It was wonderful seeing so many of you at the 39th Forum on Franchising in Miami, Florida, which I am pleased to say was 841 attendees strong. I would like to thank program co-chairs Chris Bussert and David Oppenheim for their hard work and dedication on producing the Annual Meeting, which, along with our speakers, made the Annual Meeting the success that it was. I know that the Forum’s 2017 program co-chairs, Ron Coleman and Dawn Newton look forward to beating that attendance number at the 40th Forum on Franchising, which will be held in Palm Desert, California at the JW Marriott on October 18-20, 2017.

For those of you who were not present at the Annual Meeting, you missed the launch of the Forum on Franchising’s Law Library. The Law Library currently contains content for the last five years from The Franchise Law Journal, The Franchise Lawyer and Forum workshops at the Annual Meeting. You will find using the Law Library as easy as conducting a Google® search. We will continue to add content to the Law Library so that we ultimately will have the past ten years of Forum content on the Law Library. You may access the Law Library through this link: http://www.americanbar.org/directories/forum_on_franchising.html. You may also access the Law Library through the Forum’s evergreen app, available through your app store. Once again, I would like to thank Ron Coleman, the Forum’s Webmaster, for his leadership in bringing this project to fruition, and Jared Miller and Zac LeVasseur of the law firm of Parker Hudson for taking the lead on indexing articles.

In addition to the launch of the Law Library, as is our tradition, we held the Forum’s annual award ceremony. This year’s award winners are:

- The Future Leader Award: Antonia K. Sholtz, Cheng Cohen;
- The Chair’s Award for Substantial Written

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Karen Satterlee, Hilton Hotels

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On January 11, 2017, the United States District Court for the Western District of Wisconsin granted a franchisor’s motion for summary judgment in Pope v. Espeseth, Inc., No. 3:15-cv-00486-jdp, 2017 WL 108081, a case where a window cleaning franchisee’s former employees claimed they were jointly employed by the franchisor and franchisee for purposes of the Fair Labor Standards Act (“FLSA”) and Wisconsin state wage and hour laws.

Plaintiffs filed a proposed collective and class action alleging that their former employer, a Wisconsin franchisee, used a commission-based compensation method that failed to pay them minimum wage and overtime pay, in violation of the FLSA and Wisconsin state wage and hour laws. Plaintiffs originally filed suit against the franchisee and its owner, and later added franchisor Fish Window Cleaning Services, Inc. (“Fish”), claiming that Fish and the franchisee jointly employed plaintiffs, as well as the employees of other franchisees around the country. Plaintiffs sought to conditionally certify a nationwide FLSA collective action of window cleaners allegedly jointly employed by Fish and all of its franchisees.

Fish had several facts in its favor. Plaintiffs conceded that Fish did not have the power to hire or fire the franchisee’s employees and that it did not maintain employment records. Plaintiffs consistently received paychecks and tax forms issued by the franchisee stating that the franchisee was “d/b/a Fish Window Cleaning.” The franchise agreement contained multiple provisions related to the franchisee as an independent business with exclusive control over and responsibility for employment matters. For example, the agreement provided that:

- The franchisee is an independent business . . . solely responsible for control and management . . . including such matters as hiring and discharging [its] employees”;
- Fish has “no power, responsibility or liability in respect to employees’ relations issues including hiring, discharge and discipline, and related matters”;
- No franchisee employees would be deemed an employee of Fish; and
- the franchisee would set and pay its employees’ wages, commissions and incentives” with no liability on Fish.

On the other hand, the franchise agreement also required the franchisee to “hire and supervise efficient, competent and courteous persons,” to require them to wear clean uniforms approved by Fish, and to require them to execute a non-disclosure and confidentiality agreement.

Plaintiffs contended that Fish supervised and controlled the franchisee’s employees sufficient to be deemed a joint employer primarily through two means. First, plaintiffs contended that Fish exercised control over franchisee employees through a template policy and procedure manual that Fish provided to its franchisees. Second, Plaintiffs contended that Fish controlled conditions of employment for franchisee employees through recommendations it made to franchisees for methods of compensating the window cleaners.

The Court rejected both theories, for the reasons set forth below.

The Court reasoned that under the FLSA, a joint employer relationship exists when each alleged employer exercises control over the working conditions of the employee, citing Moldenhauer v. Tazwell-Pekin Consol. Commc’ns Ctr., 536 F.3d 640, 644 (7th Cir. 2008). Applying Moldenhauer, the Court considered multiple factors in assessing whether Fish exercised control over plaintiffs’ working conditions, including whether Fish (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of payment; (3) determined the rate and method of payment; and (4) maintained employment records.

The Court first noted that plaintiffs had
conceded that Fish did not have the power to hire and fire franchisee’s employees and did not maintain employment records for the franchisee’s employees, thereby eliminating the first and fourth factors from consideration.

The Court then turned to plaintiffs’ contention that Fish exercised control over work schedules through a policy and procedure manual provided to franchisees. Plaintiffs relied on language in the manual requiring employees to report for work at a specific time during a training period and three days a week thereafter. The Court noted that there was evidence in the record that the franchisee believed that he was required to provide his employees with a copy of the manual and have them sign off on it, but held that these facts were not sufficient to create an issue of fact on joint employment, because the undisputed evidence in the record also demonstrated that the franchisee was not required to follow the manual as drafted by Fish and, in fact, modified the manual as he wished. For example, the franchisee modified the report time recommended by the manual, eliminated a requirement in the manual that employees pay for items in their work uniforms, and did not follow a recommendation that franchisees not schedule weekend work. Thus, construing the evidence in the light most favorable to plaintiffs, the Court found that plaintiffs had failed to adduce evidence that Fish controlled franchisee employee work schedules.

Plaintiffs next contended that Fish determined rates and methods of pay through making recommendations to franchisees for compensation programs for their employees. Specifically, plaintiffs pointed to a series of documents made available to franchisees by Fish— which Fish required franchisees to review in training— recommending that franchisees pay window cleaners a commission of thirty percent of the revenue generated by the window cleaner in cleaning glass. Plaintiffs also pointed out that Fish suggested in training materials that franchisees who failed to follow the compensation method would not be successful. The Court rejected the argument that these documents created an issue of fact on joint employer liability. The Court held that although the franchisee had implemented a commission-based compensation method, it did so with modifications from the recommendation. For example, the franchisee paid commission rates that differed from Fish’s recommended rate and paid window cleaners a per diem rate that was not recommended by the franchisor. Accordingly, the Court concluded that the compensation method was only recommended—not required. The Court held that a “recommendation regarding the method of employee compensation does not, on its own, amount to control over employees’ working conditions.” The “minimal control” that Fish had over franchisee employees was insufficient as a matter of law for a jury to make a reasoned finding that Fish exercised control over plaintiffs’ working conditions. Accordingly, the Court granted the franchisor’s motion for summary judgment under the FLSA.

Plaintiffs also alleged that Fish was their employer under Wisconsin law. To prevail on the state law minimum wage claims, plaintiffs were required to show that Fish had “control or direction of any person employed at any labor or [was] responsible directly or indirectly for the wages of another.” Wis. Stat. § 104.01(3) (a). To prevail on the overtime and straight time pay claims, plaintiffs were required to show that Fish was “engaged in any activity, enterprise or business employing one or more persons within the state.” Wis. Stat. § 109.01(2). The court noted the similarity of the definitions to the FLSA’s definition, and found that the same evidence that doomed plaintiffs’ FLSA claim likewise precluded a finding that Fish was an employer under state law. The court further declined plaintiffs’ invitation to import the test for respondeat superior liability or the test for independent contractor status to override the statutory definitions of employers, and dismissed plaintiffs’ claims against Fish.

The Court also rejected Plaintiffs’ motion for leave to amend their complaint to add an apparent agency theory of liability against Fish because the deadline to amend had long since passed and Plaintiffs had unduly delayed seeking the amendment.

The franchise community will continue to watch the joint employer issue with great interest in 2017 and beyond, in light of caselaw like Fish, as well as the new administration of President Donald Trump including the anticipated appointment of Andrew Puzder (chief executive of CKE Restaurants, the parent company of Hardee’s and Carl’s Jr) as United States Secretary of Labor.

Note: Heather Perkins of Faegre Baker Daniels, LLP (the Editor in Chief of The Franchise Lawyer) was lead counsel for the franchisor in this matter.
For those of us who draft and update Franchise Disclosure Documents ("FDDs"), franchise renewal season is upon us. If your practice is like mine, you will spend much of February, March and April, updating Franchise Disclosure Documents, and if you are lucky, a couple days before the filing is due, you will receive the audit. Many attorneys will then hand the audit to their staff to be included in the FDD, without ever reading it. That is a mistake!

It is important that you, as the franchisor’s attorney, review your client’s audited financial statements, hopefully before they are finalized. Failure to do so will often result in a mistake in the financial statements, or a mistake in the FDD, either of which can lead to significant liability for your client.

While it certainly helps to have knowledge of accounting principles when reviewing the audit, many problems can be identified by simply reading the Notes that appear at the end of the financial statements. This issue can best be explained by examples. Each of these is a real life example taken from a presentation made by Ron Gardner and Eric Karp to state franchise examiners at a November 2015 NASAA Examiner Training:

• The franchisor provides in Item 8 that franchisees are not required to buy supplies from any designated suppliers. The Notes to the financial statements state: “The supplier will pay [the franchisor] the sum of $650,000.... In return, [the franchisor] agrees that each franchised store will purchase [the designated supplies] from supplier for its operations.”

• Item 8 of the FDD states that the franchisor receives no payments from any supplier, but the Notes to the financial statements provide that in the last fiscal year, the franchisor received more than $500,000 in rebates from suppliers.

• Item 11 of the FDD states that any contributions to the advertising fund that are not spent in the fiscal year in which they accrue will remain in the fund for use in future years. The Notes to the financial statements state: “The Company is required to expend on advertising all monies contributed by franchisees or return the excess to them on a prorated basis.”

• The FDD discloses in Items 1 and 20 the number of franchise outlets open as of the end of the last fiscal year, while the Notes to financial statements contain the same disclosure, using a different number.

In some cases, there is not a discrepancy between the FDD and the financial statements, but rather, the financial statements will purport to impose obligations upon the franchisor that were never anticipated by the attorney who prepared the franchise agreement - or by their client. In a draft of financial statements provided to me by a client, I found a Note stating that the franchisor held advertising contributions in trust for franchisees. The franchise agreement imposed no such obligation, and certainly no trust or fiduciary obligation was intended by the franchisor. That same set of financial statements also listed the services provided to franchisees by the franchisor, many of which were not listed either in the franchise agreement or in Item 11 of the FDD. Upon consultation with the client, I learned that at least one stated service was not routinely provided. If I had not reviewed the financial statements, I would never have learned of these mistakes — until a franchisee’s attorney brought them to my client’s attention, claiming reliance on the “representations” contained in the financial statements.

If you do have knowledge of basic accounting principles, you should review the balance sheet to anticipate an impound or fee deferral requirement that might be imposed by state franchise examiners when there is a low or negative net worth or a low or negative “current
Virtually every seasoned litigator has his or her favorite story about something that happened during a deposition. The stories often involve outrageous conduct on the part of an adversary (or marginal, but still acceptable, conduct on the part of the storyteller that somehow saved the day). However, over the past decade or so, stories of this type have become fewer as courts have treated attorneys that engage in disruptive conduct during depositions with increased scrutiny and have more frequently awarded sanctions against them.

In 1993, Federal Rule of Civil Procedure 30(d)(2) was amended to add the following language:

Sanctions. The court may impose an appropriate sanction—including the reasonable expense and attorney’s fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

Although it took about a decade to gain traction, the number of motions for sanctions filed pursuant to F.R.C.P. 30(d)(2) have increased considerably over the years. This makes knowing what is acceptable conduct when defending a deposition, and what is unacceptable conduct, all the more important. Unfortunately, the lines sometimes can be quite fuzzy and can vary considerably from jurisdiction to jurisdiction. This article attempts to highlight some of the areas where litigators need to exercise particular caution.
when defending depositions.

**Make sure you know what kind of objections are permitted**

How much is an attorney defending a deposition allowed to object and what kinds of objections are permissible? F.R.C.P. 30(c)(2) states that:

> An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

So speaking objections are not allowed and objections that suggest a preferred response to the witness also are forbidden (as your adversary will, no doubt, remind you if you inadvertently forget). Objections to the “form” of the question are permissible. Unfortunately, this can mean different things in different jurisdictions. For example, in Security Nat. Bank of Sioux City v Abbott Lab., 299 F.R.D. 595 (N.D. Iowa 2014), rev. on other grounds, 800 F.3d (8th Cir. 2015), the Court observed:

> … ‘form’ objections refer to a category of objections, which includes objections to leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question and witness’ answers that were beyond the scope of the question. … [L]awyers are required, not just permitted to state the basis of their objections. … I recognize, however, … some courts explicitly require lawyers to state nothing more than unspecified ‘form’ objections during depositions. (Emphasis in original).

Be careful about discussions with your client during deposition breaks

What are you permitted to discuss with your client during a break in a deposition? Unfortunately, this is another area where different practices exist in different jurisdictions. For example, in Hall v. Clifton Precision, 150 FRD. 525 (E.D. Pa. 1993), the Court stated:

> I hold that a lawyer and client do not have an absolute right to confer during the course of the client’s deposition. … Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. … I hold that conferences between witness and lawyer are prohibited both during the deposition and during recess. … [However,] a private conference is permissible if the purpose of the conference is to decide whether to assert a privilege …

Like objections, the rules for what you can or cannot discuss with your client during a deposition break can be very different in different jurisdictions.

research the issue in advance or seek the advice of local counsel. Do not assume that the way you do it in your home jurisdiction is followed everywhere else.
This court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret a question or documents, or attempt to help rehabilitate the client fulfilling an attorney’s ethical duty to prepare a witness. … This Court disagrees with the contention that any conference counsel may have with the deponent during a deposition waives the claim of privilege as to the communications between client and counsel during any conference or other break in a deposition.

Indeed, sometimes the rule regarding whether you can confer with your client during a break can vary considerably even within the same geographic region. Compare District of South Carolina Local Rule 30.04(E):

Counsel and witnesses shall not engage in private ‘off the record’ conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

With Middle District of North Carolina Local Rule 30.1(3):

… Counsel may confer with their clients during mid-morning, lunch, mid-afternoon, or overnight breaks in the deposition. However, counsel for a deponent may not request such a break while a question is pending or while there continues a line of questioning that may be completed within a reasonable time preceding such scheduled breaks.

The takeaway is that, like objections, the rules for what you can or cannot discuss with your client during a deposition break can be very different in different jurisdictions. Do not assume that the practice you follow in your home jurisdiction is the way that every jurisdiction does it. When in an unfamiliar jurisdiction, research the issue or seek the advice of local counsel. Otherwise, you could find yourself in the embarrassing situation of having what you believed was an attorney-client privileged communication become part of the deposition record in your case.

Don’t be a jerk
It goes without saying (but I’ll say it anyway): depositions can be very combative environments where the stakes are high, but that doesn’t excuse improper behavior. For example, during a deposition in Claypole v. County of Monterey, 2016 WL 1455557 (N.D. Cal. 2016) things got a little heated and one attorney (a man) said to the other attorney: “[D]on’t raise your voice at me. It’s not becoming of a woman …”. After reviewing the deposition transcript, the court granted a motion for sanctions and observed:

When an attorney makes these kinds of comments, ‘it reflects not only on the attorney’s lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.’ In addition, in August 2016, the ABA House of Delegates amended Model Rule of Professional Conduct 8.4(g) which now provides that it is unethical to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. …

So now, not only is it good sense to avoid making sexist or disparaging remarks about your adversary, you may be ethically obligated not to do so.

Conclusion
Litigators need to be cognizant of the fact that the idiosyncrasies of deposition practice vary considerably from jurisdiction to jurisdiction, and prepare accordingly. Before defending a deposition in an unfamiliar jurisdiction an attorney needs to research or obtain guidance regarding local “deposition rules.” In addition, even when things get adversarial, litigators need to conduct themselves in depositions as if the judge were in the room. A litigator who fails to adopt these simple concepts into deposition preparation and practice potentially exposes himself or herself to sanctions under F.R.C.P 30(d)(2). ■
All Fun and Games Until Someone Wants You to Buy Them a Harrier Jump Jet: The Risk and Reward of Loyalty Programs

By A. Christopher Young and Katherine B. Puccio, Pepper Hamilton, LLP

Businesses commonly create loyalty programs to incentivize repeat customers and to attract new ones. Loyalty programs entice consumers to purchase a business’ products or services in exchange for such things as frequent flyer miles, cash back rewards, hotel stays, or rewards points. Loyalty programs can be an effective way of capturing repeat business; however, if not established and operated properly, they also can give rise to unwanted liability. In a franchise network, issues can arise in the context of consumer expectations, franchisee relations, and federal and state regulations.

Consumer Issues
Loyalty programs can inadvertently create contractual obligations with consumers. Courts typically treat loyalty programs like unilateral contracts: the program sponsor presents an offer of terms and conditions that the consumer(s) can accept by performance. Entering into unilateral contracts with thousands, if not millions, of consumers can become very problematic. For instance, loyalty program sponsors are commonly the targets of class actions involving contract breach, fraud and unfair competition, among other theories of liability.

To ensure loyalty programs generate sales growth and good will and not litigation, practitioners must understand that advertising content can supply the terms and conditions of the offer to the consumer to enter into the unilateral contract. In analyzing loyalty programs, courts have rejected the general rule that advertisements do not constitute offers. Therefore, companies should advertise the program consistent with the stated terms and conditions in all advertisements.

Just recently, in Kearney v. Equilon Enters., LLC, No. 3:14-cv-00254-HZ (D. Or. filed Apr. 29, 2016), Shell Oil agreed to settle class action consumer fraud claims arising out of its “Ski Free” Program for $2.2 million because its advertisements were allegedly inconsistent with the program’s terms and conditions. Shell’s ads promised free ski-lift tickets for buying 10 gallons of Shell gasoline; however, the official terms and conditions offered a free ticket only when the participant purchased a ticket, i.e., “buy-one-get-one-free.” In refusing to dismiss the putative consumer class action based on breach of contract, an Oregon federal court explained that advertisements are generally not understood as offers to sell, but there is an exception for reward offers. The court noted that a consumer could reasonably understand the “Ski Free” promotion to mean that a free lift ticket was the reward for purchasing fuel and not a buy-one-get-one-free promotion.

At the same time, an offer has to be serious to constitute an enforceable contract. In a notorious case, Pepsi advertised a rewards program in which consumers could accumulate points by purchasing Pepsi products and could
exchange the points for certain luxury items. A television commercial included a scene where a teenager arrived at his high school in a Harrier Jump Jet, a fighter aircraft used by the U.S. Marines. The advertisement’s subtitle revealed that the jet cost seven million rewards points. A high school student and some creative friends tendered enough rewards points to purchase the jet, but Pepsi refused to supply the item, arguing that the jet was not part of the promotion. After protracted litigation, the U.S. Court of Appeals for the Second Circuit affirmed summary judgment for Pepsi, agreeing with the district court’s conclusions that this particular advertisement was not a contract or offer to sell and that no reasonable person could think a serious offer was intended. See Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999), aff’d, Leonard v. Pepsico, Inc., 210 F.3d 88, 118-19 (2d Cir. 2000).

For programs that require registration, like frequent flyer programs, it is equally important to reserve explicitly the right to change or alter program terms and conditions or to cancel the program outright. Courts have frequently upheld provisions in loyalty program terms and conditions that allow the program sponsors to cancel, change, or otherwise alter the programs. For example, courts have found in favor of both Delta and United Airlines in breach of contract actions where unhappy consumers alleged that frequent flyer program rules were changed improperly. See Kwok v. Delta Air Lines, Inc., 578 Fed. App’x 898 (11th Cir. 2014); Gordon v. United Cont’l Holding, Inc., 73 F. Supp. 3d 472, 474 (D.N.J. 2014). In United’s case, the court noted that the terms of the program permitted United to make unilateral changes to the program rules. The plaintiff in the Delta case similarly could not demonstrate that Delta’s change in how mileage awards were allocated violated the program rules, despite the fact that the rules themselves were ambiguous. Alaska Airlines also won a case in which the court noted that the plain language of the program permitted changes to the program and that it was reasonable for these changes to apply retroactively. See Monzingo v. Alaska Air Group, Inc., 112 P.3d 655 (Alaska 2005).

**Franchise Issues**

A loyalty program may also impact a franchise network. When a franchisor sponsors a loyalty program, its franchisees are often crucial to the program’s success because they interact with customers on a daily basis and generally have primary responsibility for promoting the program. And, just as franchise systems depend on uniform product and service offerings, a uniform loyalty program in which all retail outlets participate is essential to its success. Franchisees want to participate in programs that generate more business, but they do not want to bear all of the costs or pay for the program’s administration.

Key questions to ask include:

- What protection does the franchise agreement afford the franchisee?
- Can franchisors require franchisees to participate in franchisor-sponsored loyalty programs, and who bears the cost of the program?
- Does the franchise agreement allow the franchisor to impose system changes on franchisees, and, if so, are there any restrictions on the type and scope of the changes allowed?
- Does the agreement provide indemnification to the franchisee for any litigation arising out of the franchisor-sponsored loyalty program?

Franchisors typically do have the ability to force a franchisee to engage in a system-wide program if the franchise agreement specifically permits the franchisor to do so and there are no prohibitions in applicable state laws. Recently, a federal judge in Colorado granted summary judgment to a franchisor against a franchisee which refused to participate in a “4 Meals Under $4 Menu” promotion. Steak N Shake Enters v. Globex Co., LLC, 110 F. Supp. 3d 1057 (D. Colo. 2015). The franchisee had even gone so far as to print its own menu inserts with improper pricing. In its franchise agreement, Steak N Shake required franchisees “to fully participate in all local, regional, seasonal, promotional and other programs, initiatives and campaigns adopted by [Steak N Shake].” The agreement also prohibited franchisees from printing menus without the franchisor’s approval. The Court found that the franchisee materially breached the agreements, noting that the franchise agreements made explicitly clear what the franchisee requirements were.

Even where the franchise agreement does
permit the franchisor to force a franchisee to engage in a system-wide program, state law could render such a provision void. Some jurisdictions, like the District of Columbia, outright prohibit franchisors from requiring franchisees to participate in loyalty programs in certain industries. See D.C. Code § 36-303.01 (discussing nonwaiverable conditions of marketing agreements for retail service stations). In these jurisdictions, franchisee participation in any loyalty program must be entirely voluntary, and franchisees that elect not to participate cannot be punished or penalized for doing so. To respond to this, franchisors may consider providing incentives for their franchisees to participate in their system’s loyalty program.

Another important question is whether the franchise agreement gives the franchisor the right to change the terms and conditions of loyalty programs as they apply to franchisees. A provision in a franchise agreement that generally permits the franchisor to make changes to “system standards” or “rules of operation” may not be sufficient to allow a franchisor to change the terms and conditions of a loyalty program. See, e.g., Bird Hotel Corp. v. Super 8 Motels, Inc., 2010 U.S. Dist. LEXIS 14124, *1, (D.S.D. Feb. 16, 2010) (franchise agreement generally permitting franchisor to change the rules of operation or systems standards did not give Super 8 the discretion to increase program fees).

Uniform implementation of a loyalty program across a franchise system may reduce litigation exposure and consumer complaints. As discussed above, advertising the program consistent with its official terms and conditions is essential. Likewise, franchisors that sponsor loyalty programs should carefully monitor their franchisees’ advertisement of any loyalty program to avoid conflicting messages about the program’s terms and conditions.

Regulatory Issues
The Federal Trade Commission may also investigate loyalty programs that include exclusivity or other potentially anticompetitive features if sponsored by a company with market power. In addition, some states have laws that regulate loyalty programs, most commonly where a program provides incentive cash rewards. Franchisors must consider how the cash rewards may affect compliance with competition laws, such as below-cost-sales statutes, which exist in a number of states.

Depending on the industry, state law may also prohibit the adoption of a loyalty program. In New Jersey, for example, petroleum marketers cannot run loyalty discount programs, although there is an exception for programs run through credit card companies. See N.J. Stat. § 56:6-2(e). Other states, such as Florida, require “trading stamps,” which include discount coupons issued in connection with the retail sales of merchandise or services, to have a cash value legibly printed on their face. See Fla. Stat. § 559.03. Still other states require sweepstakes operators offering more than a certain amount in prizes to register with the state, post a bond and comply with certain other promotional and operational requirements. See, e.g., N.Y. Gen. Bus. Law § 369-e; Fla. Stat. § 849.094.

Thus, checking for relevant state laws and regulatory regimes before developing and rolling out a loyalty program is essential. Local laws may affect the overall structure of the loyalty program and/or may mean that programs will have to differ from state to state.

Practice Tips
Counsel should consider the legal issues from consumer, franchise and regulatory perspectives before adopting a loyalty program, as well as heeding these tips:

- Ensure program advertisements are consistent with the program’s terms and conditions and are not overreaching.
or hyperbolic — for example, don’t advertise jump jets for points if points cannot be redeemed for jump jets.

• Reserve the right to alter the terms and conditions of the loyalty program, including reserving the right to apply changes retroactively to benefits already accrued under the program.

• Review franchise agreements to see if franchisee participation is required and confirm that the requirement is enforceable under state law. Make sure the franchise agreement expressly permits changes to the terms of the program once implemented.

• Consult an antitrust expert to analyze whether the program may violate competition laws.

• Check state-specific laws for the states in which you want to operate the program. Each state has its own regulatory regime that may significantly affect the operation of the loyalty program.
Federal Trademark Rights for Marijuana Vaporizers: Up in Smoke?

By Stephanie Gumm, Faegre Baker Daniels LLP

A franchise system’s ability to protect its trademarks can be critical to the success of that franchise system. The simplest, most powerful way to protect trademarks in the United States is to register them with the United States Patent and Trademark Office. While a number of states—Washington, Colorado, Oregon, and Alaska in the past and California, Maine, Massachusetts and Nevada in November 2016 ballot initiatives—have legalized both medical and recreational usage of cannabis, cannabis remains a Schedule I drug under the Controlled Substances Act (“CSA”). And while federal law enforcement officials have generally refrained from prosecution of those in the cannabis industry so long as industry participants strictly comply with state law under the Cole Memo (available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf), other federal agencies are not so accommodating, as a recent decision from the Trademark Trial and Appeal Board (“TTAB”) demonstrates.

In an October 27, 2016 opinion, the TTAB refused registration to federal trademark applications for the proposed marks “POWERED BY JUJU” and “JUJU JOINTS” for use in connection with smokeless cannabis vaporizing apparatus and vaporizing cannabis delivery devices, namely oral vaporizers for smoking purposes. In re JJ206, LLC, dba Juju Joints, Serial Nos. 86474701 and 86236122. The basis for the refusal was founded upon the premise that the Applicant, JJ206, LLC, could not lawfully use the marks in commerce as required under the Trademark Act. Since the Applicant’s marks were used (or intended to be used) in connection with goods that are illegal under the CSA, the actual lawful use of the marks in association with the vaporizers was impossible. The TTAB reasoned that the Applicant’s reference to cannabis in its description of goods was a reference to marijuana (as defined under the CSA) and the CSA provides that equipment primary intended to introduce cannabis into the human body is unlawful drug paraphernalia. Therefore, the Applicant’s goods violate federal law and the Applicant would be unable to meet the applicable use threshold required for federal trademark rights.

The Applicant attempted to argue that since it only markets its goods in states that allow for the sale and distribution of marijuana, its current and intended use is lawful use in commerce. The TTAB disagreed and noted that “the fact that the provision of a product or service may be lawful within a state is irrelevant to the questions of federal registration when it is unlawful under federal law.” Id., at 7. The Applicant next attempted to argue that since the Applicant markets its vaporizers in states that comply with the Cole Memo, which sets forth federal enforcement policy guidance in response to the enactment of medical marijuana laws in certain states, that its goods should be considered lawful. Again, the TTAB disagreed and noted that the Cole Memo is intended only as a guide and doesn’t override the CSA. In short, under the TTAB’s ruling, state marijuana laws do not provide support for a federal trademark registration for goods and/or services related to marijuana which may violate the CSA.

Of course, it is likely no coincidence that the TTAB issued this decision just weeks before California, Maine, Massachusetts, and Nevada voted on whether to join four others in legalizing cannabis for both medicinal and recreational use under state law. With both recreational and medicinal cannabis usage now legal in eight states and some form of legalization in place in more than half the states and the District of Columbia, it will be interesting to see where continued state legalization efforts impact the TTAB’s rationale or a federal court’s decision as to whether lawful

Stephanie Gumm
Faegre Baker Daniels LLP
use in commerce can be achieved in light of state-sanctioned cannabis businesses.

For now at least, it appears that there will be no federal trademark registrations for products or services associated with state-sanctioned businesses if those products or services may violate the CSA. Although the lack of a federally registered trademark is not an absolute impediment to franchising businesses nationally, the lack of federal trademark protection is likely to inhibit large-scale, national franchising of cannabis brands for the foreseeable future.

Franchisors interested in pursuing franchising in states permitting it may still want to consider seeking state trademark registrations in “cannabis friendly” states in order to preserve trademark rights in those jurisdictions. And, common law trademark rights may exist, although the protection is far less extensive than that offered by federal law. Of course, time will tell if the TTAB (and courts, when they reach this issue) will continue to maintain this position or if the growing tide of public opinion in favor of legalized marijuana for recreational use will impact this issue. Stay tuned.

Whitney Anderson
Edited by Heather Perkins

OFFICE LOCATION: Corporate Counsel for Carlson Rezidor Hotel Group in Minnetonka, Minnesota

PRACTICE SPECIALTY: Providing in-house legal support to our franchise operations and development teams

HOBBIES: Traveling, cooking, playing the piano and chasing after my 2 year old son

BEST-LOVED SONG: Tiny Dancer by Elton John

FAVORITE THING ABOUT THE FORUM: Meeting new people and picking up new ideas and practice tips from other franchise attorneys

SOMETHING PEOPLE WOULD BE SURPRISED TO LEARN ABOUT YOU: I took flying lessons the summer before law school
Work or Presentation: Erin Conway and Caroline Fichter. Erin is an attorney at the law firm of Garner & Ginsburg and Caroline is an associate at the Bundy Law Firm. Their article, Surviving the Tempest: Franchisees in the Brave New World of Joint Employers and $15 Now, was published in the Spring 2016 issue of the Franchise Law Journal;

- The John Baer Scholarship for International Civility and Professionalism: Kentaro Tanaka, TMI Associates;
- ABA Forum on Franchising Diversity Award: Phyllis Alden Truby, Phyllis Alden Truby, APC; and
- The Lewis G. Rudnick Award: John Tifford, Ret.

Congratulations to each of the Forum’s 2016 award winners. I would also like to congratulate the new elected members of the Governing Committee: Eric Karp, Chair of the Forum, and Bethany Appleby, Ronald Coleman, Peter Lagarias and Gerald Wells, Members-at-Large, each with terms that begin in August 2017.

Other highlights, included the plenary session featuring ethical humorist Sean Carter, who delivered this year’s ethics program in a fun and thought-provoking manner. As always, our intensives, workshops, and plenaries on cutting-edge topics added value by offering tips and best practices from our distinguished faculty of Forum members. Our events on Thursday night at Nikki Beach and Friday night at the Bath Club were both lively and rich with good company, local music, and the best of Miami’s cuisine.


As always, please do not hesitate to reach out to me directly with your suggestions for the Forum at the meeting or at Karen.Satterlee@Hilton.com.

As this issue of The Franchise Lawyer goes to press, one Presidential administration is ending and another is beginning. Many expect significant changes over the coming four years. Some changes in policy are expected and with reasonably predictable consequences for franchising. But it is probably fair to bet that there are some changes coming that few will foresee. At The Franchise Lawyer, we look forwarding to keeping you informed of the law as it develops and with providing practitioners with practical, useful, and battle-tested advice.

In this issue, we discuss some recent developments of interest to those in franchising in the areas of joint employment and trademark. Karen Marchiano writes on a summary judgment victory for a franchisor in the joint employment context, my firm and I represented the franchisor in the case. Stephanie Gumm reports on a recent decision from the Trademark Trial and Appeal Board, denying trademark protection to marks used in connection with smokeless cannabis vaporizing apparatus and vaporizing cannabis delivery devices. The decision underscores the continuing and widening gulf between the federal and state law on legalized medical and recreational marijuana, and has implications for franchisors who are considering moving into cannabis-related businesses.

We also have some excellent practical resources in this issue. In the Litigators’ Corner, Jim Goniea and Jeff Fillerup provide tips and concrete advice on how to defend depositions. And Charles Modell gives timely advice for those of us who work on FDDs this time of year. We round out the issue with the Member Spotlight of Whitney Anderson of Carlson Rezidor Hotel Group.

On behalf of the entire editorial team of The Franchise Lawyer, we hope you enjoy the issue and find its content useful. Please feel free to reach out to any of us with suggestions and article ideas.
Know the Essential Franchise Issues

Edited by Christopher Prine Bussert & James R Sims III

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