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The Road to Purgatory or Paradise?
The Devil is in the Details!

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I. INTRODUCTION

Several trial attorneys in the franchise bar have written books and papers advising franchise attorneys how to prepare a lawsuit for filing, how to maneuver the case along the way, and how to take a lawsuit to trial. The reality is, however, that trial attorneys are not taking many cases to trial these days. In fact, fewer and fewer cases are being tried and 98% of all civil cases settle. Yet, it is still difficult to predict whether any particular case will settle. Odds are that all but 2% will. But what happens if your case does not and you find yourself standing in front of a jury or a judge presenting evidence at trial? The authors of this paper want to assist you in the various ways to prepare for that possibility, even if it seems remote.

II. PREPARING AS IF THE DISPUTE WILL GO TO TRIAL

While it is one thing to say that you are preparing every case you have in your book of business for trial, it is another to actually do it. Trial attorneys are busy people, and it would not be atypical to collect information from a client about a potential claim, while subconsciously believing that the claim will either go away, or quickly settle. But battling this mindset is the first step in preparing as if the dispute will go to trial. To be sure, good attorneys are always thinking about ways to settle, and walking down the settlement path. However, you cannot be an effective advocate for your client in the settlement context if you are not also adequately preparing for a battle that may actually come. Settling a case at the last possible minute because you are not ready to go to trial is the worst place to be.

So, the first thing good trial attorneys do, is adjust their mindset. While 98% of all cases may settle before trial, you have to prepare as if 100% of them will go to trial.

III. THE INITIAL ANALYSIS OF CLAIMS AND DEFENSES

A. Initial Preparation

You will get the call or an email from a client, or a client will come to your office with a problem. Maybe they have been sued or they want to sue someone. The initial

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1 The authors would like to thank Wes Dutton, associate in the Dallas office of Haynes and Boone, LLP and Rachel D. Zaiger, associate at Dady & Gardner, P.A., for their tremendous assistance on this paper.


call/meeting/exchange is the perfect time for assessment and questions. You should use this first meeting to your advantage and begin the process of outlining your litigation strategies.

1. **Fact Gathering**

   a. **Interview Your Client And Setting Expectations**

      The first question every attorney should ask their client is: “What are your goals here and how can I help you accomplish them?” Knowing your client’s goals from the beginning of a case is the best way to ensure your litigation strategy is focused on those goals. What if your client doesn’t know his or her goals yet? That can happen too. When your client is not sure of his or her ultimate goal, help the client to understand the possible end results of the representation, including probable outcomes of the case and how the range of results might affect the client’s business.

      It is also important to know if your client has been involved with litigation or arbitration before. Does your client have realistic goals on the amount of time and money it takes? It is important for the client to understand what goes into the litigation process: document collection, depositions, hearings, briefing, etc. The monetary resources of your client are important. Litigation is expensive. It is important for your client to understand the litigation budget and what can make that budget change. Setting your client’s expectations at the beginning of a lawsuit will also help shape the litigation strategy and focus for the case.

      One of the tenets of litigation is that the first time the client tells you his or her story, that is the best version you are going to hear. Over time, and as facts develop on both sides, a reality check is often necessary. Keep in frequent communication with your client as facts evolve and the story changes.

   b. **Identify Potential Witnesses**

      Almost every case will have witnesses with knowledge of important facts. It is crucial to identify these key people at the beginning of a case. Then you will want to interview these potential witnesses as soon as possible. Interviews can be done over the phone or in person. An in-person interview may be costlier but is always most effective. By meeting in person, you can visit with the potential witness, get a sense of his or her strengths and mannerisms and understand how best to prepare the witness for deposition or trial.

      There will inevitably be a need for a corporate representative from the franchisor side. Even before the Rule 30(b)(6) notice is served and the matters on which examination are requested are known, you should attempt to identify which in-house people are the most knowledgeable in various areas. The organization will be required to designate one or more persons knowledgeable in the areas of inquiry identified in the 30(b)(6) notice. The organization (and its attorney) are responsible for the job of preparing the representatives to answer all questions pertaining to those matters. You can prepare a representative who does not have personal knowledge of the matters through use of documents and through discussions with other employees of the organization.

   c. **Identify Any Issues With Former Employees And Third Parties**

      What happens when an important fact witness is no longer with the organization? What are the risks inherent in deposing someone who is no longer a loyal foot soldier in the
company? The first option is to informally interview any potential witness to get a read on his or her story and how likely the potential witness will be to testify genuinely and without recrimination. If you can develop a relationship of trust, you can coax any negative aspects from the witness and assist the witness in retelling the story in a more positive light.

2. Outline The Causes Of Action And All Defenses
   a. Create A Timeline

   To take a case to trial you must understand the facts of the case. A timeline is an essential tool that you can update and refer to as the case proceeds. The timeline should include a date and description of each relevant event and can also include any “attorney notes” about the event and a reference to a related document. You should consider creating a key document notebook. For franchise attorneys, this normally includes any correspondence pre-signing, the franchise application and attachments, the Franchise Disclosure Document, including a signed Item 23, the executed franchise agreement, any amendments, and any correspondence related to the dispute (e.g., default notices, notice of termination, etc.). These documents can then be tied to the timeline.

   Shaping facts into a timeline accomplishes several organizational components. It forces you to review and identify the key documents. It helps organize the documents into a user-friendly format that can assist the other trial team members as the case progresses. It will also allow you to understand the facts sequentially and in context. The timeline helps portray what actions were taken (or not taken) in response to a default letter, for example, and whether significant events transpired over the course of months or days. You can also note whether any documents appear to be missing.

   You should think of the timeline as evolving and continue to update it as the litigation progresses. The timeline will also be helpful in preparing and responding to discovery requests, such as interrogatories and requests for production, in preparing for depositions, in dispositive motion practice, and, ultimately, in trial. Perhaps most immediately, the timeline can identify the strong and weak points of the case at the onset of the litigation, as discussed below. Beware, however, that sometimes sharing the timeline or other selected documents with a witness will require that you provide copies to the other side, even if you claim that they are subject to attorney-client privilege or the attorney work product doctrine.

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5 A sample timeline is attached as Appendix A.
7 Id.
b. Chart Out Your Claims And/Or Create A Case Map

A case map or chart of claims is a useful tool for analyzing the claims and defenses at issue in the case. A case map usually includes a listing of all causes of action alleged, the elements of each claim, and the evidence of each element plus all the defenses possible and the evidence necessary for each defense. The case map can contain “attorney notes” regarding the claims, including the factual basis for the cause of action or defense. For example, the case map might note that the breach of contract claim is based on the franchisee’s failure to pay royalties, or the franchisor’s improper termination of the agreement. The map can also indicate any special remedies for each of the causes of action and whether a specific claim entitles the plaintiff to attorneys’ fees or punitive damages (e.g., many state deceptive/unfair trade practices acts allow for recovery of both attorneys’ fees and punitive damages). Also, some claims (trade secrets, misuse of trademarks) may offer the chance for removal to federal court.

Like the timeline, the case map will be a useful tool as you prepare for trial. Initially, the case map can be used to inform your discussions with the client regarding the client’s goals and expectations. You can assess early-on whether enough evidence exists or is likely to be received in discovery to support or defend against the claims to be brought and can have a candid conversation with the client regarding the chances of success. You can also use the case map in preparing discovery requests. The case map will be helpful you analyze the information and documents needed to position the case for summary judgment and success at trial. The case map can serve as a “roadmap” for dispositive motion briefing. The case map is a quick reference that tells what must be proven or disproven to win the case at any stage of the litigation.

c. Figure Out The Strong Points And Weak Points Up Front

The beauty of the case map is that it helps you figure out your evidence and what you need to prove. It also assists in highlighting what documents or witnesses can help you support your claims and defenses. But it should also aid you in understanding where your strong points are—and conversely where your weak points may lie. Knowing these good and bad aspects of your case will make you more aware of what is important in your discovery—what documents to request, what witnesses to request, and which of your documents and witnesses will be the most crucial.

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9 A sample case map is attached as Appendix B.


13 Id.
IV. THE IMPORTANCE OF THEMES

A. Identifying (The Right) Themes

Themes are a crucial component of any effective litigation strategy and can be used effectively by franchisees and franchisors alike to persuade judges and jurors. Using themes allows you to tie complicated fact patterns to a story that is familiar and relatable to fact-finders and that highlights a client’s strongest arguments and deemphasizes opposing counsel’s strongest arguments. From the inception of litigation through trial and subsequent appeals, themes serve as the narrative backbone of a case. The following are themes from the franchisee and the franchisor perspective.

1. Franchisee Strategies For Using Themes

The importance of themes for franchisees cannot be overstated, as themes represent one aspect of litigation where franchisees enjoy a clear advantage over franchisors. It is imperative that franchisees develop a familiar and consistent theme when presenting their case to a fact-finder, particularly in complicated commercial disputes where a fact-finder might otherwise struggle to reconcile tedious facts and figures with the franchisees’ legal arguments.

a. Themes In Pleadings

A common theme in franchisee pleadings is the asymmetry in bargaining positions between franchisors and franchisees; whereas franchisees often operate no more than a handful of franchises, franchisors are typically large corporations with internationally-recognized brands. Even in disputes regarding relatively unambiguous contract language in franchise agreements, it is a useful tactic for franchisees to emphasize the disparity in size between themselves and their franchisor—portraying the franchisor as a massive, distant, faceless, sophisticated, and lucrative business entity, in contrast to a family-owned local business struggling to make ends meet. This theme is particularly likely to elicit sympathy for franchisees in disputes involving claims for breaches of implied covenants, fraud, or other unfair or deceptive trade practices by implying that franchisors should be held to higher business standards than their franchisee counterparts. Franchisees frequently argue that franchise agreements are contracts of adhesion, offered on a “take it or leave it” basis, and that franchisors are in the best position to know that the terms of such agreements—which are themselves, generally drafted by the franchisor—are inherently unfair to the franchisee.14 The sheer size of franchisors makes them susceptible to this theme, even against relatively experienced and successful individual franchisees, because the relationship of a single franchisor to hundreds or thousands of franchisees makes it plausible for fact-finders to assume that a franchisor is in the best position to manage the franchise relationship, having access to information from across a franchisor’s franchise network with substantial resources available to control business practices by franchisees.

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14 See Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d 365, 373–74 (Cal. Ct. App. 1996) (“Some courts and commenters have stressed the bargaining disparity between franchisors and franchisees is so great that franchise agreements exhibit many of the attributes of an adhesion contract and some of the terms of those contracts may be unconscionable. Franchising involves the unequal bargaining power of franchisors and franchisees and therefore carries within itself the seeds of abuse. Before the relationship is established, abuse is threatened by the franchisor’s use of contracts of adhesion presented on a take-it-or-leave-it basis . . . Indeed such contracts are sometimes so one-sided, with all the obligations on the franchisee and none on the franchisor, as not to be legally enforceable.”) (internal quotations and citations omitted).
A distinct but related theme is that franchisors prioritize profits over people; that franchisees are passionate business owners that involve themselves personally in managing their franchise and its employees, while franchisors are distant corporate entities that exist primarily to extract wealth from franchisees.\textsuperscript{15} As with the theme of disparate bargaining positions, this theme juxtaposes the familiarity that fact-finders have with the operation of a local business against the unfamiliar and complicated corporate structure of a franchisor. Franchisors are often accused of squeezing franchisee profits by implementing network-wide policies that increase franchisee business expenses, or policies that prioritize corporate-owned locations over competing franchisee-owned locations. There is an inherent tension between a franchisee’s interest in avoiding intra-brand competition in a given market and a franchisor’s interest in expanding its network of franchises, and it is an intuitive litigation strategy for franchisees to attribute business struggles to a franchisor’s conflict of interest between protecting and promoting individual franchise locations and developing the broader franchise network. Once again, this theme allows the franchisee to tell a very personal story of trust and betrayal by a franchisor, in contrast to a more formal and less relatable story from the franchisor regarding contract rights and franchise relationships.

Beyond these useful but generic themes, it is also critically important that franchisees develop case-specific themes. Once the franchisee attorney has a clear understanding of the facts, the very first thing that he or she should do is sit down and draft a single paragraph statement of the case. It is not as easy as it sounds, and you have to work at it—but it is very important. One of the many ways that you can distill an entire case into a single paragraph is to start by writing a document with single multiple sentences putting down all of the key facts and then grouping them into thematic statements to capture the essence of those facts. Once those several sentences have been created, you can then craft your statement paragraph, trimming, where you need to, and making sure that you are stating your case as succinctly as possible.

Once you are done with your own theme paragraph, you should do the same for opposing counsel’s case. For instance, what is it that the franchisor and his or her attorney are going to try to prove, and how are they going to go about doing it? These two documents, the competing themes document, will become the basis for your preparation of exhibits, trial testimony, motions in limine, and preparation for your witnesses for deposition. It is the central piece of work to be done early on and yet, many attorneys do not take the time to do it.

b. Themes In Discovery

A franchisee’s themes in discovery should mirror the themes in its pleadings. If a franchisee is alleging encroachment by a franchisor, then the franchisee’s discovery strategy should focus on identifying the key decision-makers within the franchisor’s corporate structure who are responsible for approving network-wide franchise policies and approving new franchise locations. If a franchisee is alleging that a change in franchisor policy caused the franchisee to struggle financially, then the franchisee should prioritize discovery that the franchisee can use to compare its performance to that of intra-brand or inter-brand competitors. If a franchisee is alleging detrimental reliance or seeking promissory estoppel, then the franchisee should emphasize facts relating to its contract negotiations and other interactions with the franchisor.

\textsuperscript{15} See, e.g., Patterson v. Domino’s Pizza, LLC, 333 P.3d 723, 725–26 (Cal. 2014) (“A franchisor, which can have thousands of stores located far apart, imposes comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way. To this extent, the franchisor controls the enterprise. However, the franchisee retains autonomy as a manager and employer. It is the franchisee who implements the operational standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior.”).
In many franchise cases, evidence showing disparities in treatment across franchisees provides a useful reference point for proving liability and damages.\textsuperscript{16} Facts demonstrating that a franchisee was treated more harshly by a franchisor than other similarly-situated franchisees would tend to support arguments that the franchisor acted in bad faith.\textsuperscript{17} For instance, a drop in franchisee revenue that is more severe than other similarly-situated franchisees over a relevant time period might provide a relative measurement of damages.

In any case, a franchisee’s overarching theme should inform its discovery strategy. The types of information a franchisee seeks through depositions, document requests, and other written discovery should all relate to the franchisee’s claims and defenses within the context of the theme adopted in the franchisee’s pleadings. Here, too, the disparity in size between the franchisor and franchisee benefits the franchisee; whereas only a few people may be actively involved in the ownership and management of a single franchise location, a franchisor may have dozens of officers and millions of documents with information responsive to a franchisee’s discovery requests.\textsuperscript{18} This provides the franchisee with flexibility in honing its discovery requests as it learns more information about the case.

2. Franchisor Strategies For Using Themes

Themes are like headlines. They advise the intended recipient that there is more to come but must be interesting enough to grab the receiver’s attention. Themes are also the introduction to the takeaways of your case. They are short and to the point but must introduce the story that will follow. So, what makes a good theme? Effective themes should be not only like a headline or introduction, they should also be like a good advertising slogan: reflective of the important features of your case (the product); simple and easy to follow (like a jingle); and (whenever possible) consistent with values important to the trier of fact.\textsuperscript{19}

One technique that can be used to identify themes that truly reflect the heart of a case is to sit in a room at the inception of a case and write out all the possible themes on a flip chart. Revisit the flipchart periodically during the initial phases of a case and then prior to depositions. Keep the flip chart in your office and periodically pull it out. Once discovery has been taken, revisit the themes again. Try to use the themes in all dispositive or other motions so the story being told is consistent and starts sounding familiar to the court.

The following are some suggestions for the development of effective themes for any case.

\textsuperscript{16} See, e.g., \textit{Andy Mohr Truck Ctr., Inc. v. Volvo Trucks N. Am.}, 869 F.3d 598, 604 (7th Cir. 2017) (providing that in order for a franchisor to be liable under the Indiana Deceptive Franchise Practices Act a franchisee must show “arbitrary disparate treatment among similarly situated individuals or entities.”) (internal citation omitted).

\textsuperscript{17} See \textit{Wright-Moore Corp. v. Ricoh Corp.}, 908 F.2d 128, 136–37 (7th Cir. 1990) (providing that distributor was unable to show that manufacturer acted in bad faith where distributor did not put forth sufficient evidence of “treatment different from similarly situated franchisees.”).


a. **Emphasize Key Points In Understandable Language**

What are the key points you would want a junior high student to understand from your case?\(^{20}\) This does not mean that your fact-finder will only be as intelligent as a 7th grader. What this does mean is that your case themes should be understood by the average 7th grader. Effective themes should be in plain English and should avoid legal mumbo jumbo.\(^{21}\) Not “the aforesaid person, nee Mary, possessed a less than large white animal with lightened hair.” But “Mary had a little lamb, whose fleece was white as snow.”

b. **Give The Fact-finder Some Reasons To Feel Good About Your Client**\(^{22}\)

“Often, the best way to explain this is by building your themes around the idea of knowledge and control—which party in the case was in the superior position of knowledge (about the circumstances surrounding the dispute) and control (over the circumstances surrounding the dispute).”\(^{23}\) Stress themes that contain concepts that are important to everyday people (judges are people too!) like that an agreement is a set of promises that a party should live up to or the positive experience a consumer wants to have in staying in a branded hotel or the expectations created by a franchised restaurant for cleanliness and food quality. When there is a breach of any of those expectations, a fact-finder can empathize with that theme.

c. **Themes Should Be Able To Be Used At Every Phase Of The Litigation**

Think about ways to make your themes connect—in your pleadings, in your deposition preparation, in taking depositions, in preparing your experts and their reports, and in filing motions. Once you’ve simplified your story and your themes, you can use your themes as helpful “home bases”\(^{24}\) that can anchor your pleadings and motions and can be helpful to witnesses during their testimony. During deposition or trial testimony, themes assist witnesses by providing a method for responding to tough questions in a positive way that supports the theory of your case.\(^{25}\)

d. **Don’t Be Afraid To Revisit And Revise Your Themes**

During the life of a lawsuit, you will gain knowledge as the case progresses. Perhaps there are documents that are uncovered that support or hurt your case. Perhaps there is a witness whose story has evolved from your first interview. Perhaps there are different new goals not apparent to your client at the outset of the case. Perhaps you received a positive (or negative) ruling from the court that alters how you will tell your story. It is always appropriate to pivot thoughtfully. Use your timeline and case map to help revisit and revise your themes and theories as necessary.

\(^{20}\) *Id.*

\(^{21}\) *Id.*

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.*

\(^{25}\) *Id.*
V. DISCOVERY AND WITNESSES

A. Poorly Prepared Witnesses Only Lead to Heartbreak

Witness preparation is a crucial yet frequently underappreciated component of the discovery process. Just as a well-prepared witness can provide solid testimony by emphasizing the strengths of your client’s case while undermining the opposing parties’ contentions, a poorly prepared witness can do irreparable damage to your case by offering testimony that obscures or contradicts your legal arguments. A credible and knowledgeable witness is an invaluable asset for conveying your story to the fact-finder, while insincere or unconvincing witnesses can cause the fact-finder to doubt facts which are material to your legal strategy. Good witness preparation involves much more than reviewing prospective testimony the day before a deposition; the process of selecting witnesses and focusing witness testimony begins with the inception of a lawsuit and continues through trial.

1. Identify Key Witnesses

While this point is obvious, its practical execution warrants detailed explanation. Prior to filing a lawsuit, or immediately upon receipt of a complaint, you should review the pleadings to identify the contours of the dispute and determine which facts—whether known or unknown—will be vital for proving or refuting liability or damages. Next, consider which potential witnesses are in the best position to deliver testimony about those key facts. Many cases will involve only a handful of potential witnesses with relevant testimony; a dispute regarding the language of a contract will typically require less witness testimony than claims arising under implied covenants. Cases involving the operation of a franchise or the use of intellectual property may require significantly more witnesses and more extensive testimony. Expert witnesses may be appropriate in cases involving particularly complex fact patterns—such as where industry practices or computer software are disputed—or where damages require a level of analysis beyond the personal knowledge of a franchise owner or employee.

Form and function are both relevant to the identification of witnesses. In reviewing the factual background of a case and conducting initial discovery requests, a competent attorney should already be assessing the key people involved in a case and their utility as potential witnesses. There are often multiple people who can offer sufficient testimony to support a legal argument; some may be well-suited to testify based on their proximity to disputed facts, while others may—for a variety of reasons—be able to offer more persuasive testimony. Just because a potential witness could provide relevant testimony of disputed facts does not mean that a potential witness should provide that testimony—bad nerves or a bad memory may render an otherwise-qualified and willing witness unsuitable for providing supportive testimony. Likewise, some potential witnesses may be reluctant or even hostile to the notion of being deposed or later examined at trial.

2. Witness Interviews

Good witnesses tend to have good relationships with the attorneys preparing them for their testimony, and this relationship begins with witness interviews. Upon identifying key witnesses, you should be proactive about arranging interviews to learn what facts witnesses know and how helpful or harmful a witness’s testimony might be. These interviews serve multiple purposes: they allow you to learn details about a case that are not apparent from initial pleadings or client interactions; they allow you to establish trust with a witness—priming the witness to deliver competent and confident testimony at a later deposition or trial; they allow you
to gauge how useful a particular witness might be for emphasizing key facts in dispute, and they help you understand how much effort will be required to prepare a witness for potential deposition or trial testimony.

While the main purpose of witness interviews is to collect pertinent information in anticipation of testimony, they are also a useful forum for introducing yourself, explaining your client’s story, and describing the litigation process to a witness that might not be familiar with the details of the case or with civil litigation generally. It can be useful to utilize early interactions during witness interviews to determine how best to prepare witnesses to give persuasive testimony. Nervous witnesses will require more involved preparation than witnesses who are already familiar with the facts of the case and who have experience being deposed. It is all too easy for attorneys to forget how stressful the adversarial process can be on lay people.

Witness interviews also present a good opportunity to evaluate or reevaluate the role of a given witness’s prospective testimony in a case. For instance, you may decide to assign greater significance to the prospective testimony of a remarkably charismatic or persuasive witness than a panicky witness. A composed witness whose interests align with your client may be innately more capable of providing favorable testimony in response to difficult questions than a witness that is easily flustered by difficult questions, despite each witness having a comparable grasp of the underlying facts. The opposite is true, as well; you may decide to reduce the extent of witness testimony, or forgo deposing a witness altogether, if you suspect that a witness will be unable to deliver testimony with conviction, or that a witness might offer inconsistent testimony due to nerves, a poor memory, peculiar personality quirks, etc. In any case, these details about prospective witness testimony are best learned in the initial witness interview to allow as much time as possible to plan ahead.

3. Preparing Your Witness For Deposition

We all know the tried and true way to prepare a witness for deposition, right? Short answers, do not volunteer, do not think you are smarter than the attorney asking questions, do not guess, and tell the truth—all in as few words as possible. This rote approach to deposition preparation is fine but if fewer and fewer cases go to trial, then the deposition becomes the testimony that will be used for motions and to help effectuate a good settlement.26 If a witness has little or no litigation familiarity, the “conventional approach” may just scare the witness into being a terrible witness.27 Instead, it is more effective to help your witness testify in his or her own voice, telling the truth naturally and not haltingly. But that type of preparation requires your familiarity with the entire file and with the witness’s role. It requires remaining in a room with your witness for several hours, listening to how your witness speaks, watching his or her mannerisms, allowing the witness to answer questions in his or her own words, focusing on the actual words that come out of the witness’s mouth and helping the witness become comfortable in his or her own skin prior to testimony.

26 Mark A. Drummond, A New Approach to Witness Preparation, 44 LITIGATION NEWS 3, Spring 2019, at 30. (citing KENNETH R. BERM AN, REINVENTING WITNESS PREPARATION: UNLOCKING THE SECRETS TO TESTIMONIAL SUCCESS (2018)) (Berman’s book “challenges all the orthodox assumptions about how witnesses are supposed to testify and presents a compelling, in-depth analysis of why the conventional approach to witness preparation so often generates losing testimony.”).

27 Id.
Tethering your witness preparation to the themes of the case is important. This is true in particular with high level executives who may have little or no familiarity with the day to day facts of the case. For example, if one of your themes is “plaintiff never offered a competitive product” because of several transgressions in use of materials, manufacturing, delivery, etc., then your witness can use that theme when asked questions about the sale of products for which the plaintiff was ultimately terminated and now seeks compensation. Generally, you want your witness to be familiar with the legal disputes in the case, your role as the attorney for one of the parties, the witness’s role as a witness (including the purpose of the witness’s individual testimony in relation to particular claims or defenses), the deposition procedure, the types of questions the witness is likely to receive from opposing counsel, and any objections you are likely to make in response to certain lines of inquiry by opposing counsel.28

As with every other aspect of litigation, you can only invest so many resources to witness preparation. Clients—even large corporate franchisors—are understandably cost-conscious, and often scoff at the prospect of spending thousands of dollars on witness school, jury consultants, and mock trials for the purpose of preparing a witness to testify at a deposition or trial. Even where a sufficient budget is available for more elaborate witness preparation, many witnesses are unwilling to devote the kind of time and effort necessary to truly master their testimony. Obviously, your witness preparations strategy will vary substantially on a case-by-case and witness-by-witness basis, but one method of preparation that is generally cost-effective is mock cross-examination. Mock cross-examination is something you can do with the witness as you review the witness’s testimony in the days or hours preceding his or her testimony, and provides several benefits: it helps the witness memorize the details of his or her testimony, avoiding anxiety-inducing lapses during the examination; it builds the witness’s confidence by allowing the witness—through your questioning—to anticipate the kind of questions opposing counsel is most likely to ask, and to practice responses to the most difficult questions; and it also allows the witness to practice how to respond to questions with an appropriate tone of voice, facial expressions, and other mannerisms which might affect the witness’s credibility to the fact-finder. If possible, you may wish to videotape your mock cross-examination and replay the recording for the witness, pointing out good and bad habits that the witness might not otherwise be aware of. This play-by-play is often an effective way to demonstrate weaknesses in testimony to witnesses that are otherwise resistant to feedback.

4. Witness Availability For Trial

The civil litigation process is often slow and cumbersome, especially in those cases that advance to the trial phase. Years may pass between the filing of a complaint and a trial verdict, with the passage of time posing unexpected and often unavoidable challenges to your trial strategy—particularly concerning witness availability. Prospective witnesses with key testimony may fall ill or die over the course of a lawsuit, they may change jobs or retire, they may become incarcerated, they may invoke their constitutional right against self-incrimination, their memory of relevant facts may deteriorate to a degree which makes rehabilitation impossible, they may relocate to a part of the world that makes their availability at trial impractical, or they may simply refuse to testify at trial. Unlike other aspects of trial preparation, witness availability is a crucial component of the trial process over which you have relatively little control. For this reason, it is important to keep witnesses apprised of likely trial dates and other important scheduling events.

to better your chances of the witness being available. While it is impossible to guarantee witness availability months or years in advance of trial, a diligent attorney can mitigate some risks of witness unavailability during the discovery phase of litigation by shaping the testimony of favorable and adverse witnesses to take advantage of hearsay exceptions in the event of witness unavailability at trial. The more crucial a witness is for supporting your arguments at trial, the more thoroughly you should prepare for contingencies in the event that a witness is ultimately unavailable. This preparation begins with witness identification and proceeds through trial.

At the outset of a lawsuit, as you identify individuals that likely have personal knowledge of key facts necessary to support your claims or defenses, you should be assessing how favorable or damaging those potential witnesses’ testimony is likely to be, as well as considering alternative sources of testimony. Though one individual—such as the franchisor’s development manager or the franchisee’s owner—may be an obvious first choice to provide testimony based on his or her position of authority and proximity to the events underlying the dispute, you should also identify alternative sources of testimony in the event that the most obvious choice is unsuitable, unwilling, or otherwise unavailable to testify. You may discover during the course of your witness interviews that a witness you had hoped would provide favorable testimony is uniquely susceptible to impeachment or unusually reluctant to testify in a deposition. You may discover, in the course of preparing to defend a deposition of a potential witness, that the witness provided damaging testimony in a prior proceeding involving your client. You may discover, through routine discussions with your client, that a potential witness is embroiled in an unrelated employment dispute with your client that could affect his or her availability at trial. Rather than proceeding stubbornly into discovery with a flawed witness, you should consider interviewing alternative witnesses who can offer substitute testimony in a more reliable package. In disputes involving franchises—much like other types commercial litigation—there are typically multiple individuals on both sides with personal knowledge of the disputed facts; as such, there is no excuse to be lazy when considering which potential witnesses to depose and examine at trial. The more flexible your pretrial strategy, the better-equipped you will be to react to inevitable complications at trial.

If a witness does unexpectedly fail to appear, particularly at trial, your only recourse may be a subpoena under Rule 45 of the Federal Rules of Civil Procedure or other applicable rule. A properly formatted and served subpoena may command a person to attend a trial, hearing, or deposition, or risk being held in contempt of court. Such subpoenas only command a person to appear within 100 miles of a location where the person subject to the subpoena resides, is employed, or regularly transacts business in person, or within the state where the person resides, is employed, or regularly transacts business in person, if the person is a party or a party’s officer, or otherwise is commanded to attend a trial and would not incur substantial expense. For a trial subpoena, this will limit the effective range of a subpoena to within 100 miles of the courthouse where the trial is taking place. However, “[f]or good cause in compelling circumstances and with appropriate safeguards,” a court may permit trial testimony in open court by contemporaneous transmission from a different location, allowing you to subpoena a witness to testify remotely in some cases where the witness is otherwise out of range.

20 See Fed. R. Evid. 804.
Depending on the importance of the witness and the time constraints at trial, if may be easier to resort to deposition testimony or an alternative witness than a trial subpoena.

a. Your Witnesses

Unsurprisingly, you have the most control over the testimony of your own witnesses. Witnesses whose interests align with your client’s will be more forthcoming in interviews than opposing parties’ witnesses and are more likely to agree to testify at a deposition or trial. These are the witnesses you will expect to communicate with the most during the pre-trial phase, allowing you to gauge the strengths and weaknesses of their testimony well in advance of trial and prepare them for the most difficult questions that you anticipate they will receive on cross examination. These witnesses are (or at least should be) your most reliable and effective source of supportive testimony; they are your primary method of telling your story to the fact-finder.

However, even friendly witnesses may be rendered unavailable to testify at trial. While depositions for the purpose of preserving testimony are rare, the Federal Rules of Evidence allow testimony from a deposition to be introduced at trial in the event that the declarant is unavailable to testify as a witness, so long as the party against whom the testimony is offered had an opportunity and motive to examine the unavailable witness at the time of the deposition. Despite the temptation to limit examination of friendly witnesses at depositions to the bare amount necessary to rehabilitate any harmful or ambiguous testimony elicited by opposing counsel, it may be prudent to take advantage of the more relaxed mode of examination in a deposition—as compared to trial examination—to establish a favorable base of testimony in the event that the deponent is unavailable to testify at trial, particularly if that witness is the sole source of supportive testimony on a disputed issue. As long as the witness is well-prepared for the deposition, there is little risk in preserving important testimony in the deposition record, especially because you have more latitude to ask leading or open-ended questions in a deposition—allowing you to tailor your questioning to ensure that your witness provides the strongest version of his or her testimony.

If you are relying on a witness to deliver uniquely important testimony—particularly if that witness is an expert or a corporate designee who will not be testifying from personal knowledge—you may want to consider designating a reserve witness in the event that your first choice is ultimately unavailable to testify in a deposition or at trial. Federal courts generally


33 As with direct examination of a witness during trial, you should prepare the witness for your examination during deposition, as well as likely cross-examination from opposing counsel. This preparation will also allow you to gauge the benefits and potential risks of a videotaped deposition ahead of time; effective videotaped deposition testimony will be a better substitute for live testimony than an audio recording or transcript, but it can also highlight vulnerabilities in testimony which may not appear in the deposition transcript.

34 Fed. R. Civ. P. 30(b)(6) permits a party to designate “one or more officers, directors, or managing agents, or designate other persons who can testify on its behalf.” See also Michelle Molinaro Burke, Making Sure the Correct 30(b)(6) Witness is Produced in Response to Your Notice, AMERICAN BAR ASSOCIATION: PRACTICE POINTS (Jan. 31, 2018), https://www.americanbar.org/groups/litigation/committees/young-advocates/practice/making-sure-the-correct-30b6-witness-is-produced-in-response-to-your-notice/; Stephen J. O’Neil, Rule 30(b)(6) Witnesses at Trial, THE FEDERAL LAWYER at 74 (Sept. 2013), http://www.klgates.com/files/Publication/3e7f02ef-03a7-490b-835c-6b17277ea8928/Presentation/PublicationAttachment/698a925f-bc8a-4354-a56b-6dd88078857/Witnesses_at_Trial.pdf (noting that if a corporate designee is unavailable to testify at trial, the corporate party is likely barred from introducing the deposition testimony of its designee at trial).
allow a party to substitute an expert in unexpected circumstances, such as the death or illness of an expert in the interlude between the close of discovery and the start of trial, but also require the party to provide timely disclosure of the need for a substitute so as to avoid prejudice to opposing parties.  

As a general practice, you should keep your witnesses in the loop for the duration of the pretrial process, with particular attention to the weeks leading up to the trial. Maintaining a consistent dialogue with witnesses—such as by reviewing deposition testimony, discussing potential boundaries on testimony that might warrant a motion in limine, and preparing for cross examination at trial—is an important step for ensuring that your witness is prepared to give reliable testimony at trial. You want your witnesses to be aware of the purpose of their testimony and their role in the broader legal arguments, as well as the logistical and procedural details of testifying at trial. You should inform your witnesses of likely trial settings and advise them to arrange their schedules to ensure that they reserve adequate time to testify at trial, as well as reserving sufficient time to prepare for examination in the weeks and days leading up to their testimony. This period of sustained communication between you and your witnesses is crucial for ensuring that they are available to testify, as well as for building up the confidence they will need to deliver compelling testimony. It is not enough to warn trial witnesses of the rigors of cross examination; they should feel trust in the degree to which you have prepared them, and you should also remind them of your ability to bolster their testimony in real time, such as by objecting to opposing counsel’s questions, refreshing their memories if they forget a detail, and otherwise rehabilitating their testimony on redirect.

This dialogue in the closing months of the pre-trial phase will decrease stress on your witnesses in the immediate approach to trial and keep the facts of the case fresh in their minds in the months and weeks leading up to their testimony. Most importantly, if there is going to be an unexpected change in the availability of one of your witnesses at trial, maintaining frequent contact with your witnesses ensures that you become aware of such developments with as much time to react as possible.

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35 Jenna Shives and Peter Racher, How to Prepare for an Unavailable Expert Witness, THE INDIANA LAWYER (Aug. 8, 2018), https://www.theindianalawyer.com/articles/47775-how-to-prepare-for-the-inconceivable-an-unavailable-expert-witness. See also Baumann v. American Family Mutual Ins. Co., 278 F.R.D. 614, 616 (D. Colo. 2012) (allowing plaintiff to substitute an expert witness after the close of discovery where the expert died a month before trial; despite the defendant’s opposition, the court held that deposition testimony, alone, was not fair to the plaintiff because the expert had only been cross-examined by the defendant, affording plaintiff no opportunity for direct examination, and also that plaintiff would be prejudiced by the absence of live testimony at trial). But see Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co., 308 F.R.D. 649, 655 (S.D. Cal. 2015) (court denied defendant’s request to substitute an expert witness where the defendant failed to notify plaintiff’s counsel of the original expert’s illness and the need for a substitute expert for 10 months after defendant became aware of the need for a substitute).

36 Be aware that some notes and other materials used for witness preparation may be discoverable in certain situations, such as where materials are used to refresh a witness’s recollection. See generally https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1968&context=plr.

b. Their Witnesses

Your primary tool for shaping the trial testimony of an opposing party’s witnesses is deposition. Not only does an effective deposition allow you to probe a witness’s testimonial strengths and weaknesses well in advance of trial, but it provides a roadmap of testimony that can be used for impeachment at trial. Because depositions can occur months or years before actual trial, an ideal deposition will be comprehensive, probing every aspect of the witness’s knowledge of the case that might indicate vulnerabilities in the opposing party’s arguments or likely examination at trial. Your primary objective in deposing an adverse witness is to try to pin down the witness’s testimony at trial by creating an exhaustive record of deposition testimony that you can use to hold the witness accountable for any inconsistencies at trial. As a secondary objective, you would like to use deposition testimony to preserve any damaging admissions that you can use at trial if the witness is unavailable. Whether deposing a party or non-party witness in a deposition, you should request, pursuant to Fed. R. Civ. P. 30(e), that the deponent review the deposition transcript and sign a statement listing any changes the deponent made to the transcript and reasons for making the changes. This will make the deposition testimony more persuasive at trial—particularly if the witness is unavailable to testify—because the witness had a contemporaneous opportunity to review his or her deposition testimony for inaccuracies.

B. Good Deposition Procedures

1. The Best, And Worst, Reasons To Take Particular Depositions

As previously stated, depositions are time-consuming and expensive. Thus, each deposition should be thoughtfully noticed and taken. “The decision to depose a witness is sometimes used as a lazy alternative to critically thinking about trial strategy.” There are several questions, therefore, to ask yourself before actually taking a deposition: 1. Do you really need to take this witness’s testimony?; 2. Does this witness provide some evidence that is only known by him or her or is it cumulative of documents or another witness’s testimony?; 3. Can you interview the witness informally and decide after that whether to take the witness’s deposition? If the witness will be good for your case and is available during trial, the deposition may not be necessary; 4. Will the benefits of the deposition outweigh its costs? 5. If you preserve this witness’s testimony, can it possibly harm your case?

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38 Fed. R. Civ. P. 32(a)(3) permits an opposing party to use “for any purpose” the deposition of a party (or the party’s officer, director, managing agent, or designee), even if the opposing party does not testify at trial. Depositions of non-party witnesses can be used in a more limited range of circumstances due to hearsay rules; such testimony can be used for impeachment if the witness testifies at trial, or if the witness is unavailable. Even then, Rule 32(a)(4)(E) provides a catchall category allowing a deposition to be used where “exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court[.].” Note that Fed. R. Civ. P. 32(a)(6) requires that, if any party offers in evidence only part of a deposition, that an adverse party may require the offeror to introduce the other parts that in fairness should be considered with the part introduced.

39 Evan Schaeffer, 5 Questions to Ask Before Taking a Deposition, LAWYERIST (Sept. 8, 2017), https://lawyerist.com/reduce-litigation-costs-take-fewer-depositions/.

40 Id.

41 Id.

42 Id.
Of course, there are certain advantages that depositions provide that other forms of discovery do not. As an example, many times a witness will provide unfiltered information that is helpful for the case.\(^{43}\) Lay witnesses and those who are unfamiliar with the deposition process have been advised to be truthful and that may inure to your or the other side’s benefit. Depositions also provide you the opportunity to follow up on answers to questions until you are satisfied with the answers, whereas other forms of discovery do not.\(^{44}\) Depositions provide the opportunity to size up a witness who may appear at trial in the other side’s case and the questioning attorney can see how the witness reacts to certain questioning.

There are also disadvantages to taking a deposition. First, a deposition may reveal your theories to the other side, although your pleadings and motions may have already done so.\(^{45}\) Second, witnesses improve with practice. The untested witness who has a deposition under his or her belt will be more able to answer questions later during trial.\(^{46}\) The deposition may also freeze certain testimony that is harmful to your case or reveal facts that the other side did not appreciate until the deposition. And again, there is the expense of a deposition.\(^{47}\) The cost includes not only the preparation for and taking of the deposition but the fees for a court reporter, perhaps a videographer, travel and other incidental costs.

### a. Best Deposition Practices

There are some items that will ensure that you take a great deposition. First, prepare an outline. Some attorneys use a very broad outline with various topics and documents listed. This allows them to prod and pursue each question to its end without the rigidity of a more specific outline. Many attorneys prepare a granular outline, writing out each question to be asked in the way they want to ask it. The form for the deposition outline is a personal preference. But typed or handwritten, broad or specific, the best attorneys do not slavishly follow the outline but depend on it to make sure they cover important points, expound on their themes and cover the documents they want to prove up or ask about.

The second thing that is crucial to taking a good deposition is to understand the key documents of the case. In the end, there will be 25 documents that are the foundation of the case. But many times, depositions are a good place to uncover various witnesses’ knowledge of the facts or contents of some of the more peripheral documents, in addition to the key documents.

The third item to understand is the main reason(s) this deposition is being taken. There are essentially three basic reasons to take a deposition: 1. To gather information; 2. To preserve testimony; or 3. To facilitate settlement.\(^{48}\) Some witnesses offer facts. Some witnesses understand how a particular part of a franchise system works. Some witnesses are experts hired to bolster a party’s damages or other theory. Regardless, ponder ahead of time what you

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\(^{44}\) Id.

\(^{45}\) Id. at 34.

\(^{46}\) Id. at 33.

\(^{47}\) Id. at 33–34.

\(^{48}\) Id. at 21–25.
want to accomplish with each witness and which of the three rationales is most important for this deposition. This will also underscore the way you ask certain questions. Open-ended questions may be helpful if you are using the deposition for furtherance of discovery and to gather evidence. Asking focused cross-examination-type questions may allow you to limit what that witness can say at trial by freezing testimony. If you have evidence that may impugn a witnesses’ credibility, your aim may be to let the witness expound on his or her knowledge or expertise and then ask the witness the impeachment questions to let the air out of that particular balloon at the end of the deposition. That may assist in an early settlement.

One item that you might consider for any witness is doing a background check on that particular witness. There are services and private investigators who can do this. The internet provides a cornucopia of information without the necessity of paying someone to do some quick checking. You can normally access someone’s Facebook posts or tweets without much trouble. There is also a small fee for running a Lexis/Nexis background check on someone to determine if there is something in the past that he or she may not want to come to light on the record (DWI or DUI arrest, unpaid child support claims, drug use convictions, etc.). If depositions are indeed the new trials, using this information wisely at a deposition may hasten a quicker and better settlement.

b. Worst Deposition Practices

There are some ways to make sure you take a terrible deposition. First, argue with the witness at every turn. That will ensure that you do not get the information you need, and the witness will turn surly and uncooperative after each question. Second, ask questions like an attorney using lengthy legal jargon. That way, neither the witness nor the judge or jury will understand the questions or the points you are trying to make. Third, fail to prepare and wing it. That way, your client has wasted his or her money on you and the case does not move forward—to settlement or to trial.

2. When To Take Your Depositions

Conventional wisdom dictates that the best time to schedule depositions is later in the discovery phase of litigation, after the parties have had a meaningful opportunity to conduct written discovery and have developed a thorough understanding of the disputed facts. Ideally, waiting until later in the discovery phase will allow you to ask the deponent more incisive questions, and will minimize the risk of omitting questions on a topic which later surfaces in trial testimony. Yet, while waiting until later in the discovery process to take depositions is the most common approach, there is nothing in the Federal Rules of Civil procedure that mandates that depositions occur after other forms of discovery. Rule 26 states that, absent a court order or stipulation from the parties, “methods of discovery may be used in any sequence[,] and discovery by one party does not require any other party to delay its discovery.”49 Therefore, it is generally permissible, and in some cases even advantageous, to take depositions early in the discovery phase.

Depending on the complexity of your case and your command of the underlying facts relative to opposing parties, you may feel that you have a tactical advantage noticing a deposition at an early stage of discovery. By taking a deposition before conducting written discovery, you may catch opposing counsel off guard, who may have only a vague notion of

your theory of the case and may lack important factual details which he or she would otherwise use to prepare a witness for deposition. Particularly where there is an asymmetry in the information in the possession of each party—as is often the case where a corporate franchisor is sued by an individual franchisee—the party in possession of the information will have a better opportunity to master material facts earlier than opposing parties, even after making the initial disclosure mandated by Rule 26.50 If you feel confident that you know your arguments better than opposing counsel knows their arguments, you may be able to elicit damaging testimony from an inadequately-prepared fact witness by noticing an early deposition.

C. The Documents

As with any litigation, documents often lie at the heart of franchise disputes in franchise. Franchise agreements, confidentiality agreements, lease agreements, non-compete agreements, etc., are abundant in modern franchise relationships, and frequently form the basis of lawsuits between franchisors and franchisees.51 In order to be successful in franchise-related litigation, it is imperative to master the documents defining the franchise relationship at an early stage of the dispute—this mastery occurs during the discovery phase of the lawsuit.

1. What Documents To Ask For—What Do You Really Need?

A prerequisite for determining what documents you really need is establishing what documents you already have. Whether you are representing a franchisor or franchisee, your client is the best source for information to guide initial discovery in a case. Your client will have general background knowledge on his or her relationship with the opposing party, will be able to assist you in identifying key individuals who might have testimony relevant to the dispute, and will be able to assist you in identifying the location of documents and other tangible information already in the client’s possession, as well as documents and information that may be in possession of a third party, but which the client can easily obtain.52 The client will also be the best source of information regarding potentially-relevant electronically stored information (ESI), the key custodians of information, such as the client’s employees or third-party vendors, and the client’s own document retention policies.53 Indeed, the first step in securing access to potentially relevant documents and other tangible information is determining who the relevant parties are in a given dispute, followed closely by drafting a litigation hold that informs the client and other parties of their obligation to preserve relevant documents, including ESI—this litigation hold should be distributed as soon as you are aware of a reasonable likelihood of litigation.54

50 Rule 26(a)(1)(A)(ii) requires disclosure of “a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[].” (emphasis added).


53 Id. at 2–3.

54 Id. (noting that the litigation hold should indicate, with as much detail as possible: nature of the issues in the case; the individuals/entities involved; the time frame during which relevant documents and data may have been generated; individuals to whom the litigation hold should apply if they can be specified; and potential locations to search for
Following these background discussions with the client during the preliminary period of a litigation, you should undertake an independent review of the facts available through the client; this will allow you to evaluate the merits of the case and assess potential legal outcomes and broader implications for the client’s business, and will also serve to focus early discovery requests by familiarizing yourself with the contours of the universe of potentially responsive information. In any franchise litigation, this initial investigation should begin with a close reading of the franchise agreement and any ancillary agreements. In many cases, the terms of a franchise agreement can provide for rapid resolution of claims against your client—obviating the need for protracted discovery. Whether your client’s claims or defenses are based in contract, tort, or statute, franchise litigation is fundamentally about the relationship between franchisors and franchisees, and the backbone of this relationship is the franchise agreement.

Branching out from the franchise agreement, your preliminary fact review should involve additional agreements between the parties, as well as relevant documents in your client’s possession or control. Once again, your client is the best resource for identifying and procuring this information, whether it consists of business records, email communications, text messages, or anything else which is likely to be material to claims or defenses, or to be responsive to opposing parties’ discovery requests. This process is also iterative: as you communicate with your client and focus your understanding of the case during the course of your preliminary independent review, you should continually update your requests for documents and information from your client. It is imperative that your client is aware of the legal arguments for your claims and defenses, as well as the likely arguments of opposing parties, and is aware that effective representation requires your client to provide you with any information—harmful or helpful—which is likely to affect the outcome of the case. As with other aspects of the discovery and trial process, you want to be the first to know of any unpleasant facts lurking in documents within your client’s possession.

Your discovery strategy will evolve as your understanding of the case develops during your preliminary independent investigation of the documents in your client’s possession or control. At the onset of formal discovery, you should have a sophisticated understanding of the most difficult issues in the case and what information—known and unknown—is likely to influence the resolution of those issues. In other words, you should have a reasonably good grasp of the “known unknowns” in your case; information that you could not learn through your client, but that may exist in the documents and tangible information in the possession of opposing parties or other entities beyond your client’s control. These known unknowns will guide your initial discovery requests, including requests for production.

documents, including computer networks, hard drives, email folders, contacts, personal digital assistants, smart phones, backup tapes, social media sites, and text messages).


56 This is particularly true for franchisors, who commonly insist on provisions in a franchise agreement—such as arbitration clauses, terms governing choice of law and forum, restrictions on transfer or termination, waiver of jury trial, and waiver of future claims—which offer a distinct advantage in defending lawsuits by franchisees. See Trigg, supra note 51, at 18.

57 In a typical franchise dispute, these might include: amendments or agreements related to the franchise agreement; franchise disclosure documents and receipts; notices of default and/or termination; brand or operating standards; emails and other communications relating to issues in dispute; written demands or offers of compromise; relevant inspections or audits of franchised businesses; and any documents containing admissions against interest by your client or potential adversaries. See Goode, supra note 55, at 25–26.
2. **Understanding The Documents**

Documents are a powerful source of evidence in any litigation. Unlike witness testimony based on memories that degrade over time, the content of documents is fixed in time and the veracity is often undisputed—such as when both parties are signatories to the same contract. The permanence of documents allows them to provide a reliable base of evidence on which to build a case. Documents and affidavits are frequently the only evidence adduced in pre-discovery dispositive motions. Documents can serve as a roadmap for detailed discovery requests. Documents can bolster or undermine the testimony of deponents and witnesses at trial. Apart from initial discussions with the client, documents should be your primary reference for understanding the dispute and developing your basic theme at the inception of a lawsuit. For these reasons, locating and reviewing key documents is of paramount importance.

a. **Identify Key Documents**

The number and type of key documents will vary on a case-by-case basis. A dispute concerning injunctive relief for breach of contract may involve only the franchise agreement itself and a handful of documents supporting each side’s interpretations of the disputed terms in the agreement. A claim for breach of implied covenants in which the plaintiff seeks monetary damages could involve a collection of responsive documents, including contracts, business records, and communications, which span years and number in the tens- or even hundreds-of-thousands. Some damage claims will require projections of lost income, which will in turn require discovery of detailed financial and operations records. Likewise, claims related to intellectual property or trade secrets may require extensive discovery of documents related to the development and use of the relevant material—such as proprietary software for a website or mobile device application. The information contained in technical documents may be inscrutable to laypersons and even attorneys, requiring the consultation of experts in the subject matter to use the information effectively. It would also be prudent to identify client documents containing confidential information, such as product pricing information, which is likely to be responsive to discovery requests. Identifying such documents early will allow you and the client more time to develop a strategy for limiting production or disclosure of such confidential information.58

In any case, the process of identifying key documents begins with your early communications with the client and continues through the end of the discovery phase of litigation. As you identify documents relevant to the case, you should add them to your case map and chronology by date and in relation to specific topics, claims, or defenses. You will likely be referring to these documents throughout the litigation, and it will spare you a great deal of time and frustration to have the key documents organized in one location.

b. **Identify Harmful Documents**

The process for identifying harmful documents mirrors that of identifying key documents and is no less important, albeit frequently more urgent. Depending on the importance of a harmful document, you may need to rethink your case strategy, including the viability of settlement at an early stage. These documents can come in many forms and varying degrees of severity. The proverbial “smoking gun” may be an overt admission by your client that

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58 *See Goode, supra note 55, at 27–28.*
contradicts elements of your claims or defenses. Somewhat less dramatic but still harmful documents may be emails or notes undercutting your arguments, such as a disparaging email sent by your client during contract negotiations that weighs in favor of your opponent’s claims involving elements of bad faith or actual knowledge. Some harmful documents bear only tenuous relation to the material facts of a case but are nonetheless damaging to your client’s reputation and credibility in the eyes of the fact-finder, such as emails between employees containing profanity-laced tirades or crude comments about an opposing party’s physical appearance.

Like other key documents, harmful documents are often already in your client’s possession, allowing you to search for them at the outset of a case without resorting to cumbersome discovery requests and document review. Ideally, your client will already be aware of the existence and location of harmful documents and can point you in the right direction. As soon as litigation is reasonably anticipated, you should advise your client of your shared responsibility to preserve relevant documents and electronically-stored information; credible claims of spoliation from opposing counsel will only exacerbate the damage posed by harmful documents.

c. Evaluate The Applicability Of Privilege And Work Product

One of the most effective means of defending against harmful documents is to avoid creating them in the first place. Clients without formal legal training often overestimate the scope of attorney-client privilege and may memorialize harmful information on the mistaken assumption that the communication falls within the scope of the privilege. Clients may assume, incorrectly, that the privilege attaches to every email on which their in-house counsel is carbon copied, or that the privilege extends to communications between any of their employees and their trial attorney. Though privilege analysis is hardly formulaic, diligent attorneys can minimize the most common risks of waiver of privilege or mistaken privilege by counseling clients on best practices for discussing sensitive information that may otherwise be subject to discovery. It is particularly important for attorneys representing franchisors to advise their clients of the dual roles of in-house counsel and other employees; whereas communications necessary for obtaining legal advice might fall within the attorney-client privilege, more routine communications regarding the operation of the business typically are not privileged, even if an attorney is involved. Furthermore, clients cannot “un-ring the bell” by forwarding non-privileged documents to an attorney for legal analysis. Given the contextual nature of attorney-client privilege and nuanced recognition of the privilege by courts, the best advice to clients is often a general overview of the purpose of the privilege and a warning for the client to consider how best to convey information—and to whom it is best to convey it—before creating and disseminating a document with harmful information that might be subject to subsequent discovery requests.

Where the existence of a harmful document cannot be avoided, there are still several means of excluding the document from evidence. Two of the most powerful protections are

59 Id. at 12–17.

60 As a general rule, telephone calls and in-person conversations are more discreet than emails and text messages because—unless the conversation is recorded—there is no precise record of the contents of the communication; though the details of the conversation may ultimately be discoverable through a request for admission or deposition, the probative value of the evidence will be diminished by the lack of a contemporaneous record. See Goode, supra note 55, at 16–17.
attorney-client privilege and the work product doctrine; barring waiver, these protections can shield a party from requests for discovery and can even apply retroactively, allowing a party to reclaim privileged or protected information that was produced inadvertently. A party may assert the attorney-client privilege for any communications between a client and counsel that was intended to be—and was in fact—kept confidential, and made for the purpose of obtaining or providing legal advice. This privilege extends to employees—and occasionally to former employees—of the client entity where employees communicate confidentially with counsel at the direction of their superiors, within the scope of the employees’ official duties, and employees are aware that counsel, or an agent of counsel, are communicating with them so that the corporation can obtain legal advice.

A party may invoke the protection of the work product doctrine to shield documents and tangible things prepared in anticipation of litigation by the client, the client’s attorney, agents and consultants retained by the client or attorney, and experts retained by the client or attorney. Courts generally construe “in anticipation of litigation” to require, not only that a document was created in anticipation of litigation, but that a document would not have been created but for the prospect of litigation. Work product protection extends to factual work product, such as an attorney’s billing records, a list of confidential witnesses prepared by an attorney, photographs taken by an attorney investigating the facts of a case, factual chronologies, internal litigation calendars, etc. Work product protection also extends to opinion work product, such as an attorney’s (or other representative’s) mental impressions, conclusions, opinions, and legal theories. While work product protection is not quite as strong as attorney-client privilege—the latter being absolute unless waived—courts will generally protect opinion work product information in all but the most extraordinary circumstances, and will protect fact work product unless the party seeking discovery can demonstrate a substantial need for the information, as well as demonstrating that the information is not available through other means without undue hardship.

Despite providing less absolute protection from discovery than attorney-client privilege, information subject to the work product doctrine is less susceptible to waiver than privileged communications; whereas attorney-client privilege can be waived by disclosure to any unnecessary third parties, work product protection is only waived by disclosure to adversarial parties or third parties that might share work product with adversaries. The risk of inadvertent

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63 Id. at 1.
64 Id. at 2.
65 Id. (citing In re Grand Jury Subpoena, 357 F.3d 900, 908 (9th Cir. 2004)).
66 Id. at 2.
67 Id. at 2.
68 Id. at 2 (citing In re Cendant Corp. Sec. Litig., 343 F.3d 658, 664 (3d Cir. 2003)); Fed. R. Civ. P. 26(b)(3)(A)(ii)).
disclosure and waiver of both the attorney-client privilege and work product doctrine can be diminished by entering into a joint defense agreement in cases involving multiple parties; where parties’ interests in the litigation are sufficiently aligned, the common interest doctrine may allow parties to share privileged and protected information without waiving their rights to shield such information from document request or subpoenas from opposing parties.\textsuperscript{70}

Rules 26(b) and 45(e) describe the procedure for claiming a privilege or protection allowing a party to withhold information otherwise subject to a discovery request or subpoena.\textsuperscript{71} According to the Federal Rules, a person withholding information subject to a subpoena must make a claim of privilege or work product expressly, and must “describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable parties to assess the claim.”\textsuperscript{72} These requirements are typically satisfied by producing a privilege log along with any non-privileged documents, discovery motions, and written objections.\textsuperscript{73}

In addition to asserting attorney-client privilege or work product protection, there are also a range of discovery motions, such as motions to quash, motions for protective orders, motions in limine, etc., which may be used to limit your client’s exposure to overbroad production requests and potentially mitigate the risk posed by harmful documents. These are discussed in detail in Section VII(B)(1)(b), below.

VI. EXPERT WITNESSES

Expert witnesses are a critical part of today’s commercial litigation landscape. Experts bring life, gravitas, and credibility to your claims and defenses. Knowing whom to retain and when to deploy an expert witness can be the difference between winning and losing your case.

A. When To Use Experts

Experts do not fall off trees (although if you limit your search to the Internet, you would think that they might). The best experts are those who have an extreme familiarity with the subject matter, coupled with a charisma that invites the fact-finder to like them and to be taught about a complicated issue.

B. Identifying The Best Experts

When identifying experts, it is extremely important that you vet them thoroughly. Understand their background, their flaws, and how they approach cases. If possible, watch them testify to see whether they come off as genuine or authentic or artificial and stiff. Anyone who has tried more than one case knows that the way people come off in an interpersonal communication may or may not be the same way they come off on the stand. Understanding that dynamic is important in selecting a good expert.

\textsuperscript{70} Id. at 5.


It is also important to interview people for whom the expert has worked, and perhaps more importantly, against. Honest assessments from colleagues or friends who have knowledge of the expert’s work can be invaluable.

Additionally, learn as much as you possibly can about your fact-finder’s preference in an expert. In franchising, when so much goes to arbitration, understanding how your arbitrator views expert testimony is important, as you will want to match the expert’s style to the learning style of the fact-finder. If your arbitrator is a former retired judge, who believes he or she knows everything, an expert who comes off as condescending while testifying might be horrific. Conversely, a professorial-type expert might be perfect in front of a jury who is looking for the “gray haired” wisdom that an expert can bring to complex issues.

C. How Best To Use Experts

Under Rule 702 of the Federal Rules of Evidence, an expert is allowable at any point in the proceedings where the expert’s scientific, technical or specialized knowledge will be helpful to the trier of fact, the expert’s testimony is based on “sufficient facts or data,” the expert’s testimony is the product of “reliable principles and methods,” and the expert “reliably applied the principles and methods to the facts of the case.”

Figuring out when best to actually deploy the expert is one of the many tricks of a good trial attorney.

1. Liability

The use of experts on questions of liability is increasingly common in franchise litigation. Experts who can explain the nature of the relationship between a functional and competent franchisor are helpful for fact-finders who are unfamiliar with our model and the independence of the franchisor and franchisee. Experts who can explain the custom and practice between a franchisor and a franchisee can be very helpful to both plaintiffs and defendants in many breach of contract actions, and someone who has a working knowledge of the FTC Rule could also be extremely helpful in a case involving a claim of fraud.

2. Damages

There are very few franchise cases that proceed to trial without a damages expert. Whether the case involves a termination, where the lost value of the business and the opportunity related to that business needs to be calculated, or a fraud claim, where the amount of damages for rescission needs to be estimated, damages experts who can do that kind of analysis are critical. And while there are some cases that have upheld a claimant’s right to testify on his or her own behalf with respect to economic damages, proceed down this road with extreme caution.

See Fed. R. Evid. 702.

See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1175 (3d Cir. 1993) (allowing a franchisor’s founder and sole owner to offer lay opinion testimony concerning the franchisor’s lost profits stemming from supplier’s tortious interference with the franchisor’s contracts with its franchisees, without needing to qualify as an expert to offer such testimony).

See id. (subjecting the franchisor to arguments that its founder and sole owner failed to satisfy “either of Rule 701’s prerequisites for establishing a foundation for [founder/sole owner’s] lay opinion testimony,” as well as arguments that the founder/sole owner’s damages testimony was not helpful to the jury as “too speculative.”).
Damages experts need to have a basic understanding of the concepts of valuation, mitigation, and present valuing losses. While many of these concepts are basic economic concepts, you should be sure that a damages expert in a commercial franchise case understands how the franchise model works. It simply is not the case that someone who provides damages testimony in a real estate evaluation or a divorce will understand the economics of franchising. In short, choose wisely.

3. Offensive Experts

Whether testifying on liability or damages, another factor to consider is whether the expert you choose is going to be an offensive expert or a defensive expert. Offensive experts are experts who testify for the party who carries the burden of proof on an issue. They typically go first, which necessarily means that the burden of explaining the issues before the fact-finder related to the expert’s testimony need to be explained by the expert. When choosing an expert on an issue in which you carry the burden of proof, not only should you potentially see the expert testify, but you should ask for a written sample of the expert’s work and any criticism the work has received. Ask whether the expert has ever been excluded by a court and find out why. Read the court decision related to such exclusion to determine whether it was your expert’s lack of knowledge, the expert’s inability to explain him or herself, or a theory that simply was not supportable. Because experts who carry the burden of proof are typically required to submit a written version of their opinion, it is critical that they be not only good oral advocates, but good written advocates as well. Nothing is worse than losing an expert at the summary judgment or Daubert motion stages because your expert was not able to adequately explain his or her opinion.

4. Defensive Experts

Conversely, experts who specialize in finding the flaws in others’ opinions also have special talents. When choosing a defensive expert or one that will attack the theories put forward by the opposing expert, meticulous study and understanding of the other’s work are critical. Undermining opposing experts is especially effective when the causes for the criticism are mistakes in theory or math committed by that expert. Therefore, having someone who can find those mistakes, and adequately explain them, is one of your key considerations.

5. Daubert Motions

When considering whether to have an expert, it is important to evaluate whether the potential expert’s testimony will survive a Daubert motion. Daubert motions are the product of the United States Supreme Court case Daubert v. Merrell Dow Pharmaceuticals, Inc.77 A Daubert motion is a motion in limine, which can be raised at any time before or during trial, in order to exclude a proposed expert’s testimony.78 If a party raises a Daubert motion, the trial court, as the gatekeeper, is tasked with determining whether a proposed expert’s testimony meets the requirements of Rule 702 of the Federal Rules of Evidence.79 When making such a


78 See In re H & M Oil & Gas, LLC, 511 B.R. 408, 419 (Bankr. N.D. Tex. 2014) (providing “[w]e have long stressed the importance of in limine hearings under Rule 104(a) in making the reliability determination required under Rule 702 and Daubert.”) (citations omitted).

determination, the trial court may consider the following factors: “(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique’s operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.”80 The burden is on the party offering the challenged expert to establish by a preponderance of the evidence that the proposed expert’s testimony is admissible.81

In bringing a Daubert motion, you typically will have the best success when focusing on the deviations an expert makes from the normal protocols of his or her field.82 That is the point of the Daubert gatekeeping function—to keep out “pseudo-science.”83 The Supreme Court was concerned that expert testimony is given such gravitas by juries that, unless the court kept out pseudo-science, or unproven theories, juries would be likely to wrongfully accept them for fact.84 Accordingly, attacking an expert’s methodology (rather than his or her expertise or actual execution of their examination of the matter—both of which would typically go more to weight than admissibility), will enhance the likelihood that an expert’s testimony will be excluded.

Conversely, when defending against a Daubert motion, establishing the acceptability of the expert’s methodology is critical.85 Arming yourself with treatises, sources, and other cases where the methodology employed by your expert has been explained as being a generally accepted way of going about the particular inquiry is of immense assistance.86 Additionally, emphasizing that proposed expert’s ability to “assist the trier of fact” and the court/jury’s ability to “assess the expert’s qualifications,” goes to weight, and not admissibility, should also help.87


81 In re H & M, 511 B.R. at 412.


83 See, e.g., Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579, 595 (1993) (explaining the concern for “pseudo-science,” and providing that “[r]espondent expresses apprehension that abandonment of ‘general acceptance’ as the exclusive requirement for admission will result in a ‘free-for-all’ in which befuddles juries are confounded by absurd or irrational pseudoscientific assertions.”).

84 See generally id.

85 See In re TMI Litig., 193 F.3d 613, 669 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir 2000) (stating that “[a]lthough the ‘general acceptance’ test of Frye v. United States, 54 App.D.C. 46, 293 F. 1012 (1923), was displaced by the Federal Rules of Evidence, Daubert, 509 U.S. at 589, 113 S.Ct. 2786, ‘general acceptance’ in the scientific community can yet have a bearing on the inquiry, and be an important factor in ruling particular evidence admissible.”) (internal quotations omitted).

86 See, e.g., Moore v. Ashland Chem. Inc., 151 F.3d 269, 276 (5th Cir. 1998) (providing that “[t]he proponent need not prove to the judge that the expert’s testimony is correct, but she must prove by a preponderance of the evidence [using, for example, sources where the expert’s same methodology has been used] that the testimony is reliable.”); Stephen Mahle, Daubert and Commercial Litigation Expert Testimony, Florida Bar, 2019) (providing that general acceptance can be shown by “withstanding the scrutiny of the broader scientific community to which publication [such as treatises] exposes the methods.”).

87 Morgan, supra note 78, at 17.
D. **How Best To Minimize The Effectiveness Of Your Adversaries’ Expert Witnesses**

Even if your *Daubert* motion has been denied, or if you elected not to make such a motion, the expert witness battle never ends there. Indeed, an entire paper could be written on tactics that might be used to minimize the effectiveness of your adversaries’ expert witness. For instance, you should always review all articles, books, and publications that were authored by the expert witness for any potentially impeaching or contradictory material. Impeaching an expert with his or her own words can be devastating to an expert’s credibility. Additionally, highlighting any negative facts about the expert (e.g., previously excluded testimony, criticism of prior testimony in a written opinion, lack of experience in the field, etc.), can also minimize the effectiveness of your adversaries’ expert witness. Finally, you can focus on issues specific to the report and testimony being given. If possible, introduce evidence that disputes the accuracy of the facts and/or data on which the expert witness relied; highlight any facts indicating expert witness bias or prejudice, such as whether the expert appears to testify only for one particular side in past litigation, as well as the financial relationship between the expert and your adversary (i.e., how much the expert is being paid in order to testify for your adversary). In all, even if an expert is allowed to testify, you can still employ techniques to minimize the expert witness’s effect on the judge or jury.

VII. **PLEADING AND MOTION PRACTICE**

A. **Initial Pleadings And Remedies**

While notice pleading might be fine in a collections matter, good trial attorneys in commercial arbitration understand the concept of recency and primacy. Therefore, in drafting the initial pleadings and request for remedy, telling a compelling story with an obvious connection between the wrongdoing and the remedy you are seeking in your initial presentations, is critically important.

1. **Ensuring Your Pleadings Match The Theme(s) Of Your Case**

As mentioned previously in Section IV, once you have gathered all your key facts, drafting a themes memo is important. Using that memo as a guide, as well as the paragraph statement of your case and the single sentences that you drafted to come up with that paragraph, you can easily ensure that the pleadings that are drafted, particularly the complaint and/or answer and counterclaim, match those themes. It does no one much good to develop a themes memo to advance a case, only to ignore it at the most critical times. The initial pleading, because of the issue of primacy, is one of those times.

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89 See, e.g., *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 996 (Fla. 1999).

90 See *Grant v. Royal*, 886 F.3d 874, 945 (10th Cir. 2018), cert. denied sub nom. *Grant v. Carpenter*, 139 S. Ct. 925, 202 L. Ed. 2d 659 (2019) (providing that “[t]he laws of primacy and recency tell us that people best remember what they hear first and last. Therefore, the strongest points should be made at the beginning and end of the closing.”) (internal citation omitted).
If your case is about fraud, make sure that you plead it with specificity. Be extremely detailed in the “who,” “how,” “where,” “when,” and “what” description of what occurred. If you are a franchisee attorney, use the generic themes that we set forth above to the extent that you deem them to be helpful in the complaint, early motions, and your response to the inevitable motion to dismiss. Franchisor attorneys with clients who have been diligent in trying to assist franchisees, but have been resisted or shunned by the franchisee, should make it clear in their initial responses and motions that the problems with the franchisee were not caused by the franchisor, but instead by the franchisee’s own conduct, or lack thereof.

In other words, take the generic and case-specific themes and explain them in detail. How did these themes actually come to be themes? What are the facts that underlie them—and even more specific than that, what is the story, or the facts, behind these themes. Put those facts in the most compelling order that you can to justify the remedy that you seek.

2. Remedies—What Are You Really Asking For?

Not only should your pleadings match your themes, your remedy needs to bear some relationship to not only the wrong that was done to you, but the loss that was occasioned because of that wrongdoing. If a franchisee has lost money, explain how, and how much. If the franchisor needs conduct to stop, and it is seeking injunctive relief, explain why and how stopping that conduct will alleviate or at least mitigate some of the harm the franchisor complains about in its pleadings. Far too often even good attorneys fail to make the connection between the wrongdoing and the damage. In law school terms, focus on proximate cause and do not go astray.

As a quick note, here, make sure you do not allow your expert to go astray either. Experts are typically not attorneys and have not been trained in the law. Therefore, you must make sure that the damages model developed by your expert matches the theme of your case, and the harm that you are attempting to receive a remedy for. More than one attorney has won liability, but has lost the case on damages, when his or her expert failed to be ingrained into the themes, so that the expert’s report and opinions were part and parcel of the entire case, rather than the expert’s standalone work.

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91 See, e.g., Hengel, Inc. v. Hot 'N Now, Inc., 825 F. Supp. 1311, 1321 (N.D. Ill. 1993) (dismissing franchisee’s fraud claim under the Illinois Franchise Disclosure Act against the franchisor where franchisee failed to plead fraud with the requisite specificity required by Rule 9(b) of the Federal Rules of Civil Procedure and instead, included only “vague and conclusory allegations of fraud.”). See also Putzier v. Ace Hardware Corp., 50 F. Supp. 3d 964, 969 (N.D. Ill. 2014) (granting franchisor’s motion to dismiss franchisee’s fraud claim where franchisee failed to plead fraud with “the specificity required by Federal Rule of Civil Procedure 9(b).”).

92 Likewise, your remedy sought must be appropriate under the circumstances. See, e.g., Linkous v. Linkous, 941 So. 2d 530, 530 (Fla. Dist. Ct. App. 2006) (reversing the trial court’s grant of specific performance of a contract since specific performance was not the appropriate remedy in the case).

93 See, e.g., William M. McErlean, Dennis P. Stolle, Monica R. Brownewell Smith, The Evolution of Witness Preparation, Litigation, Fall 2010, 21, 23 (2010) (emphasizing the importance of a witness’ understanding of your theme, and explaining that “[i]f your witnesses don’t know what your theme is, don’t agree with your theme, or are likely to provide testimony that is inconsistent with your theme, then it becomes very difficult to maintain your theme with any credibility, particularly when it is under nearly constant attack by opposing counsel.”).
3. Amending Pleadings After Discovery

Of course, things change. Facts may not be as originally understood or believed, and stories may not hold up, and documents that someone believed support one theory might, in fact, support the opposite. If that happens, act quickly.

Rule 15(a)\textsuperscript{94} of the Federal Rules of Civil Procedure allow for amendment of complaints prior to trial. Making sure that your key facts are not misstated in the complaint at the time of trial is very important. Clients are subject to excruciatingly embarrassing cross-examination if discovery answers that were given do not match what you have in your initial complaint or answer. No client will be pleased with their attorney if they are grilled with their attorney’s own words in front of a judge, jury, or arbitrator.

B. Deciding What Motions Need To Be Brought And When To Bring Them

1. Setting Up Your Case Through Motions

By the time you are considering drafting dispositive motions, you should already have a thorough understanding of the law applicable to your case, the facts that you were able to learn through your client during your initial investigation, and an overarching theme for your client’s story. Barring major unanticipated developments during discovery, you want your motion practice to adhere to a consistent theory of the case, and this theme begins with your answer and/or motion to dismiss.

Once you have a baseline of relevant knowledge about your case, you should refine your motion strategy by considering the strengths and weaknesses of your opponents’ arguments, as well as rules which may be peculiar to the particular jurisdiction, venue, or courtroom in which your case is pending. Local rules may enforce restrictions on motions that exceed those in the Federal Rules of Civil Procedure or a state law equivalent. Individual judges may have a reputation for being unusually deferential to plaintiffs or defendants, or for disfavoring aggressive motion practice. The nature of the claims at issue may also inform your motion strategy. Complex claims by sophisticated plaintiff’s counsel may indicate from the outset of a case that protracted discovery will be unavoidable. In comparatively straightforward cases with a small number of claims requiring limited evidentiary support, you may feel more confident pushing for expedited discovery and a rapid resolution of claims or defenses at the summary judgment stage. Where a claim is borderline frivolous, you may elect to pursue dispositive motions before even filing an answer.

\textsuperscript{94} “(1) A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. (2) In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires. (3) Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.” Fed. R. Civ. P. 15(a)(1)–(3).
a. **Dispositive Motions**

i. **Motion To Dismiss**

Rule 12(b) of the Federal Rules of Civil Procedure provides seven independent grounds for dismissing a lawsuit, often allowing defendants to dismiss a lawsuit without resorting to protracted discovery. A party may assert the following defenses in a Rule 12(b) motion: (1) the court lacks subject matter jurisdiction; (2) the court lacks personal jurisdiction; (3) venue is improper; (4) insufficient process—such as where there is a defect in the summons; (5) insufficient service of process; (6) plaintiff’s failure to state a claim upon which relief could be granted; and (7) failure to join a party that is required for fair and complete resolution of the dispute—such as where joinder of a necessary party would otherwise destroy subject matter jurisdiction.

A motion to dismiss for failure to state a claim upon which relief can be granted is one of the broadest and most common bases for seeking dismissal of a lawsuit. Rule 12(b)(6) motions were historically disfavored by courts, which placed a nearly insurmountable burden on defendants to establish that “beyond any doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” More recent Supreme Court decisions have lowered the threshold for granting a 12(b)(6) motion by requiring a plaintiff’s complaint to “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” While courts must still construe facts alleged in the complaint in favor of the plaintiff when evaluating a motion to dismiss, courts are not required to “accept as true conclusory allegations, unwarranted factual inferences, or legal conclusion.” Nonetheless, a judge will not grant a motion to dismiss hastily, and will often allow the plaintiff an opportunity to amend the complaint and cure deficient pleadings as an alternative to dismissal.

As a preliminary consideration before drafting a motion to dismiss for failure to state a claim, you should weigh the advantages and disadvantages of moving to dismiss. An obvious advantage of a motion to dismiss is that it is a cheap and quick method for dismissing implausible claims. Yet even where dismissal is highly improbable, a motion to dismiss can still serve a beneficial purpose by focusing the plaintiff’s claims and thereby narrowing the scope (and cost) of subsequent discovery. A close call on a motion to dismiss may also motivate the plaintiff to settle his or her claims soon after the motion is denied; a grudging denial of a motion to dismiss by the trial judge under such a plaintiff-friendly standard is a strong signal to the plaintiff that his or her claims are unlikely to survive a motion for summary judgment.

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95 A party may assert the following defenses in a Rule 12(b) motion: (1) the court lacks subject matter jurisdiction; (2) the court lacks personal jurisdiction; (3) venue is improper; (4) insufficient process—such as where there is a defect in the summons; (5) insufficient service of process; (6) plaintiff’s failure to state a claim upon which relief could be granted; and (7) failure to join a party that is required for fair and complete resolution of the dispute—such as where joinder of a necessary party would otherwise destroy subject matter jurisdiction. Carl Barbier and Donna Phillips Currault, *Fundamentals of Rule 12, FBA NO CHAPTER – FEDERAL PRACTICE SERIES*, March 26, 2015, available at http://nofba.org/wp-content/uploads/Fundamentals-of-Rule-12.pdf.


97 Id. (*quoting* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

98 Id. at 12 (*quoting* Gentilelo v. Rege, 627 F.3d 540, 544 (5th Cir. 2010)).

There are also several disadvantages to motions to dismiss that may determine when to file a motion, if you decide to file one at all. Where a plaintiff alleges weak but plausible claims, a motion to dismiss may provide a roadmap for the plaintiff to build a stronger case if the plaintiff is afforded an opportunity to amend his or her complaint—a routine outcome of such motions. By exposing weaknesses on the face of the plaintiff’s complaint, your motion to dismiss may cause the plaintiff to build a stronger case against your client.\textsuperscript{100} For this reason, it may be tactically advantageous in some cases to wait until later in the case to move for summary judgment instead of moving to dismiss; a judge will likely be less forgiving of substantive flaws in a plaintiff’s theory of the case after months of discovery.\textsuperscript{101} Likewise, a motion to dismiss may invite the court to consider it as a premature motion for summary judgment, if fact issues are too closely tied to the initial motion.\textsuperscript{102} Finally, a motion will consume judicial resources and resources of your client that might better be preserved for other aspects of a case, particularly when making a motion to dismiss on substantive grounds with supporting affidavits.\textsuperscript{103} If the motion to dismiss has very little chance of influencing the outcome of the case, it may damage your credibility in a judge’s eyes to waste judicial resources so early in a case.

\textbf{ii. Motion For Summary Judgment}

Rule 56 of the Federal Rules of Civil Procedure provides the basis for a summary judgment motion; it states that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”\textsuperscript{104} Whereas a motion to dismiss requires the nonmovant to show only that the facts necessary to support his or her claims or defenses are plausible, a movant that carries its initial burden on summary judgment shifts the burden the nonmovant to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). This burden-shifting feature dramatically increases the evidentiary burden for a nonmovant by requiring the nonmovant to present affirmative evidence for each disputed claim or defense prior to trial, with the burden being particularly acute in fact-intensive commercial litigation.\textsuperscript{104} For these reasons, the motion for summary judgment is the most versatile of the dispositive motions; it can be brought at virtually any stage of a lawsuit prior to trial, can challenge any or all of the nonmovant’s claims or defenses, and places an affirmative burden on the nonmovant to prove its case in response to a properly-supported motion for summary judgment, so long as the nonmovant had an adequate opportunity to conduct discovery prior to the motion.\textsuperscript{105}

\textsuperscript{100} Id. at 23–24.

\textsuperscript{101} Id. at 24.

\textsuperscript{102} Edna Sussman, \textit{All About Motions to Dismiss}, THE PRACTICAL LITIGATOR 17, 19–22 (March 2006), available at https://sussmanadr.com/docs/motions_to_dismiss_plit.pdf.

\textsuperscript{103} Id. at 22.


\textsuperscript{105} Id. at 240. See also Fed. R. Civ. P. 56(d) provides that, if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to its opposition to a motion for summary judgment, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.
A summary judgment motion serves several purposes that enhance the efficiency of the litigation process. A motion for summary judgment clarifies facts prior to trial by forcing the nonmovant to identify facts in the record that will need to be proved at trial.106 A motion for summary judgment also clarifies the applicable law by winnowing valid claims from untenable claims prior to trial; whereas a Rule 12(b)(6) motion allows all plausible claims to proceed, a motion for summary judgment forces the nonmovant to marshal evidence in support of its legal argument, defining precisely which factual and legal issues will be contested if the case proceeds to trial.107 These factual and legal issues are not merely clarified for the parties on the eve of trial, but also for the judge reviewing the motions and attendant briefs and evidence. Whereas a judge can dispose of a 12(b)(6) motion without detailed factual analysis—or simply delay ruling on such a motion indefinitely—the substantive nature of a motion for summary judgment requires the judge to be familiar with the legal and factual issues of the case and to provide thoughtful analysis of the strength of opposing arguments.108 This encourages a more active bench following summary judgment and also facilitates settlement, as the parties receive meaningful feedback from the court—often for the first time—on the prospect of their claims after an opportunity for discovery.109

Summary judgment need not always occur after extensive discovery. In some cases, summary judgment provides an ideal vehicle for resolving contract claims at the inception of a case. For example, many franchise agreements and other franchise-related contracts include pre-filing requirements, such as a formal written demand outlining the prospective plaintiff’s claims, and clauses that require parties to mediate or arbitrate before resorting to a lawsuit.110 In many jurisdictions, the failure of a plaintiff to follow these contractual pre-filing requirements renders the plaintiff’s claims premature.111 Similarly, a summary judgment motion is the appropriate dispositive motion for dismissing claims under substantive contractual limitations, such as waivers of claims or releases of liability, waivers of statutes of limitations, or express terms which contradict the plaintiff’s claims for breach.112 Even where there is a dispute


107 Id. at 692–93.

108 Id. at 700–02.

109 Id. at 697–99 (noting that preparation for summary judgment also incentivizes mediation by requiring parties to take stock of evidence which can be used by a mediator to evaluate their claims prior to trial; without the impetus of summary judgment, this analysis of evidence might not occur until trial is inevitable, drastically reducing the efficacy of alternative dispute resolution at an earlier stage of the case).

110 See Goode, supra note 55, at 26–27.

111 Id. at 26 n. 91.

112 Even for claims for breaches of implied covenants, the majority view under state laws is that a claim under the implied covenants cannot vary the express terms of an agreement; in other words, a claim for breach of implied covenants must fail as a matter of law where the defendant’s conduct was expressly authorized by an agreement. See, e.g., Sain Consulting Group, Inc. v. Endurance American Specialty Ins. Co., Inc., 699 F.3d 544 (1st Cir. 2012); In Touch Concepts, Inc. v. Cellico Partnership, 788 F.3d 98 (2d Cir. 2015); In re IT Group, Inc., 448 F.3d 661 (3d Cir. 2006); Homeland Training Center, LLC v. Summit Point Auto Research Center, 594 F.3d 285 (4th Cir. 2010); Texas Tech Physicians Associates v. United States Department of Health and Human Services, 917 F.3d 837 (5th Cir. 2019); Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co., 210 F.3d 672 (6th Cir. 2000); Life Plans, Inc. v. Security Life of Denver Ins. Co., 800 F.3d 343 (7th Cir. 2015); Stokes v. DISH Network, LLC, 838 F.3d 948 (8th Cir. 2016); McKnight v. Torres, 563 F.3d 890 (9th Cir. 2009); J.R. Simplot v. Chevron Pipeline Co., 563 F.3d 1102 (10th Cir. 2009); Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012); Dobyns v. United States, 915 F.3d 733 (Fed. Cir. 2019).
regarding the interpretation of an ambiguous provision of a contract, a court may resolve the issue on summary judgment at an early stage of litigation where the court need only consider a small amount of extrinsic evidence to resolve the ambiguity.\textsuperscript{113} Prevailing on summary judgment at the inception of a lawsuit could save you hundreds of hours in time-consuming discovery, and save your client tens of thousands of dollars in legal expenses. Even where a movant only succeeds in dismissing a partial number of the nonmovant’s claims, summary judgment at an early stage of litigation can reduce the scope of discovery by narrowing factual issues of dispute.\textsuperscript{114} Additionally, success on an early partial motion for summary judgment may entice some plaintiffs to settle by decreasing the expected value of trial relative to the prospect of expensive discovery and may decrease plaintiffs’ confidence in their ability to obtain summary judgment on remaining claims after discovery.

b. Discovery Motions

i. Motion To Compel

Rule 37 of the Federal Rules of Civil Procedure permits parties to move for an order compelling disclosure or discovery, so long as the party has first attempted in good faith to confer with the person or party failing to make disclosure or discovery in an effort to resolve the discovery dispute without court action.\textsuperscript{115} A motion to compel is a versatile discovery tool, and can be used in a variety of common discovery disputes: it can be used to require a party to make initial disclosures required by Rule 26(a); it can be used to compel discovery responses by seeking an order compelling an answer designation, production, or inspection—including any discovery permitted under Rule 30 (oral depositions), Rule 31 (written depositions), 33 (interrogatories), and 34 (production, inspection, etc.); and it can be used to compel answers to questions in an oral deposition.\textsuperscript{116} If the motion is granted, or if the disclosure or requested discovery is provided after the motion is filed, the court must—after a hearing—require the party, deponent, and/or attorney whose conduct necessitated the motion to pay the movant’s reasonable expenses and attorneys’ fees incurred in making the motion, unless the party opposing the disclosure was substantially justified or the award is otherwise unjust.\textsuperscript{117}

\textsuperscript{113} J. Bradford McCullough, The Ten Commandments of Summary Judgment Practice, 19 PRETRIAL PRACTICE AND DISCOVERY 2 (Winter/Spring 2011), available at https://www.lerchearly.com/news-detail/the-ten-commandments-of-summary-judgment-practice. See also Goodman v. Resolution Trust Corp., 7 F.3d 1123, 1126 (4th Cir. 1993) (“Even where a court, however, determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis.”).

\textsuperscript{114} Rule 56 does not expressly limit parties to a single motion for summary judgment per case. In cases where a relatively early partial motion for summary judgment might conserve substantial resources of the parties and court by limiting the scope of discovery and attendant attorneys’ fees, there is little reason for a judge to delay ruling on the motion or deny the movant a second bite at the apple after an opportunity for discovery. In fact, a judge may be less willing to grant attorneys’ fees after learning that a party delayed moving for summary judgment on a weak claim and incurred considerable expenses in the meantime. See McCullough, The Ten Commandments of Summary Judgment Practice, supra note 112 (quoting Cordoba v. Dillard’s, Inc., 419 F.3d 1169, 1188 (11th Cir. 2005) (“there is no reason to assume that a district judge will stubbornly refuse to rule on a motion for summary judgment at an early stage of the litigation if the moving party clearly apprises the court that a prompt decision will likely avoid significant unnecessary discovery.”)).

\textsuperscript{115} Fed. R. Civ. P. 37(a).

\textsuperscript{116} Id. at 37(a)(3).

\textsuperscript{117} Id. at 37(a)(5)(A).
Due to its breadth and the threat of sanctions, a motion to compel production is the most direct method of settling discovery disputes, but also carries some risks that should be considered before filing. First and foremost, judges hate resolving discovery disputes. A hearing on a motion to compel is always time-consuming and often trivial, and judges will look scornfully upon parties wasting court resources with inconsequential discovery disputes or disputes that could reasonably have been resolved without court action. Likewise, arguing a motion to compel is time-consuming for the attorneys involved, and therefore expensive for clients; think carefully about how valuable the disputed disclosure or discovery is to your case before filing the motion. While it may be tempting to take opposing counsel to task for rebuffing your reasonable discovery requests, it is almost certainly not worth incurring the ire of your client and the judge to prove a point. Furthermore, Rule 37 also permits the court to issue protective orders and awards of expenses and fees to the nonmovant if the motion to compel is denied in whole or in part. To avoid the threat of sanctions, you should limit your motions to compel to circumstances where you feel the motion is substantially justified. Under no circumstances should you allow yourself to be drawn into a petty squabble; judges have no patience for hand-waving antics or personal attacks on opposing counsel, and your professional credibility will be damaged irreparably by engaging in courtroom frivolities.

Having mentioned these caveats, well-founded motions to compel can serve an important strategic purpose in setting the tone for your case. These motions are often the first adversarial hearings in a case and provide an early opportunity to distinguish your client from opposing parties before a judge that will eventually be deciding dispositive issues. While it is never advisable to get too far into the weeds of the merits of your case in drafting a motion to compel, the motion can be a good platform for describing the contours of your discovery strategy and how that strategy relates to your broader arguments on the merits. Additionally, the motion can serve as a shot-across-the-bow to opposing counsel that are frustrating your discovery strategy by delaying production, producing incomplete information, or being unduly aggressive in objecting to reasonable discovery requests. Filing a motion to compel after making a good faith attempt to reconcile disputes with opposing counsel will put them on notice that you are an alert and assertive opponent; if opposing counsel persist in their attempts to resist your discovery requests, they risk giving the judge a negative impression of their case or their professionalism, as well as incurring the aforementioned expenses and fees required by Rule 37.

In any case, it is crucial that both movants and nonmovants take the good faith conference prerequisite to a motion to compel seriously. By being reasonable in your requests for discovery and your accommodations to opposing counsels’ requests, you provide yourself the best chance of resolving discovery disputes without resort to court. Generally, most opposing counsel can be reasoned with, particularly with the threat of a motion to compel and attendant Rule 37 sanctions on the table. Often, a little compromise on your discovery requests can save you and your client the hassle and expense of a drawn-out discovery dispute, while still ensuring that opposing counsel provide timely and complete responses to your most important discovery requests. If good faith conference is insufficient to resolve the underlying discovery dispute and a motion to compel is filed, your record of good faith and candor with


opposing counsel will improve your credibility in the eyes of the court and thereby improve your chances of prevailing at a hearing on a motion to compel, whether you are a movant or nonmovant.\textsuperscript{120}

\section*{ii. Motion To Quash}

A party that does not wish to comply with a subpoena seeking documents or testimony may move to quash or modify the subpoena under Rule 45(d)(3).\textsuperscript{121} Prior to filing a motion to quash, you should consult the court's local rules to determine if procedures are specified in addition to the Federal Rules. Federal courts sometimes require the parties’ attorneys to meet and confer about the subpoena prior to hearing a motion to quash.\textsuperscript{122} Likewise, some courts provide for an automatic stay of the relevant discovery obligation upon filing of a motion to quash, whereas other courts do not stay discovery until the motion is granted; given the relatively short deadlines for responses to subpoenas, this distinction can be significant.\textsuperscript{123} The motion can be made in the compliance court—the jurisdiction where the production or deposition will occur—or in the issuing court—the court where the action is pending.\textsuperscript{124} If the recipient of a subpoena is located outside of the jurisdiction of the issuing court, a motion to quash must be made in the compliance court, though Rule 45(f) provides for the compliance court to transfer the motion to the issuing court for particularly significant or complex discovery issues, though the Rule states expressly that, barring consent of the person subject to the subpoena, the court must find “exceptional circumstances.”\textsuperscript{125}

There are mandatory and permissive grounds for a court to grant a motion to quash. On motion to quash, a court \textit{must} quash or modify a subpoena that: (1) fails to allow a reasonable time to comply; (2) requires a person to comply beyond the geographical limits specified in Rule 45(c) (within 100 miles or within the recipient’s home state); (3) requires disclosure of privileged or other protected information, unless such privilege or protection was waived or an exception applies; or (4) where the subpoena subjects a person to undue burden. “Undue burden” is the broadest mandatory grounds for granting a motion to quash, and federal courts weigh a range of factors in determining whether the burden on the recipient of the subpoena outweighs the value of the requested discovery. Common non-exclusive factors include relevance of the requested discovery, the needs of the requesting party, the breadth of the information requested, the time period given for compliance, the adequacy of the description of information sought in the subpoena, the burden imposed on the recipient, privacy interests of the recipient, and whether the information is available from another source.\textsuperscript{126} Where a court determines that a subpoena imposes an undue burden on the recipient, the compliance court “must enforce [the duty to take reasonable steps to avoid imposing an undue burden or expense] and impose an

\textsuperscript{120} Salzwedel, \textit{supra} note 117.

\textsuperscript{121} Fed. R. Civ. P. 45(d)(3); Lender, \textit{Responding to a Subpoena, supra} note 73, at 7–12.

\textsuperscript{122} \textit{Id.} at 7.

\textsuperscript{123} Lender, \textit{supra} note 73, at 7–8.


\textsuperscript{125} Lender, \textit{supra} note 73, at 8.

\textsuperscript{126} \textit{Id.} at 10 (citing Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 377 (5th Cir. 2004); Northwestern Memorial Hosp. v. Ashcroft, 362 F.3d 923, 927–32 (7th Cir. 2004); Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48, 51–52 (S.D.N.Y. 1996)).
appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.\footnote{127 Fed. R. Civ. P. 45(d)(1).}

Permissive grounds for granting a motion to quash are somewhat narrower, allowing a court to quash or modify a subpoena requiring disclosure of trade secrets or confidential research, development, or commercial information, or requiring disclosure of an unretained expert’s opinion.\footnote{128 Id. at 45(d)(3)(B).} These grounds for a motion to quash are less common than the mandatory ones, since disclosure of confidential information can be addressed more easily through a confidentiality agreement or protective order, and the rule regarding unretained expert opinions is intended primarily to prevent parties from being forced to testify without compensation.\footnote{129 Lender, supra note 73, at 11.} Even if a motion to quash is made on these grounds, the motion may still be denied if the requesting party demonstrates a substantial need for the testimony. As a third permissive option, a court may simply specify alternative conditions instead of quashing or modifying a subpoena, so long as the serving party demonstrates a substantial need for the information—and that such information cannot otherwise be obtained without undue hardship—and ensures that the subpoenaed person will be reasonably compensated.\footnote{130 Fed. R. Civ. P. 45(d)(3)(C).}

iii. Motion For Protective Order

Courts have inherent authority to grant confidentiality orders, and Rule 26(c) empowers “[a] party or any person from whom discovery is sought” to move for a protective order, so long as the motion includes a certification confirming that the movant made a good faith attempt to confer with affected parties about resolving the dispute without court intervention.\footnote{131 Fed. R. Civ. P. 26(c)(1).} For good cause shown by the movant, the court may issue an order protecting a party or person from “annoyance, embarrassment, oppression, or undue burden or expense.”\footnote{132 Such order may prescribe one or more of the following restrictions: (1) forbidding the disclosure or discovery at issue; (2) specifying details on disclosure or discovery, such as the time and place of disclosure or the allocation of expenses; (3) prescribing a non-standard method of conducting the challenged discovery; (4) limiting the scope of disclosure or discovery to certain matters; (5) designating persons who may be present while discovery is conducted; (6) requiring that a deposition be sealed and opened only on court order; (7) requiring that a trade secret or other confidential information not be revealed, or be revealed only in a specified way; and (8) requiring that the parties simultaneously file specified documents in sealed envelopes, to be opened as the court directs. Fed. R. Civ. P. 26(c)(1).} “Good cause” is not a difficult standard to meet, and is often satisfied by a statement in the opening paragraph of the motion advising the court of the basis for seeking a protective order—for example, the motion might simply assert that the parties anticipate the exchange of trade secrets which are subject to state and/or federal privacy laws.\footnote{133 Karen L. Stevenson, A Protective Order Doesn’t Guarantee Sealing, American Bar Association: View from the Bench (Feb. 1, 2017), available at https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/a-protective-order-doesnt-guarantee-sealing/ (in contrast to the “good cause” required for granting a protective order under Rule 26(c), a motion to seal court records from public disclosure requires a much higher showing of “compelling reasons”).} Courts will often consider the following non-exclusive
factors when determining whether “good cause” exists for a protective order: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose; (3) whether disclosure will cause embarrassment; (4) whether the information subject to the motion is important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the protective order is a public entity or official; and (7) whether the case involves issues important to the public.\textsuperscript{134} It is important to note that the mere filing of a protective order does not automatically stay discovery obligations pending resolution by the court; the local rules may provide for a temporary stay during the pendency of the motion, but otherwise you will need to request a temporary stay.\textsuperscript{135}

The court’s discretion to issue open-ended protective orders makes motions for protective orders a useful tool for limiting the scope of discovery in complex commercial litigation, particularly for large franchisors that often bear an asymmetrical discovery burden in franchise litigation. A detailed protective order defining the scope of discovery and describing specific procedures for conducting discovery can help parties avoid frustrating discovery disputes and help to manage discovery costs. A protective order can also mandate protocols for the safe handling and storage of electronically stored information during litigation—a subject of ever-increasing urgency in contemporary commercial litigation, with best practices still very much in flux. Even in relatively simple cases, a well-crafted protective order is a prudent method for ensuring that opposing counsel maintains the security of your client’s confidential information during litigation, as well as in its aftermath. Depending on the willingness of the parties to compromise, the parties may prefer to negotiate a confidentiality agreement addressing these issues, which can be entered by the court in place of a free-standing protective order.\textsuperscript{136}

\textbf{iv. Motion For Sanctions}

Multiple bases exist for courts to sanction bad-faith conduct relating to discovery, such as civil contempt, courts’ inherent power to sanction, and statutes providing for fee-shifting in cases where discovery abuses impose unnecessary litigation costs on non-offending parties.\textsuperscript{137} In federal courts, Rule 37 of the Federal Rules of Civil Procedure is the most common authority cited in motions for sanctions in the context of discovery.\textsuperscript{138} The purpose of these sanctions is manifold: to deter litigants from shirking their discovery obligations, punish litigants for unfair conduct, remedy harm to litigants caused by discover abusers, encourage respect for the

\textsuperscript{134} Lender, \textit{supra} note 73, at 12 (citing Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)).

\textsuperscript{135} Id. at 12.

\textsuperscript{136} Id. at 4.

\textsuperscript{137} For example, 28 U.S.C. § 1927 provides that “[a]ny attorney… who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” See C. Williams Phillips, \textit{The Law and Tactics of Sanctions}, Legal Ethics for In-House Corporate Counsel: Corporate Practice Series (2007), available at https://www.cov.com/-/media/files/corporate/publications/2007/09/the-law-and-tactics-of-sanctions.pdf (noting that § 1927 claims can be brought by separate action or by motion in an existing action, but that a high degree of culpability is require for liability—the frivolous or dilatory conduct must be so egregious that bad faith may be inferred).

\textsuperscript{138} While a motion for Rule 11 sanctions is a viable response to false or frivolous assertions in pleadings, motions, and other papers, Rule 11(d) states that the Rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rule 26 through 37.
authority of courts and the legal process, and—perhaps most salient from a policy perspective—reduce unnecessary costs and delays which have pervaded the discovery process for decades.\textsuperscript{139}

Rule 37 is designed to provide a broad basis for sanctions for discovery abuses. Whereas Rule 11 concerns pleadings, motions, and “other papers,” and expressly excludes discovery abuses, Rule 37 authorizes sanctions for failures to make appropriate disclosures or otherwise cooperate in discovery, including (among other abuses): failure to make initial disclosures required by Rule 26(a); failure to answer an interrogatory or admit a fact in response to a request for admission; failure to designate a corporate representative, identify a witness, or attend a deposition; failure to produce documents or to preserve electronically stored information (ESI); or failure to participate in developing and submitting a Rule 26(f) discovery plan.\textsuperscript{140} Rule 37(a)(4) makes clear that evasive or incomplete disclosures, answers, and responses to discovery requests are sufficient to warrant sanctions.\textsuperscript{141} As with Rule 11, Rule 37 encourages resolution of discovery disputes without resort to judicial intervention by requiring every motion for Rule 37 sanctions to include a certification that the movant has, in good faith, conferred or attempted to confer with the person for party failing to make required disclosures or otherwise participate in discovery.\textsuperscript{142}

Rule 37 also provides parties with a broader range of available remedies for discovery abuses than Rule 11. Whereas Rule 11 sanctions are expressly limited to “what suffices to deter repetition of the conduct or comparable conduct by others similarly situated[,]” Rule 37 contemplates a measure of sanctions sufficient to remedy the harm caused by the discovery abuse; unlike the permissive language in Rule 11 allowing a court to authorize fee shifting at the court’s discretion, Rule 37 prescribes payment of the prevailing party’s expenses unless the discovery abuse was substantially justified or other circumstances render the award unjust.\textsuperscript{143} In addition to requiring the offending party or person to pay the movant’s reasonable expenses incurred in making a motion to compel disclosure or discovery, Rule 37 offers a non-exhaustive list of sanctions available to remedy failures to comply with a court order, including adverse inferences, exclusion of evidence, striking pleadings, staying proceedings until a discovery order is obeyed, holding the offending person or party in contempt of court, and dismissing the action or proceeding in whole or part, or rendering a default judgment against the offending party.\textsuperscript{144} Specifically with regard to ESI lost as a result of a party’s failure to preserve evidence, Rule 37


\textsuperscript{140} Fed. R. Civ. P. 37.

\textsuperscript{141} Fed. R. Civ. P. 37(a)(4).

\textsuperscript{142} Fed. R. Civ. P. 37(a). See also Rule 11(c)(2) (stating that a motion for Rule 11 sanctions must not be filed if the offending conduct is corrected by opposing counsel within 21 days of notice of the motion for sanctions—a feature of Rule 11 referred to by the advisory committee as the “safe harbor”).


offers more circumscribed relief, permitting measures “no greater than necessary to cure the prejudice” caused by the loss of ESI where it cannot be restored or replaced through additional discovery, and permitting more significant sanctions—like adverse inferences, dismissal and default judgment—only upon finding that the offending party acted with an intent to deprive another party’s use of the information in the litigation.145

While the breadth and severity of sanctions available under Rule 37 make a motion for sanctions a tempting response to suspected discovery abuses, it is imperative to consider the negative consequences of filing such a motion—even a well-founded one. It is common wisdom among litigators that judges generally disfavor sanctions motions due to the time-consuming and subjective analysis required resolving the underlying disputes.146 Although Rule 37 does not have a formal “safe harbor” period like Rule 11, the requirement under Rule 37(a)(1) that all motions for sanctions include a certification that the movant conferred or attempted to confer with the offending party should be taken seriously. Good faith attempts to reconcile discovery disputes without resort to the judge can not only spare your client the time and expense of a heated sanctions hearing, but they will also enhance the judge’s perception of your credibility if a motion for sanctions is unavoidable. For similar reasons, when you are forced to move for sanctions under Rule 37, you should be cautious to focus your motion only on those egregious discovery abuses for which sanctions are clearly warranted, you should meticulously document your grounds for suspecting a discovery violation, and you should emphasize your repeated attempts to resolve the dispute with opposing counsel.

In sum, a Rule 37 motion is not a good vehicle for lodging a litany of discovery grievances. If you are serious about forcing your opponent to honor its discovery obligations, you should tailor your Rule 37 motion to those discovery abuses on which you reasonably expect to prevail. When it comes to frustrating but otherwise mundane discovery abuses, the temptation to challenge opposing counsel is usually not worth the risk of incurring the ire of a federal district judge or magistrate.

v. Motion In Limine

Motions in limine (Latin for “at the threshold”) are typically filed on the eve of trial as a means of preventing opposing counsel from introducing evidence which is irrelevant or unfairly prejudicial to your client or a witness, or as a way to obtain an advance ruling on the admissibility of evidence that you hope to present at trial.147 Authority for the use of motions in limine in most jurisdictions is found in the trial court’s “inherent discretionary power to admit or exclude prejudicial evidence.”148 Because no portion of the Federal Rules of Civil Procedure


146 Phillips, The Law and Tactics of Sanctions, supra note 136, at A-89; see Blanchard, supra note 138, at 124–26 (describing widespread perceptions among scholars and practitioners that judges are loath to assess even moderate monetary sanctions for discovery abuses under Rule 37).


prescribes the timing or format of a motion in limine, they are a versatile platform for resolving evidentiary issues at any stage of litigation—such as a determination of whether you may refer to certain evidence during voir dire, or opening or closing arguments. Many courts will set a time for filing motions in limine in a pretrial order, but the form that such motions take may vary according to the types of evidentiary issues they address; some motions may include a laundry list of specific evidence that you wish to introduce or exclude, others may focus on permissible lines of examination for a single witness, while still others explore broad evidentiary themes.

The motions can also address a broad range of specific evidentiary objections, such as witness qualifications under Rule 104(a) of the Federal Rules of Evidence, relevance under Rule 401, privileges under Rule 501 and waiver under Rule 502, character evidence of a witness under Rules 608 and 609, hearsay exceptions under Rule 803, etc.; in other words, “[o]nly a lack of imagination on the part of counsel will limit the situations in which a motion in limine may legitimately be employed.” The judge hearing the motion in limine also has flexibility in adjudicating the issues presented: the judge might decide to overrule objections to evidence, sustain objections and enter an order prohibiting the proponent of evidence from mentioning the evidence, enter a preliminary order prohibiting the proponent from referring to the evidence until a later time (such as prohibiting reference to evidence during voir dire or opening statements, but declining to foreclose introduction at trial), or simply defer a ruling on an objection until a later date. Particularly where a judge is unfamiliar with the merits of a case and the evidence parties are seeking to exclude, it is not uncommon for a judge to defer ruling on a motion in limine until a date closer to trial.

The most obvious benefit of a motion in limine in a trial by jury is as a mechanism to exclude evidence that might confuse or improperly influence the jury’s understanding of the case; whereas a contemporaneous objection may be too late to prevent a witness from referring to inadmissible evidence on examination, a motion in limine can place you on notice to avoid lines of questioning that invite irrelevant or prejudicial testimony. Motions in limine can also be useful for streamlining the resolution of evidentiary issues that might otherwise disrupt the flow of trial—a consideration germane to both bench trials and trials by jury. A judge is likely to devote more time to considering an argument to exclude prejudicial evidence at the pre-trial stage than to pause in the middle of trial to adjudicate an evidentiary issue with only ancillary

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149 As a general form, a motion in limine should “be simple and concise and should state: [1] the basic issues that will arise in the trial; [2] what evidence the opposing counsel is likely to attempt to offer; [3] why that evidence is unduly prejudicial; and [4] that no remedial action taken by the court at the time the evidence is offered could repair the damage caused by the mention of the evidence.” Richardson, Use of Motions in Limine in Civil Proceedings, supra note 146, at 135.

150 Linn, supra note 146, at 286.


152 Richardson, Use of Motions in Limine in Civil Proceedings, supra note 147, at 140 (quoting 20 AM. JUR. TRIALS 458 (1973)).

153 Linn, supra note 146, at 287.

154 Valukas, supra note 150 at §37:3.

155 Linn, supra note 146, at 286.
relevance to the merits of the case. In addition, motions in limine can be used to preserve evidentiary issues for appeal, and are generally considered to be a more reliable form of preservation than an objection in a trial transcript; an appellate judge may be more willing to scrutinize an objection preserved in a motion in limine that the trial judge reviewed in a dedicated hearing, than to second-guess a trial judge’s contemporaneous ruling on an objection raised in the midst of trial testimony. More subtly, a motion in limine can allow you to probe opposing counsel’s purpose for introducing a specific piece of evidence or examining a specific witness; by objecting to the introduction of such evidence, you can force opposing counsel to explain why they think it is relevant to their arguments.

There are multiple risks associated with motions in limine that must be considered carefully, both prior to filing the motion and in the wake of any orders concerning a motion in limine. The flexibility of motions in limine renders them susceptible to abuse. Beware the “omnibus” motion in limine, in which every conceivable shred of evidence that may be relevant at trial is contested; these are not only costly to draft and to argue at a hearing, but they needlessly risk distracting the judge from the most pertinent evidentiary issues—while likely annoying the judge, as well. Additionally, your motion in limine may inadvertently draw opposing counsel’s attention to evidence at a pretrial hearing that gives them critical insight into your trial strategy. Particularly where you are still deciding whether specific evidence is worth introducing, or where the evidence concerns a narrow issue at trial, it may be worth waiting until trial to offer the evidence and argue admissibility. Finally, and perhaps most importantly, it is crucial that you understand the judge’s order in response to a motion in limine, as well as the rules in your jurisdiction for preserving issues for appeal. While a grant or denial of a motion in limine is generally not reversible error on appeal, there is significant variation among jurisdictions regarding proper methods for preserving an objection in the record for a potential appeal. In any case, make sure you understand the judge’s order regarding each objection—this is not always an easy task given the discretion judges have to issue nuanced orders on evidentiary issues—and never assume that an objection is preserved in the record simply because it is included in a motion in limine.

C. How Best To Deal With The Decisions You Receive, Both Good And Bad

The decisions you get related to discovery disputes have the potential to dramatically affect the outcome of a case. Being able to lawfully withhold, or recover, a particularly juicy piece of evidence can change the dynamic, not only at trial, but throughout the life cycle of an entire case.

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156 Id. at 286.
157 Id. at 293–94.
158 Richardson, supra note 147, at 134.
160 Valukas, supra note 150, at §37:3.
161 Linn, supra note 146, at 293–94.
162 Richardson, supra note 147, at 137–40; Valukas, supra note 150, at §37:1.
But you cannot count on winning every discovery motion or getting everything that you want. Accordingly, it is important, particularly if you are bearing the burden of proof on an issue, to be prepared to lose in an effort to recover material, and still be able to prove your case.

There is not much to say about what to do when you win an important discovery motion. Follow through, get what you are entitled to, and use the system (arbitral or court) to make sure you get what you want. Rule 37, calling for sanctions for failure to comply with discovery responsibilities, can be an extremely valuable tool in these circumstances.163

The tougher job is when you lose an important motion. If you are seeking material that was important to your case, figure out whether you can still prove your case without the material you thought you were going to get. If it is impossible to prove your case without that material, you are going to need to adjust your strategy.

On the other hand, if you were acting defensively, and lost a motion to protect evidence you did not want to turn over, and now are being compelled to do so, that will almost always necessarily require you to re-evaluate your leverage and position.

Perhaps that is the most important lesson here when all is said and done—you need to continually be evaluating your position and your leverage. Litigation does not happen in a vacuum, and things change. When things change, nimble attorneys adjust accordingly. Make it your practice to do so as well.

VIII. DEMONSTRATIVE AND OTHER EXHIBITS

A. What Do You Want The Jury To See And (Hopefully) Remember?

One of your main jobs is persuasion. Demonstrative exhibits are a tool in the attorney's toolkit for persuasion. A best practice for demonstrative exhibits is to use them to simplify a complicated set of facts. For example, a timeline may assist the trier of fact in understanding more clearly what happened when. But it can also be used in a motion for summary judgment to explain to the court the chronology as well.

In a recent trial, there were several acronyms used for the names of the various parties and for the legal status of the different entities, all of which had business at an airport. It was essentially going to be alphabet soup for the fact-finder. To simplify those acronyms, one of the attorneys prepared a demonstrative that served as a dictionary for each of the parties' names and the various designations by the airport (e.g., ACDBE; MBE).164 The jury referred often to that exhibit that was on a large poster board and kept within viewing distance of the judge and jury. In that same case, the joint venture structure was quite complicated. To address this, a simple graphic was used to explain the relationships between the various joint venture partners. That exhibit was on a large poster board and was also kept on an easel during the trial. In fact, the other side used those same demonstrative exhibits during their presentation. But it was helpful to the judge and jury to have those aids in understanding the facts of the case.


164 See the attached Appendix C for a sample demonstrative.
B. Other Exhibits

It is important to streamline the number of exhibits that are going to be important in a case. The tendency of most young litigators is to be over inclusive. In the end, however, only about 20 – 25 exhibits are the key ones that will be used at trial. It is important to remember that with exhibits, less is more. Identifying the exhibits should not be the last item on your list before you go to trial. It should be one of the first items on your “to do” list once you have your arms around the various documents that you have produced, and the other side has produced. Again, keeping a notebook of the most important exhibits, and tying the timeline to exhibits and the case map, will help you in the culling process.

IX. STRATEGIC DECISIONS ALONG THE WAY

A. Revisit Claims Chart/Case Map And Strategy Frequently

As previously mentioned, the facts and circumstances surrounding litigation are fluid. We have talked extensively about themes, theme memos, and adjusting your strategies to the facts and circumstances as you know them. But because you are using your themes memo as the basis for most everything you are doing, it is often the case that the themes themselves need to be revised—so that your strategies and tactics may be revised to be in accord. Not surprisingly, there are some obvious times in which those strategies need to be tweaked.

1. Times To Tweak Strategy

a. New Facts

Perhaps nothing requires a revision of your theories and themes more than a change in facts.

Facts change for a whole bunch of reasons. Clients may have originally thought things were a certain way, and they turn out to be different—or worse, the client was less than completely truthful with you. More frequently, while clients might truly believe the facts to be one way, the documents, or the testimony, prove to be another. And finally, it is frequently the case that when pressed under good and effective cross examination, clients are unable to effectively establish the facts as they believe them to be.

If the facts are not as you assume, it is often the case that the themes cannot be sustained. Nimble attorneys will adjust their themes accordingly—which will require you to go back to your paragraph and re-write it considering the new facts. Of course, once having your theme re-written, that may mean that you need to revise your discovery (or issue additional discovery or revise and amend discovery answers), as well as potentially changing direction in your trial strategy. In the most dramatic cases, it may also be the case that you have to go back and amend your pleadings and/or withdraw your claims.

b. New Law

Far less frequently, but more devastating, would be a change in the law.

If you made a claim under the assumption that a law is going to be interpreted in a certain way, and the law is subsequently changed, your claim may no longer be viable—and if you are lucky and the claim is still viable, your theory may need to change. Pay attention to
changing law, and to decisions that come out during the pendency of litigation, as they may help, and even more importantly for your consideration, they might hurt.

Changes in the law can affect what you have done in the past, what you are currently doing in a particular case, or your ability to use past results in the future. For example, on July 12, 2018, seven franchise systems entered into legally binding assurances of discontinuance with the Washington State Attorney General’s Office, which required them to remove “no poach” clauses (also referred to as “anti-poaching,” “non-solicitation,” and/or “no hire” clauses) from their franchise agreements on a national scale. These types of clauses are common in franchise agreements. While franchisors may have frequently argued that such clauses were enforceable in the past, for franchisors in those seven franchise systems (at least), such arguments will no longer be made. In a Tenth Circuit case, the Court of Appeals held that a state court’s change of law in litigation involving the same or similar events as the federal case might permit reopening of the case. Likewise, a party cannot apply the doctrine of collateral estoppel when “a judicial declaration intervening between the two proceedings substantially changes the applicable legal rules . . . .”

Changes in the law can have staggering effects on litigation, ranging from placing a chilling effect on certain arguments that used to be commonplace, to the re-opening of a case, to the inapplicability of certain legal doctrines. It is for these reasons that it is important to shepardize, stay current on recent cases, and brush up on any pending legislation that may ultimately impact your case, argument, and/or trial strategy.

c. Client Goals

Finally, your theories and themes might have to change because your clients have changed their minds about what they want. Early on, particularly on the plaintiff side, franchisees want out of a system, all their money back, and the ability to compete. However, almost as frequently, franchisees figure out that paying for an expensive lawsuit does not make a lot of sense if they can change their theory, pay the franchisor some money, and be able to compete. In other words, rather than being a payee, a franchisee may decide to be a payor in order to achieve his or her goals.

If something like that happens, with the uncertainty that the franchisor will acquiesce to any such deal, the franchisee attorney in that situation has to be able to adjust his or her themes to be copacetic with the outcome the client now desires—the ability to continue, perhaps without any monetary recovery. This may, or may not, make the case easier for the franchisee attorney to prevail on. Without the specifics, you will not know—but when you are working a case, and you know the specifics, you will have to adjust.

B. Local Counsel

1. In Which Cases Should You Employ Them?

Litigators typically have an abundance of self-confidence. Thus, they might have the tendency to believe that they can handle any case, anywhere, by themselves. The value of

165 See Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074, 1078 (7th Cir. 1997) (referencing Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975)).

166 See Olsen v. Siddiqi, 520 S.W.3d 1, 11 (Mo. Ct. App. 2017), reh’g and/or transfer denied (Apr. 27, 2017), transfer denied (June 27, 2017).
engaging local counsel, however, is clear. Local counsel can provide several irreplaceable positives for your case. First, they typically know the judges and the local court system. They will understand how the court’s docket works and what types of arguments are appealing to a judge. Their firm will most likely have a relationship with the local judiciary, whether through Inns of Court or years of practice. If your opponent is an attorney in the locality, he or she will certainly have that knowledge and may have an advantage if you were not to hire local counsel. Second, local counsel can assist in navigating quirky local laws (e.g., “pocket filing” in Minnesota, designation of an attorney on the pleadings as an expert on fees or “due order of pleadings” in Texas.) The nuances are sometimes baffling and may ultimately torpedo your case if not understood or appreciated. Third, you have a place to land before hearings and during trial should you need to set up a war room. It is preferable to have access to printers, internet, computers, etc. in the venue at your fingertips, rather than hunting down the lone Kinko’s in a small berg in an unfamiliar place.

2. Timing?

Although it may be more costly initially, local counsel is necessary from the beginning of a case. And typically, the benefits will outweigh the costs. Someone who can file your pro hac vice application and who can vouch for you with the local bar will be a necessity from the inception of your engagement. You can, of course, manage local counsel to budget for fees and your client’s expectations. The best local counsel, however, can provide you forms for preparation of pleadings and motions, insight into the particular magistrate or judge, and comments on anything that will get filed in the case. They can help you select a good mediator for the case and/or understand when and how to start settlement negotiations with the other side. They can be the “good cop” to your “bad cop” or vice versa. They can accompany you to hearings and to trial. In short, good local counsel are part of a winning strategy, whether the matter ends up in trial or not.

X. CONCLUSION

In Part One of Dante’s *Divine Comedy*, Virgil accompanies Dante through the nine concentric circles of Hell, with each level of Hell visiting greater levels of pain and agony upon its occupants. And while trial preparation can feel like one of these levels on the way to Purgatory, good attorneys can plan and prepare in a way that eases or eliminates most or all of this pain. We don’t suggest trial preparation will ever be like Paradise, but with thoughtful planning, anticipation and nimble response to changing facts and circumstances, the experience can be both enjoyable and rewarding. For at the end of the day, a job well done, win or lose at trial, is what you need to demand of yourself, and the most a reasonable client can expect.
APPENDIX A
# Timeline of Events/Correspondence

<table>
<thead>
<tr>
<th>Date</th>
<th>Author/Source</th>
<th>Recipient(s)</th>
<th>Description of Correspondence or Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/15/2015</td>
<td></td>
<td></td>
<td>Initial meeting between Chet Restranteur, Garth Vador, and Gwen Reywal at Franchisor’s headquarters in An Antonio, Texas, to discuss Restranteur’s interest in becoming a franchisee.</td>
</tr>
<tr>
<td>1/1/2016</td>
<td></td>
<td></td>
<td>On behalf of the Franchisor and Franchisee entities, respectively, Cleo Franchini and Chet Restranteur execute Franchise Agreement #1.</td>
</tr>
<tr>
<td>1/1/2016</td>
<td></td>
<td></td>
<td>On behalf of the Franchisor and Franchisee entities, respectively, Cleo Franchini and Chet Restranteur execute Development Agreement whereby Franchisee agrees to develop five Franchise restaurants in five years.</td>
</tr>
<tr>
<td>1/1/2016</td>
<td>Chet Restranteur</td>
<td>Franchisor</td>
<td>Chet Restranteur executes Personal Gauranty, guaranteeing Franchisee’s performance under the Development Agreement and any present or future franchise agreements between Franchisee and Franchisor.</td>
</tr>
<tr>
<td>5/1/2016</td>
<td></td>
<td></td>
<td>On behalf of the Franchisor and Franchisee entities, respectively, Cleo Franchini and Chet Restranteur execute Franchise Agreement #2.</td>
</tr>
<tr>
<td>11/5/2016</td>
<td></td>
<td></td>
<td>Franchisee’s first restaurant opens in Miami, Florida.</td>
</tr>
<tr>
<td>4/15/2017</td>
<td></td>
<td></td>
<td>Franchisee’s second restaurant opens in Boca Raton, Florida.</td>
</tr>
<tr>
<td>10/27/2017</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Franchisee submits first proposal for third restaurant location to Franchisor.</td>
</tr>
<tr>
<td>1/15/2018</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Mark Devo sends Franchisee a letter denying Franchisee’s first proposal for its third restaurant location.</td>
</tr>
<tr>
<td>3/10/2018</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Franchisee submits second proposal for third restaurant location to Franchisor.</td>
</tr>
<tr>
<td>5/25/2018</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Mark Devo sends Franchisee a letter denying Franchisee’s second proposal for its third restaurant location.</td>
</tr>
<tr>
<td>6/20/2018</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Franchisee submits third proposal for third restaurant location to Franchisor.</td>
</tr>
<tr>
<td>8/1/2018</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Mark Devo sends Franchisee a letter denying Franchisee’s third proposal for its third restaurant location.</td>
</tr>
<tr>
<td>Date</td>
<td>Individual 1</td>
<td>Individual 2</td>
<td>Event Description</td>
</tr>
<tr>
<td>------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1/1/2019</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Deadline for Franchisee to open third restaurant under the Development Agreement.</td>
</tr>
<tr>
<td>1/2/2019</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Garth Vader mails notice of default to Franchisee and Chet Restranteur as Guarantor.</td>
</tr>
<tr>
<td>2/1/2019</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Beth La Ferme send letter to Gwen Reywal informing Gwen that Franchisee will immediately cease paying franchising fees required by FA #1 and FA #2.</td>
</tr>
<tr>
<td>2/7/2019</td>
<td>Franchisee</td>
<td>Franchisee</td>
<td>Franchisee ceases operation of its Boca Raton and Miami restaurants.</td>
</tr>
<tr>
<td>3/15/2019</td>
<td>Franchisee</td>
<td>Franchisee</td>
<td>Franchisee files current lawsuit in the Federal District Court for the Western District of Texas.</td>
</tr>
<tr>
<td>5/15/2019</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Rule 26(f) Conference</td>
</tr>
<tr>
<td>5/25/2019</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Franchisee serves its initial disclosure.</td>
</tr>
<tr>
<td>5/27/2019</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Franchisor serves its initial disclosure.</td>
</tr>
<tr>
<td>8/1/2019</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Franchisee serves its disclosure of expert testimony designating Skip Ledger as Franchisee’s expert on the issue of damages.</td>
</tr>
<tr>
<td>8/10/2019</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Franchisor discloses Dr. Bill Able as its damages expert, as well as Dr. Able’s written report.</td>
</tr>
<tr>
<td>8/25/2019</td>
<td>Franchisee</td>
<td>Franchisor</td>
<td>Beth La Ferme serves subpoenas for the depositions of Dr. Bill Able and Garth Vader.</td>
</tr>
<tr>
<td>9/1/2019</td>
<td>Franchisor</td>
<td>Franchisee</td>
<td>Franchisor serves subpoenas for depositions of Skip Ledger and Chet Restranteur.</td>
</tr>
</tbody>
</table>

**Individual**  
**Company/Position**

<table>
<thead>
<tr>
<th>Individual</th>
<th>Company/Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cleo Franchini</td>
<td>Franchisor / Chief Executive Officer</td>
</tr>
<tr>
<td>Mark Devo</td>
<td>Franchisor / Dir. of Market Development</td>
</tr>
<tr>
<td>Garth Vader</td>
<td>Franchisor / Dir. of Franchisee Relations</td>
</tr>
<tr>
<td>Gwen Reywal</td>
<td>Franchisor / General Counsel</td>
</tr>
<tr>
<td>Chet Restranteur</td>
<td>Franchisee / Chief Executive Officer</td>
</tr>
<tr>
<td>Beth La Ferme</td>
<td>Dewey Cheatum, PC / Franchisee Counsel</td>
</tr>
<tr>
<td>Dr. Bill Able</td>
<td>Damages, Inc. / Franchisor Damages Expert</td>
</tr>
<tr>
<td>Skip Ledger, CPA</td>
<td>Overdraft Consulting / Franchisee Damages Expert</td>
</tr>
</tbody>
</table>
Franchisee v. Franchisor

CASE MAP

FRANCHISEE’S CLAIMS

1. Breach of Contract – Material Breach by Franchisor

<table>
<thead>
<tr>
<th>Elements</th>
<th>Supporting Evidence</th>
<th>Franchisor’s Defenses</th>
<th>Witness</th>
<th>Comments/Other Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Existence of a valid contract;</td>
<td>- Franchise Agreements for Franchisor’s two existing restaurants (“FA”).</td>
<td>- Texas has a four-year statute of limitations and Franchisor’s alleged breach occurred in 2018, so Franchisee’s claim for breach is not time-barred.</td>
<td>- N/A</td>
<td>- The first FA (FA #1) and Development Agreement were both signed on January 1, 2016 (the “Effective Date”), and Franchisee opened its first restaurant on November 5, 2016. - The Development Agreement required Franchisee to open one new franchise restaurant by the anniversary of the Effective Date of the Development Agreement for five consecutive years (2017-2021)—for five total franchise restaurants opened by 1/1/2021.</td>
</tr>
</tbody>
</table>

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<tbody>
<tr>
<td>2. <strong>Performance or tendered performance by the plaintiff:</strong></td>
<td>- Franchisee argues that the $50,000 development fee it paid Franchisor under the Development Agreement, and Franchisee’s development of its second restaurant within the deadline prescribed by the Development Schedule in the Development Agreement, are evidence that Franchisee substantially performed.</td>
<td>- Given the poor finances of Franchisee’s existing restaurants at the time it was seeking approval for a third restaurant, Franchisor will argue that Franchisee intentionally selected unsuitable locations in hopes of pressuring Franchisor to renegotiate Development Agreement. - Franchisee’s intentional submission of flawed location proposals is a material breach of the Development Agreement which excused any alleged breach by the Franchisor.²</td>
<td>- Franchisor’s Director of Franchise Relations (testifying about prior material breach by Franchisee).</td>
<td>- Franchisee executed a second FA (FA #2), effective as of May 1, 2016, and opened its second restaurant on April 15, 2017. - Franchisee notes that it submitted proposed locations for a third restaurant on three separate occasions between October, 2017, and June, 2018, and that all three proposals were rejected by Franchisor. - Franchisee alleges that the Franchisor intentionally delayed issuing its rejections in order to delay the third restaurant indefinitely.</td>
</tr>
</tbody>
</table>

² *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (under Texas law, when one party to a contract commits a material breach, the other party is discharged or excused from further performance).
<table>
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</table>
| 3. Material breach by the defendant;         | - Franchisee claims Franchisor breached Development Agreement by rejecting Franchisee’s proposed restaurant locations without a valid business purpose.  
- § 15 of the Development Agreement required Franchisor to provide Franchisee with a written explanation for any rejection of a proposed location.  
- Franchisee argues that Franchisor’s written explanation for each rejection concealed an impermissible motive: that Franchisor rejected each location in an effort to protect territory for planned expansions of Franchisor-owned restaurants. | - The Development Agreement gave Franchisor sole discretion to withhold approval of franchise locations, in accordance with the process and procedure for site selection in the Franchisor’s confidential operations manual (incorporated by reference).  
- Franchisor denies any obligation to provide a reason that approval of a proposed franchise location is withheld.  
- Alternatively, Contemporaneous market studies indicated that each location was unlikely to generate sufficient revenue due to a low residential population density in the surrounding neighborhoods. | - The CEO of the Franchisee LLC will likely testify about delays caused by Franchisor’s rejections of Franchisee’s proposed locations.  
- Franchisor’s Director of Market Development will testify to the criteria Franchisor considers when evaluating a proposed location. | - The Franchise Disclosure Document (FDD) is not incorporated into the FA or Development Agreement by reference, but the Franchisee will likely reference statistics in the FDD regarding growth of system franchises in other cities to argue that Franchisor unreasonably withheld approval of the new location. |
<table>
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<tbody>
<tr>
<td>4. Damages sustained by the plaintiff as a result of the breach.</td>
<td>- Franchisee is suing to recover damages for (i) the development fee Franchisee paid; (ii) Franchisee’s investments in the development of the proposed restaurant; (iii) lost profits for Franchisee’s existing restaurants, from the date of Franchisor’s alleged breach to the expiration of each restaurant’s FA on January 1, 2025.</td>
<td>- (i) the Development Agreement states expressly that the development fee is for the right to develop additional restaurants, and does not guarantee development; (ii) the Development Agreement states expressly that the development fee is, without exception, nonrefundable; (iii) Franchisee assumed the risk of loss by investing in a restaurant prior to the location approval; (iv) the Franchisee is only entitled to actual damages under the FA and Development Agreement; (v) regardless, given the poor track record of Franchisee’s two restaurants to date, they are unlikely to ever make a profit.</td>
<td>- Both sides will use expert witnesses to dispute damages, particularly regarding lost profits.</td>
<td>- N/A</td>
</tr>
</tbody>
</table>
## 2. Fraudulent Inducement

| Elements                      | Supporting Evidence                                                                                                                                                                                                 | Franchisor’s Defenses                                                                                                                                                                                                 | Witness                                                                 | Comments/Other Issues                                                                                     |
|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|
| 1. A material misrepresentation; | - Franchisee’s petition cites portions of the 2015 and 2016 FDDs estimating the initial investment needed to open a restaurant and financial performance representations of established franchise restaurants.  
- Franchisee alleges that its actual investment in its first restaurant was 45% higher than the highest estimate in the estimated range in the 2015 FDD, and that its operating expenses consistently exceeded estimates in the FDD. | - The figures in the 2015 and 2016 FDDs accurately report the development and operating costs experienced by actual franchise units; there is no actual misrepresentation.                                                                                           | - Franchisee CEO.  
- Franchisor Director of Market Development.                                                                                                                  | - Need to determine if Franchisee CEO or employees spoke to any established franchisees prior to signing the Development Agreement or FA #1.                                                                                       |

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3 See Anderson v. Durant, 550 S.W.3d 605, 614 (Tex. 2018) (reciting the elements of fraudulent inducement under Texas law).
<table>
<thead>
<tr>
<th>Elements</th>
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<th>Witness</th>
<th>Comments/Other Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Made with knowledge of its falsity or asserted without knowledge of its truth;</td>
<td>- Franchisee’s petition alleges, on information and belief, that Franchisor knew or should have known that the franchise restaurants described in the 2015 and 2016 FDDs were not representative of the costs that Franchisee would experience in Franchisee’s proposed market.</td>
<td>- The FDDs each noted that costs could vary depending on the location, design, configuration, and condition of the premises selected for a franchise unit location.</td>
<td>- Franchisee CEO?</td>
<td>- Need to review prior litigation to determine if Franchisor has litigated similar claims from other franchisees; Franchisee may seek to pull witnesses from earlier cases.</td>
</tr>
<tr>
<td>3. Made with the intention that it should be acted on by the other party;</td>
<td>- Franchisee’s petition alleges that Franchisor declined to inform Franchisee that Franchisee’s initial investment would almost certainly be higher—and its profit margins lower—than then-established franchise restaurants in order to entice Franchisee to agree to purchase the rights to develop five franchise units in five years.</td>
<td>- The FDDs contain express language that estimates of development costs, operating expenses, and revenues will vary depending on the management skill, experience, business acumen, local economic conditions, labor costs, real estate costs, and competition of individual franchisees and franchise unit locations.</td>
<td>- Franchisee CEO?</td>
<td>- N/A</td>
</tr>
<tr>
<td>Elements</td>
<td>Supporting Evidence</td>
<td>Franchisor’s Defenses</td>
<td>Witness</td>
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</tr>
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</tr>
<tr>
<td>4. Which the other party relied on;</td>
<td>- But for Franchisor’s alleged material misrepresentations regarding per-unit franchise finances, Franchisee would never have signed FA #1 or the Development Agreement requiring Franchisee to develop five restaurants in five years.</td>
<td>- Merger clause in Development Agreement, FA #1, and FA #2. - Entire Agreement clause in Development Agreement and both FAs.</td>
<td>Franchisee CEO</td>
<td>N/A</td>
</tr>
<tr>
<td>5. And which caused injury.</td>
<td>- Franchisee has allegedly expended over $600,000 in initial investments, fees, and operating expenses to open and operate two restaurant franchises and attempt to develop a third restaurant location.</td>
<td>- Some or all of the Franchisee’s losses can be attributed to the Franchisee’s own business decision; poor location selection, design choices, and cost management rendered the first two restaurants unprofitable from the beginning. - The Franchisee failed to mitigate damages once timely development of the third restaurant became impossible.</td>
<td>Damages experts for both sides.</td>
<td>May want to consider hiring additional expert with experience in small business ownership or management—ideally restaurant franchises.</td>
</tr>
</tbody>
</table>
# Franchisor’s Affirmative Defenses

<table>
<thead>
<tr>
<th>Affirmative Defense</th>
<th>Supporting Evidence</th>
<th>Supporting Law</th>
<th>Franchisee’s Arguments</th>
<th>Comments/Other Issues</th>
</tr>
</thead>
</table>
| 1. Franchisee’s Own Negligence | - Both restaurants that Franchisee developed have been operating at a loss since their opening. | - *Stewart Title Guarantee Co. vs. Sterling*, 822 S.W.2d 1 (Tex. 1991).  
- *First Title Co. of Waco vs. Garrett*, 860 S.W.2d 74 (Tex. 1993). | - Franchisee’s restaurants struggled due to lack of support from Franchisor. | - N/A |
| 2. Failure to Mitigate Damages | - Franchisee knew for months that it would not meet the conditions of the Development Agreement and should have ceased investing in the third restaurant sooner. | - *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995).  
- *Walker v. Salt Flat Water Co.*, 128 Tex. 140, 96 S.W.2d 231, 232 (1936). | - Most of Franchisee’s investments in the third restaurant were for market research and design plans that occurred months before breach was even anticipated, let alone inevitable. | - Franchisee invested tens of thousands of dollars designing the third restaurant before Franchisor had approved a location. |
<table>
<thead>
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</tr>
</thead>
<tbody>
<tr>
<td>3. Failure to Prove Damages</td>
<td>- Damages impermissibly remote and speculative because Franchisee unable to show with reasonable certainty that results would have improved if Franchisor had acted differently.</td>
<td>- <em>Phillips v. Carlton Energy Group, LLC</em>, 475 S.W.3d 265 (Tex. 2015) (lost profits must be proved with reasonable certainty). - More legal research required.</td>
<td>- The amounts that Franchisee invested in developing all three restaurants are easily proven by Franchisee’s financial records. - Franchisee will prove lost profit based on projections of future revenue by expert.</td>
<td>- Franchisee’s damages expert failed to separate damages attributable to the various allegations against Franchisor in expert report. - Franchisor’s damages expert will opine about the lack of any damages attributable to the Franchisor’s conduct.</td>
</tr>
</tbody>
</table>

**FRANCHISOR’S COUNTERCLAIMS**

1. **Breach of Contract**

<table>
<thead>
<tr>
<th>Elements</th>
<th>Supporting Evidence</th>
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<th>Witness</th>
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</tr>
</thead>
<tbody>
<tr>
<td>1. Existence of a valid contract;</td>
<td>- Franchise Agreement (“FA”) - Development Agreement - Personal Guaranty by sole member of Franchisee entity.</td>
<td>- The Franchisee will likely rely on language in the Franchise Disclosure Document (“FDD”) to try to alter the terms of the Franchise Agreement and Development Agreement.</td>
<td>- Guarantor.</td>
<td>- The cross-default provision in the FA includes default under the Development Agreement. - The merger clause in the Franchise Agreement prevents the use of the FDD by Franchisee to vary the terms.</td>
</tr>
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<td>2. Performance or tendered performance by the plaintiff;</td>
<td>- It is undisputed that Franchisor sent timely notice of default and Franchisee failed to cure within the 30 days required by the Development Agreement.&lt;br&gt;- At no point prior to its default did Franchisee allege that Franchisor breached the FAs or Development Agreement.</td>
<td>- Franchisor sent timely notice of default but did not send notice of termination after Franchisee failed to cure; Franchisee will argue that notice of termination was required by the Development Agreement.&lt;br&gt;- Franchisee will argue that Franchisor breached the Development Agreement by failing to approve a third location.</td>
<td>- Franchisee CEO.&lt;br&gt;- Franchisor’s Market Development Director?&lt;br&gt;- Franchisor’s Director of Franchise Relations?</td>
<td>- The notice of default gave notice of intent to terminate if Franchisee failed to cure within 30 days.</td>
</tr>
<tr>
<td>3. Material breach by the defendant;</td>
<td>- Franchisor sent timely notice of default and Franchisee failed to cure within the 30 days required by the Development Agreement.&lt;br&gt;- Under the cross-default provision in the FA, Franchisee is in default of its obligations under both the Development Agreement and FA.</td>
<td>- Franchisee will argue that Franchisor’s alleged material breach of the Development Agreement discharged Franchisee from performing under the Development Agreement or FAs.</td>
<td>- Franchisor’s Market Development Director?</td>
<td>N/A</td>
</tr>
</tbody>
</table>
### 4. Damages sustained by the plaintiff as a result of the breach.

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<td>- Franchisor is a party to the FAs and Development Agreement.</td>
<td>- Possible defense of unjust enrichment or promissory estoppel. - Damages limited to actual damages by contracts, and future franchise royalties or other fees are too speculative.</td>
<td>- Damages expert.</td>
<td></td>
<td>- Franchisor seeks unpaid fees, liquidated damages, interest, costs, and attorneys’ fees incurred in enforcing Franchisor’s rights under the FA and Development Agreement.</td>
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</tbody>
</table>

### 2. Breach of Guaranty – Against Guarantor Only

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<td>- Guaranty (guarantor is jointly and severally liable for injury caused by Franchisee’s breach of the development agreement).</td>
<td>- Franchisor first breached the FA, invalidating the guaranty that is based on the FA and other Franchisor promises, so the Guaranty is no longer a valid and enforceable contract.</td>
<td>- Same as Franchisor’s claim for breach against Franchisee.</td>
<td></td>
<td>- N/A</td>
</tr>
</tbody>
</table>

- N/A
### FRANCHISEE and GUARANTOR’s AFFIRMATIVE DEFENSES

<table>
<thead>
<tr>
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<tr>
<td>1. Counterclaims barred by Franchisor’s prior material breaches of the Development Agreement</td>
<td>- Franchisee argues that non-performance under development schedule in the Development Agreement is excused by Franchisor’s prior material breach in failing to approve Franchisee’s choice of restaurant location.</td>
<td>- See Mustang Pipeline Co., 134 S.W.3d at 196.</td>
<td>- Franchisor did not breach the Development Agreement – had no obligation to approve selected location. - Even if Franchisor did breach the Development Agreement, Franchisee still obligated to pay fees due under FAs.</td>
<td>N/A</td>
</tr>
<tr>
<td>2. Frustration of Purpose</td>
<td>- Franchisor knew performance under the Development Agreement was impossible due to changes in the market; five restaurants could not feasibly be operated successfully.</td>
<td>- Equitable doctrine that relieves a party of its contractual obligation if an event occurs that frustrates the purpose of the contract and the event was unforeseeable.</td>
<td>- Franchisee’s own actions caused its restaurants to lose money—not unforeseeable. - Franchisee was responsible for selecting a viable location for its third restaurant and picked poor locations.</td>
<td>N/A</td>
</tr>
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<tr>
<td>3. Equitable Estoppel</td>
<td>- Franchisor knowingly misled Franchisee with false representations in the FDDs and induced Franchisee to sign the Development Agreement and FAs in reliance on false information; therefore, Franchisor is estopped from suing for breach of the agreements.</td>
<td>- <em>Gulbenkian v. Penn</em>, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952) (describing elements of estoppel in pais).</td>
<td>- There was no false representation or concealment of material facts in the FDDs or elsewhere; Franchisee is solely responsible for its breach of the Development Agreement and FAs.</td>
<td>- N/A</td>
</tr>
</tbody>
</table>
The Parties

**Duty Free JV**
ABC Duty Free JV, which includes partners ABC, LMNO, QRS and ACME

**ABC**
The manager of the ABC JV

**Starlight**
Starlight Quality Foods, LLC, the general partner of LMNO

**QRS**
QRS Limited Partnership, a joint venture partner managed by Darth Vader

**DEF**
DEF Corporation, an affiliate of ABC, a joint venture partner

**LMNO**
Let’s Make No Other, LP, a joint venture partner owned by Jill, Judy, and Jamie Jones, and QRS

**ACME**
Acme Enterprises Limited Partnership, a joint venture partner owned by John and Judy Smith
Common Acronyms

**DAL**
Dallas Love Field Airport

**NCTRCA**
North Central Texas Regional Certification Agency

**TRIP**
Terminal Renewal and Improvement Program

**ACDBE**
Airport Concessionaire Disadvantaged Business Enterprise

**DBE/MBE**
Disadvantaged Business Enterprise/Minority Business Enterprise
DEBORAH S. COLDWELL

Deborah S. Coldwell is a partner in the Dallas office of Haynes and Boone, LLP. She is a Past Chair of the American Bar Association Forum on Franchising. She served as editor in chief of the Franchise Law Journal (2006 – 2009) and was the Forum’s Publications Officer (2009 – 2013). Deb also serves as the practice group co-chair for Haynes and Boone’s Franchise Practice Group and as co-chair of the Firm’s Sports Law Practice Group.

Deb represents franchisors, distributors, joint ventures, limited liability companies, partnerships and the individuals who run those companies in jury trials, bench trials and arbitrations. She has litigated across several industries – from hotels and restaurants to health clubs and tax preparation services to product and service-based franchise and distribution networks.


Deb is ranked nationally in Chambers USA as a franchise litigator. She has also been listed in the International Who’s Who of Franchise Lawyers and as one of the top franchise lawyers in the U.S. by Franchise Times. Deb has been recognized by her peers as a Texas Super Lawyer in Texas Monthly and as one of the top lawyers in franchise and distribution law in Dallas, Texas in D Magazine. Education: J.D., The University of Texas School of Law; M.A.T., The Colorado College; B.A., Colorado State University.
RONALD K. GARDNER, JR.

Ronald K. Gardner is the Managing Partner of the firm of Dady & Gardner, P.A., and limits his practice to the representation of franchisees, franchisee associations, dealers and distributors, focusing most frequently on his clients’ disputes with their franchisors, manufacturers and suppliers. Dady & Gardner, P.A. has an international reputation for helping their franchisee, association, dealer and distributor clients to resolve their disputes through negotiation, mediation, and when necessary, litigation and arbitration.

Ron is a member of the American, Minnesota, Hennepin County and Rice County Bar Associations, an active member of the ABA Forum on Franchising, and a Past Chair of the Forum (the first “franchisee lawyer” to be elected Chair). Ron is also a member of the North American Securities Administrator Association Franchise Project Advisory Group, which helps to promulgate franchise regulations and train state franchise regulators in the nuances of franchise law.

Ron is an author and a highly sought-after lecturer on topics related to franchise/distribution law. He is listed as a Best Lawyer in America, has been named one of Minnesota’s Top 100 Super Lawyers for six times, and has been recognized by Chambers USA as “the premier franchisee lawyer” in America. He was recognized as “Franchise Lawyer of the Year” in Minnesota by Best Lawyers for 2015, and recently honored with the same accolade for 2019.