The Soul of Franchising

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Introductions

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THANK YOU
Convincing the Factfinder:
Strategic Trial Techniques for Franchise Counsel

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I. Introduction

Presenting a case in the best light is a continual challenge for franchise litigators. While lawyers become intimately familiar with the strengths and weaknesses of a case on the long journey toward trial, it is easy to lose sight of the fact that trial presents the opportunity to start fresh in the eyes of the factfinder. With that in mind, successful litigators artfully frame the legal and factual issues in a strategically favorable manner for the factfinder at the outset, and filter a compelling story that falls in line with these issues throughout trial.

The authors’ goal is to offer advice, experience and best practice techniques for strategically structuring and presenting a franchise case to a factfinder. Against a backdrop of three of the most frequent franchise disputes—pre-sale disclosure violations, termination, and non-competition claims—this paper highlights each side’s strategies. From vetting potential factfinders, to developing an effective theme, delivering strong opening and closing statements, and effectively using exhibits and technology, the authors aim to provide valuable insights on convincing the factfinder to hand down a favorable judgment, verdict or arbitration award.

II. Three Prevalent Franchise Disputes: Pre-sale Disclosure Violations, Termination, and Non-Competition Claims

This paper proceeds by highlighting key strategies employed by franchise litigators in three of the most prevalent franchise disputes: (1) pre-sale disclosure violations; (2) termination; and (3) non-competition claims.

In a pre-sale disclosure dispute, a franchisee generally alleges that the franchisor failed to accurately or sufficiently disclose material information to the franchisee prior to entering the franchise agreement. Franchisees usually allege statutory and common law claims against the franchisor. Franchise disclosure laws are designed to ensure prospective franchisees are provided essential information to make an informed decision prior to entering a franchise relationship. Claims against franchisors involving pre-sale disclosure violations most commonly sound in violations of state franchise registration statutes, state consumer protection or “little FTC” acts, fraud, or negligent misrepresentation.

Termination and non-competition claims are relational disputes in which the challenged conduct takes place after the parties entered into a relationship. A franchisee’s failure to adhere to a franchisor’s performance and payment obligations may lead to a premature termination of the franchise agreement. Depending upon the circumstances, a franchisee may view the termination as unlawful. Unlawful termination or nonrenewal claims often arise because franchisees have made large investments, only to be lost in one fell swoop, leaving the franchisee unable to maintain his/her livelihood. Unlawful termination claims are often predicated on state franchise relationship laws that require “good cause” for termination or

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3 Since these types of disputes also common to distributor and dealership relationships, the authors’ discussion of them are equally applicable to those disputes as well, subject to any applicable state statutes that might require different treatment.
In addition to good cause, disputes also arise out of failure to comply with statutorily imposed termination procedures, such as notice and opportunity to cure. In addition to good cause, disputes also arise out of failure to comply with statutorily imposed termination procedures, such as notice and opportunity to cure.

Finally, non-competition disputes arise when a franchisee continues to operate a franchise or similar business after the franchise agreement has been terminated. Invariably, franchisors contractually prohibit franchisees from doing so. While non-compete agreements are generally enforceable, franchisees often attack them on numerous grounds, such as wrongful termination of the franchise agreement, the franchisor’s prior material breach of the franchise agreement, or the validity of the non-compete’s temporal or geographic restrictions.

III. Threshold Considerations: Who is the Factfinder?

As an initial matter, there are three potential factfinders in franchise disputes: an arbitrator, a judge or a jury. Moreover, the parties to a franchise dispute usually have at least some influence on the composition of the factfinder(s). Franchise disputes frequently bring social and economic ideologies to the forefront. In most cases, franchisees have significantly less bargaining power than the franchisor. Whether an arbitrator or potential juror aligns more with big business or would likely empathize with the plight of a franchisee may impact their decision. A prudent lawyer understands this concept when vetting potential factfinders, and continues to illustrate these themes throughout a trial.

A. Arbitrators.

Given the widespread use and consistent judicial enforcement of arbitration clauses in franchise agreements, franchise litigation proceeds in front of arbitrators far more frequently than juries and judges. Franchise agreements frequently require that the arbitrator, or at least one of them, be agreed upon by both parties after the dispute arises. Perhaps not surprisingly, franchisees generally seek an arbitrator who has the following characteristics:

- Has worked on behalf of franchisees;
- Has made previous, favorable rulings in favor of franchisees;
- Recognizes specific franchisee arguments as valid; or
- Has a longstanding track record and an open mind.

Conversely, franchisor counsel generally seeks an arbitrator who has:

- Has worked on behalf of franchisors;
- Has made previous, favorable rulings in favor of franchisors;
- Refuses to recognize certain franchisee arguments; or
- Rigorously enforces contractual terms.

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4 See, e.g., HRS § 482E-6; IOWA CODE §§ 523H7-8; NEB. REV. STAT § 87-404; N.J. Stat. ANN. § 56:105; RCW 19.100.180. Other franchise relationship laws may require some variant of “good cause” such as “reasonable cause,” or the statute may prohibit “unjust” conduct. See, e.g., DEL. CODE ANN. Tit. 6, § 2552; VA. CODE § 13.1-564.

5 See, e.g., R.I. GEN. LAWS § 6-50-4; RCW 19.100.180.
Researching potential arbitrators, however, might offer significant challenges. The private nature of arbitration, in many cases, makes previous decisions unavailable. Without published decisions, attorneys are left only with word of mouth inquiries, experience with the arbitrator, or, at the very least, a general internet search as to the arbitrator’s background.

B. Juries.

With regard to jury selection, or voir dire, this paper does not endeavor to cover the vast array of scholarship and theories on the matter, but briefly covers some of the highlights in the context of franchise litigation.

Jury selection is not only an opportunity to choose factfinders, but also to begin to shape the jurors’ opinions of the case. Lawyers might wish to test a theme in their case. Most judges permit these types of questions. For instance, a franchisee lawyer might ask a prospective juror whether he/she believes that parties in a business transaction have an obligation to treat each other fairly regardless of what the fine print in a contract might say, or whether a large company seeking an investment has an obligation provide the investor with all reasonably available and material information. Conversely, a franchisor lawyer might ask a juror whether he/she believes that parties to a negotiated written contract are entitled to expect that the contract be performed according to its negotiated terms, or whether a party is entitled to rely on promises that are not contained in the parties’ negotiated contract. The line between soliciting and conveying information to the juror is murky, and lawyers must learn the latitude they have in questioning jurors, which likely depends on the judge. Some judges may limit questioning to background and life experiences, while others permit a broader scope of questioning. In any event, lawyers should ask questions to develop juror beliefs, biases, and attitudes, and infer to the best of their ability which jurors would be most receptive to the theme of their case.

Questions that encourage jurors to talk about themselves are the most effective and revealing. A simple “Tell me a little more about your job,” can reveal if someone is unmotivated or dissatisfied (“It’s just a job”) or motivated and driven (“It’s my dream job”). Asking a juror about their work can reveal how they might favor or disfavor a franchisor or a franchisee. In the words of one jury consultant: “Play the psychologist: You want to assess whether they’re anti-corporation or pro-corporation; angry or happy with the world; logical, thoughtful thinkers or more heartfelt, emotional thinkers; inductive or deductive in their reasoning; a leader or a follower; generally interested in participating or hostile, militant and angry.”

It is important to realize that the word “franchising” may still be a mystery to some people. Many people do not understand the meaning of the word, the relationship created by it, or the system which it represents. This lack of knowledge can be detrimental to either side. Therefore, in any franchise dispute, it is important to ask about the juror’s experience and that of a family member or close friend, involving the purchase of a franchise. Ask if the juror’s direct experience with franchising may be limited, a line of questions directed to their business ownership experience may prove equally revelatory. Ask about the juror’s experience in being

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6 An indirect source of information regarding an arbitrator’s proclivities may be found by researching opinions and orders involving motions to confirm or vacate arbitration awards. See, e.g., Choice Hotels Intern., Inc. v. Felizardo, 278 F. Supp. 2d 590 (D. Md. 2003)(denying motion to vacate award in favor of franchisee on the grounds that franchisor failed to meet high burden of establishing that arbitrator exceeded the authority granted to him by the parties or, in the alternative, because the award was made in manifest disregard of the law).

self-employed or owning a business. Ask if they are still self-employed or operating the business. If not, ask why they are no longer doing so. Ask if the experience of being self-employed or owning their own business was a positive or negative experience, or a mixed experience, and ask them to explain why.

You should also inquire about the juror’s experiences with investments generally. Ask if the juror’s experience has been positive, negative, or mixed, and ask them to explain. Ask if the juror, or a family member or close friend, has lost money on an investment where the juror thought that the loss was caused by someone else’s wrongdoing, fraud, or dishonesty, and ask them to explain. Ask if the juror, or a family member or close friend, has lost money on an investment where the juror thought that the loss was not caused by someone else’s wrongdoing, fraud, or dishonest, and ask them to explain.

While the foregoing questions are all relevant to any franchise dispute, if your case involves a non-competition claim, ask about the juror’s experience and that of a family member or close friend, in having signed a non-competition agreement and in having the agreement enforced against them. Ask about the juror’s views of the benefits of non-competition agreements. Since non-competes are still something of a rarity, a more fertile line of questioning regarding a juror’s own experiences as an employee is also recommended. Ask whether the juror has ever been harassed, discriminated against, or otherwise treated unfairly by a supervisor or manager. Ask whether the juror has ever been defrauded or lied to by an employer. Ask whether the juror has ever been unfairly passed over for a promotion or bonus. Your goal is to identify a juror’s problems in the work place that might lead the juror to identify with the now-competing franchisee rather than the enforcing franchisor.

C. Judges.

Judges perform the fact finding role in rare cases in which the dispute is not subject to arbitration and the parties waive their right to jury trial. In most instances, the jury waiver is provided for in the franchise agreement, although less frequently the parties may agree to waive trial by jury following the initiation of litigation. The parties have a lesser degree of control in choosing a factfinder in this scenario, as judges are usually assigned cases. In reality, filing in a specific venue is likely the extent of control the parties have as to who will preside over the case. After a particular judge is assigned to a case, lawyers should, at the very least, conduct some research as to his/her background and past decisions.8

Regardless of whom the eventual factfinder might be, because of the unique and complex nature of franchise litigation, lawyers need to educate the factfinder on the specifics of franchise law. Arbitrators range from those well versed in franchise law to those that may have concentrated in other areas of civil litigation. Oftentimes judges, and frequently jurors, are much more likely to have little, if any, experience with franchise laws and litigation. Adept litigators are cognizant of this fact and are sure to translate legal concepts unique to franchising into a language that can be understood by the factfinder, whoever that may be.

IV. Developing a Theme, Story, or Punch Line

In a number of franchise cases, dispositive legal or factual issues are frequently close, with compelling law and facts for both sides. Consequently, a lawyer’s ability to portray a compelling story in favor of his/her client is especially important in franchise disputes.

Not surprisingly, the franchisor and franchisee usually have differing versions of what actually happened. A theory, or simple story, of what actually took place, must show not only what happened, but why the parties acted in the manner they did. The theory of the case must be consistent with both the undisputed facts and with one version the disputed facts, and it must be clear cut and simple, yet persuasive at the same time.

A. Pre-Sale Cases

Franchisees tend to approach pre-sale cases with a simple story: that the franchisee, despite reasonable diligence, was falsely and unlawfully induced into entering the franchise relationship. Had the franchisor sufficiently disclosed material information, the franchisee would never have entered the agreement. While telling the story, it is important to humanize the franchisee. Franchisees, while usually doing business as an entity, are, nevertheless, people who trusted the franchisor and made a large, undiversified investment in them. It is the franchisee lawyer’s responsibility to make sure the factfinder understands that underlying truth. Franchisees may be easy to empathize with—e.g., an early retiree who lost his/her retirement savings and now must return to work as a result of the franchisor's misdeeds. By humanizing the franchisee, franchise laws become even more potent because they are, after all, consumer protection statutes. This way, franchisee counsel can forcefully argue that their clients are exactly who the statutes were designed to protect.

Given that pre-sale disclosure violations are based on consumer protection laws, jurors, as every day consumers, tend to empathize with franchisee arguments by analogy. The most forceful analogies usually relate to frustrating consumer experiences, such as discovering latent defects after the purchase of a used automobile or a new piece of technology, or underperformance of certain products, such as a dishwasher, washer or dryer. Had the consumer been properly apprised of these problems, he/she would never have purchased the item in the first place. Thus, the most logical remedy is to make the consumer whole, and return that person to the position he/she occupied before the disclosure violation.

As for the franchisor, its failure to sufficiently disclose material information is not always innocent. Franchisees attempt to establish an alternative theory, motive or some other reason to explain the franchisor’s failure to disclose material pre-sale information. This may be a franchisor’s dire need for cash from franchise fees, or due to a franchise developer’s incentive to push more sales, either of which may have led the franchisor to insufficiently or inaccurately provide information to the prospective franchisee. Of course, not all cases contain facts necessary to establish these theories. In any case, however, franchisees generally stress

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9 Indeed, there may even be favorable law existing for both sides. In a pre-sale disclosure lawsuit, two decisions by the District Court of Minnesota have interpreted the standard of proof of a franchisee’s reliance standard differently, one requiring justifiable reliance, as opposed to merely reliance, to prove liability under the Minnesota Franchise Act (MFA), and one not so requiring. Compare Ellering v. Sellstate Realty Sys. Network, Inc., 801 F.Supp.2d 834, 845 (D. Minn. 2011) (reliance on pre-sale disclosures must be justifiable under the MFA) with Randall v. Lady of America, 532 F.Supp.2d 1071, 1086 (D. Minn. 2007) (“[T]he Court is not convinced that justifiable or reasonable reliance is an element of a claim for misrepresentation under the [MFA]”).
themes of fundamental unfairness resulting from the franchisor’s failure to provide all material information, which induced the franchisee to enter into the franchise relationship when he or she otherwise would not have. The factfinder’s job is to right the franchisor’s wrong.

Franchisor lawyers approach most pre-sale disclosure violation cases carefully. One approach plays off of the legal defense that the franchisor was not the cause in fact of the franchisee’s failure. When the franchisee’s performance record is dismal, the theme may be that the franchisee’s failure was the result of its own misconduct. This theme shifts the emphasis to the franchisee’s role in his demise. Even when a franchisor is saddled with a problematic financial performance representation, a franchisor may be able to demonstrate that the franchisee’s mismanagement of its franchise was the direct cause of his losses.

Alternatively, even when a franchisor is saddled with the unauthorized representations of a rogue sales representative, depending upon the disclaimer language contained in the franchise agreement and the applicable state law, the franchisor can argue that any reliance was unreasonable given that the franchisee understood and acknowledged that the franchisor did not authorize its sales representatives to give any financial information to prospective franchisees. When your legal defense is that the franchisee was not entitled to rely on the misrepresentation, this theme shifts the examination of the pre-sale conduct from the franchisor to the franchisee.

Finally, in those circumstances where a franchisor is confident that its earning claims have a well-grounded, reasonable basis, the franchisor should emphasize that it has “nothing to hide.” This theme allows the franchisor to show that in giving an earnings claim, the franchisor provided more information to prospective franchisee than the law requires.

**B. Termination Cases**

A common theory for franchisees is that they were terminated without good cause, despite reasonable alternatives to termination, and/or that the termination was for something other than the franchisor’s stated reasons. Indeed, a number of states franchise laws require “good cause” for termination, and franchisees regularly argue that their franchisor failed to meet that standard. The most common example of “good cause” is failure to comply with requirements imposed by the franchisor, or breach of the franchise agreement. In other cases, a franchisor’s material breach will excuse the franchisee’s performance obligations. In such cases, if the franchisee discontinues performance, the franchisor no longer has the lawful right to terminate the franchisee.11

Additionally, franchisees might claim that termination was unnecessary, especially noting the franchisee’s loss of a substantial investment in the franchisor. Rather than find a solution,


11 Such an argument is a basic tenet of contract law. *See Travelodge Hotels, Inc. v. Honeysuckle Enterprises, Inc.*, 357 F. Supp. 2d 788, 797 (D.N.J. 2005) (“It is black letter contract law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance . . . .”); *RESTATEMENT (SECOND) OF CONTRACTS* § 237 (1981) (“Except as stated in § 240, it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.”). *See, e.g.*, *Red Roof Franchising, LLC v. Patel*, 877 F. Supp. 2d 124, 132 (D. N.J. 2012) (noting that the franchisor’s breach may excuse the franchisee’s continued performance, or permit the franchisee to continue to operate under the agreement and sue for partial breach).
the franchisor immediately terminated the franchisee. These theories fall in line with certain franchise relationship statutes that impose procedural requirements prior to franchise termination, such as notice and opportunity to cure. The majority of franchise relationship statutes require an advance written notice that provides the reasons for termination, and a stated period of time in which the franchisee must cure its deficiency.\textsuperscript{12} Some statutes permit shorter cure periods for differing reasons for termination, such as abandoning the franchise or bankruptcy. Whether operating under the statute or not, a franchisee’s story is more compelling if there was a more equitable solution to termination, in which all parties could have benefitted. Even more, if the franchisee demonstrates that notice and opportunity to cure would have resolved the issue, it is more believable that the franchisor asserted the cause for termination as a pretext, when in fact the franchisor had an ulterior, unlawful motive.

It follows that a franchisee’s argument is more compelling if the termination was for something other than the franchisor’s stated reasons. For instance, in Wisconsin a franchisor cannot opportunistically terminate a franchisor if it intends to replace the franchise with a company owned store in the same area,\textsuperscript{13} or if it asserts that it terminated the franchisee for minor deviations from system standards. In Connecticut and New Jersey, it can amount to constructive termination if a manufacturer transforms an exclusive distributorship into a nonexclusive one, and begins to compete with the distributor.\textsuperscript{14} Under the Arkansas’ franchise statute, a franchisor cannot implement a concerted plan to force franchisees out of business in an effort to reduce the number of distributors in a specific area.\textsuperscript{15}

In sum, in unlawful termination cases, franchisees’ most compelling argument is that the franchisor did not have good cause for termination, and acted in response to some ulterior motive, or in bad-faith in terminating the franchisee, and that it had reasonable alternatives to termination, which resulted in a substantial loss of investment by the franchisee.

For franchisor lawyers defending a termination claim, the themes are plentiful. When termination is due to issues of quality or illegal conduct, the franchisor can easily highlight that duty requires it to enforce its agreement. This theme allows a franchisor to demonstrate that it is looking out for the interests of the reputation of the brand, which benefits both the public and its other franchisees. Another common franchisor theme is that franchising is a two-way street. For example, when termination results from non-payment, this theme allows a franchisor to demonstrate the many benefits it bestowed on the franchisee and for which the franchisee simply refused to pay. Another common theme franchisors turn to is that “enough is enough.” When termination is due to either quality and/or non-payment issues, and the franchisor gave an appropriate opportunity to cure—often repeated opportunities—this theme allows the franchisor to demonstrate that it was patient, but that even patience has its limits.

\textbf{C. Non-Competition Covenant Cases}

In response to a franchisor’s claim that the former franchisee is violating the franchise agreement’s non-compete clause, the franchisee most often argues that it continued to operate because the franchisor first breached the agreement. Franchisees, after all, should be

\textsuperscript{13} Kealey Pharm. & Home Care Servs., Inc. v. Walgreen Co., 761 F.2d 345, 350 (7th Cir. 1985).
permitted to maintain their livelihood with the continuation of their business if the franchisor’s breach precipitated the end of the franchise agreement and triggered the post-term non-competition agreement. Why should a franchisor be permitted to breach an agreement and then also enforce a non-competition clause that is being violated because of that same breach? Some courts have been receptive to such arguments. In one case, a court refused to grant a manufacturer a preliminary injunction for its distributor’s non-compliance with a post-term non-compete agreement because the manufacturer breached the agreement by failing to provide the distributor with access to sell some of the manufacturer’s products.  

Thus, at least in some cases, if the franchisor breached the agreement, but nevertheless terminates the franchisee or the relationship ends, the franchisor has a much less compelling argument that the franchisee should not be permitted to continue its business operations. Moreover, if a franchisee can demonstrate that the franchisor does not intend to re-license the territory, the franchisee has another basis to fend off the non-competition covenant’s enforcement.

Franchisors have an array of themes to choose from when a terminated franchisee continues to operate in violation of its covenant of non-competition. Franchisor counsel may argue that the former franchisee is now biting the hand that fed him. This theme allows the franchisor to highlight the many valuable aspects of its system, the franchisee’s success while operating within the system and the greed factor which motivated the franchisee to set up a similar competing business. Franchisors can also effectively argue that if ex-franchisees can leave the system and compete immediately, they threaten to undermine the system itself.

When the former franchisee has actually misappropriated the franchisor’s confidential information, clients or employees, an effective argument is to characterize the former franchisee as a thief. This theme allows the franchisor to harness most people’s visceral reaction to theft. Exiting a franchise system with a franchisor’s valued, protected, assets does not sit well with most factfinders as no one likes a thief.

A final theme might be to remind the jury that no one put a gun to the franchisee’s head and forced him to sign the franchise agreement. As the late, great Jack Dunham observed, franchisees are businesspeople too: “In our free society, opportunities entail choice, and the responsibilities that accompany choices made. To state the obvious, nobody is forced to become a franchisee at all, let alone in any particular system. Owning an independent business and working as someone else’s employees are always among the potential franchisee’s other options.” This theme allows the franchisor to demonstrate that it was the franchisee’s choice to align himself with the franchisor system and in so doing enjoy the benefits, while also shouldering its reasonable burdens. In other words, the franchisor should “back up” to the time when the franchisee had many other options for franchising. At that time, the franchisor held no power over the franchisee except to the extent that the franchisor offered a better package than its competitors.

Other areas of dispute in non-competition cases relate to the validity of a non-competition agreement in itself. Court generally find that restrictive covenants are enforceable so long as they are no greater in their restriction on activities, and geographic and temporal

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17 ATL Int'l, Inc. v. Baradar, Bus. Franchise Guide (CCH) 11, 345 (D.Md.1997)(oral ruling, not officially reported)(finding irreparable harm if a “breakaway” franchisee were allowed to continue operating in violation of a noncompete clause, because it would send a signal to other disgruntled franchisees, would damage the franchisor’s goodwill, and could unravel the entire franchise system).
scope, than is reasonably necessary to protect the legitimate interests of a franchisor.\footnote{19} Notably, depending upon the jurisdiction, some courts have refused to “blue-pencil” non-competition agreements, instead holding that the entire restriction is void.\footnote{20}

V. Exhibits & Technology

Offering an exhibit at trial, if done well, can be a powerful persuasive tool for the factfinder. Lawyers should selectively introduce exhibits, however, given the length of trial and limited attention span of potential factfinders. Today’s courtroom technology allows lawyers to more effectively communicate the significance of exhibits by displaying and highlighting exhibits on a large projector while introducing exhibits, or at any time later when referring back to them. Thus, rather than the factfinder imagining an exhibit in the abstract, he/she will be able to view an enlarged version of the document while lawyers argue their points.

As for exhibits specific to franchising, in nearly all franchise disputes the Franchise Disclosure Document (FDD) and franchise agreement play a prominent role in the parties’ claims. In pre-sale disclosure disputes, the controversy often centers on financial performance representations because they are prohibited outside of Item 19 in the FDD. Item 19 disclosures must also meet specific requirements, including having a reasonable basis at the time the disclosure is made and providing a description of the factual basis underlying the preparation and presentation of the disclosure. Thus, pre-sale disclosure violations understandably proceed with analysis of the FDD. However, bear in mind that the FTC’s Franchise Rule’s definition of a financial performance representation is not limited to the information set forth in Item 19, but extends to financial information provided elsewhere by the franchisor.\footnote{21} As a result, don’t overlook the franchisor’s website, advertisements, and sales brochures as other potential exhibits.

For franchisors defending a pre-sale disclosure dispute, the FTC Rule requires that the franchisor must also possess, in writing, the supporting data underlying any financial performance representations. Demonstrating to the factfinder that the franchisor’s Item 19 financial performance representations were not “pulled out of thin air” can be crucial. While the introduction of mountains of detailed financial information can cause the factfinder’s eyes to glaze over, a franchisor should be prepared to demonstrate it maintained meticulous business records from which its earnings claim information was derived and the accuracy of that information. The use of summaries and charts can be an effective alternative to utilizing the underlying business records themselves.\footnote{22}

\footnote{19} See, e.g., Unlimited Opportunity, Inc. v. Waadah, 290 Neb. 629, 861 N.W.2d 437 (2015) (“One-year noncompete covenant in a noncompete clause in a franchise agreement, which prohibited a franchisee from operating for one year a competing business in any other territory in which a franchise of franchisor operated, was not reasonable in both space and time.”); Gandolfo’s Deli Boys, LLC v. Holman, 490 F. Supp. 2d 1353 (N.D. Ga. 2007) (non-competition covenant was overbroad and unenforceable by the franchisor because it precluded the franchisee from employment, in any capacity, in a broad array of restaurants, including those not targeting the same customers or directly competing with the franchise).


\footnote{21} “Financial performance representation means any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables.” 16 C.F.R. 436.1 (e).

\footnote{22} To prevent a challenge to proposed summaries and charts, ensure that all of the information identified on them is supported by competent and admissible evidence. Remember, the summaries and charts are not evidence, they are
Financial documents and accounting records introduced as exhibits may range from those produced by the franchisor, the franchisee, and perhaps to other similarly-situated franchisees, among others. Financial documents are especially helpful for the franchisee to show there was no reasonable basis for the franchisor's financial performance representations in Item 19. Even beyond pre-sale disclosure claims, any expert damages analysis relies, not surprisingly, in large part on financial documents and accounting records. Financial spreadsheets may help persuade a factfinder one way or the other on the amount of damages, if any, permitted in a particular case. Oftentimes, however, the factfinder, whether a juror or arbitrator, is inundated with financial documents or exhibits with complicated financial issues. Lawyers can make use of summary exhibits that focus the factfinder on summaries that accurately highlight the material in an understandable fashion.

In termination and restrictive covenant disputes, the franchise agreement is always an indispensable exhibit as it outlines nearly all of the rights and obligations of the parties to a franchise dispute. In particular, the franchise agreement contains the in- and post-term non-compete clauses and termination rights and procedures that become the subject of dispute. Yet because the FDD and franchise agreement are merely documents, their visual display is not overly persuasive. However, lawyers might display specific portions from the FDD or franchise agreement that weigh heavily on the case.

Internal communications between franchisor directors, officers, and other employees, most frequently consisting of emails, are important exhibits for franchisees. As noted, supra, franchisees often search for an ulterior motive or some other reason to explain the franchisor's conduct. Internal email communication between employees may reveal the franchisor's actual intent, as opposed to purported reasons, behind franchisor conduct. Emails between sales representatives and the prospective franchisee may have been the vehicle in which unlawful financial performance representations were made to franchisees, making them important exhibits for the factfinder to evaluate. Additionally, the franchisor's internal policies and procedures may also become important exhibits for franchisees as well, perhaps revealing illegal franchisor practices.

For franchisors, in the case of termination for non-payment, the FDD, the executed franchise agreement, printouts of invoices, accounts receivable statements, default and cure notices, and the termination notice will all be essential exhibits. In those instances where the franchisor has offered a payment plan to the franchisee, whether accepted or not, the payment plan should be also be introduced to demonstrate the franchisor's efforts to assist the franchisee get back on track. In the event of termination for failure to adhere to system or quality standards, the FDD, the executed franchise agreement, inspection reports, photographs, customer complaints, on-line customer reviews, notices of non-conformance/warning letters, default and cure notices, and the termination notice will all be essential exhibits. In the event of termination for other misconduct, the FDD, the executed franchise agreement, photographs, customer complaints, on-line reviews, police reports, code violation notices, IRS or other taxing authority notices, default and cure notices, and the termination notice will all be essential exhibits.

simply a convenient and efficient way of presenting evidence and the admissibility of the underlying information upon which they are based must be established independently. See Fed. R. Evid. 1006.
In addition, in cases involving a restrictive covenant, franchisors will want to introduce exhibits that confirm the franchisee’s improper activities post-termination. Photographs or video taken of the franchisee’s place of business, copies of advertising and screen shots of websites, as well as secret shopper or private investigator’s reports often prove to be powerful evidence.

While the number and type of exhibits will undoubtedly change according to the specifics of each case, those mentioned above are most likely to play a significant role in most franchise litigation cases. As for the use of technology in courtrooms, in addition to displaying exhibits, some lawyers have made use of projectors to display the legal elements of a particular claim during an opening or closing argument. It should also be noted that while technology is often helpful, it can be equally disruptive if it malfunctions. Lawyers not familiar with the use of technology in a specific courtroom or venue should understand the venue’s technological capabilities and test its use prior to trial.  

VI. Opening Statement

In all opening statements, regardless of the case, opposing sides compete to communicate a persuasive story of what actually happened thereby causing the factfinder to develop a preference for one side over the other as evidence is presented during trial. Effective opening statements usually begin with counsel coming out swinging, by highlighting the most persuasive facts and articulating the themes of the case, and then proceeding to portray a compelling story, isolating and framing the issues in a preferable manner, and explaining exactly why the factfinder should side in its favor.

In the pre-sale disclosure context, franchisees carry the burden of proof, and therefore present the opening statement first. The goal in these cases should be to compel the factfinder to right the franchisor’s wrong, and make the franchisee whole, as if the agreement had never taken place. The themes in these cases, as noted, supra, are fairness, fraud, and deceit – the theory being that the franchisee, despite reasonable diligence, was falsely and unlawfully induced into entering the franchise relationship; and that if the franchisor sufficiently disclosed material information, the franchisee would never have entered the agreement. The opening statement also presents an opportunity to introduce an analogy that the factfinder can grab a hold of, and remember throughout the trial. As noted, supra, an effective analogy for pre-sale disclosure violation usually relates to some sort of consumer purchase of a defective or underperforming product, such as a used automobile or home appliance.

For franchisor counsel faced with defending a pre-sale disclosure, if the legal defense is no reasonable reliance, then the franchisor’s theme might be that the franchisee saw the red flag and ignored it. Your opening should also immediately acknowledge and condemn the unauthorized representation of your rogue sales representative, but emphasize that the warning signs were so large that any reasonable person could not have failed to see them. Underscore that the franchisee entered voluntarily, and willingly, into the franchise relationship—despite the presence of the warning signs. To prevent the factfinder from tagging the franchisor with its rogue employee’s improper conduct, the franchisor counsel’s opening should highlight the many efforts the franchisor takes to prevent such misconduct and to warn prospective franchisees to

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disclose it before signing the franchise agreement. A franchisor counsel’s opening should also underscore the seriousness with which the franchisor treats rogue employees by describing any sanctions or termination of employment that ensued.

Alternatively, if the legal defense is that the franchisor’s FDD is accurate, the franchisor’s theme might be that the franchisor has nothing to hide. In such cases, an effective opening statement will need to tell the jury the painstaking process the franchisor undertook to provide prospective franchisees with information that could assist them in making an informed decision. During opening, franchisor’s counsel will need to give the jury an appreciation for the method of collection of, and the close examination of, the franchisor’s data that—only after careful review—ultimately yielded the earnings claim at issue. A corollary to this theme is that the franchisor didn’t cause the franchisee’s failure; rather, the franchisee was the cause of its own failure. In such cases, franchisor counsel’s opening should be directed to the underscoring franchisee’s role in mismanaging the franchise. Franchisor counsel’s job is to maximize the franchisee’s own lack of diligence in the disclosure process or, alternatively, the franchisee’s own misconduct in allowing the franchise to fail.

In unlawful termination cases, franchisees’ opening statements should include similar themes of fairness, pretext or ulterior motives, greed, or perhaps deceit – the theory being that the franchisee was terminated without good cause, under a pretext, when there were alternative and mutually beneficial measures available, as opposed to the harsh decision to terminate. Similar to pre-sale disclosure violations, the goal should be to leave the factfinder compelled to right the franchisor’s wrong.

The franchisor counsel’s goal will be the opposite. When termination is at issue, franchisors often adopt as a theme that they have a duty to uphold. An opening statement should emphasize for the factfinder that the reputation of the brand rises and falls on the performance of its individual franchisees. When that performance is sub-par, it can be injurious to the health of the system overall, and in some instances, even the public at large. As a result, franchisor counsel’s will want to explain that uniformity of quality and or service must be demanded so that the consuming public recognizes and values the brand for its excellence.

Since franchisee’s counsel opening in termination disputes will also typically underscore the disparity between the parties in terms of bargaining power, franchisor’s counsel must educate the factfinder about the nature of franchising. In short, the factfinder must understand that becoming a franchisee is not, in and of itself, a guarantee of success. Instead, the franchisor has merely laid the foundation and the franchisee must build and operate his own business upon that foundation.

Another effective franchisor theme when the propriety of termination is at issue is that there comes a time when enough is enough. In opening, franchisor’s counsel should portrays the franchisor as generous with its time and efforts focused on bringing the franchisee into compliance. While the franchisee’s counsel will attempt to portray the franchisor as unfair and unreasonable, franchisor counsel’s job will be to the factfinder see that the franchisor was flexible and lenient and that termination was the reluctant outcome following the franchisor’s multiple attempts to guide the franchisee towards a successful operation.

In non-competition claims by the franchisor against the franchisee or dealer, an effective opening statement for the franchisee focuses on the franchisor’s unlawful conduct which left with the franchisee with no other option than to violate the non-compete clause in the franchise agreement as a means of maintaining his/her livelihood. Common themes relate to fairness,
unclean hands, livelihood, and mitigation. Counsel may even ask rhetorically whether it’s fair for a franchisor to breach a franchise agreement on one hand, and enforce its other provisions on the other. Conversely, the franchisor’s counsel will want to underscore in opening that the franchisor provided the franchisee with a valuable knowledge base upon which to own and operate a business that the franchisee now wants the benefit of operating without giving the franchisor its due. Or, in cases of outright misappropriation, the opening statement should underscore the franchisor’s investment in the franchise system that allowed the franchisee to acquire or have access to the valuable asset that the franchisee has made off with to the franchisor’s detriment.

Of course, at some point during the opening statement, counsel must articulate the applicable law and the franchisor’s specific violations thereof. In pre-sale disclosure and unlawful termination cases, franchise relationship statutes will play a prominent role and therefore must be discussed and translated into an easily understandable language. Similarly, the applicable law with regard to non-competition claims by the franchisor should be discussed to the extent necessary.

In sum, the opening statement is, in most cases, the first opportunity for lawyers shape the factfinder’s impression of the case. If done correctly, the opening statement is a preview of the factfinder’s eventual determination of what actually happened, which the factfinder will filter evidence through as the trial progresses. If done incorrectly, however, it can confuse, bore, or perhaps alienate the factfinder.

VII. Direct Examination

After the opening statements, trial proceeds in the form of questions and answers from witnesses with personal knowledge of the events, or from expert testimony. Ironically, despite questioning a friendly witness, direct examination has been described as “the most difficult part of trial” because counsel has to take a backseat to the witness and guide him/her to present clear, efficient, and memorable testimony. Indeed, many lawyers struggle with direct examination. Moreover, counsel should advise witnesses that he/she will guide them with the presentation of evidence, but cannot ask leading questions, so all substantive answers must be provided by the witness themselves. As for the ordering of witnesses, it is more frequently established by pragmatic considerations, such as schedule conflicts, than it is by preference.

Direct examination in franchise disputes is in some ways no different than other areas of the law, and therefore, franchisee lawyers should anticipate weaknesses in their witness’s testimony. Addressing weaknesses during direct examination builds credibility with the factfinder and it allows the witness to explain his/her reasoning in a positive light, thereby taking the sting out of cross-examination. Franchisee lawyers might do so by asking direct questions that allow the franchisee to defuse unfavorable facts. For instance, franchisee counsel might ask the franchisee, “You have a background in finance, so why didn’t you independently investigate the basis behind the earning representations the franchisor provided to you?” Perhaps that the franchisor told the franchisee that it was not necessary or that the franchisor manipulated the

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24 In the case of arbitration, the demand for arbitration, statement of the claim, or pre-trial motions may actually be the first impression for the fact finder. Nevertheless, the opening statement is a powerful tool to begin persuading the arbitrator at an early stage.


26 Id. at 109 (discussing direct examination).
numbers in a way that made the falsity of the representations undiscoverable to franchisee. Whatever the case may be, it is usually beneficial for the franchisee to reduce the surprise of unfavorable facts and defuse the issue prior to cross-examination.

The same holds true for the franchisor. Rarely does the franchise relationship progress without the franchisor making a mistake in dealing with its franchisees. The key is to admit the mistake, but minimize its impact on the ultimate outcome. For example, if the franchisor failed to default the franchisee during the course of several inspections, that fact should be admitted, but presented in such a way that allows the franchisor to demonstrate that it gave the franchisee leeway to comply with system standards.

The overarching goal of direct examination is to establish the credibility of the witness, and present to the factfinder enough information to visualize the scene and understand the events in the manner in which counsel wishes them to be perceived, consistent with the theme and theory of the case.

A. Common Franchisee Witnesses

Witnesses obviously change with various cases, but franchise disputes commonly involve a number of recurring players, comprised usually of the franchisees themselves and franchisee employees, both having personal knowledge of at least part of the events that gave rise to the lawsuit. Other potential franchisee witnesses include anyone who lent the franchisee money on the basis of an illegal earnings claim made by the franchisor, such as bankers, or perhaps the franchisor’s ex-employees who may offer compelling testimony with incentive to testify on behalf of his/her former employer.

The franchisee is usually the star witness in franchise disputes. In pre-sale disclosure cases, the franchise owner is the person to whom the franchisor illegally sold the franchise; in termination cases, the franchise owner’s agreement is terminated; and in non-competition cases, the franchise owner decides to operate post-termination. Direct examination of the franchisee is critically important, as it engages the factfinder not only by explaining to the factfinder what happened, but also by making an emotional connection with the witness and the witness’s life experiences. Inevitably, the factfinder will decide whether he/she believes the franchise owner, and whether the franchise owner should recover. To a certain extent, the witness’s credibility is out of franchisee lawyers’ hands. However, if the franchise owner has positive attributes that will build his/her credibility, it is incumbent upon franchisee counsel to draw those out. Indeed, witnesses that contribute positively to society and lead responsible lives are usually well received by factfinders. Franchisee counsel should proceed by highlighting important facts, wasting little time on anything unnecessary for the factfinder to learn, and transitioning effectively in and out of topics such that the factfinder is cued into the topic at hand and remains interested.

B. Common Franchisor Witnesses

Similarly, there are numerous recurring franchisor witnesses. Franchise compliance officers, sales personnel, field representatives, and other employees frequently testify in franchise disputes. Former franchisor employees are not uncommon witnesses because the relationship with certain franchisees may span the course of one or more decades, during which time a franchisor’s employees may have been fired, laid off during an ownership transition, or left voluntarily. Former employees are unique in some sense because, in certain instances,
they may feel no obligation to defend their former company, perhaps leading to more candid testimony.

In pre-sale disclosure disputes, the franchisee counsel’s focus will be on proving the elements of a claim for intentional fraud, which requires proof by clear and convincing evidence, and/or a claim of negligent misrepresentation and its lesser evidentiary burden. In addition, the franchisee’s counsel is likely to have asserted any available statutory claims, whether arising under the applicable state’s Little FTC Act, Uniform Unfair and Deceptive Trade Practices Acts, or its franchise investment laws.

To overcome these claims, the franchisor’s CFO, or another competent accounting representative, should testify as to basis of the information contained in Item 19, or other documents or media containing the financial performance representation. While a general “corporate representative” often attempts to fill this role, accounting issues can easily trip up a lay person, even one properly prepared to testify. The presence of a company’s CFO or accounting department representative sends a message to the factfinder that the franchisor’s financial information is accurate and grounded in GAAP or other applicable industry standards. Ultimately, the goal is for the witness to demonstrate that the franchisor exercised reasonable care or competence in publishing the financial information to prospective franchisees.

If franchisor counsel is aware that prior to the execution of the franchise agreement the franchisee retained an accountant to review the franchisor’s FDD or other materials, consider having the franchisor’s business representative testify as to any discussions he may have had with the accountant, and to authenticate any supporting documentation that the franchisor may have provided to the franchisee’s accountant, to demonstrate that the franchisee’s accountant was satisfied with franchisor’s financial information.

In addition to the franchisor’s CFO or accounting representative, the testimony of the franchisor’s sales representative will be crucial. The sales representative must firmly and with as much specificity as possible recount his discussions with the prospective franchisee. Moreover, he must categorically deny having made any oral representations inconsistent with the franchisor’s authorized financial representations. To fend off cross-examination, have the sales representative testify as to the many reasons why he would not make unauthorized financial projections to a prospective franchisee, e.g., his commission is tied to the franchisee’s performance and not his own, his brand is well-established and its high visibility is a sufficient selling point, the disclosures made in Item 19 are attractive on their own, his reputation is on the line, his job is on the line, and/or his goal is to grow the brand with successful franchisees, not those who fail.

In pre-sale disclosure cases, franchisor sales personnel are key witnesses. In many cases the sales personnel made the illegal financial performance representation. Finally, franchisor field representatives are usually called to recount the details of an alleged default by a franchisor. In termination and non-competition cases, therefore, field representatives may become important witnesses. For instance, if a franchisee alleges that he/she was terminated for some ulterior motive, the field representative may have details regarding the franchisee’s default, and whether it was a minor issue, or something that may trigger termination. A word of caution, however: in the event that the franchisee previously sought, but was denied, discovery concerning the treatment of other franchisees, this testimony would likely be objected to and excluded.
Terminations for failure to pay royalties and other charges due under a franchise agreement are common. Since the fact of payment is objectively determinable, a corporate representative, fully familiar with the franchise agreement’s royalty and fee structure is usually adequate to the task of demonstrating non-payment. In the event that non-payment arises from a dispute as to how the franchisor has accounted for past due amounts, then the franchisor’s CFO, accounting department, or audit team representative may prove to be the better witness.

Termination for failure to adhere to the franchisor’s quality or other system standards often requires a more nuanced inquiry and level of proof. For example, within the hospitality or food industries, one of the franchisor’s on-site quality inspectors can offer the factfinder an “eyewitness account” of the condition of the hotel or restaurant. When coupled with supporting photographs, such testimony can prove quite powerful and persuasive to a factfinder.

When termination results from the franchisee’s misconduct, such as its failure “to comply with all applicable laws,” a franchisor’s representative can and should testify as to the reputational harm that results from the franchisee’s misconduct. Depending upon the type of misconduct leading to the termination, e.g., illegal drug sales, routinely serving alcohol to minors, purposeful skirting of the local building code, and failing to report and pay taxes, the franchisor’s representative’s testimony, while important, may nonetheless not present a complete picture to the factfinder. In these circumstances the most compelling witness may not be a representative of the franchisor at all. A police officer, a building code inspector, and a state revenue agent, are all potential witnesses who can inform the factfinder of the nature and implications of the franchisee’s illegal conduct.

In cases involving non-competes, franchisor counsel should consider having a current franchisee testify as to the importance of having the franchisor enforce the non-compete for the benefit of the brand and that current franchisee’s business in particular. Another potential witness might be a highly placed franchise executive who can testify as to the “investment” the franchisor has made in the franchisee in terms of training and the level of access the franchisee has been given to the franchisor’s confidential operational guidelines or methods of doing business, all of which the franchisee has now appropriated for its sole benefit.

Whatever witnesses are selected, counsel’s job is to ensure that the witnesses testimony recounts your client’s version of the seminal events in a manner that is easy to understand, convincing, and engenders the factfinder’s sympathies for your client’s position.

VIII. Cross-Examination

Generally, effective cross-examination is a stealth mission, not a frontal assault. In a sense, lawyers stand in for their clients. Proceeding in a disrespectful manner rarely does much good for the lawyer’s client. This does not mean that the substance of the cross-examination is non-confrontational, but merely that counsel should proceed in a respectful manner. In most scenarios witnesses are generally more willing to engage in candid dialogue during a pleasant exchange; but in others, aggressive questioning may elicit aggressive responses. The best approach requires the lawyer’s judgment depending on the situation and characters involved.

Prior to cross-examination, however, lawyers should first question whether the witnesses can actually help their side or whether the lawyer can discredit the witness’s testimony. If successful, cross-examination can produce favorable information and expose biases and/or weaknesses in a witness’s testimony. If unsuccessful, however, it can serve to strengthen the
witness’s testimony. Effective cross-examination is often the product of ample preparation and organization of documents which counsel may access immediately to impeach the witness.

Moreover, because in practice (if not by rule) cross-examination is at times permitted to move beyond the scope of direct examination,27 it might also present an opportunity to take advantage of a witness prepared to testify regarding an entirely different issue. For instance, in a pre-sale disclosure suit in which the franchisee eventually defaulted, a field representative may have been prepared to testify as to the franchisee’s default, but not for pre-sale disclosure violations, such as whether it is realistic for a franchisee to earn the numbers contained in Item 19.

If counsel chooses to move forward with cross-examination, the goal should be to dismantle the adverse party’s themes, while bolstering their own. In a termination case, franchisee counsel might proceed by eliciting favorable responses from witnesses about the franchisee’s honesty and hard work, while continually questioning franchisor witnesses about whether there was a scheme to eliminate franchisees, whether the franchisor stood to benefit financially from the termination of the franchisee, or whether similarly-situated franchisees were also terminated. In contrast, franchisor counsel will want to reinforce the franchisor’s justification for termination and draw concessions from the franchisee that he agreed in writing to discharge its obligations of payment and/or performance, yet repeatedly failed to do so.

Recurring questions that reinforce the franchisee’s and franchisor’s themes will vary along with the facts of each case. Yet, both counsel generally must ask leading questions and keep the witness on a short leash so that cross-examination bolsters counsel’s theme and not that of the opponent.

IX. Expert Witnesses

Expert witnesses often play a significant role in franchise disputes. The two most common experts involved in franchise disputes are liability and damages expert witnesses. Franchising is a specialized area of law that makes the use of a liability expert quite persuasive in the correct case. Liability expert witnesses generally testify, or educate, the factfinder as to industry norms and laws. Damages experts are generally called by both sides in franchising disputes to support their claim for monetary damages and perhaps to rebut the opposing side’s expert report and testimony.

A. Liability Experts

Expert testimony offered to prove liability, while presented less frequently than as to damages, is another effective method employed by franchisees and franchisors alike to explain

27 See Fed. R. Evid. 611(b) (“Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness’s credibility. The court may allow inquiry into additional matters as if on direct examination.”); State v. Bryant, 286 P.3d 239 (Kan. Ct. App. 2012) (holding that admission of cross-examination beyond the scope of direct is within the court’s discretion, and will not be overturned as an abuse of discretion). Permitting cross-examination beyond the scope of direct examination also promotes trial efficiency, consistent with Federal Rule of Evidence 102. See S. REP. NO. 93–1277 (1974), available at https://www.law.cornell.edu/rules/fre/rule_611 (The House granted “discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial . . . providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination.”).
franchise laws and their intent. Expert testimony as to liability usually covers technical issues relating to a product or service, the nature of franchising, or franchise laws generally. In one instance, a state attorney general was permitted to testify as to the meaning and scope of the FTC Rule. More specifically, an industry expert may testify with regard to a pre-sale disclosure violation. In one case, a franchisee was permitted to offer expert testimony that the franchisor’s sales quota was unreasonable. In another, a franchisee’s expert was permitted to testify regarding the reasonableness of the franchisor’s site selection efforts. Indeed, expert liability testimony can be especially persuasive in pre-sale disclosure disputes. Liability experts generally focus on the franchise law intent and coverage, however. For instance, in a pre-sale disclosure case in which the franchisee has alleged a statutory violation for failure to provide complete information, the liability expert will illustrate the nature of franchising, why franchisees are afforded special protections as to omissions, and what actually constitutes a material omission of factual information under the law.

In disputes involving termination and non-competition claims, the Lanham Act may also be in play. Depending upon the facts of the case at hand, an expert might be utilized to obtain and present for the factfinder the results of a survey on the issue of confusion if the former franchisee is using a similar trade name or service mark to that of the franchisor.

Both franchisors and franchisees alike must consider whether expert testimony is cost-effective, especially given the costs involved with expert reports and testimony. The ultimate factfinder is another factor to consider. A lay jury will likely be more impressionable than a seasoned arbitrator or judge who understands franchise laws. In sum, liability experts can generally have a powerful effect on the factfinder.

B. Damages Experts

Damages experts are frequently used in franchise litigation. Damages experts are used in connection with pre-sale disclosure violations in which a franchisee seeks rescission of the franchise agreement, and in termination cases in which franchisees and franchisors allege that they are entitled to lost future profits. Even when liquidated damages are at issue, a damages expert might be called upon to demonstrate whether the franchisor’s formula bears some rational relationship to the cost of replacing the franchisee in the marketplace. Damages experts are also employed to discredit an adverse party’s expert and claim for damages. Such an expert may offer an alternative damages figure, or merely discredit the report of the opposing party’s expert witness.

In sum, damages experts are an invaluable tool for franchisees and franchisors. Employing a credentialed expert with a defensible report and testimony goes a long way toward persuading a factfinder as to the amount, if any, of an award. The importance of retaining a competent testifying damages expert cannot be overstated. See, e.g., Otis v. Doctor’s Assocs., Inc., No. 94 C 4227, 1998 WL 673595, at *4 (N.D. Ill. Sept. 14, 1998) (precluding proffered expert's
experts risk their credibility if they create the perception that they are advocating too strongly on behalf of the franchisor or franchisee. To dissuade that perception, experts in fact might actually concede minor points of their analysis if they are properly challenged. Finally, much like a liability expert, franchise counsel should consider whether employing a damages expert is cost-effective. In most cases, however, a damages expert is essential to prove damages.34

X. Closing Argument

Closing argument presents the only opportunity for lawyers to argue the facts elicited during trial and the legal theory, and how they fit together in a manner favorable for their client. The closing argument is also the last opportunity to reinforce the theme and theory of the case, and to argue why the factfinder must return a favorable award.35

In pre-sale disclosure cases, franchisee lawyers should reinforce the inherent unfairness of the franchisee entering into an agreement with a party that withheld material information, when the franchisor had an incentive to sign the franchisee up, regardless of their eventual success. Given the complexity of statutory claims, franchisee counsel should also explain the significance of pre-sale disclosure laws, while incorporating jury instructions, in relation to specific facts admitted during trial. Counsel may do so by reiterating the testimony from a liability expert, or perhaps reading the expert’s testimony directly, which may be more forceful. Finally, lawyers should continue to humanize the franchisee, and stress the importance of righting the franchisor’s wrong.

A franchisor lawyer’s closing in a pre-sale disclosure case should tie together the testimony and documentary evidence to demonstrate the absence of a violation, or, if it occurred, to demonstrate the absence of a franchisee’s reliance on the claim in entering into the franchise agreement. Jury instructions will be a key component of any closing, especially, for example, where the standard for reliance is an objective rather than a subjective standard. Where the facts support it, franchisor counsel should also emphasize that any losses experienced by the franchisee emanated from its own failure to abide by the franchise agreement, and not from deficiencies in the franchisor’s pre-sale disclosures. In sum, the goal is to paint the franchisor as following the federal and/or state rules, providing appropriate disclosures, and to paint the franchisee as an informed investor who was not misled, or where some form of violation occurred, purposefully disregarded the warning signs.

In termination cases, franchisee counsel should reinforce themes of unfairness and an ulterior motive that explains franchisor’s decision to terminate, especially highlighting all mutually beneficial and reasonable alternatives that would have permitted the franchise relationship to survive. Also with the help of jury instructions, franchisee counsel should clearly and understandably explain the law to the factfinder, and the law as it applies to the facts elicited during trial. In termination disputes, the explanation may relate to what constitutes “good

opinion on anticipated lost profits where plaintiff had shown no evidence that the expert’s calculations were “anything more than an exercise in arithmetic based on inherently unreliable values.”). 34 It is possible that a business owner might offer testimony as to lost future profits if the court finds that person to have sufficient personal knowledge under Federal Rule of Evidence 701. See, e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff’s owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business).

35 For an interesting discussion of what constitutes an improper jury argument, see Carousel's Creamery v. Marble Slab Creamery, 134 SW 3d 385, (Tx. Ct. App. 2004).
cause” under a franchise relationship statute, or to the franchisor’s failure to comply with procedural requirements for termination. Again, the closing argument is another opportunity to humanize the franchisee, and, if the facts are present, explain the real reason behind the franchisor’s conduct.

Franchisor counsel’s closing argument should give the factfinder a comfort level that the franchisor “did the right thing” in terminating the franchisee. A recitation of the timeline, particularly of the noticed defaults and notices to cure, will remind the jury of the factual basis for the termination. By overlaying the payment and performance obligations of the franchise agreement with jury instructions regarding breach, causation and damages, counsel can walk the jury through the factual and legal pathway leading to favorable franchisor verdict.

In non-competition claims, franchisee counsel should focus on the franchisor’s actions that precipitated the franchisee’s violation of the non-compete provision. Franchisee counsel might even ask rhetorically, “Why should a franchisor be permitted to breach an agreement and then also enforce a non-competition clause that is being violated because of that same breach?” Franchisor counsel should reiterate the absence of its own breach and highlight its adherence to the franchise agreement’s terms. In so doing, counsel will be able to make an appeal to the factfinder during closing that the franchisor is not only able to, but indeed is entitled to, enforce its non-competition provision. While some states have statutes governing restrictive covenants, many states have only a partially developed body of case law concerning them. While jury instructions that track statutory language are easier to explain to a jury, the case law driven jury instruction can offer more fertile ground for arguing your client’s position.

Franchisee arguments appeal to the factfinder’s sense of fairness, highlighting the franchisor’s wrongs, (e.g., the failure to comply with disclosure guidelines, fraudulent inducement, or enforcement of wholly inequitable terms) and a request that equity be done. Franchisor’s arguments more typically will appeal to the factfinder’s logic and sense of adherence to obligations entered into in business transactions, particularly those governed by a written agreement. Like the opening statement, the closing argument should start strong and capture the factfinder’s attention, usually by stating the strongest facts of the case, and reinforcing the themes, all the while proceeding to recount the story and theory of the case. As counsel argues how the specific facts relate to the law, displaying the evidence at the same time will make it easier for the factfinder to understand the argument. Equally important, counsel should concentrate on his/her delivery, changing voice complexion when necessary, and showing passion and commitment to the factfinder at key moments. In each of the three most prevalent cases in franchise disputes, the franchisee and franchisor counsel must tell a compelling story, and charge the factfinder with making the fair, lawful, correct decision. For the franchisee this typically adds up to righting a wrong in order to make the franchisee whole, while for the franchisor, this will typically add up to upholding the parties’ bargain.

XI. Jury Instructions and Verdict Form

While only applicable in jury trials, a closing argument is even more powerful if counsel walks the jury through important portions of the jury instructions. Jury instructions simplify the legal issues and rules so that jurors can understand and apply the law. Because franchising is a unique area of law, jury instructions may vary depending on the law and the state in which the trial is held. Most states have standard, and similar, instructions for basic claims in fraud, breach of contract, and damages. Standard instructions are merely the starting point, however, from which more favorable instructions should be developed. In franchise disputes, state franchise laws may provide additional interpretation of the law, and be incorporated into the jury
instruction. Franchisees should be especially cognizant in termination disputes in which the franchise agreement permits termination without good cause, but the franchise relationship statute requires good cause for termination. Franchisees would seek a jury instruction as to the franchise relationship statute requiring good cause, and perhaps to a “non-waiver” provision in the franchise statute, which prohibits waiver of “good cause” or any other substantive rights under the statute.

The verdict form can also have a significant impact on an eventual jury determination. General verdict forms require juries to apply the facts to the law and render a decision in favor of either the plaintiff or defendant, while special verdict forms require the jury to make specific findings as to issues of fact without specifically finding for the plaintiff or defendant. In special verdicts, after the jury completes the verdict form, the court applies the findings of fact to the law and determines the prevailing party and award. Special verdict forms are generally more favorable for defendants seeking to avoid large awards because the specific questions generally cause the jury to avoid duplicative damages and more thoroughly break down the award, while general verdict forms favor plaintiffs seeking large awards because the jury merely chooses who wins and need not break down the eventual award. Caution must be exercised when using special verdict forms so that inconsistencies are identified and clarified before a jury is discharged.

XII. Conclusion

Whether you are advocating on behalf of the franchisor or the franchisee, the opportunity to present your case to a factfinder is a thrill like no other. Yet knowing that a successful outcome for your client rests in your hands is a great responsibility. While any seasoned advocate will devote the time and attention needed to prevail, franchise cases can present advocates with unique challenges that arise from the host of federal and state laws that are often in play in a franchise dispute. In addressing your arguments to an arbitrator, a judge or a jury in a franchise case, convincing the factfinder requires careful planning and a fully stocked toolbox of strategies.

36 See, e.g., Carvel Corp. v. Diversified Management Group, 930 F. 2d 228 (2d Cir. 1991)(reversing judgment in favor of franchisor, Carvel, when district court refused to give an instruction to the jury that Carvel had a duty to perform in good faith and that finding that the duty of good faith was not “subsumed” within the general instructions on breach of contract and fraud).
37 In Burger King Corp. v. Mason, 710 F. 2d 1480 (11th Cir. 1983), the appellate court affirmed the lower court’s order for a new trial after inconsistencies on a special verdict form left the court unable to determine the number of restaurants the jury found Burger King properly terminated. As the district judge noted: "it would not serve the best interests of justice for the court to attempt to read the jury’s mind in an effort to resolve this ambiguity."