

The Franchise Lawyer

American Bar Association • Forum on Franchising

#MeToo at the Forum

The Women's Caucus Steering Committee

In the wake of many high-profile scandals rocking the news cycle in the last year, organizations and industries across the globe have begun to take a closer look at their roles and their responsibilities in combating sexual harassment in the workplace. The Forum is no exception. Eager to hear from the Forum's many members about the impact of the #MeToo movement, the Women's Caucus Steering Committee dedicated the entirety of its annual event at the ABA Forum on Franchising to this single topic. After all, the #MeToo movement raises a host of legal and practical issues for law firms, franchisors, and franchisees, and we hoped for a robust discussion surrounding the best practices and pitfalls our members have observed. What we got was a candid look at the reality of the female membership of the Forum. The topic merits further discussion and—even more—action. Because of this, the Committee drafted this summary of the luncheon and our top takeaways.

The Women's Caucus luncheon at the annual meeting of the Forum in Nashville was attended by almost 200 people, all of whom were women, although all were welcome. The women at each table participated in small-group discussions, facilitated by a list of possible topics prepared in advance by the Women's Caucus Steering Committee. For example, the list contained questions about how firms and businesses have handled #MeToo allegations and reporting internally, what policies or training have been effective at prevention, best practices for advising a client who calls with a question about harassment,

and how to prepare for the possibility of backlash. Finally, volunteers shared takeaways from their discussions with the group. Below we share some of those insights.

1. How to be a Better Bystander

At the crux of the #MeToo movement is the understanding, now clearer than ever, that sexual harassment is incredibly widespread. As such, preventing sexual harassment is not only the responsibility of employers and organizations, but also of individuals. Each of us must be willing to speak out when we see behaviors that threaten, harass, or

are otherwise inappropriate. Although confronting a harasser is often the first instinct, it may not always be a safe or practical approach. Fortunately, simply disrupting or interrupting a difficult situation can have a meaningful impact. Bystanders should also report harassing or threatening behavior to the proper HR authority. Witness accounts are critical to investigating harassment claims. Moreover, repeated behavior will only be revealed when each incident is reported. The following article was handed out

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to provide a resource for being a better bystander: https://www.nsvrc.org/sites/default/files/2018-02/publications_nsvrc_tip-sheet_bystander-intervention-tips-and-strategies_1.pdf.

2. Preventing and Responding to Allegations

We heard several accounts of how law firms are addressing the issues brought to light by the #MeToo movement. One preventative measure is mandatory training, including topics such as what constitutes harassment, how to be a good bystander, and how to report and investigate claims. We also heard many ideas for handling incidents after they arise, such as requiring mandatory reporting of all incidents and ensuring that behavior by outside sources (e.g., clients and vendors) is also addressed. Ultimately, the solutions and ideas varied widely based on the culture and also the size and make-up of each organization. For example, smaller firms and businesses face unique challenges with protecting the anonymity of victims and alleged harassers, whereas larger organizations may instead struggle with fostering a culture of proactive reporting.

Many tables also discussed the importance of having measured and intelligent responses to these claims. Zero tolerance and other heightened response policies may have a chilling effect on the willingness of bystanders and victims to report these incidents. Attendees also expressed a concern of potential backlash from men to protect themselves from the #MeToo movement. For example, some women reported that men may not want to mentor women or might refuse to take junior associates on business trips. Although these concerns are certainly not intended to discourage organizations from promptly and effectively responding to allegations of harassment, they are considerations that must be weighed by organizational leaders.

3. Men Must be Involved

Although many topics were discussed (and debated) at the annual luncheon, one point was raised without a single voice of dissent. Men must be involved in both the #MeToo discussion and in its solutions. Simply put, it is neither ethical nor practical to turn a blind eye to this type of behavior. It causes conflict and tension within any organization, it drives intelligent and driven women out of promising careers, and it results in a higher cost of doing business, both for law firms and the clients they represent. The prevalence of sexual harassment is an issue that affects all of us and should therefore be addressed by all of us.

4. Sexual Harassment Happens at the Forum

Yes, even in a group as welcoming and collegial as the Forum, there were numerous stories of unwanted touching, hugs that lingered, propositions, and unwelcome advances that have occurred at annual meetings of the Forum. This has no place in a professional networking group. And, the Women's Caucus raised these concerns to the Governing Committee; Eric Karp the Chair of the Forum, adds his comment in his companion piece following this article. We encourage every member of the Forum to be a responsible bystander and intervene when threatening, harassing, or unwelcome words or actions are witnessed.

5. Supporting Women Does Not Stop with #MeToo

Although the hallmark of the #MeToo movement is the fight against sexual harassment and sexual assault, we should remember that supporting women in the workplace involves more than a swift response to harassment. Law firms and businesses of all sizes still face challenges in retaining and promoting women.

There are, of course, some great success stories in this arena. The firms with the best records have instituted reviews not just of hiring women, but also of whether and how women are advancing to partnership and leadership roles. Supporting women can come in many forms—it could be formal policies relating to equal compensation and mentorship programs, and it can be informal practices like providing women practitioners greater choice and control over their career paths. Some law firms even participate in national programs, such as the Mansfield Rule, to demonstrate an organization-wide commitment to the advancement of women and diverse candidates. But these stories are still generally the exception to the rule. We hope to see the opportunities for women in the legal industry, and leadership roles in particular, grow with each new year.

We encourage all members of the Forum to raise their voices and join the fight against sexual harassment, both at the Forum and within their own organizations. For additional tips or resources on combating sexual harassment, we recommend visiting www.nsvrc.org for materials published by the National Sexual Violence Resource Center. Eric Karp's piece accompanying this article provides additional information about how to report unacceptable behavior in connection with the ABA and our Forum.

Message from the Chair

Eric H. Karp, Witmer Karp Warner and Ryan, LLP

Many thanks to the Women's Caucus Steering Committee for this opportunity to express my wholehearted support for the work of the Caucus in general, and for its outstanding and timely program at the most recent Annual Forum in Nashville in particular.

The Forum on Franchising is dedicated to providing a harassment-free and inclusive experience for everyone. We do not and will not tolerate sexual harassment of event participants in any form. We take violations of this policy seriously and pledge to respond appropriately. We reserve the right to refuse admittance to, or remove from any of our events, any person behaving in a disorderly, harassing, threatening or unwelcome manner.

For this reason, I am deeply distressed to have been informed of, and to read in the report of the Women's Caucus Steering Committee, numerous stories of unwanted touching, hugs that lingered, propositions and unwelcome advances that have occurred at Annual Forums. This cannot stand.

The wider American Bar Association has established policies and procedures which are contained in its Business Conduct Standards, last revised on September 6, 2018. The Standards prohibit verbal, sexual or physical harassment of any kind. These Standards also prohibit "harassment, including, but not limited to, unwelcome sexual advances, requests for sexual favors, or unwelcome verbal or physical conduct of a sexual nature, jokes, emails or other forms of communication."

If anyone subject to any such inappropriate behavior wishes to pursue the matter, the ABA has established three different alternatives to make a report or file a complaint.

- Contact EthicsPoint, a third-party service provider which offers confidential reporting via the web, or a telephone hotline. To contact EthicsPoint, go to www.americanbar.ethixpoint.com or call 1-800-536-6783;



Eric H. Karp

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- Contact Jarisse Sanborn in the office of ABA General Counsel at 312-988-5215 or at jarisse.sanborn@americanbar.org; or
- Contact Yolanda Muhammad, Forums Director at 312-988-5794 or at Yolanda.Muhammad@americanbar.org.

The ABA Standards also make clear that members are encouraged, but not required, to inform a harasser that the conduct is unwelcome and should stop. On that basis, if I am at any point a witness to any sexual harassment or other unwelcome behavior, I will politely but firmly intervene. I encourage all other members of the Forum to take on this responsibility.

Finally, I welcome a continuing dialogue with the Women's Caucus so that we can jointly develop a plan to produce an environment at all of our meetings consistently and reliably free from any form of inappropriate, harassing or unwelcome behaviors, so that all can enjoy Forum on Franchising continuing legal education and social networking events. Every member of the Forum has a stake in achieving that goal.

I would be pleased to respond to any of your comments or questions regarding this message. I can be reached at ekarp@wkwrlaw.com or 617-423-7250.

Websites and the Americans with Disabilities Act: What Franchisors Need to Know and Do

Charles S. Marion, Blank Rome LLP

During the past few years, there has been a virtual explosion in the number of lawsuits being filed asserting that a business' website violates the Americans with Disabilities Act ("ADA"). In the first nine months of 2018 alone, more than 1,000 such cases were filed. Absent intervention by the Department of Justice ("DOJ") or Congress, the number of these cases will continue to increase. While nearly all of them are being filed in just three states—California, Florida and New York—companies doing business throughout the United States, and in a wide variety of industries (including hotels, banks, clothing and other retailers, supermarkets and restaurants), are being targeted. These lawsuits are typically brought by a visually impaired plaintiff who uses screen reader software to access and "read" the content of websites. The complaints allege that the plaintiff visited the defendant's website but was prevented from accessing all of the pages, features and content on the site that non-disabled individuals can access and enjoy, because the website was not coded or otherwise set up to work with such software.

Franchises are not immune from such lawsuits. Among the growing list of franchises sued in these cases are GNC, 1-800-Flowers.com, Famous Dave's, O'Charley's and Domino's Pizza. In fact, some of the most important decisions in this area over the last few years have involved franchises. There are, however, some unique issues that franchisors and franchisees need to consider and address when it comes to website accessibility issues and claims.

But how did we get here? That is a reasonable question given that the ADA, which was enacted in 1990, says nothing whatsoever about the Internet or websites. Title III of the ADA prohibits discrimination on the basis of disability in the activities of "places of public accommodation." 42 U.S.C. § 12182(a). But the twelve categories or types of public accommodations identified in the statute are all physical spaces, such as restaurants, schools, and movie theaters. 42 U.S.C. § 12181(7).

During the 2000s, however, with the tremendous growth of e-commerce and use of the Internet, more attention was paid to individuals' ability to access and navigate websites. In 2006, the National Federation for the Blind filed a class action lawsuit against Target Corporation, alleging that Target's website violated Title III of the ADA, because visually impaired visitors were unable to access all of the information on or purchase goods through the website. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006). The case survived motions to dismiss, and for summary judgment, and was eventually settled by Target, which agreed to pay a significant amount in damages to the class members and update its website so that it was accessible to visually impaired users.

Around that same time, the DOJ began showing interest in this issue. It investigated certain ADA claims involving websites, sided with the plaintiffs in some lawsuits, and, in 2010, announced it was beginning the process of developing rules and regulations for how businesses could make their websites accessible to disabled individuals. However, the DOJ repeatedly postponed its deadline for issuing these guidelines, and in 2017, the Trump administration moved the rulemaking project to the DOJ's "inactive" list, meaning there will be no regulation for the foreseeable future.

As a result, there are no federal rules or regulations that detail what a business must do in order to make its website accessible to visually impaired and other disabled individuals. At least one district court found that requiring a franchisor to update its website to make it more accessible to disabled individuals without any governmental rules or other authority telling it how to do so would violate the franchisor's due process rights. *Robles v. Domino's Pizza, LLC*, No. 2:16-cv-06599, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017). However, the Domino's decision has been appealed and several courts in other jurisdictions have rejected this type of due process argument.



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An industry group active in this area, the World Wide Web Consortium, publishes Web Content Accessibility Guidelines (“WCAG”) which are updated from time to time (the current version is 2.0, but version 2.1 is in the process of being finalized). The WCAG have become the de facto standards for what criteria a website must meet to be accessible to visually impaired persons and others with disabilities.

Title III of the ADA generally does not provide for monetary damages. Rather, only injunctive relief is available. 42 U.S.C. § 12188. However, a prevailing party can recover its attorney’s fees. 42 U.S.C. § 12205. In addition, a growing number of plaintiffs are also pleading violations of state or local statutes which prohibit discrimination against those with disabilities, such as California’s Unruh Civil Rights Act and the New York State Human Rights Law, that provide for statutory or other types of damages.

Most accessibility lawsuits are settled by the parties at a very early stage in the proceeding. Others, however, have been decided on a motion to dismiss or a motion for summary judgment, and at least one has proceeded to a bench trial. See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1315 (S.D. Fla. 2017) (finding Winn-Dixie’s website is heavily integrated with its physical store locations and its inaccessibility violated Gil’s rights under the ADA). Court decisions in these cases have not been consistent. To the contrary, a split has developed among the Circuits regarding whether and when one who has encountered an accessibility problem on a website can state a claim under Title III of the ADA.

For example, ever since *Target* was decided in 2006, California courts have consistently held that a “nexus” must exist between the defendant’s website and its physical, or “bricks and mortar,” location in order for a plaintiff who experienced accessibility issues on the website to state a claim for violation of Title III. In *Target*, a sufficient nexus was found to exist, as the plaintiffs argued, among other things, that the website allowed customers to purchase items that could then be picked up in Target’s stores and print coupons that could be used in the stores. *Target Corp.*, 452 F. Supp. 2d at 956 (denying Target’s motion to dismiss). Courts in the Third, Sixth, and Eleventh Circuits similarly require this nexus in order to state a claim under the ADA. In Florida, for example, courts have generally held that encountering an accessibility issue on a website is not, by itself, sufficient to state a claim under the ADA. It is only where the

accessibility problem impedes the plaintiff’s ability to access the defendant’s physical store or location that a claim can be stated. See, e.g., *Gomez v. Bang & Olufsen America, Inc.*, No. 16-cv-23801, 2017 WL 1957182 (S.D. Fla. Feb. 2, 2017).

In other circuits, however, district courts have held that encountering accessibility problems on a defendant’s website is, in and of itself, sufficient to give rise to a claim under the ADA. In fact, in two cases decided ten days apart in the summer of 2017, judges in the Southern and Eastern Districts of New York denied defendants’ motions to dismiss, and declined to require any nexus between the defendants’ website and its physical location in order to state a claim under Title III. See *Markett v. Five Guys Enterprises LLC*, No. 17-cv-788 (KBF), 2017 WL 5054568 (S.D. N.Y. July 21, 2017) (involving franchisor’s website www.Fiveguys.com); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017).

Not surprisingly, since *Five Guys* and *Blick* were decided, New York has become the most popular venue for plaintiffs filing website accessibility cases. While most of these cases are brought as class actions, nearly all of them are settled or otherwise resolved prior to the class certification stage. It would be interesting to see if a class could, in fact, be certified in these types of cases, given that the plaintiffs have many different levels of visual impairment, use various types of computers that have different operating systems, use different types and versions of screen reader software, and are trying to access a wide variety of features on a wide variety of websites.

This is an area justifying clarification and guidance, whether from Congress, the DOJ, or—in light of the split among the Circuits—the Supreme Court. The U.S. House of Representatives last year passed a bill targeting “drive-by” ADA lawsuits and requiring that plaintiffs give a business notice and an opportunity to cure before filing a lawsuit. The law only deals with physical spaces, however, and does not address the many website-related claims and lawsuits being asserted. Certain states are considering similar legislation. In September 2018, several U.S. senators sent Attorney General Sessions a letter seeking clarification regarding the ADA and websites, noting, among other concerns, that business and property owners are unsure as to what standards, if any, govern their online services.

In the meantime, plaintiff's lawyers will continue to file ADA lawsuits against businesses that operate websites that cannot be accessed using screen reader software, or otherwise do not comply with the WCAG. Given that trend, as well as the increasing number of court decisions holding that accessibility problems with websites can give rise to a claim under Title III of the ADA, franchises would be wise to assess the accessibility of their websites and what steps can be taken to reduce their exposure for such claims.

Franchisors normally own and operate the website for a system or brand, with franchisees contributing to an ad fund that helps cover the cost of maintaining the site and other marketing efforts engaged in by the franchisor. In terms of best practices, first and foremost, the franchisor should conduct an audit of its website to determine how compliant or non-compliant it is with the WCAG. If the website is not compliant, the franchisor should investigate options for remediating or updating the website to bring it into compliance. There are numerous vendors that conduct such audits and then either recommend corrective measures to the franchisor's IT staff or implement them themselves. This same effort should be undertaken with respect to any mobile apps the franchisors offer to their customers. It is also important to check any on-line job application pages, forms, and sites the franchisor utilizes, as some recent claims allege ADA violations due to disabled individuals not being able to access and complete on-line job application forms. (Another recent trend beyond the scope of this article is for quick serve restaurants and other franchise systems to install kiosks where customers can place their orders using a touch screen; while the kiosks themselves may be ADA-compliant in terms of their height and other dimensions, there could be accessibility issues with the touch screen ordering system.)

If franchisees are permitted to operate their own websites, especially if they are using the franchisor's name and marks on such sites, the franchise agreement should be updated or amended to require that the franchisee's website(s) comply with the then current version of the WCAG (or, if the federal or a state government enacts rules and regulations governing website accessibility, such rules). Similarly, if there are third parties that contribute content to a franchisor's website, the franchisor should include a provision in its contract with the third party that such content must comply with the WCAG. In addition, many websites contain links that take the visitor to

a third party's website (for example, to purchase a gift card). If that is the case, when the visitor clicks on the link, a prominent message should appear advising the visitor that he is leaving the franchisor's website and being taken to a third party's website over which the franchisor has no control. And if possible, the franchisor's contract with the third party should include a requirement that the third party's website comply with the WCAG.

Another best practice is to post an accessibility policy on the website's home page (or at least include a link to such policy next to links for the site's terms and conditions and privacy policy) as well as a telephone number visitors can call if they encounter accessibility problems on the site. Whether the telephone number will help insulate the website operator from liability may depend on whether the number will be staffed and answered 24 hours a day, seven days a week, because, if it is not, those who encounter issues and call the hotline but then have to wait for someone to get back to them at a later time are not truly being given equal treatment and access.

An interesting issue that has not yet been litigated but could arise in a jurisdiction that requires a nexus between the defendant's website and its physical location in order to state a claim for violation of Title III is that, in many franchise systems, the franchisor owns and operates the system's website but does not own, lease or operate its franchisee's physical location. The franchisor could therefore argue that the website is not a service, privilege, advantage or accommodation of its physical place of public accommodation. *Dunkin' Donuts* raised this issue in its motion to dismiss in *Haynes v. Dunkin' Donuts LLC*, No. 18-10373, 2018 WL 3634720 at *1 n.2 (11th Cir. July 31, 2018), but because plaintiff's complaint did not allege anything about Dunkin' being a franchisor, the court held that it was not appropriate to consider this issue on a motion to dismiss, rather it was more appropriate for a motion for summary judgment.

ADA lawsuits targeting businesses' websites are not going away, nor is the law in this area going to become any clearer or more settled, any time soon. It is therefore important for franchisors and franchisees to not only be aware of this issue, but to assess their potential liability and exposure for ADA claims relating to their websites and take whatever steps they can to eliminate or minimize such risk.

¹The author is attorney of record for *Dunkin' Donuts* in the *Haynes* case cited above

Conditional Renewals: Are They Useful in Preserving Franchise Relationships?

Bethany Karsten, Two Men and a Truck & Lauren Ralls, Kilpatrick Townsend & Stockton

Every franchisor faces difficulties at one time or another when it comes to deciding whether or not to renew a franchise agreement with a franchisee. Whether the decision is being made based on poor performance, failure to abide by the franchise agreement or because the franchisee is negatively impacting the brand reputation of the franchise, the decision is never easy. It is important for both the franchisee and franchisor to be able to evaluate in advance whether the relationship might be salvageable and know the possible options ahead of time when the term of a franchise agreement is about to expire.

There are three basic options when it comes to expiration of the term of a franchise agreement: renew, don't renew, or enter into a conditional renewal.

A conditional renewal can come into play when a franchisor believes a franchise appears headed down a path of non-renewal but hopes that with additional time and training the franchisee can avoid non-renewal. If the relationship is salvageable, and entering into a conditional renewal could allow the franchisee to meet the criteria necessary for renewal, then a conditional renewal could be the best option for both parties. Conditional renewals can allow the franchisee the ability to correct past issues and give the franchisor additional time to evaluate whether the relationship with the franchisee is one that can and should continue.

Setting Yourself Up for Conditional Renewals

Conditional renewals can be best implemented when outlined clearly in the renewal provisions of a franchise agreement. Ideally, the franchise agreement should further allow the franchisor, at its sole option, to enter into a second conditional renewal with the franchisee if, at the expiration of the first conditional renewal, the franchisee

has not yet fully met the criteria outlined in the first conditional renewal. Lastly, this type of renewal should also give the franchisor the right to include additional criteria, beyond what is described in the franchise agreement.

If the franchise agreement does not expressly set forth the right to enter into the conditional renewal, then the franchisor may still approach a franchisee with the option of a conditional renewal through a notice of default close to the time of renewal. The notice must comply with both the franchise agreement and any applicable state specific franchise relationship statutes. The notice of default should outline the deficiencies and the curable sections of the franchise agreement that have been violated, and the franchisor may then propose entering into a conditional renewal as an option to provide the franchisee additional time to cure the deficiencies and be considered for renewal.

Drafting a Conditional Renewal

Whether the term of a franchise agreement is 3, 5, or even 10 years, a franchisor has the option to set the conditional renewal to a term it feels appropriate, provided that such conditional renewal is in compliance with applicable law. Typically, franchisors consider 6-12 months to be a reasonable period for a conditional renewal. The type of industry in which the franchise operates can also help determine the appropriate length of time for a conditional renewal. If the franchise operation is seasonal, it might be beneficial to adopt a longer conditional term to allow the franchisee to operate through another busy season and assess progress after that point. Some examples of seasonal franchise models that might benefit from this approach include, retail stores, tax preparation, landscaping, moving, and outdoor holiday light decoration.

When drafting a conditional renewal, the franchisor should consider imposing



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new restrictions or criteria on the franchisee specifically directed to the deficiencies noted in the franchisee's performance. And it should also set clear expectations insofar as those restrictions or criteria for the franchisee to meet, including, where appropriate, specific milestones in order for the franchisee to be eligible for renewal. These milestones could be anything from meeting sales goals, receiving a certain customer satisfaction score, or exceeding previous revenue numbers. However, the milestones should be supported by clear business justifications and should be attainable for the franchisee. For example, setting sales goals that are many times what the franchisee has been able to achieve historically or are out of line with how other franchisees in the system are performing or requiring money to be spent on excessive building renovations or new equipment are examples of criteria that would not be appropriate for a conditional renewal.

Franchisee actions that have a negative impact on the brand or relationship, but don't amount to a material breach, can also be addressed in a conditional renewal, provided that doing so would be in compliance with applicable law. In many circumstances, franchisee actions can have a demonstrative impact on the brand as a whole. Given the reliance of the consuming public on social media, one negative Facebook post or tweet by or about a franchisee can theoretically impact millions of potential customers, particularly if that communication goes viral. For example, a franchisee lashing out in response to a poor online review or making a negative statement about the franchisor online when the franchisee is unhappy about a system change can quickly spread and have a significant impact on the image of the franchise system. Franchisees have a duty to protect the goodwill and nature of the brand, and if specific behavior isn't already addressed in a code of conduct, it can be set forth as one of the criteria for a conditional renewal. Although a franchisor should be cautious in unduly limiting a franchisee's first amendment rights, carefully worded provisions can accomplish the desired outcome.

There can also be instances where a franchisee has been in the system for quite some time but hasn't conformed to regulatory or system changes. In these situations, consideration should be given to structuring conditional renewal language to require a franchisee to

participate in additional training or immediately implementing system changes during the term of the conditional renewal to get the franchisee back on track.

In a franchise relationship, a number of issues could arise that might make the franchisor question whether to move forward with renewal of a particular franchisee. In these scenarios, the conditional renewal can address a combination of items to be satisfied depending on the franchisor's strategy. Conditional renewal requirements should be specific to the franchisee and tailored each time it is utilized. Unlike a franchise agreement, there is not a one-size-fits-all conditional renewal.

Steps for the Franchisor to Take During the Conditional Renewal

Once a conditional renewal is implemented, the franchisor should carefully monitor where the franchisee stands in meeting the criteria outlined in the conditional renewal. Having reports and dashboards that allow the franchisor to review daily, weekly, or monthly where a franchisee stands is a helpful tool. The franchisor should also document, in writing, the franchisee's progress, or lack thereof, on a regular basis. By doing so, the franchisor can build a case for a non-renewal if necessary and the franchisee will better know what to expect at the end of the conditional renewal.

As a precursor to the parties entering into a formal conditional renewal agreement, the franchisor might wish to require the franchisee to visit the franchisor for a re-engagement meeting. Sometimes meetings in which issues and expectations are addressed in a face-to-face setting can have the biggest impact. During this meeting, different subject matter experts within the franchisor can meet with the franchisee to provide advice and assist in areas where the franchisee appears to be struggling. For example, the franchisee might need assistance in recruiting new employees or ramping up marketing efforts in its territory and the subject matter experts might have new tactics for the franchisee to try. It can also be worthwhile to have employees of the franchisor visit the franchisee to do an on-site assessment in order to have a better idea of the struggles the franchisee is facing. After the visit, an action plan can be developed which can be memorialized within the conditional renewal agreement that identifies any areas of deficiency and

what steps need to be taken by the franchisee. Both of these options can provide valuable insight to the franchisee's operation, and allow the franchisor and franchisee to connect on a higher level.

Notification to Franchisee

If the franchisee isn't meeting minimum performance standards in the franchise agreement or the franchise is negatively impacting the brand's reputation, the franchisee should be provided notice of these issues prior to entering into a conditional renewal.

There are 19 states that regulate franchising with state-specific laws. Notice for non-renewal varies from state to state so it is important that the franchisor and franchisee are aware of any notice requirements in the state in which the franchise is located. A franchisor will need to implement the conditional renewal within the states' required notice period before the franchise agreement expires. If a franchisor and franchisee enter into a conditional renewal, the franchisor will then need to provide notification of renewal or non-renewal within any applicable notice period as well.

Some states also require good cause to non-renew a franchise agreement, which will require the franchisor to demonstrate clearly any material breaches of the franchise agreement. Oftentimes, the good cause requirements imposed by states don't include within the definition of good cause perceived underperformance by a franchisee. The franchisor, therefore, should clearly set forth in the franchise agreement and/or conditional renewal the breaches that have occurred constituting good cause under these state laws, such as failing to meet certain milestones or failing to pay royalties. Extending the franchise agreement for an additional 6 or 12 months through a conditional renewal may result in a renewal or a non-renewal, if the franchisee is unable to cure the breaches identified by the franchisor and good cause exists. In situations where the franchise relationship cannot be salvaged, this period may also provide time for the franchisee to sell its business. Documentation of the reasons leading up to a conditional renewal should ideally start at least 13 months prior to expiration of the franchise agreement.

Terminating After a Conditional Renewal

Franchisees often invest many of thousands of dollars into opening and operating their franchise over the course of the franchise agreement with the hope of recouping their investment and making a profit. A franchisee's livelihood can depend on the renewal of its franchise. Accordingly, depending on the condition of the franchise, it might be in the both parties' best interests to allow the franchisee a specific length of time to transfer the franchise if the deficiencies in the franchisee's performance identified by the franchisor cannot be cured and the franchise relationship cannot be salvaged after going through the conditional renewal process. Shutting down a franchise can also have a significant impact on the franchisor's future development and sales in that market, and so a transfer can be in the franchisor's best interest as well. Depending on the industry, a franchise transfer can take anywhere from a few months to an entire year.

If the franchisor doesn't want to extend the franchise agreement for an additional period of time beyond an initial conditional renewal term with a franchisee, then it is important that the franchisee is aware months in advance of the need to start looking for a buyer before the initial conditional renewal expires.

Renewing After a Conditional Renewal

If the franchisee meets the criteria set out in the conditional renewal before the term is up, then the franchisor can either enter into a renewal agreement with the franchisee or the franchisee can choose not to renew the agreement. There is always the possibility that the franchisee could revert back to how it was operating its franchise once a renewal agreement is executed, but it's important to weigh this consideration against non-renewing a franchise.

If set up properly and documented well, conditional renewals can be beneficial to both the franchisor and franchisee. With proper communication, notice, clear criteria, and advanced planning, conditional renewals can be useful tools in dealing with struggling franchisees and improve the relationship between the franchisor and franchisee.

The Lawyer's Role in Representing Startup Franchisors

Sawan S. Patel, Larkin Hoffman

Once startup franchisors embark on franchising, they are often surprised to find themselves in a completely new business, selling franchises to prospective franchisees, rather than cupcakes, yoga classes, or hotel rooms to consumers. The relationship between a startup franchisor and its lawyer will evolve from picking the right advisors, to structuring the initial franchise system, to addressing ongoing sales and franchisee issues as the system grows. The lawyer's role in representing a startup franchisor is to educate, guide, and protect the client and the franchise system.

Engagement as Counsel

Most wise startup franchisors retain experienced franchise lawyers and consultants to assist with structuring, documenting, and registering the franchise offering. Experienced franchise lawyers and consultants can advise on whether a particular concept is likely to work well as a franchise and provide best practices, war stories, and connections for a startup franchisor.

Franchise lawyers use a variety of fee structures when representing startup franchisors. For preparing the initial franchise offering, some lawyers charge hourly but many charge flat fees. Flat fees allow the client to budget for the project and to properly document and describe the franchise system, without worry about cost overruns.

Some franchisors will look for the lowest cost lawyer without regards to experience or reputation and some lawyers will prepare the franchise disclosure document ("FDD") as a loss-leader to be recouped in a long-term relationship. Lawyers usually charge hourly fees for annual renewals or amendments and for franchise relationship issues as the amount of work can vary significantly. Choosing the low-cost provider can later haunt the franchisor. Ideally, lawyers should stress their expertise and the value they provide, and together with their client come to an acceptable fee structure that allows the lawyer to spend the

necessary time to prepare a quality product that is customized for the client while being respectful of the client's budget.

Should the Client Franchise its Business?

Before franchising, often the first question a potential franchisor will ask its lawyer is "Should I franchise my business?" Franchising is a completely different business model than the franchised business itself.

One key role of counsel is to assist the potential franchisor to understand what it actually means to franchise a brand. Many times, the startup franchisor is not familiar with franchising. Quite often, the potential franchisor knows some household names in franchising, or a customer walked into their store once and asked if they are selling franchises. Before the ecstatic entrepreneur can even put on the rose-colored glasses, he or she is off to the races either looking into franchising or, worse, selling "licenses" (see below). At this point, the lawyer should educate the client on the pros and cons of franchising, the short-term and long-term costs to franchise, and the state and federal laws governing the offer, sale, and termination of franchises and business opportunities.

Even if a business can be franchised, it does not mean it *should* be franchised. A franchise system with a strong brand (even if local or regional), noticeable differentiators from competitors, and supportive marketing and training systems in place will attract franchisees and is more likely to succeed. The lawyer should ask, at a minimum, the following questions to any potential franchisor looking to franchise its business:

1. Does the potential franchisor have at least one outlet that has been operating for at least a few years successfully? The more experience the business has in operating its own outlet(s), the more fine-tuned the franchise system should be.



Sawan S. Patel
Larkin Hoffman

2. Can a franchisee make a profit in the franchised business? First, if the client has not been profitably operating its outlet(s), it has no business selling that concept to others. Second, the potential franchisor should determine what the expected revenues and expenses of a franchised outlet would be (taking into account any inefficiencies a franchisee may experience), and then subtract from the gross sales any hypothetical ongoing fees payable to the franchisor, to determine whether the margins at the unit level are large enough to pay the franchisor its fees and still permit a reasonable return on the franchisee's investment.
3. Does the business have a "secret sauce?" The secret sauce may be a proprietary product; technology system; recipe; access to clients, accounts, or suppliers; being the first to market; or other trade secrets that franchisees cannot otherwise obtain without buying into the system. This secret sauce will attract prospective franchisees to buy a franchise and stick with the franchise even after the initial term has expired. Although not required to franchise, this secret sauce may be a patented process, technology, or system or copyrighted material.
4. Can the business be replicated? Franchising involves copying-and-pasting a business model in another location. A business that relies on the expertise or branding of an individual or that can be successful only in a limited geographic area may not be replicable.

Sometimes the startup franchisor had already offered franchises—whether lawfully or unlawfully, intentionally or unintentionally. The lawyer should determine the scope of these previous expansion efforts and whether any state or federal laws were violated. If so, the lawyer should counsel the startup franchisor on the consequences of these sales as well as the potential remedies, such as rescission. The lawyer should also discuss how these franchisees or licensees can be brought into the new franchise system under the new franchise agreement.

Structuring the Initial Franchise System

If the business is ready for franchising, the startup franchisor and its lawyer must discuss various

issues affecting the structure of the system. Some of these issues are business related (such as the amount of fees to charge franchisees and the training program) and others are required by law (such as a description of the protected territory, if any, and any litigation or bankruptcy history of the franchisor or its management).

During the initial meetings with a startup franchisor, the lawyer and the startup franchisor will both learn what the other knows. It is counsel's job to educate the client on the legal hurdles to franchising, including preparing an FDD, initial and renewal filings, and maintaining relationships with franchisees. The lawyer should learn about the available resources the startup franchisor has (including personnel, existing systems, and capital) and the business model from the client (and outside sources). In addition to the startup franchisor's description of the business during the introductory meetings, the lawyer should review the company's website to determine the history and management of the company and what is unique about the business. The lawyer and start-up franchisor should consult resources for information on competitors include *Entrepreneur* magazine's annual "Franchise 500" list and "Top New Franchises Ranking" and the FDDs filed by franchisors in California, Minnesota, and Wisconsin, which are available online.

Franchising is not stagnant. Clients will rely on their lawyer's foresight to reserve for the franchisor and its franchise system sufficient space to grow, while protecting the rights of the franchisor. During the term of a typical franchise agreement, there will be technology improvements, changes in consumer demands which spawn changes in marketing practices, and new legal standards on operating a business. Successful franchise systems will need to adapt to these changes in real time. For example, as the system grows, the size of protected territories granted to franchisees will become important—inappropriately large protected territories may lead to brand cannibalization by neighboring franchisees. Cheryl Lucente, Sawan Patel, & Leslie Pujo, *A Practical Guide to Managing Issues Faced by Smaller and/or Startup Franchisors*, IFA 51st Annual Legal Symposium (2018).

Clients will rarely have thought through all of the various issues to be addressed to effectively structure a franchise system, including how much

money it actually takes to open an outlet, how territories will be assigned, what services the franchisor will offer, and what fees franchisees will pay. The lawyer should expect to offer suggestions and work with consultants to explain various issues—often more than once—while fine tuning the franchise documents. Most lawyers use detailed questionnaires to walk clients through the items in the FDD. Jim Meaney & Max Schott, II, *Starting a Franchise System: Practical Considerations, Planning and Development*, ABA 33rd Annual Forum on Franchising (2010). After preparing the initial drafts of the FDD and agreements, the lawyer and client will probably exchange revisions over several weeks or months as they continue to perfect the documentation.

Preparing for Franchising

A great deal of preparation work goes into launching a new franchise system beyond just the FDD and agreements. Although the startup franchisor or its consultants needs to handle most of this prep work, the lawyer should inform and monitor the client's progress. This prep work will allow for a faster roll out of the franchise system, a better product that can be sold to franchisees, and a value-add to the business.

Before even preparing drafts of the FDD, the lawyer should run a trademark search to determine if there are other users of the startup franchisor's trade name, and whether those rights are senior to the client's rights. If there are no third party owners with senior rights, the lawyer should file a trademark application at the United States Patent and Trademark Office for registration of the primary mark(s). It can take a year or two for a trademark registration to issue. Once registered, the client will enjoy increased trademark protection of its brand—which provides assurances to franchisees—and the client avoids having to register its franchise offering as a business opportunity in many states. Beata Krakus & Alexander Tuneski, *Caught in the Web of Federal and State Business Opportunity Laws: Managing and Avoiding the Entanglement of Regulations*, ABA 36th Annual Forum on Franchising (2013).

Further, the lawyer should usually form a new legal entity for the franchising operations, which would be the franchisor, separate from any existing entities the client uses for operating its existing outlet(s). In addition to creating another liability shield, having a new franchising entity will reduce the costs and time necessary to prepare audited financials. However, be aware of

disclosure obligations for parents and affiliates, and of registration states that will require a parent guaranty and/or financial assurances if the new entity is inadequately capitalized or lacks sufficient operating history. The lawyer should review all audited financial statements (in particular, the footnotes) to ensure they are consistent with the FDD.

The lawyer should instruct the client to begin systematizing its operations in written standards manuals and training materials as soon as possible. Most often, a startup franchisor will have some documentation—however scattered—on operating the business. Once fully developed, this information will become the operations manual given to franchisees. Sometimes the client will engage a consultant to assist in developing the systems manual and training curriculum. The lawyer should at least review the operations manual for anything that may expose the franchisor to liability or be inconsistent with the FDD; for example, startup franchisors may include employment guidance on hiring, paying, and disciplining employees which could expose the franchisor to joint employer liability claims.

The client may need to renegotiate its existing or negotiate new supplier relationships for favorable pricing and delivery terms for its franchisees. Franchisees will expect volume pricing discounts as a benefit of participating in a franchise system. Clients may ask their lawyer to assist in reviewing and negotiating these supplier agreements.

The client may also need to bolster its sales and training staff. The lawyer should provide guidance to the sales staff on complying with federal and state disclosure laws, including compliance with waiting periods and what financial performance information can be shared with prospective franchisees. Sometimes this is accomplished by a training session conducted by the lawyer.

Ongoing Representation

The lawyer's role does not end with preparation and registration of the franchise offering. Lawyers representing startup franchisors should expect a lot of questions from their clients once they begin the sales process.

First, the FDD must be updated at least annually in all states, or sooner upon a material change or amendment. In most cases, the client

will request the lawyer's assistance in preparing these changes, some of which are required by law. Many other changes stem from changes in the business, including changes to fees or supplier relationships. It is not uncommon for startup franchisors to experience more changes to the system each year than established franchisors as these startup franchisors work through the growing pains of launching a franchise system.

Second, many state franchise and business opportunity laws restrict the termination and non-renewals of franchises. See, e.g., Minn. Stat. § 80C.14. Improperly sending default notices—without following the minimum notice and cure periods required by the agreements or state law—will invalidate the default notice and potentially lead to litigation between the franchisor and the franchisee. When defaulting, terminating, or not renewing a franchisee, lawyers should review the applicable agreements and state law to determine the proper course

of action.

Some lawyers also assist their franchisor clients with contract management, including properly completing the receipt pages attached to the end of the FDD and retaining any signed receipts, franchise sales compliance questionnaires, and franchise agreements. Startup franchisors may find the rules on waiting periods and completing all necessary signatures on the agreements confusing for the first sale. Many startup franchisors would rather not worry about the paperwork involved in franchising and want to focus on making sales and operating their company-owned outlet(s).

Conclusion

Franchisor lawyers must rely on their business experience in addition to their legal knowledge to properly structure the initial franchise offering and guide the franchisor during the initial years of franchising.

SOLO AND SMALL PRACTITIONER'S CORNER

Market Like a Kardashian

Chamise Sibert Parson, Sibert Law Firm



Chamise Sibert Parson
Sibert Law Firm

Whether you love or loathe them, most of us recognize the Kardashian name. While most of us think of the Kardashians as reality tv stars, they are so much more. Since 2007, this famous family has used their fame and online marketing to build a business empire. How did reality television stars become multi-million-dollar digital marketing moguls? And, what can lawyers in solo or small firms learn from their marketing strategies?

Strategy #1: Create Cross-Marketing Synergy

If your marketing plans are larger than your budget, take a cue from the Kardashians and create marketing synergy with complementary businesses. Like many smart businesses, the Kardashians cross-promote each other's products to their respective audiences. In 2017, Kim Kardashian's online gift guide

included click-to-buy links to products sold by each of her siblings. Because the gift guide was an instant success, the entire family profited from this joint marketing effort.

Cross-promotion is a savvy marketing strategy because it can grow your audience with minimal cost and effort. It can be a powerful tool for solos and small firms because it stretches your marketing dollars. Collaborating with other businesses expands your network and, if done wisely, can bolster your credibility. If clients rave about a superstar accountant, invite him or her for coffee to discuss collaborating on a webinar, panel discussion, or guest blogging opportunities. Because most franchise clients also work with insurance and lenders, these industries offer cross-promotional and networking opportunities. By enlisting brand ambassadors or "fans," your network can grow exponentially. Remember

that strategic alignment, not luck, creates synergy, which can lead to additional business opportunities and increased revenue.

Before launching any cross-marketing campaigns, review your jurisdiction's ethical rules on attorney marketing and prohibited communications, solicitation, referrals, and compensation for recommendations. In 2018, the ABA amended Rules 7.1 through 7.5 of the Model Rules of Professional Conduct, which address attorney marketing and the solicitation of clients. While the laws in each state vary, Rule 7.2 of the American Bar Association Model Rules of Professional Conduct states that an attorney can use any form of media to market his/her services but cannot pay nor offer anything of value to another attorney or non-attorney in exchange for a recommendation, with limited exceptions. Model Rules of Prof'l Conduct R. 7.2(b) and cmts. 2-5 (2018) (the "Model Rules"). While fee sharing with a non-attorney is generally prohibited, Model Rule 7.2(b)(5) permits nominal thank you gifts or tokens of appreciation for a recommendation or client referral. Such gifts cannot compensate a non-attorney for a recommendation and cannot be given in consideration of a promise of future referrals. *Id.* at R. 7.2(b)(5) and cmt. 4. A reciprocal referral agreement between attorneys or an attorney and a nonlawyer is forbidden unless the arrangement is non-exclusive and you inform the client (or potential client) of the referral agreement. *Id.* at R. 7.2(b)(4). Reciprocal referral arrangements are prohibited if they interfere with the attorney's professional independence and judgment. *Id.* at R. 5.4(c) and cmt. 1; R. 2.1; R. 7.2 cmt. 8.

Cross-promotional marketing is also a useful online marketing strategy that involves spreading your content across different online platforms. Because people gravitate to various websites, all online platforms are not equal. To reach a broader audience, and to maximize your time, use the free or fee-based version of social media management sites such as hootsuite.com, buffer.com or Zoho Social to post content simultaneously on multiple platforms. Facebook also allows you to add social tabs so that visitors can view content from various social media sites.

Strategy # 2: Embrace Online Marketing

Digital marketing is the great equalizer because it levels the playing field between large and small firms. It is also a lower-cost option and more flexible than traditional print ads because you can target a specific market at a particular time or expand your advertising to reach anyone with a phone, tablet or laptop.

If you are looking for a place to start, maximize free online resources by claiming your company's Google listing; add social media links to your website; and join profile websites like LinkedIn and Avvo where clients can view your experience, practice areas, and recommendations from clients and colleagues. You can also use "freemium" services and content marketing such as newsletters or blogs to increase traffic to your website. If you prefer audio content rather than writing, robust platforms like Webinarjam.com, Everwebinar, Demio, or Readytalk allow you to record your webinar sessions and upload them to the website of your choice. These hosting sites are dynamic and will enable you to engage webinar attendees through interactive tools such as online polls, live chats, and surveys. If your email inbox is at capacity, replace business cards with LinkedIn invitations and Facebook friend requests. In addition to creating an instant connection, these websites serve as 24/7 marketing tools and promote your business while you sleep.

Ignoring the online audience in today's economy is a costly business mistake. The same is true for failing to research and know your firm's digital footprint. You can actively manage your online reputation in a simple, yet effective way, by periodically searching your name or your firm's name. If you are not pleased with the results, create more online content or improve your website ranking. Ensure that you use plain English, not legalese, on your site to increase search hits. Bolster search engine optimization ("SEO") by using local keywords that connect you with potential clients in your geographic area such as "Georgia franchisee attorney" or "Tennessee franchise litigation." Because directory listings and group advertisements that list lawyers by practice area are permitted, add backlinks to websites such as Martindale.com, Findlaw.com, SuperLawyers.

com, and your local Chamber of Commerce. By linking your Facebook, LinkedIn or Twitter page to your website, your online rankings improve with each post.

In digital marketing as elsewhere, lawyers must refrain from statements and communication about themselves or their services that could be construed as misleading. Model R.7.1 cmt. 2 (explaining that a truthful statement could be misleading in certain circumstances). Protect your brand by including disclaimers on all online communications including social media platforms, your company websites, and articles. *Id.* at R. 7.1 cmt. 3.

Strategy #3: Move Online Connections Offline

If you prefer in-person interactions over online chats, build online connections that move offline. Free websites like Meetup.com combine digital connections and face-to-face meetings. Meetup.com connects individuals with similar interests such as networking and business development. Meetup groups can also provide valuable speaking or cross-promotional opportunities. You can also view “meetup” attendees before a meeting, which allows you to target one-on-one potential connections strategically. If you cannot find a “meetup” group that meets your needs, you can create one for less than \$200/year.

Model Rule 7.3 provides guidelines for in-person solicitations of potential clients for financial gain and distinguishes between different client groups. While in-person solicitations are generally restricted, direct or in-person solicitations of clients that routinely hire attorneys such as business brokers or in-house counsel are not prohibited outright because there is less risk of undue influence, intimidation or overreaching. *Id.* at R. 7.3(a–b) and cmts. 2–5. However, the prohibition on person-to-person contact or direct solicitations remains intact if the potential client is an unsophisticated consumer that needs legal services but has limited or no prior interaction with an attorney. *Id.* According to the comments, the rule is intended to protect individuals that might find it difficult to fully evaluate all available alternatives in the legal services field to make a reasonable judgment and careful response, or persons that might be influenced by an attorney’s overreaching marketing efforts. *Id.*

Strategy #4: Focus on Your Professional and Personal Brand

In the digital world, your personal image is as important as your professional one. At smaller and solo firms this is especially true because clients hire you, or the brand called You. Tom Peters, who coined the phrase in 1997, defines “personal brand[ing]” as a person’s key differentiator or what people think and know about that person based on his or her work, word-of-mouth, and online content. Tom Peters, *The Brand Called You*, Fast Company (August 31, 1997), available at <https://www.fastcompany.com/28905/brand-called-you>.

Kardashian sibling Kylie Jenner is an expert at leveraging her personal brand to career success. In a family of successful entrepreneurs, Kylie stands out as the creative force behind a popular line of beauty products. If you examine her social media posts, beauty is a constant theme, and most pictures promote her makeup brand. Kylie often mixes personal posts with product launches that sell out in hours or even minutes. Although she is a beautiful young woman living an enviable lifestyle, she freely shares her insecurities and struggles with body image. Not only does this make her relatable, but it also allows her to promote the use of her beauty products, thereby increasing sales. Although some may dismiss her “marketing tactics,” Kylie is laughing all the way to the bank. When Kylie launched her lip kits, they sold out in hours, and in August 2018, Forbes magazine profiled the then 21-year old as the next youngest self-made billionaire. Natalie Robehmed, *How 20-Year Old Kylie Jenner Built a \$900 Million Fortune in Less Than 3 Years*, Forbes (August 31, 2018) available at <https://www.forbes.com/sites/forbesdigitalcovers/2018/07/11/how-20-year-old-kylie-jenner-built-a-900-million-fortune-in-less-than-3-years/>.

As small business owners, we are continually marketing ourselves and our practice. If your key differentiator is your level of service, then promote this because it sets you apart. If you want to market to growing businesses, highlight your role as an attorney and business owner that has built a successful practice. Who better understands and relates to business ups and downs than another business owner. Once you identify your target demographic, use social media to engage them on a professional or personal level. Khloe Kardashian,

a self-proclaimed fitness fanatic, has carved out a niche social media following of health enthusiasts and now markets fitness-branded products and services to her audience. By sharing your interests on social media, you can find common ground with potential clients, and it helps smaller firms stand out in a crowded marketplace. Personally, photos of my dog on my website and social media helped onboard a pet-product manufacturer and retail client simply because we shared an affinity for pets. This one strategy can lead to greater opportunities because people are more likely to work with others that they relate to and like. While ethical concerns may prevent us from adopting celebrity “personal brand[ing]” methods, we can build online name recognition through blogging and podcasting. We can also brand ourselves by connecting with industry-specific groups such as restaurant, hotel or manufacturing associations.

Periodically review your state’s rules and opinions for updates on online communications, particularly social media

restrictions. The improper use of social media can expose you to ethical issues. For example, answering legal questions on Twitter or giving your opinion on a blog post may inadvertently create an attorney-client relationship under Rule 1.18 of the Model Rules. *Id.* at R. 1.18 cmt.

2. Because social media has changed the way that attorneys communicate with the public, be mindful that requesting or inviting and responding to legal questions is often referred to as a legal consultation.

Conclusion

Marketing opportunities are everywhere, and we can learn marketing strategies from unlikely sources. When used wisely, business synergy, online marketing, and promoting the brand called You can help solos, and small firms attract more fans, i.e., clients. While we might not be cultural icons with millions of followers, we can use digital marketing to create buzz and expand our network in the new year.

A Litigator’s Perspective on Precision in Drafting: Choice-of-Law Clauses

Frank Sciremammano, Gray Plant Mooty

A LITIGATOR’S
PERSPECTIVE

Almost all franchise agreements today include a choice-of-law clause. One of the primary purposes of a choice-of-law clause is to avoid uncertainty over the law that would govern any potential disputes arising from the agreement. In drafting and negotiation, attention is usually given to the jurisdiction selected in the choice-of-law clause. The “other words” in a choice-of-law clause can be just as critical in litigation as the jurisdiction selected. This installment of *A Litigator’s Perspective* highlights how subtle differences in the actual language used in a choice-of-law clause can have ramifications in litigation on statutes of limitation and tort issues.

A common boilerplate choice-of-law clause may read: “this agreement shall be governed by and construed in accordance with the laws of the State of New York.” One question that may arise in

litigation is which “law” of New York (or the chosen jurisdiction) is selected by the foregoing language. Courts in most jurisdictions draw a distinction between “procedural” law, which generally governs the enforcement of a party’s rights, and “substantive” law, which generally governs the creation of those rights. The distinction is critical, because a statute of limitations is generally considered procedural law, and courts in most jurisdictions have thus concluded that the term “law,” when used in a choice-of-law clause, encompasses only the “substantive” law of the chosen jurisdiction, and not the “procedural” law of the chosen jurisdiction. Accordingly, a common boilerplate choice-of-law clause may not encompass the selected-law’s statutes of limitation.

In *Coldwell Banker Real Estate, LLC v. Brian Moses Realty, Inc.*, for example, the U.S. District Court for the



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District of New Hampshire held that a franchisee's claim for negligent misrepresentation was barred by New Hampshire's three-year statute of limitations, despite the fact that the parties' franchise agreement had a choice-of-law clause selecting New Jersey law law. 752 F. Supp. 2d 148, 168 (D.N.H. 2010). The court applied New Hampshire's statute of limitation because "statutes of limitation are usually a matter of procedure" and so "they follow the forum[] [court's] rule." *Id.* at 165. Notably, New Hampshire's statute of limitations for negligent misrepresentation is three years shorter than New Jersey's (see N.J.S.A. § 2A:14-1), so the difference could have significantly affected the parties' substantive rights and liabilities. See also *Ramada Franchise Systems, Inc. v. CapitolView II Ltd. Partnership Venture*, 132 F. Supp. 2d 358, 362 (D. Md. 2001) (applying New Jersey's statute of limitations despite the fact that the parties chose Arizona law "as the source of substantive law," because the case was transferred from the U.S. District Court for the District of New Jersey and federal courts apply the procedural rules of the transferor court's forum).

A second question that may arise in litigation involving a boilerplate choice-of-law clause is its scope—i.e., whether it applies to tort claims between the parties as well as contract claims. When a dispute arises in a franchise relationship, it is common for parties to allege contract claims (like breach of contract or the duty of good faith and fair dealing), tort-based claims (including fraud and misrepresentation), and statutory claims (such as claims arising under registration or consumer protection statutes). In answering the question of what law applies, a court is likely to examine the precise language used. The choice-of-law provision may apply to the "interpretation" and "construction" of only the "agreement;" or it may apply to any disputes "arising from the agreement;" or it may apply to the "relationship between the parties." The precise language used is therefore critical. Most courts have adopted a presumption that language merely referring to the interpretation or construction of the "agreement," without more, does not encompass tort claims.

For instance, in a case brought by marble care franchisees against a franchisor for various alleged torts and contract violations, the choice-of-law clause stated that the "agreement is to be construed in accordance with the law of the State of New York." *Maltz v. Union Carbide Chemicals & Plastics Co., Inc.*, 992 F. Supp. 286 (S.D.N.Y. 1998). The U.S. District Court for the Southern District of New York held that

language was too "narrow" to encompass tort claims between the parties. *Id.* at 297-298. Instead, and despite the choice-of-law clause, the court applied Texas, Ohio, and California law to the tort claims at issue. *Id.* at 299.

Conversely, in the *Coldwell Banker Real Estate, LLC* case discussed above, the choice-of-law clause governed the agreement and the relationships among the parties. *Coldwell Banker Real Estate, LLC*, 752 F. Supp. 2d at 165. Given the more expansive scope, the court held that the choice-of-law clause encompassed tort claims related to the parties' relationship. *Id.*

The lesson from these cases is that franchisors, franchisees, and their respective counsel should carefully review the "other words" in their choice-of-law clauses. Parties seeking to ensure certainty that the selected jurisdiction's statutes of limitation will apply should consider adding specific language establishing their intent to include the statutes of limitation of the selected jurisdiction. Parties seeking to ensure that the selected jurisdiction's law will govern tort claims related to the parties' agreement or arising out of the parties' relationship should consider adding similar specific language clearly defining the scope of the choice-of-law clause. Failing to consider the "other words" in a choice-of-law clause can threaten the certainty sought to be achieved by using such a clause, and can require parties to litigate issues peripheral to the central dispute.





Message from the Editor in Chief

Heather Carson Perkins, Faegre Baker Daniels LLP

In this issue, we have a special piece authored the Women's Caucus Steering Committee of the Forum on Franchising. At the Forum in October, the group took on the issue of the #MeToo movement, and how lessons can be learned even in our Forum. This piece, and Eric Karp's follow-on discussion, lead this issue. I'm proud of the members of the Women's Caucus for having the courage to discuss this topic honestly and of the Forum's leadership for its support.

Also in this issue, Charles Marion of Blank Rome provides an update on the law surrounding accessibility of websites under the Americans with Disabilities Act. This is an area of the law that has evolved largely through caselaw, with planned federal regulations being put on the backburner in the current administration. Bethany Karsten of Two Men and a Truck and Lauren Ralls of Kilpatrick Townsend & Stockton offer a franchisor's perspective on conditional renewals as a tool a

franchise system can use. Look for a franchisee-side perspective in our next issue.

Sawan Patel of Larkin Hoffman offers thoughts on how lawyers can represent clients who are looking to franchise, from evaluating the concept to system structure to documentation and ongoing representation. Chamise Sibert Parson of the Sibert Law Firm offers an unconventional (for lawyers) take on marketing in the Solo and Small Practitioner's Corner—encouraging practitioners to borrow from successful business development techniques in places where we might not otherwise look. And Frank Sciremammano of Gray Plant Mooty offers a litigator's perspective on the importance of precision in drafting choice-of-law clauses.

We hope you enjoy the Winter issue.

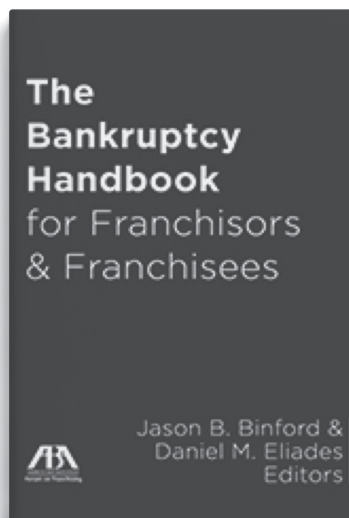
SAVE THE DATE

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THE BANKRUPTCY HANDBOOK FOR FRANCHISORS & FRANCHISEES



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