlawyers and has as one, but not all of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing non-legal, as well as legal, services.

---

74 Model Rules of Prof'l Conduct R. 1.7 cmt 1(2004).
75 Id. R. 1.0(e).
78 Rest 3d of the Law Governing Lawyers § 49.
MDPs have been the subject of great debate. Although common in foreign countries, most jurisdictions have outlawed MDPs in the United States, except the District of Columbia. Model Rule 5.4 serves as a basis for the prohibition of lawyers that engage in MDP's. Model Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer if the partnership consists of the practice of law. Model Rule 5.4(c), prohibits regulating a lawyer's professional judgment in rendering legal services, and Model Rule 5.4(d) prohibits lawyers from practicing in professional associations when nonlawyers have certain power over the association.

A June 15, 2007 ethics opinion from the New Jersey Advisory Committee on Professional Ethics, however, may indicate a more liberal approach towards MDPs, at least in New Jersey. That opinion authorizes New Jersey lawyers to refer clients to investment companies in which they own stock and permits them to receive a share of commissions paid by the attorney’s clients, provided that terms of the arrangement are fair and reasonable, the client agrees in writing and the attorney advises the client in writing of the desirability of obtaining independent legal counsel.

C. Representing Competitors

Franchise attorneys may face ethical issues when asked to represent a client who is in the same industry as an existing client. This dilemma poses many questions: can any lawyer represent two potential competitors within the same industry; is consent required of both; and can the lawyer even divulge the identity of the client? The starting place of the analysis is whether the representation “will be directly adverse” or if the lawyer’s representation of one client will be “materially limited” by his responsibilities to the other client. If both answers are negative, then the lawyer may generally proceed with the representation.

Another question is if a lawyer can resolve any confidentiality issues, can his or her transactional representation ever be said to be “directly adverse”? The Revised Rules do not provide a clear answer. Attorneys can take some solace that the commentary appears to suggest that mere competitive economic interest is not a conflict that requires consent in litigation. Arguably, if mere competing economic interests do not constitute a conflict in litigation, then they certainly should not in transactional practice. However, the comments do not mention competing economic interests in the context of transactional conflicts. That is, the

---

82 District of Columbia, Rules of Prof'l Conduct R. 5.4 (Feb. 2007)(does not completely bar lawyers and nonlawyers from joining together to provide legal services).
84 Id. R. 5.4(b).
85 Id. R. 5.4(c).
86 Id. at 5.4(d).
88 For a further discussion of this opinion, see http://www.law.com/jsp/article.jsp?id=1183626394587.
89 This section is from a previous ABA Forum that was co-authored by one of the authors of this paper, and is addressed more fully therein. See Howard E. Bundy and Leonard D. Vines, Ethics Issues in the Practice of Franchise Law, ABA Forum on Franchising (Orlando, Fla.) (Oct. 2005).
90 Model Rules of Prof'l Conduct R. 1.7(a)(1).
91 Id. R. 1.7(a)(2).
92 Id. R. 1.7(a)(1) and R. 1.7(a)(2).
93 Id. R. 1.7, cmnt. 6.
94 Id. R. 1.7, cmnt. 7.
authors have not found any authority on the question of whether there are circumstances under which representing competing franchisors in transactional work would constitute a directly adverse representation.

Assuming there is no “direct adversity,” the lawyer must still determine whether there is “significant risk” that the representation of a new client “will be materially limited by the lawyer’s responsibilities to another client.” The Revised Rules provide no objective guidance on the definition of “significant risk” either. The comments to Rule 1.7 note that whether a conflict is consentable depends on the circumstances. When the interests of the parties are fundamentally antagonistic, it is clear that the lawyer cannot represent multiple parties. However, where the clients are generally aligned in interest, a lawyer can establish and adjust a relationship that is mutually advantageous, even if there is some difference of interest among the parties. If not, the lawyer must still obtain the written informed consent of the client after consultation.

If the attorney determines that there is “a significant risk” the representation of one competitor might materially limit the lawyer’s ability to represent the other, in order to proceed the lawyer must; (a) “reasonably believe he will be able to provide competent and diligent representation to each client” and (b) obtain the written informed consent of each client “after consultation.”

Here, the lawyer should consider obtaining consent to future conflicts. The Revised Rules appear to approve of such consents in certain circumstances:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [of Model Rule 1.7]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise (and the actual and reasonably foreseeable adverse consequences of those representations), the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b) [of Revised Rule 1.7].

Industry conflicts tend to be economic and potentially competitive in nature. Clients’ legitimate concerns are that the lawyer not publish their trade secrets to competitors or potential competitors. When dealing with sophisticated clients or with clients who have independent

95 Id. R. 1.7, cmt. 28.
96 Id.
97 Id. at 1.7(b).
98 Id. R. 1.7, cmt. 22.
counsel, it should not be difficult to obtain consent. However, as a practical matter, even if there is no technical ethical conflict, an attorney may determine that representing a competitor of a client conflicts with the interests of an existing client, and that the representation should be declined.

A lawyer should consider adding language to the representation agreement that specifically addresses the issue of representing competitors in the same industry. The agreement could address issues most sensitive to franchise clients, such as the attorney’s non-disclosure of trade secrets between clients. A lawyer could also develop a routine for evaluating the magnitude of the risk that the representation of a new client will have. One question to ask is if it will materially limit or be materially limited by the lawyer’s representation of another or existing client? Additionally, a lawyer should document the facts that support the decision he or she makes. Lastly, a lawyer should communicate openly with every client about the risk that the lawyer's ability to provide competent and diligent representation could be materially limited by obligations to another client.

D. Solicitation and Advertising Issues

Attorneys face greater restrictions on advertising than consultants face. Model Rule 7.3(a) prohibits attorneys from soliciting clients in-person or by telephone. Model Rule 7.3(c) requires that every “written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ‘Advertising Material’ on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, except under certain circumstances.” Furthermore, Model Rule 8.5 provides that the rules of a state apply to lawyers admitted in another state.

A development of interest to attorneys both inside and outside the franchise field is whether they can advertise their selection on certain lists involving lawyer’s rankings. New Jersey is leading the challenge to advertising such rankings; however, as of the time that this paper was submitted, the issue has not yet been decided in New Jersey. The Committee on Attorney Advertising Appointed by the New Jersey Supreme Court (“Committee”), found that the methodology used in determining the qualifications for such designations was unclear and that advertising oneself as a “Super Lawyer” or “Best Lawyer in America” does not comply with the New Jersey Rules of Professional Conduct. The Committee specifically determined that the “use of superlative designations by lawyers is inherently comparative.” The New Jersey Supreme Court stayed the order and appointed a special master to rule on the validity of Opinion 39. As of the date that this paper was submitted, the special master has not ruled.

100 Advertising rules for states are posted on the ABA website http://www.abanet.org/legalservices/clientdevelopment/adrules/.
101 Id. R. 7.3(a).
102 Id. R. 7.3(c).
103 Id. R. 8.5.
104 The current status of New Jersey Opinion 39 along with copies of briefs and legal arguments can be found on the web at http://www.superlawyersfacts.com/2007/05/ftc_recommendets_.html.
105 Opinion 39 is available at http://www.judiciary.state.nj.us/notices/ethics/CAA_Opinion%2039.pdf#search=%22new%20jersey%20committee%20on%20attorney%20advertising%20opinion%2039%22.
106 Id.
107 Id.
The Federal Trade Commission filed an *amicus curiae* brief recommending that Opinion 39 be vacated.\(^{108}\) The FTC took the position that: (a) the prohibition on truthful, non-misleading attorney advertising is likely to harm New Jersey consumers; (b) First Amendment commercial speech doctrine requires that restrictions be narrowly tailored to further a substantial government interest; (c) the Committee does not provide any evidence that consumers are likely to be deceived by the prohibited advertising; (d) the advertising at issue contains verifiable facts that are unlikely to mislead consumers, and (e) there are substantially less restrictive alternatives than banning comparative ratings programs.\(^{109}\)

Although the respective roles of an attorney and consultant can be very different, there are, of course, many situations where their respective roles will intercept, as discussed more fully in the section of this paper.

**VI. ROLES INVOLVED IN THE DEVELOPMENT OF A FRANCHISE SYSTEM**

**A. Relationship Between Lawyer and Consultant in Providing Services to New and Existing Franchisors**

From the business consultant’s viewpoint, very little involved in the design, development and management of a franchise system has very much to do with the law. The law related to franchising primarily deals with the offer of a franchise and in only a limited number of jurisdictions deals with the relationship and those limited mainly to termination and expiration issues. To the consternation of some lawyers, many consultants have an equal or often a superior knowledge of many of the laws related to franchising and routinely factor that knowledge into their discussions with clients. The issue of consultants applying their knowledge of franchise law in serving their clients is at the center of the dispute between lawyers and consultants.

While it is necessary to have a franchise disclosure document and properly drafted legal documentation, having a franchise disclosure document is insufficient to be a successful franchisor. Equally, while it is essential that lawyers be the only profession allowed to prepare the necessary legal documentation, from the business person’s perspective, it is the business content of those agreements which are the most important elements of those documents. Even where the client agrees with the lawyer’s recommendations, from the business consultant’s point of view, without engaging in the proper work product, the recommendations of the lawyers may be without sufficient foundation.

Generally, clients looking for advisors to begin the development of their franchise system have little understanding of what is required for the proper development and management of a franchise system and few understand the requirements of whether their businesses are even candidates to become successful franchisors. They expect that the professional service provider has the requisite skills and experience to provide them with competent guidance. It is for this reason that “franchise packaging firms,” whether they are business or legal practitioners, are so troubling to both business and legal professionals in franchising.

Many lawyers are quite capable of providing outstanding business and other non-legal advice to clients and complete the requisite work to support their recommendations. The

\(^{108}\) Brief for the FTC as Amicus Curiae supporting arguments to vacate Opinion 39 of The Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey (2007) (Docket No. 60,003).

\(^{109}\) *Id.*
concern for the business professionals is that many others are without sufficient business experience or fail to perform the underlying tasks necessary to provide competent business advice and place the client at more than some risk. Also the process that many lawyers use to obtain the necessary business decisions from their clients, a discussion of questions and answers contained in a lengthy questionnaire prepared by the lawyer, may be insufficient as a replacement to a proper strategic process.

The concern for legal professionals and business professionals is whether boundaries can be defined for both professions as they encroach into the services of the other. Just as many lawyers are capable of providing business advice; many consultants are capable, within limits, of providing legal advice to clients involving franchise related matters. As discussed elsewhere in this discussion, the providing of that information by a knowledgeable layman is likely not akin to practicing law. The exception to this, as we have discussed may be the franchise packaging firms, such as Francorp and others, whose internal staff prepare legal documentation for review by their client’s legal counsel. From the business person’s viewpoint, franchise documents, even when prepared by competent legal counsel, are as problematic as those prepared by packaging firms when the documents are not built on terms defined by using a proper strategic process.

Other than the restriction that the consultant is prohibited from engaging in the practice of law and that an attorney is at risk if it renders predominantly business advice, there are not strict guidelines as to the specific roles that an attorney and consultant take in connection with a franchise system. An experienced, sophisticated client will likely have fewer needs than a novice, and some of the items listed below may be handled directly by the client. In addition, the involvement of an accountant and attorneys with experience in other disciplines (i.e., trademark, tax, labor, real estate, etc.) may be necessary in certain circumstances. The roles of the consultant and attorney may very well overlap in many instances, with each providing their input and perhaps a different perspective. Appendix B is a chart that outlines various roles that an attorney and a consultant might fill in connection with providing services to a franchisor. The chart should be viewed as a summary of how some might view the respective roles; however, there is room for disagreement. Indeed, in some cases, an experienced, highly qualified consultant will know more about franchise law than an attorney who is not experienced in the field. Likewise, an attorney with extensive franchise experience may be more suited for handling certain roles that might appear more suited to the consultant. Furthermore, franchise brokers may also provide certain consulting type services to those franchisors who utilize them.

B. Consultant’s Conduct of the Feasibility Examination

From the business consultant’s viewpoint, the feasibility examination is an essential element in the development of any franchise system. A client's desire to become a franchisor should not relieve the lawyer of their responsibility of recommending to the client that they have a proper feasibility examination conducted before they become a franchisor. A cursory discussion with the client may not be adequate to properly advise them on this issue.

Making a determination of whether the client is ready to franchise requires an examination of the client’s business against agreed upon benchmarks. While the criteria used in feasibility examinations may vary among professionals, at a minimum a feasibility examination should include an examination of the following key issues:

Business Economics and Capital
Does the franchisor have sufficient economic resources? Can the franchisor afford to assess whether the business is franchisable, design and develop the franchise system, prepare the necessary legal documentation and create the required tactical elements to launch and support the franchise system? In addition to the investment required to become a franchisor, does the client have the necessary resources to manage and grow the business including meeting its commitments to its franchisees? The client should also understand whether its return on investment as a franchisor is acceptable against other investment opportunities or methods of downstream distribution.

The required investment must be affordable for the expected potential franchisee. Once converted to a franchise model (after incurring the required initial and continuing franchise fees), is the business profitable and will it earn an acceptable return on investment within each of the class(es) of franchisees that will be recruited?

Product or Service

- The business should be in existence for a sufficient period of time to predict its future. In the targeted markets, is there sufficient consumer demand for the company’s products and services? The business should be based on either a well established consumer demand or a trend that will keep the company’s products and services in demand for the foreseeable future. The relevant market for the company’s products and services should be growing and the competitive business environment should be beneficial to the company’s long term success.

Management

- The proposed franchisor’s management should be experienced, ethical and have a history of financial and personal accomplishments. The company should be willing and able to recruit management and staff to fill any gaps in required skills. The franchisor should have the capability to add sustainable value to the relationship, including product and service enhancement, management and staff training, operations manuals, field consulting, consumer and franchisee marketing capabilities, multi-unit operations skills and other support services required by a growing franchise system.

Commitment

- Management must be committed and have the capability to make the required financial investment into the long-term growth and support of the franchise system. The franchise system must have the necessary resources to adapt the system to local market conditions; evolve the product and service offering; motivate franchisees to achieve successful operations; and, enforce system brand standards.

Systemization

- The business to be franchised should be based upon a set of refined and unified operating processes that have been tested and proven in actual operating
locations. The business systems should be clearly defined and documented. Management should be able to communicate system standards and procedures in well documented operations manuals and training programs that include required forms and checklists.

Skill Transference

- Franchisees and their employees can be taught to operate the business in a reasonable period of time. With proper training and support the franchisee will be able to operate the business to meet the minimum standards of the franchisor. If any special skills or licenses are required, there is an adequate pool of potential franchisees with those skills. In the alternative, is there an adequate pool of potential employees available with those skills that the franchisee can hire?

Localization

- While it is generally accepted that brands work best when locations operate at consistent levels of performance and when each location offers products and services consistent from location to location, variations may be acceptable. The products and services should be adaptable to location market conditions (culture, real estate, consumer preferences, regulations, etc.) The real estate requirements for the system, based upon anticipated growth, need to be assessed and the client's capacity to assist the franchisee needs to be evaluated.

Differentiation

- The business is marketable against competition. While its products and services may also be offered by franchised and non-franchised competitors, there are certain competitive advantages or points of differentiation which the company offers to consumers.

Availability of Franchisees

- There is an adequate pool of potential franchisees that are ready, willing and able to become franchisees in the system. The company's expansion goals allow it to create critical mass and sufficient market share in core markets and these goals are realistic and achievable. Franchisees will need to be skilled, highly motivated and client-service focused.

Regulations

- Most franchise related laws and regulations in the United States deal with disclosure of the franchise relationship, the offering of the opportunity, protection afforded to the franchisor's trademarks and trade secrets, and in limited areas, the relationship between the franchisor and franchisee. However, other non-franchised regulations may also impact businesses ability to franchise successfully including zoning, environmental, professional licenses required, etc. The impact of these rules must be factored into determining if the business is franchisable.
Some of the above criteria are soft objective evaluations that can be based upon discussions with the client. However, most of the issues require substantial work and are measurable. Unless proper procedures are conducted and evaluations made, the professional providing the advisory service may be challenged that they have not met their minimum burden in providing proper advice to their client. Lawyers providing business advice to their clients may be advised to recommend the services of business consultants or other business professionals who can complete this type of evaluation.

C. Development of the Terms of the Franchise Offering (Strategic Planning)

Once the feasibility examination has been completed, and assuming it points to the establishment of a franchise system, developing the terms of the franchise offering is necessary. There are a myriad of both legal and business issues that must be examined in order to determine the terms of the franchise offering that ultimately will be included in the offering circular and underlying agreements.

Each element of the business strategy is interconnected and interdependent. As such, a detailed planning approach to creating the franchise system is required. Basing a franchisor’s offering on another franchise system’s documentation, or relying on a discussion of a series of disclosure questions and experience alone is not a suitable substitute for the proper determination of the terms of the offering. Franchise systems, even in the same industry subset, are often substantially different from their competitors. Using fungible solutions as replacement for a proper business strategic process can create serious issues for new franchisors that may only become noticeable when the franchisor matures. These include, but are certainly not limited to determining if the overall structure of the franchise offering including, retail and franchise competition, classes of franchisees to be considered and the obligations of the parties produces a satisfactory return on investment at each level based upon the initial and continuing fees, cost of providing the promised services, territorial rights, critical mass requirements, etc. There is a natural tension in any business strategy between marketability, scalability, sustainability and system expansion that must be considered for each unique franchise offering. While clients may be knowledgeable about their existing business, few emerging franchisors, even those with prior franchise experience have the required knowledge to make those informed decisions independently. Without the proper professional rigor being applied to determining the requirements of the business structure and franchise offering, the long term risk to the franchisor is heightened. Some of the basic elements that require review include, but are not limited to, those set forth on the chart in Appendix C.

The resulting strategic and tactical plan will provide the terms for inclusion in the franchise agreements and disclosure documents including, but not limited to:

- The concept to be franchised
- Business structure and system statistical and other information
- Operating standards
- Franchise network support and controls
- Franchisee relations
- Financial modeling, initial investment, fees, financing and earnings claim
- Franchise system expansion
- Administrative, accounting, controls, reporting systems
- Advertising, publicity, promotion
• Training
• Franchisor and franchisee organization and staffing
• Site and territorial issues including market size, site selection, acquisition, management, décor and design
• Merchandising and Packaging
• Purchasing and Supply Chain Management
• Retrofranchising
• Tax planning
• Trademarks, service marks, copyrights, patents and graphics

Each of these elements above, which make up the major issues required to be addressed in the design of a franchise system, is primarily business related. Unless the lawyer is experienced and is prepared to employ, at a minimum, the same professional rigor used by business professionals in making their recommendations to clients, lawyers should consider and may have a professional duty to recommend to their clients that they use the services of other professionals to assist them in making these critical determinations.

There are other areas of service to the emerging franchisor (including operations manuals, training programs, website development, etc.) that are typically provided exclusively by nonlawyers. There are other services that tend to be shared by business consultants, lawyers and other professionals. These include, but are not limited to:

• Assisting client in the filing for registration of trademarks and service marks;
• Implementation of franchise sales compliance program and ongoing assistance to client;
• Determination of schedule for applying for approval to offer franchisees in the required states;
• Definition of the rights and limitations of the system to alternative channels of distribution;
• Determination of requirements to protect confidential trade secrets, systems etc.;
• Options to enter into successor agreements and conditions;
• In-term and post-term restrictions and obligations, including but not limited to competition;
• Penalties and default provisions imposed by franchisor;
• Determination of the conditions governing the transfer, inheritance, and assignment of the franchisee rights;
• Determination of the provisions for resolving franchisor and franchisee disputes;
• Determination the conditions under which either party may terminate the franchise agreement;
• Determination of the inclusion or exclusion of earnings claims and the development of the claim;
• Determinations regarding real-estate and site support and development, environmental, leasing and zoning issues;
• Integration of legal information into operations manuals, training programs, etc.;
• Review of manuals and training programs for risks related to vicarious and other liability;
• Supplier relationships and supply chain management;
• Advertising programs and marketing options (fund/cooperatives); and
• Franchisee staff certification.
Clearly, as the lawyer prepares the underlying legal agreements where they believe the “legal” determinations reached by the client and their business advisors may be in error, their role is to raise these issues directly with their client. However, the above areas of advice are routinely provided by business advisors during their engagement with the client.

VII. CONCLUSION

While attorneys and consultants face some of the same issues when representing franchise clients, different issues and obligations distinguish the two types of advisors. Although consultants, for the most part, do not face near the degree of regulation that attorneys do, they must be careful to avoid crossing the line and giving legal advice that could result in the unauthorized practice of law. However, as with attorneys, sometimes the line between legal and business advice is unclear, and attorneys run the risk of losing the attorney-client privilege and subjecting themselves to malpractice claims when they provide predominantly business advice. Attorneys, too, face risks of engaging in the unauthorized practice of law when they engage in multi-state conduct; however, as a practical matter, the regulatory authorities generally “turn the other cheek.” Both attorneys and consultants should exercise care when referring clients to other professionals. An attorney clearly has a fiduciary duty to the client, must avoid conflicts of interest, and must protect a client’s confidences. The extent of those same duties from a consultant’s standpoint are not as clear and have not been developed to the same degree that they have been in the attorney-client context. Some of the ethical issues, such as fee-splitting, provision of ancillary services, and fiduciary duties, can overlap, and the ultimate outcome of many ethical issues will be dependent on state law.
APPENDIX A – STANDARDS FOR CONSULTING SERVICES

Standards for Consulting Services (MSPC’s SSMCS)

11. The general standards of the consulting profession are contained in the IMC USA/MSPC/AMCF Codes of Ethics and apply to all Consulting Services performed by management consultants. They are as follows:

**Professional competence.** Undertake only those professional services that the practitioner’s can reasonably expect to be completed with professional competence.

**Due professional care.** Exercise due professional care in the performance of professional services.

**Planning and supervision.** Adequately plan and supervise the performance of professional services.

**Sufficient relevant data.** Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

12. The following additional general standards for all Consulting Services are promulgated to address the distinctive nature of Consulting Services in which the understanding with the client may establish valid limitations on the practitioner’s performance of services. These Standards are established under the IMC USA/MSPC/AMCF Codes of Ethics.

**Client Interest.** Serve the client interest by seeking to accomplish the objectives established by the understanding with the client while maintaining integrity and objectivity. "

**Understanding with Client.** Establish with the client a written or oral understanding about the responsibilities of the parties and the nature, scope, and limitations of services to be performed, and modify the understanding if circumstances require a significant change during the engagement.

**Communication with Client.** Inform the client of (a) conflicts of interest that may occur pursuant to the IMC USA/AMCF/MSPC Code of Ethics (b) significant engagement findings events.”

Standards for Consulting Services (AICPA’s SCS)

6. The general standards of the profession are contained in Rule 201 of the AICPA Code of Professional Conduct and apply to all services performed by members. They are as follows:

**Professional competence.** Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.
Due professional care. Exercise due professional care in the performance of professional services.

Planning and supervision. Adequately plan and supervise the performance of professional services.

Sufficient relevant data. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

7. The following additional general standards for all Consulting Services are promulgated to address the distinctive nature of Consulting Services in which the understanding with the client may establish valid limitations on the practitioner’s performance of services. These Standards are established under Rule 202 of the AICPA Code of Professional Conduct.

Client Interest. Serve the client interest by seeking to accomplish the objectives established by the understanding with the client while maintaining integrity and objectivity. ¹

Understanding with Client. Establish with the client a written or oral understanding about the responsibilities of the parties and the nature, scope, and limitations of services to be performed, and modify the understanding if circumstances require a significant change during the engagement.

Communication with Client. Inform the client of (a) conflicts of interest that may occur pursuant to interpretations of Rule 102 of the Code of Professional Conduct, ² ³ (b) significant reservations concerning the scope or benefits of the engagement, and (c) significant engagement findings or events."

C. Standards for Services Provided by Consultants

Both SSMCS and SSCS have nearly identical standards as to the conduct for the consulting in providing their services to the client. The following are the SSCS standards. The SSMCS standards are included in the appendix.

Definitions

5. Terms established for the purpose of the SSCSs are as follows:

Consulting Services Practitioner. Any AICPA member holding out as a CPA while engaged in the performance of a Consulting Service for a client, or any other individual who is carrying out a Consulting Service for a client on behalf of any Institute member or member's firm holding out as a CPA.

Consulting Process. The analytical approach and process applied in a Consulting Service. It typically involves some combination of activities relating to determination of client objectives, fact-finding, definition of the problems or opportunities, evaluation of alternatives, formulation of proposed action, communication of results, implementation, and follow-up.
**Consulting Services.** Professional services that employ the practitioner’s technical skills, education, observations, experience, and knowledge of the consulting process.  

1. **Consultations,** in which the practitioner's function is to provide counsel in a short time frame, based mostly, if not entirely, on existing personal knowledge about the client, the circumstances, the technical matters involved, client representations, and the mutual intent of the parties. Examples of consultations are reviewing and commenting on a client-prepared business plan and suggesting computer software for further client investigation.

2. **Advisory services,** in which the practitioner's function is to develop findings, conclusions, and recommendations for client consideration and decision making. Examples of advisory services are an operational review and improvement study, analysis of an accounting system, assisting with strategic planning, and defining requirements for an information system.

3. **Implementation services,** in which the practitioner's function is to put an action plan into effect. Client personnel and resources may be pooled with the practitioner's to accomplish the implementation objectives. The practitioner is responsible to the client for the conduct and management of engagement activities. Examples of implementation services are providing computer system installation and support, executing steps to improve productivity, and assisting with the merger of organizations.

4. **Transaction services,** in which the practitioner's function is to provide services related to a specific client transaction, generally with a third party. Examples of transaction services are insolvency services, valuation services, preparation of information for obtaining financing, analysis of a potential merger or acquisition, and litigation services.

5. **Staff and other support services,** in which the practitioner's function is to provide appropriate staff and possibly other support to perform tasks specified by the client. The staff provided will be directed by the client as circumstances require. Examples of staff and other support services are data processing facilities management, computer programming, bankruptcy trusteeship, and controllership activities.

6. **Product services,** in which the practitioner's function is to provide the client with a product and associated professional services in support of the installation, use, or maintenance of the product. Examples of product services are the sale and delivery of packaged training programs, the sale and implementation of computer software, and the sale and installation of systems development methodologies.

8. Professional judgment must be used in applying Statements on Standards for Consulting Services in a specific instance since the oral or written understanding with the client may establish constraints within which services are to be provided. For example, the understanding with the client may limit the practitioner's effort with regard to gathering relevant data. The practitioner is not required to decline or withdraw from a consulting engagement when the agreed-upon scope of services includes such limitations.
Notes to SSCS

1. The definition of Consulting Services excludes the following:

a. Services subject to other AICPA Technical Standards such as Statements on Auditing Standards (SASs), Statements on Standards for Attestation Engagements (SSAEs), or Statements on Standards for Accounting and Review Services (SSARSs). (These excluded services may be performed in conjunction with Consulting Services, but only the Consulting Services are subject to the SSCS.)

b. Engagements specifically to perform tax return preparation, tax planning/advice, tax representation, personal financial planning or bookkeeping services; or situations involving the preparation of written reports or the provision of oral advice on the application of accounting principles to specified transactions or events, either completed or proposed, and the reporting thereof.

c. Recommendations and comments prepared during the same engagement as a direct result of observations made while performing the excluded services.

2. Article III of the Code of Professional Conduct describes integrity as follows:

"Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Integrity can accommodate the inadvertent error and the honest difference of opinion; it cannot accommodate deceit or subordination of principle."

Article IV of the Code of Professional Conduct differentiates between objectivity and independence as follows:

"Objectivity is a state of mind, a quality that lends value to a member's services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. Independence precludes relationships that may appear to impair a member's objectivity in rendering attestation services."

3. Rule 102-2 on Conflicts of Interest states, in part, the following:

"A conflict of interest may occur if a member performs a professional service for a client or employer and the member of his or her firm has a significant relationship with another person, entity, product, or service that could be viewed as impairing the member's objectivity. If this significant relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service..."

4. AICPA independence standards relate only to the performance of attestation services; objectivity standards apply to all services. See footnote 2."
<table>
<thead>
<tr>
<th>Item</th>
<th>Attorney’s Role</th>
<th>Consultant’s Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advantages and disadvantages of franchising – removing the myths about franchising</td>
<td>Provide information about franchising sufficient to allow client to participate in the development of their franchising strategy</td>
<td>Provide information about franchising sufficient to allow client to participate in the development of their franchising strategy</td>
</tr>
<tr>
<td>Feasibility of the concept for franchising</td>
<td>Provide information on whether the concept will fit within the legal confines of the franchise laws</td>
<td>Provide information from a business prospective whether the concept lends itself to being a sustainable franchise</td>
</tr>
<tr>
<td>Analysis of alternate methods of distribution in lieu of franchising</td>
<td>Advise client on types of arrangements that might fall outside of the franchise laws and the legal consequences of doing so, such as risk of falling under the business opportunity laws</td>
<td>As part of a feasibility examination assist the client in determining which method(s) of distribution should be included in their expansion strategy and then assist in analyzing the business issues involved in structuring the arrangement in different forms</td>
</tr>
<tr>
<td>Explore client’s reasons for franchising</td>
<td>Although not a legal issue, this would be an appropriate area of inquiry for any attorney; motivations should be based on sound reasons</td>
<td>As part of feasibility examination.</td>
</tr>
<tr>
<td>Implementation, development, and operation of the franchise system</td>
<td>Advise on legal constraints of selling and operating franchise systems and the practical and legal implications of the franchise agreement and other documents</td>
<td>As part of feasibility examination. Prepare financial projections for franchisor and each class of franchisee to determine fees and ensure adequate return on investment at each level of the organization</td>
</tr>
<tr>
<td>Industry analysis and background</td>
<td>Advise on legal impact of various laws that could affect the type of business that is being franchised</td>
<td>As part of feasibility examination and strategic structure of the franchise system</td>
</tr>
<tr>
<td>Item</td>
<td>Attorney’s Role</td>
<td>Consultant’s Role</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Corporate structure, and tax issues</td>
<td>Assist in determining type of entity, formation of entities, preparation of agreements between affiliated entities and among the owners of the franchisor; tax advise through tax counsel or CPA</td>
<td>Advise on corporate structure from a business perspective</td>
</tr>
<tr>
<td>Capitalization of franchisor</td>
<td>Advise on risks of undercapitalization; possible need for escrowing in certain registration states; piercing the corporate veil if undercapitalized</td>
<td>Advise with respect to capital necessary to implement and sustain the franchise system according to the strategic planning process</td>
</tr>
<tr>
<td>Intellectual property protection</td>
<td>Evaluate the strength of the trademark and the likelihood of being able to obtain a federal registration from a legal prospective; search to determine if there are claims of common law trademark; prepare legal documents necessary to file for a federal trademark registration; advise on measures to protect intellectual property, including trademarks and trade secrets</td>
<td>Assist in helping select the trademark and evaluating the strength of trademark from a marketing prospective</td>
</tr>
<tr>
<td>Structure of franchise system: single unit, area development and/or master franchise options</td>
<td>Prepare documents for area developer or master franchise; advise on advantages and disadvantages of different types of agreements</td>
<td>Advise on structure of franchise system based upon the strategic planning process</td>
</tr>
<tr>
<td>UFOC</td>
<td>Prepare UFOC document and ancillary documents such as releases, Lease Addendum, State Law Addenda; perform due diligence as necessary to verify that information provided by client is accurate; update UFOC as required; analyze what must be included and what</td>
<td>Advise on issues included in the UFOC based upon the strategic planning process. Review the work product of the attorney to determine that the terms included in the UFOC and agreements meet the terms of the strategic process and that the documents are clearly written and</td>
</tr>
<tr>
<td>Item</td>
<td>Attorney’s Role</td>
<td>Consultant’s Role</td>
</tr>
<tr>
<td>------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Financial representations</td>
<td>can be excluded from UFOC</td>
<td>marketable</td>
</tr>
<tr>
<td>Franchise Agreement</td>
<td>Drafts the franchise agreements and ancillary documents such as non-compete,</td>
<td>Consultant will provide advice on all business issues and most terms to be</td>
</tr>
<tr>
<td></td>
<td>power of attorney for telephone number, collateral assignment of lease,</td>
<td>included in the disclosure document, franchise and ancillary documents without</td>
</tr>
<tr>
<td></td>
<td>promissory note and personal guaranty</td>
<td>limitation</td>
</tr>
<tr>
<td>Real estate issues</td>
<td>Draft documents (i.e., collateral lease assignments, subleases, etc.) as</td>
<td>Assist in determining suitable locations for sites</td>
</tr>
<tr>
<td></td>
<td>appropriate; include necessary language in franchise agreement</td>
<td></td>
</tr>
<tr>
<td>Antitrust and unfair</td>
<td>Review sourcing issues for possible antitrust violations</td>
<td>Advise client on supply arrangements from a business prospective</td>
</tr>
<tr>
<td>competition issues</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operations Manual</td>
<td>Review for legal issues, such as vicarious liability and matters regarding state</td>
<td>Prepare or have prepared Operations Manual. Provide a preliminary assessment of</td>
</tr>
<tr>
<td></td>
<td>law differences; advise on protecting confidentiality and copyright of Manual.</td>
<td>vicarious liability for further review by legal counsel; provide basic advice on</td>
</tr>
<tr>
<td>Training Program Development</td>
<td>Draft appropriate provisions of franchise agreement and UFOC regarding training</td>
<td>Advise on or prepare the initial and ongoing training programs</td>
</tr>
<tr>
<td></td>
<td>programs</td>
<td></td>
</tr>
<tr>
<td>Item</td>
<td>Attorney’s Role</td>
<td>Consultant’s Role</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Exemptions and Exclusions from state franchise laws</td>
<td>Advise client if it can legally avoid compliance with franchise registration and assist in evaluating advisability of doing so and the consequences</td>
<td>Assist in analyzing business structure to help determine if reliance on an exemption or exclusion will be the correct business decision</td>
</tr>
<tr>
<td>State registrations</td>
<td>File for registration and keep registrations current</td>
<td>Advise on which states to seek registration</td>
</tr>
<tr>
<td>Marketing and growth strategies; franchise sales assistance</td>
<td>Counsel client on legal aspects of selling and other compliance issues relating to franchising; advice on the use of brokers</td>
<td>Conduct a franchise sales compliance program with legal counsel and further develop the franchise marketing strategy, including providing training in sales, for client; advise on the use of brokers</td>
</tr>
<tr>
<td>Sales of Franchises</td>
<td>Provide general information regarding complying with the state and federal laws and registration of salesman when required</td>
<td>Provide and implement a plan for marketing the franchises. Advise on sales compliance</td>
</tr>
<tr>
<td>Gift card programs</td>
<td>Assist in advising client on various laws relating to establishment of gift card program, including expiration dates, disclosures, breakage, and escheat; work with CPA in determining if a new entity should be formed in a different state. Advice regarding other laws applicable to gift cards</td>
<td>Assist in establishing gift card program</td>
</tr>
<tr>
<td>Website development</td>
<td>Counsel client on what is and is not legally permissible on the website</td>
<td>Assist client’s outside web developer on the content of the site</td>
</tr>
<tr>
<td>Evaluating prospective franchisees</td>
<td>Due diligence as required by client</td>
<td>Establish the franchise sales compliance program including methods for evaluation</td>
</tr>
<tr>
<td>Item</td>
<td>Attorney’s Role</td>
<td>Consultant’s Role</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Ongoing responsibilities of</td>
<td>Advise client on its ongoing responsibilities under the franchise agreement and</td>
<td>Provide business and management advice</td>
</tr>
<tr>
<td>a franchisor</td>
<td>applicable law</td>
<td></td>
</tr>
<tr>
<td>Forms for monitoring franchisees</td>
<td>Review, revise, and/or draft forms utilized by the client</td>
<td>Assist in creating appropriate form during the tactical development of the franchise system</td>
</tr>
<tr>
<td>Franchisee relationship</td>
<td>Provide guidance for avoiding and resolving disputes at earliest possible stage</td>
<td>Provide advice and implementation services as required to develop and maintain a positive relationship with franchisees</td>
</tr>
<tr>
<td>counseling</td>
<td>and to maintain good relations with franchisees. Advise client to take quick action when franchisees fail to comply with their obligations when appropriate</td>
<td></td>
</tr>
<tr>
<td>Dispute resolution and</td>
<td>Clearly handled by attorneys</td>
<td>Can provide advice on how to handle disputes, but must be careful not to practice law</td>
</tr>
<tr>
<td>litigation with franchisees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State relationship and</td>
<td>Attorneys will also advise clients on state relationship and termination laws. After a dispute arises between the franchisor and franchisee, the attorney should advise the client of its rights and obligations</td>
<td>---</td>
</tr>
<tr>
<td>termination laws</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## APPENDIX C – STRATEGIC PLANNING REVIEW ITEMS

<table>
<thead>
<tr>
<th>Assessment Areas</th>
<th>Financial Planning/Analysis</th>
<th>Market Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establish goals and objectives</td>
<td>Franchisee/Franchisor capital requirements, profit and loss and cash flow</td>
<td>Market area criteria</td>
</tr>
<tr>
<td>Evaluate present concept</td>
<td>Return on investment</td>
<td>Market approach</td>
</tr>
<tr>
<td>Evaluate management ability/depth</td>
<td>Financing requirements for franchisees/franchisor</td>
<td>Prioritize target markets</td>
</tr>
<tr>
<td>Assess the franchise and non-franchised competition</td>
<td>Appropriate financing structures</td>
<td>Site selection criteria and methodology</td>
</tr>
<tr>
<td>Determine current potential markets</td>
<td></td>
<td>Territorial protection</td>
</tr>
<tr>
<td>Assess strengths/weaknesses and alternative strategies</td>
<td></td>
<td>provided to franchisees</td>
</tr>
<tr>
<td>Franchisor/Franchisee potential</td>
<td></td>
<td>Use of multi-unit or alternative expansion strategies</td>
</tr>
<tr>
<td>Conflicts</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Franchise Recruitment</th>
<th>Support</th>
<th>Policy Formulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single unit and multi-unit franchisee profile(s)</td>
<td>Operating manual library</td>
<td>Lease participation</td>
</tr>
<tr>
<td>Search, screen, approval process</td>
<td>Marketing and sales support</td>
<td>Franchise Fees</td>
</tr>
<tr>
<td>Recruitment, marketing strategies</td>
<td>Accounting, statistical and control</td>
<td>Royalties</td>
</tr>
<tr>
<td></td>
<td>Operations, Personnel, Financial, Purchasing, Sales, Inventory, Policies, Field Staff, Start up and Procedures</td>
<td>Advertising</td>
</tr>
<tr>
<td></td>
<td>Opening business package</td>
<td>Territorial exclusivity, size</td>
</tr>
<tr>
<td></td>
<td>Headquarters support</td>
<td>Supply and distribution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Supplier terms</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Terms of franchise renewal terms</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Equipment - capital and Maintenance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Training Program</th>
<th>Monitoring Mechanisms</th>
<th>Field Support Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type(s) of training to be provided</td>
<td>Site criteria, approval and development</td>
<td>Field staff requirements</td>
</tr>
<tr>
<td>Participants</td>
<td>Monitoring of operations, quality, inventory, etc.</td>
<td>Field management requirements</td>
</tr>
<tr>
<td>Training location(s)</td>
<td>Financial mechanisms</td>
<td>Filed support manuals</td>
</tr>
<tr>
<td>Training procedures</td>
<td>Sales, marketing analysis</td>
<td>Communication</td>
</tr>
<tr>
<td>Training staff</td>
<td>comparative analysis</td>
<td></td>
</tr>
<tr>
<td>Fees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Material required</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Opening Support</td>
<td>Ongoing Services</td>
<td>Legal Related</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>----------------------------------------------------------</td>
<td>----------------------------------------------------</td>
</tr>
<tr>
<td>Training and personnel required</td>
<td>Product research and development</td>
<td>Trademark</td>
</tr>
<tr>
<td>Market introduction support</td>
<td>Supply chain</td>
<td>Disclosure content</td>
</tr>
<tr>
<td>Ongoing visits</td>
<td>Brand fund and marketing program</td>
<td>Agreement content</td>
</tr>
<tr>
<td>Contact reports</td>
<td>Communication programs</td>
<td>Additional agreement content</td>
</tr>
<tr>
<td>Competitive updates</td>
<td>Franchisee advisory council</td>
<td></td>
</tr>
<tr>
<td>Upgrades</td>
<td>All others</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Michael H. Seid is the founder and Managing Director of Michael H. Seid & Associates, LLC, (MSA) a domestic and international franchise advisory firm. He has over 25 years experience as a Senior Operations and Financial Executive or Consultant for companies within the franchise, retail, restaurant, hospitality and service industries as well as having been a franchisee.

Michael has consulted both domestically and internationally for companies on the appropriateness of franchising, the design and development of franchise systems and for established franchisors and other multi-unit operators. MSA provides services in developing programs, systems, manuals and training programs, franchisor marketing and expansion strategies, real estate selection and site development, franchisee advisory councils, franchisee relations, crisis management, litigation support and the strategic restructuring of established companies. Michael has provided litigation support services for both franchisors and franchisees.

Michael was a senior officer for Supercuts, an international franchisor of hair care salons and was also a franchisee of the system. He was a Senior Vice President of Seligman and Latz and was Secretary Treasurer/Chief Operating Officer for Phillips Son & Neale (US), an international Fine Art Auction and Appraisal Company. Michael was a principal advisor to the Franchise Group of the New York investment-banking firm, Kidder, Peabody & Company and has served as the back up servicer on several franchisor securitizations. Michael is a non practicing Certified Public Accountant.

Michael is a member of the board of CFWshops, a 65 unit franchisor established to provide clinical services and essential medicines to the poor in rural Kenya. He is also presently co-founding and will serve on the board of Healthguard (Uganda) an innovative franchise approach to Indoor Residual Spraying (IRS) expected to reduce Malaria rates by up to 80% in communities where it will operate. MSA will be developing commercial business format franchisors in developing countries to improve the human condition and have a world changing impact on poverty, diseases and economic development.

Michael is a frequent speaker at programs for the International Franchise Association (IFA), universities, law schools, retail and professional organizations and have lectured and written for the ABA Franchise Forum and the IFA’s Legal Forums. He has published numerous articles on franchising, and co-authored Franchising for Dummies, recently released in its 2nd Edition published by Wiley Publishing, Inc. Franchising for Dummies was co-authored by the late Dave Thomas, Founder of Wendy’s International.

Michael H. Seid & Associates is a member of the IFA’s Supplier Forum (SF) and Michael serves on the SF’s Board of Directors as a Past Chairman. As SF Chairman Michael was a member of the Board of Directors of the IFA and a participant on its Executive Committee. Michael is currently a member of the Board of Directors of the IFA and a trustee of the International Franchise Association’s Educational Foundation.
as well as a member of several IFA and SF committees. He serve as Chairman of the IFA’s VetFran Committee.

Michael has completed the requirements for and has been awarded the designation of Certified Franchise Executive (CFE) by the International Franchise Association’s Education Foundation and is also a Certified Public Accountant, licensed in the State of New York.

Michael is a member of the American Institute of Certified Public Accountants, New York State Society of CPAs and an associated member of the American Bar Association. He has been qualified as an expert in Federal and State courts and have testified in several cases involving franchising, restaurants and retailing in State Court, Federal Court and in Arbitration proceedings.
Leonard Vines is an officer in the St. Louis law firm of Greensfelder, Hemker and Gale, P.C. He concentrates his practice in franchise and distribution and general business and corporate law and has served as counsel for developers of major retail developments. Mr. Vines is listed in the Best Lawyers of America, the International Who’s Who of Franchise Lawyers, Who’s Who in American Law, and Kansas Missouri Super Lawyers.

Mr. Vines is a former member of the governing committee of the American Bar Association Forum on Franchising, and a member of the franchise advisory board of the North American Securities Administrators Association (NASAA). He is a frequent lecturer on franchise topics for various organizations and has spoken at programs sponsored by the American Bar Association Forums Committee on Franchising, International Franchise Association, the Bar Association of Metropolitan St. Louis, Missouri Bar, and the National Franchise Law Institute. He served as editor for Chapters on “Business Franchises” and “Sale of Assets” for Rabkin & Johnson Current Legal Forms (Matthew Bender) and for the American Bar Association publication, Mergers and Acquisitions of Franchise Companies. He has also written articles for various legal publications such as the ABA Journal, The Franchise Lawyer, Journal of the Missouri Bar, St. Louis Bar Journal, LJM’s Franchising Business and Law Alert, and Franchise Law Journal.

Mr. Vines graduated from the University of Illinois in 1969 with a B.S. in accounting with honors and from Washington University School of Law in 1972.