

The Franchise Lawyer

American Bar Association • Forum on Franchising

Message from the Chair

Will K. Woods, Baker & McKenzie LLP



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Baker & McKenzie LLP

Few would characterize this season as a typical fun-filled summer, and virtually everyone is looking forward to better times ahead. Over the past six months, we have all been called on to become much more flexible in our personal and professional lives — to make the best of a difficult situation. Thankfully, my family and I have stayed healthy, and I have enjoyed spending (much!) more time with my wife (Kelly) and two teenage boys (Ben (17) and Abe (15)), seeing them grow into young men literally before my eyes on a daily basis (and hopefully becoming more responsible in the process!). They have learned a lot about how their dad works too, including that he is loud and paces seemingly miles per day when he's on phone calls and that, even though he is a lawyer, he seems to know A LOT about planning a meeting for "that Forum thing" that he's working on all the time.

We all have our own experiences during this period, and I would have loved nothing more than to have shared some of those experiences over drinks and laughs (or even cries) with good friends at the Annual Forum Meeting, in person, in Phoenix. But, despite all of our hopes, as you all know, we won't be seeing each other in person this October.

For the first time in 43 years, we have been forced to cancel our live Annual Forum Meeting. That is a big deal — to me, as Forum Chair; to the 13 living Past Chairs of the Forum; to the co-Chairs of this year's Annual Meeting; to the Planning Committee; to the entire Governing Committee; to the speakers; and, most importantly, to all of you, the members of our great organization. This difficult decision was not taken lightly, but I believe it was the right decision.

Like each of us individually, the leadership of the Forum has made the very best of a difficult situation. In early July, we pivoted from planning a hybrid meeting to an all virtual Annual Forum Meeting. We are calling our 43rd Annual Forum on Franchising *Franchising in Focus 2020@Home*. And a great (albeit different) Annual Forum Meeting it will be!

I can assure you that the Annual Meeting will continue to meet the Forum's very high standards

Continued on page 19

In This Issue

- 1 MESSAGE FROM THE CHAIR
- 3 ITEM 19 DURING COVID-19
- 6 DEVELOPMENTS IN NON-SIGNATORY LIABILITY IN FRANCHISE AGREEMENTS, WHERE AND WHEN DOES IT APPLY?
- 9 WHEN NO POLICY IS BAD POLICY: EXTENDING DOCUMENT RETENTION POLICIES TO TEXT MESSAGES (AND BEYOND)
- 13 A BURGER AND A SIDE OF NUTRITION FACTS, PLEASE!
- 17 SECRETS IN PLAIN SIGHT: WHAT A MEDIATOR SEES THAT YOU MAY NOT. HOW TO MAXIMIZE YOUR OPPORTUNITY TO "WIN" AT MEDIATION.
- 19 MESSAGE FROM THE EDITOR-IN-CHIEF

Table of Contents

- 1** **Message from the Chair**
Will K. Woods
- 3** **Item 19 During COVID-19**
Stuti Murarka
- 6** **Developments in Non-Signatory Liability in Franchise Agreements: Where and When Does It Apply?**
Brett M. Buterick and Evan Goldman
- 9** **When No Policy is Bad Policy: Extending Document Retention Policies to Text Messages (and Beyond)**
Samuel A. Butler
- 13** **A Burger and a Side of Nutrition Facts, Please!**
Lauren Smith Madden
- 17** **Secrets in Plain Sight: What a Mediator Sees that You May Not. How to Maximize Your Opportunity to “Win” at Mediation.**
Arthur L. Pressman
- 19** **Message from the Editor-in-Chief**
Karen C. Marchiano



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Item 19 During COVID-19

By Stuti Murarka, Cheng Cohen LLC

While some franchise systems are thriving during the COVID-19 pandemic, many are not. In many franchise systems, franchisees' performance during the pandemic has been different than it was before the pandemic, due to governmental closures, capacity limits, increased or reduced customer demand, altered business models, or other factors. Despite the pandemic, franchisors continue to offer and sell franchises, and must continue to register franchise disclosure documents ("FDD") in accordance with state law and to provide FDDs to prospective franchisees in all states pursuant to the FTC Franchise Rule, 16 CFR 436.1, *et seq.* During this period of uncertainty, franchisors must consider whether and how to make financial performance representations ("FPR") in Item 19 of their FDDs in light of COVID-19.

The NASAA Franchise Project Group (a group of select regulators) recently issued guidance on this issue concluding, "Each franchise system is unique, and the determination of whether a franchisor has a reasonable basis to make an FPR is based on the specific facts and circumstances relating to the franchise offering." *Disclosing Financial Performance Representations in the Time of COVID-19 (2020)* at p. 3, NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, dated June 10, 2020, available at <https://www.nasaa.org/wp-content/uploads/2020/06/FPRs-in-the-time-of-COVID-19.pdf> (the "NASAA Project Group Guidance"). This article addresses the facts and circumstances franchisors should consider.

Reasonable Basis

A franchisor must have a "reasonable basis" in support of its FPR at the time such FPR is made. 16 CFR § 436.5(s)(3). While the FTC Franchise Rule does not define the parameters of determining a "reasonable basis," the FTC has opined that FPRs must be based on factual information which a prudent businessperson would rely on while making investment decisions. *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008) at p. 135, FEDERAL TRADE COMMISSION

(the "Compliance Guide"), available at <https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf>. According to the Compliance Guide, the quality and quantity of information constituting a reasonable basis will vary from case to case.

Franchisors also must comply with anti-fraud provisions in state franchise laws. See, e.g., N.Y. Gen. Bus. Law § 687 ("It is unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly...omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."); Md. Code Ann., Bus. Reg. § 14-227 (A person who sells a franchise is civilly liable to the person who buys a franchise if the person who sells a franchise does so by means of "any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, if the person who buys or is granted a franchise does not know of the untruth or omission.")

Given the landscape of regulations and guidance, each franchisor must, as this pandemic unfolds: (1) make an objective analysis of its current and future market conditions; (2) determine how COVID-19 has impacted its franchise system; and (3) assess whether it continues to have a reasonable basis to provide an historical FPR to its prospective franchisees. According to the NASAA Franchise Project Group's guidance, this should include considering the following factors:

- Whether the franchise business has been significantly impacted by the COVID-19 pandemic;
- The type of data the franchisor includes in the FPR;
- The reasonable inferences a prospective franchisee can draw from the FPR;
- When the franchisor estimates a prospective franchisee can expect to open for business after entering into a franchise agreement;



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- Whether and how the franchisor adapts the franchise business to account for current market conditions resulting from the COVID-19 pandemic; and
- Whether and how the franchisor adapts the franchise business to account for future market conditions resulting from the COVID-19 pandemic.

NASAA Project Group Guidance at p. 2.

Multiple arguments support allowing a franchisor to disclose historical pre-COVID-19 financial information in its Item 19 as long as the franchisor does not have a reasonable basis to believe that its franchised business will substantially change post-COVID-19. First, with a clear and conspicuous admonition that an individual franchisee's results may vary from the historical Item 19, prudent prospective franchisees should not be misled to believe that optimal financial performance is achievable during a global pandemic. Second, historical Item 19 information is not meant to be an exact measure of the expected financial performance of a future franchise business; rather, it is supposed to give prospective franchisees a clear view of the financial performance of a franchise business at a given period of time. Prospective franchisees must use their business and investment acumen to assess the current economic conditions of the market as compared to the period based upon which Item 19 information was prepared. Third, a temporary closure or temporary reduction in business does not automatically mean that franchisors have no reasonable basis to include historical financial data under Item 19.

Franchisors that grant franchisees a longer period of time to commence the franchise business (after executing the franchise agreement) may have a stronger argument in favor of including historical data in Item 19. Arguably comparable markets, like New Zealand, Germany, Canada, and South Korea, are already reported to be on a path to economic recovery. With most states in the United States opening up businesses, the United States economy is seemingly on the recovery trajectory. Reade Pickert, Yue Qiu and Alexander McIntyre, U.S. Economy Is Opening Back Up, But the Covid-19 Fallout Will Linger, BLOOMBERG.COM, (June 1, 2020, 11:40 am) <https://www.bloomberg.com/graphics/recovery-tracker/> (last visited June 4, 2020). However, the status is constantly changing, and in first week of July, many jurisdictions tightened

(or refused to relax) restrictions as the number of COVID-19 cases has continued to rise. <https://www.cnn.com/2020/07/06/us/florida-coronavirus-miami-dade-county/index.html> (last visited July 8, 2020). The possibility of a second wave of COVID-19 outbreak in the fall/winter of 2020 increases uncertainty.

Franchise systems that have managed to conduct either business as usual or been able to generate steady income streams under a modified form may have a stronger argument in favor of providing historical FPRs under Item 19. Many franchise systems have implemented innovative ideas to continue to operate during this pandemic. For example, in addition to offering third-party delivery and curbside pickups, many restaurants are pivoting to offer new products such as family-style DIY meal prep boxes, cocktail mixes, food truck services, and open-air restaurant concepts. Educational franchises have moved to e-learning platforms, and fitness and wellness franchises are offering online services. On the other hand, the addition of different products and services could change the sources and profitability of revenue streams pre- and post-COVID-19.

There are state-specific considerations as well. Some states previously indicated that they will not treat Item 19 historical data any differently during COVID-19 as long as franchisors comply with the FTC Franchise Rule and the guidelines outlined in the NASAA Franchise Commentary on Financial Performance Representations. However, recently, Washington and Maryland have issued comment letters to franchisors who have disclosed FPRs based on historical data from before the COVID-19 outbreak. Further, Washington is requiring franchisors to make representations as to why they believe COVID-19 will not have a financial impact on the franchised business or provide more updated financial information that includes the COVID-19 time period.

Washington's requirements may create issues in other states. While Washington may approve an FDD with representations from franchisors as to why they believe COVID-19 will not have a financial impact on the franchised business, it is unclear whether other states will approve an FDD with such amendments/representations. Further, such representations may increase a franchisor's potential liability if franchisees do not achieve the numbers presented in Item 19. And, if the FPR in

Item 19 is questioned by one registration state, a failure to make any resulting changes to the FPR in all other states, or abandonment or withdrawal of the registration application without making changes, may raise significant concerns regarding the FPR's compliance with the Franchise Rule. *Amended Franchise Rules FAQ #38*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/amended-franchise-rule-faqs#38> (last visited June 4, 2020). As a result, if franchisors are unable to resolve Item 19 based comment letters, prudence may dictate that franchisors refrain from providing any FPR at all until businesses and the economy stabilize from the impact of COVID-19.

Material Changes to Item 19 and Amendment Obligations

A franchisor's ability to use pre-COVID historical FPRs may change as the pandemic continues. At the time of furnishing a disclosure document, franchise sellers must notify prospective franchisees of any material changes relating to any FPR. 16 CFR § 436.7(d). In addition, franchisors shall, "within a reasonable time after the close of each quarter of the fiscal year, prepare revisions to be attached to the disclosure document to reflect any material change to the disclosures included, or required to be included, in the disclosure document." 16 CFR § 436.7(b). While the FTC Franchise Rule requires that material changes be disclosed within a reasonable period after each quarter, some states require amendments to the FDD to disclose material changes "promptly" after they occur. *See, e.g.*, Cal. Corp. Code § 31123, N.Y. Gen. Bus. § 683(9)(a), and Md. Code Ann. Bus. Reg. § 14-220(a).

While the FTC Franchise Rule does not define "material change," the FTC's Statement of Basis and Purpose states that "materiality" is assessed from the standpoint of a reasonable prospective franchisee. *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities; Final Rule*, 72 Fed. Reg. 15455 (March 2007). Franchisors can notify prospective franchisees of material changes in the information underlying Item 19 in any reasonable manner as long as a franchisor can prove that it has informed the prospective franchisee about the material change. *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008) at p. 135, FEDERAL TRADE COMMISSION. Although the FTC Franchise Rule does not require a formal amendment to the FDD to reflect

material changes in Item 19, most state laws require franchisors to file an amendment upon the occurrence of a material change. *See, e.g.*, Md. Bus. Reg. Code Ann. 14-220(a)(1).

The NASAA Project Group Guidance emphasizes that franchisors cannot avoid their obligation to update the FDD to reflect a material change by including disclaimers or admonitions in Item 19 which suggest that prospective franchisees should not rely on the pre-COVID-19 FPR. *Disclosing Financial Performance Representations in the Time of COVID-19* (2020) at p. 3, NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, available at <https://www.nasaa.org/wp-content/uploads/2020/06/FPRs-in-the-time-of-COVID-19.pdf>.

In light of the above ongoing obligations, franchisors must, as this pandemic unfolds, assess: (1) whether the system changes introduced due to COVID-19 alter the franchise system in a manner that may impact a prudent prospective franchisee's willingness to acquire the franchise rights; (2) whether the system changes introduced due to COVID-19 are permanent or long-term in nature; and (3) whether pre-COVID-19 data under Item 19 continues to be relevant for prospective franchisees in light of COVID-19 and/or the modifications to their franchise system.

Conclusion

"Reasonable basis" and "material change" are not cut-and-dried concepts. As long as businesses and the economy continue to evolve to find the new normal, franchisors must continuously assess their FPRs and the underlying data to ensure compliance with the FTC Franchise Rule and state laws. This analysis will vary with every franchise program. A failure to amend an FDD in compliance with the FTC Rule and the state laws can have serious ramifications including requiring the franchisor to offer rescission to franchisees, as well as civil and, in some cases, criminal liability. Franchisors that have a "reasonable basis" to support their FPR as of today, may not continue to have a reasonable basis a few months down the line. Therefore, franchisors will continue to face this unique challenge as they offer to sell franchises during and after COVID-19. ■

Developments in Non-Signatory Liability in Franchise Agreements: Where and When Does It Apply?

By Brett M, Buterick and Evan Goldman, A.Y. Strauss LLC

Nearly every franchise agreement today contains a restrictive covenant preventing a franchisee from engaging in a business competitive with its franchisor during the franchise agreement term and after the franchise relationship ends. A non-compete clause can be a very effective tool to protect a franchise system and intangible assets, though it has its limits. A non-compete generally prohibits a franchisee from engaging in a business competitive with its franchisor, but what happens when a former franchisee continues using a franchisor's system through a spouse, family member, close friend, or former employee who did not sign the non-compete and is not contractually bound to the franchisor. Will such a person be constrained under the non-compete signed by the franchisee?

The scenario is a familiar one. After termination or expiration of a franchise agreement, substantially similar business operations continue. Often, the business is operated out of the same physical location or territory as the former franchisee, offering the same or similar products and services to the same or similar customers as the former franchisee. The former franchisee, however, has no involvement, on paper in the new business (i.e. the new business is recorded, leases are assumed, and marks are all registered in the close individual's name).

Can a franchisor enforce a contractual provision against the non-party to a franchise agreement who is, on paper, operating the competing business? The answer—it depends. As franchisors press the issue, courts across the country have been increasingly willing to extend restrictive covenants, whether the restrictive covenant explicitly mentions non-signatories or not, to non-signatories in *certain circumstances*, namely where a close individual is either under

the signator's control or otherwise being used to aid or abet the signator in violating the non-compete clause.

This article addresses recent case law evaluating whether to enforce non-competition clauses against non-signatories when it is alleged that the non-signatory is aiding and abetting, or acting in concert with, a former franchisee. (For a comprehensive overview of prior cases, we recommend "Covenants Not to Compete and Nonsignatories: Enjoining Unfair Conspiracies" by Michael R. Gray And Jason M. Murray, in the Winter 2006 Franchise Law Journal).

Within the past few years, several district courts addressed the issue in-depth under different factual scenarios and reached different conclusions, providing some basic take-aways for what it means to "aid and abet" or "act in concert with" a former franchisee. These courts highlighted what facts meet that threshold, including the often-emphasized closeness of the relationship to the former franchisee. The cases addressed in this article are *Winmark Corp. v. Brenoby Sports, Inc.* (non-compete does not extend to non-signatory), *JTH Tax, Inc. v. Abikarram* (non-compete extends to non-signatory), *JTH Tax, Inc. v. Freedom Tax, Inc.* (non-compete does not extend to non-signatory), and *H & R Block Tax Servs., LLC v. Strauss* (non-compete extends to non-signatory).

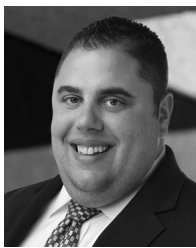
The Cases

Winmark Corp. v. Brenoby Sports, Inc.

In *Winmark Corp. v. Brenoby Sports, Inc.*, the franchisor of a used sporting goods retail franchise (Play It Again Sports), moved for injunctive relief against its former franchisee, the purchasers of the former franchise's assets who were operating a competing business, and the former franchisee's son, who



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managed the competing business. *Winmark Corp. v. Brenoby Sports, Inc.*, 32 F. Supp. 3d 1206, 1216-17 (S.D. Fla. 2014). The former franchisee testified that upon receiving notification that his Play It Again franchise was terminated, he personally installed signage rebranding the store as “Play or Trade Sport.” *Id.* at 1217. The former franchisee then sold the business assets to a third party, SOS Sports, Inc., d/b/a Play or Trade Sport (“SOS Sports”), owned by non-signatory, Jorge Bocca (“Bocca”). *Id.* The former franchisee testified he sold the franchise assets to the non-signatory for a lump sum payment and, additionally, an indefinitely continuing percentage of future Play or Trade Sport revenue. *Id.*

The competing business, Play or Trade Sport, operated exactly as Play It Again Sports had operated, including by offering products in a similar manner and utilizing the same point of sale and data software Play It Again Sports required its franchisees to use. *Id.* at 1216-17. The former franchisee’s son managed the competing business. *Id.* at 1217-18.

Despite the former franchisee’s continued connection to the competing business through profit sharing and his son’s management of the business, the court found with respect to the non-signatory purchasers:

Winmark has not established that non-parties Jorge Bocca and SOS Sport are an alter ego for [the former franchisee] to secretly operate Play or Trade Sport, or that these non-parties are under [the former franchisee]’s control. [The former franchisee] testified that he sold the assets of his franchise to Bocca, who is not a close friend or relative. While [the former franchisee]’s testimony that he has no affiliation to Play or Trade Sport is belied by his financial incentive for the store’s success, Winmark has not established that Play or Trade Sport is under [the former franchisee]’s control, a corporate fiction, or otherwise being used to aid and abet [the former franchisee] in violating the non-compete agreement.

Winmark, 32 F. Supp. 3d at 1221–23.

In a footnote, the court stated “[t]o the extent that Winmark believes that Play or Trade Sport is

wrongfully utilizing Winmark’s DRS software, then Winmark may of course consider legal action against Play or Trade Sport if it fails to desist from using the software.” *Id.* at n. 6.

With respect to the former franchisee’s son and manager of the competing business, the court found:

The evidence does not support a finding that [the former franchisee’s son is] operating Play or Trade Sport or [is] otherwise aiding and abetting Defendant [. . .] in violating the non-compete agreement. Likewise, the evidence does not support a finding that Play or Trade Sport is merely an alter ego of the Defendants or is operating under Defendants’ control. While [the former franchisee’s son] is listed as a co-manager of Play or Trade Sport, [the former franchisee] testified that [his son] does not own Play or Trade Sport and is merely an employee. [. . .] Finally, [the former franchisee’s son is not a] personal guarantor[] or owner[] of [the former franchisee], and [is] therefore not bound by the non-compete covenant in the Franchise Agreement.

The Southern District of Florida found the former franchisee’s tangential relationship to the continued operation by way of his son’s managerial involvement and his own profit sharing potential was insufficient to enforce the franchise’s restrictive covenant on the purchasing entity, SOS Sports. Given the interweaving of the former franchisee’s earnings with the new entity, it seems the Southern District of Florida leaned heavily on the fact the business purchaser, Bocca, was “not a close friend or relative” of the former franchisee.

JTH Tax, Inc. v. Abikarram

Several years later, the Southern District of Florida reexamined the non-signatory issue in *JTH Tax, Inc. v. Abikarram*, No. 19-CV-60328, 2019 WL 2254816 (S.D. Fla. Mar. 22, 2019) and under the facts of this case reached a different conclusion. There, the franchisor Liberty Tax Service (“Liberty”) sought an injunction against Freedom Tax, Inc. (“Freedom”), a competing tax preparation business owned by the former franchisee’s wife. *Id.* at 1.

Plaintiffs argued the former franchisee was

simply using his wife to side-step the non-compete clause in the franchise agreement. *Id.* at 3. Defendants defended by arguing that the former franchisee's wife was operating an unaffiliated tax preparation business and, if Plaintiffs wished to extend the non-compete restrictions to the spouse, they could have incorporated the restriction in the franchise agreement, but did not. *Id.* at 2. Ultimately, the Southern District of Florida found Freedom was operating under the former franchisee's control, was a corporate fiction, and was otherwise being used to aid and abet the former franchisee, and accordingly, entered a preliminary injunction. *Id.* at 3.

In reaching this conclusion, the Southern District of Florida leaned on four main facts: (1) the close relationship of the former franchisee and the manager of the new entity—i.e. the former franchisee's spouse; (2) Freedom's operation out of the same office that housed the former Liberty franchise and, at least for a portion of time, under the Liberty marks; (3) the former franchisee's statement to Liberty's investigator that he had a business interest in Freedom; and (4) the former franchisee's significant reduction in revenues on his tax return in the year before the termination (which presumably suggested he was transitioning clients to the new entity, even before termination).

Notably, the same magistrate judge in the Southern District of Florida issued the Reports and Recommendations in both *Winmark* and *Abikarram*.

JTH Tax, Inc. v. Freedom Tax

An interesting comparison to the *Abikarram* case arose in *JTH Tax, Inc. d/b/a Liberty Tax Service, et al. v. Freedom Tax, Inc., et al.* involving the same franchisor. No. 3:19-cv-00085-RGJ, 2019 WL 2062519 (W.D.KY May 9, 2019). In *Freedom Tax* (unrelated to the "Freedom Tax" in *Abikarram*), the Western District of Kentucky denied Liberty Tax's attempt to use the Defend Trade Secrets Act ("DTSA") to in effect enforce a noncompete clause against a former franchisee's "General Manager," Adisa Selimovic, who had never signed the noncompete. Ms. Selimovic had been listed as an "officer" on the franchisee's corporate documents filed with the Kentucky of Secretary of State, but maintained no ownership interest in the franchisee entity. The court rejected Liberty Tax's arguments that the former General Manager should be enjoined from operating a competing business, stating "[w]

ere the Court to issue an injunction effectively enforcing the Franchise Agreements' broad non-compete clause against Selimovic, who was not a signatory to the Franchise Agreements, it would unjustifiably harm Selimovic's ability to earn a living in the Louisville area." *Id.* at *14.

H & R Block Tax Servs., LLC v. Strauss

In an earlier tax-franchise-related case, the Northern District of New York examined whether a former franchisee's lease of the former franchise location's office space to her former employees, who then performed tax preparation services out of that same location constituted "aiding and abetting" sufficient to apply the post termination non-compete to the non-signatories. *H&R Block Tax Servs., LLC v. Strauss. H & R Block Tax Servs., LLC v. Strauss*, No. 1:15-CV-0085 LEK/CFH,

2015 WL 470644 (N.D.N.Y. Feb. 4, 2015). In *Strauss*, the former franchisee's franchise agreement lapsed and the post-termination covenants prohibited the former franchisee from: (1) soliciting clients to whom her franchise had provided tax return preparation services and competing with Plaintiff in the business of preparing tax returns, for a period of one year and within a certain radius of her location; and (2) leasing the premises used for her franchised business to a third party for the purpose of preparing tax returns. *Id.* at 1.

After termination of the franchise agreement, the former franchisee violated both prongs of the non-compete covenant by continuing to provide tax preparation services at the franchise location under a new name, and leasing the franchise office space to two tax professionals whom the former franchisee previously employed when she operated the franchised business. *Id.* at 1.

The Northern District of New York had no hesitation extending the non-compete to the non-signatories, finding:

the [franchise agreement] unambiguously provides that upon termination of the franchise agreement, Defendant may not lease to any individual the premises for the purpose of conducting tax preparation services, [. . .] and Defendant has not refuted that she is in breach of this provision. Furthermore, pursuant to Fed.R.Civ.P. 65(d)(2), a preliminary injunction

Continued on page 12

When No Policy is Bad Policy: Extending Document Retention Policies to Text Messages (and Beyond)

By Samuel A. Butler, Lathrop GPM LLP

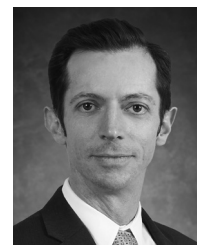
Most franchisors and many franchisees understand the importance of document retention policies. They understand that such policies can help them comply with document retention laws and limit expensive discovery fishing expeditions. They also know that they must suspend routine destruction under document retention policies when litigation is reasonably anticipated and the duty to preserve evidence is triggered. “[A] party can only be sanctioned for destroying evidence if it had a duty to preserve it,” and that duty “begins when litigation is pending or reasonably foreseeable.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quotations omitted). These are well-established maxims of discovery in the era of predominantly electronic communications.

Here is a basic falsehood of that era: a document retention policy that is adequate for email can be made adequate for other electronic forms of communication simply by adding “or text or internet messages, or social media” (etc.) after every mention of the word “email.” Many franchisors and franchisees continue to use document retention policies constructed on the basis of an email paradigm. That paradigm assumes that the infrastructure used for communication—the email account—is controlled by the franchisor or franchisee. It assumes that the franchisor or franchisee will be able to suspend the deletion of documents simply by contacting its IT department, and telling a group of relevant custodians not to delete their messages. But email is no longer the exclusive, or perhaps even predominant mode of electronic communication—even for business communications. This was true before the COVID-19 pandemic, and is even more so during this work-from-home period. A document retention policy oriented towards email can be ineffective or irrelevant if applied to other forms of electronic communication without appropriate adjustments.

To reap the benefits of a document retention policy, a company must ensure that its policy is oriented towards the sorts of documents it actually generates in the course of its business.

Types of Electronic Communications to Consider

To a greater extent than in other industries, franchisors and franchisees communicate with business partners of a remarkable range of sophistication. Franchisees can be large, multi-national conglomerates or they can be small family businesses; the same is true of franchisors. Franchisees can have significant business experience and technological savvy or they can struggle to set up an electronic funds transfer. The media franchisors and franchisees use to communicate are, therefore, as diverse as the franchisors and franchisees themselves. Some predominantly communicate over email or telephone. Others use the SMS or MMS text messaging capacities of cell phones, third-party messaging applications like WhatsApp or Viber, ephemeral messaging applications like Snapchat



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or Wickr, the direct or private messaging capabilities of social media platforms like LinkedIn or Facebook, or more . . . the scope of the list is significant.

The list includes several items unfamiliar to many practitioners. SMS and MMS messages are both commonly referred to as “text messages,” and are generally available with an ordinary cell phone plan. “SMS” stands for “short message service,” while “MMS” stands for “multimedia messaging service.” An SMS message consists of text, while an MMS message can include pictures, audio, or video. WhatsApp is one of the more popular third-party services, and provides end-to-end encryption for sending text messages, images, video and audio files, and video and voice calls. An “ephemeral” messaging application sends text messages, but deletes the message after it is received. In theory, this ensures that the recipient cannot save a copy of the message. Finally, many social media platforms allow users to send a “private” message directly to another user, so that it does not appear as part of the user’s public-facing page.

While practitioners do not need detailed knowledge of every capability offered by every application, they should understand the range of possibilities at play from one category to the next. This is because a document retention policy oriented towards the processes of one platform will be ineffective or irrelevant if applied to another platform without appropriate adjustments.

How is a franchisor or franchisee to know how its employees are communicating with franchisees (or the franchisor), vendors, prospective franchisees, and fellow employees? Of course, once a litigation hold requirement is triggered, franchisor or franchisee personnel or outside counsel can and in many situations, should, conduct interviews with potential custodians. See, e.g., *Small v. Univ. Med. Ctr.*, No. 2:13-CV-0298-APG-PAL, 2018 WL 3795238 (D. Nev. Aug. 9, 2018) (criticizing the inadequacy of party’s custodian interviews and issuing adverse inference as a sanction). Interviewers typically ask employees questions about their involvement with the matters at issue in the litigation, how they communicated with others about those matters, and the applications and devices they used to carry out those communications. This

enables counsel to craft a litigation hold notice directed at the correct individuals, and to provide sufficient guidance to those individuals as to what information they need to retain. Without an understanding of what communication has taken place and how, there is a significant risk that individuals will (intentionally or not) delete relevant documents, possibly exposing the franchisor or franchisee to spoliation sanctions.

Who Has Possession, Custody, or Control over Electronic Communications?

While important, custodian interviews during the course of e-discovery can come entirely too late. A franchisor or franchisee who waits to understand how its employees are communicating until after the duty to preserve evidence is triggered, risks finding out that a substantial amount of that communication took place on platforms the franchisor does not control, or that fall in a gray area where the employers’ obligations are uncertain and vary by jurisdiction.

Not only do text messaging, ephemeral messaging, direct messaging and the like function in ways that are importantly distinct from email, they are also frequently accessed through accounts that are owned by the employee. An employee who texts from her own phone, who creates messaging application accounts under her own name, phone number, or email account, or who communicates with franchisees through her social media accounts may herself have “possession, custody, or control” of her messages. See The Sedona Conference, *Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,”* 17 SEDONA CONF. J. 467 (2016). Her employer, therefore, may not. *Matthew Enter., Inc. v. Chrysler Grp. LLC*, 2015 WL 8482256, at *3 (N.D. Cal. Dec. 10, 2015) (denying a motion to compel production where employees used personal email accounts to conduct business); but see *Waymo LLC v. Uber Techs., Inc.*, 2017 WL 2972806, at *2 (N.D. Cal. July 12, 2017) (holding a party responsible for the production of documents in the custody, control or possession of its officers); *Arconic Inc. v. Novelis Inc.*, No. CV 17-1434, 2018 WL 4958976, at *3 (W.D. Pa. Oct. 15, 2018) (same); *Int’l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, No. 3:12-CV-1058-SI, 2018 WL 6305665, at *3 (D. Or. Dec. 3, 2018) (accepting the argument that a company can be required to produce documents in the possession, custody, or control

of its officers, but denying a motion to compel for failure to show that a party's officers "use[d] personal email for work correspondence more than a de minimis amount").

In this regard, a franchisor or franchisee may or may not have diminished responsibility to preserve or produce messages that are in the possession, custody or control of its employees. See *Commentary on Rule 34 and Rule 45* at 482–506. The extent to which this is true will depend largely on the forum in which litigation proceeds. The federal district courts are split as to how far a litigant's discovery obligations extend with respect to this sort of material. While some district courts restrict a party's preservation and production obligations to documents it has a legal right to obtain, others require a party to notify its adversary if it is aware that such material is in the hands of a third party, and others require a party to obtain material when it has the "practical ability to do so." Of these standards, the "practical ability" standard is the most far-reaching. This standard can support a holding that a company has the practical ability to obtain documents held by its employees because it has the authority to "discharge the individual if he or she fails to cooperate in discovery." *Royal Park Investments SA/NV v. Deutsche Bank Nat'l Tr. Co.*, No. 14CV04394AJNBCM, 2016 WL 5408171, at *6 (S.D.N.Y. Sept. 27, 2016).

Who Should Control The Accounts Sending the Messages?

A franchisor or franchisee who requires employees to communicate only on employer owned devices, using employer-controlled accounts (including for SMS or MMS text messages), provides itself with the opportunity to institute a comprehensive and consistent document retention policy. It can control the media used by its employees for communication and decide how long documents are retained. By contrast, a franchisor or franchisee who permits communication via employee owned accounts on employee-owned devices risks the consequences of a hodgepodge of *ad hoc* document retention policies implemented by the preferences and convenience of its employees and application developers. Some employees may have saved years of text or instant messages, while others may have deleted them all immediately. Some may have selectively deleted certain messages. Ultimately, permitting such a hodgepodge of

policies risks forcing a franchisor or franchisee to litigate based on an unrepresentative corpus of discovery material, and to address disputes over what materials were or were not required to be preserved or produced.

To be certain, enacting a policy of employer-controlled accounts entails costs and risks. It requires having the IT capacity to service and administer employees' smart phones in a manner parallel to the services currently provided for employees' computers. There is the risk the employees will resist the directive, preferring to use a device other than that chosen by the franchisor or continuing to use platforms or accounts that are not sanctioned. Finally, sometimes having an unrepresentative corpus of discovery material is a benefit! A franchisor or franchisee who takes on responsibility for its employees' social media accounts may find things in a representative corpus it would prefer not to find.

Four Steps Towards a Better Document Retention Policy

Every employer must weigh the risks and benefits of taking control of the accounts its employees use for their professional communications. To the extent a franchisor or franchisee decides the benefits of such control outweigh the risks and warrant the costs, how can it best prepare itself for litigation?

Step 1. Create a list of approved (third-party) applications that employees are permitted to use for professional communications, and require that employees restrict their professional communications to those applications, using accounts that are created and owned by the franchisor. This provides the employer with the opportunity to incorporate more fully these accounts into the employer's document retention policy. Such a practice need not be overly restrictive for employees. If an employee needs to create an account in a new application, an employer would have the opportunity to expand its list of approved applications.

Step 2. Provide devices to employees. This step is an important improvement over the first step alone because having the employer as the subscriber for the phone extends employer access to the native texting application of the phone. Enacting this measure need not be any more

burdensome on the employer or its employees than the current, common practice of the employer providing a computer to all employees. An employer who provides devices to employees would also benefit from bulk purchasing discounts, ease of administration for information technology personnel, and the ability to ensure that confidential data is adequately protected.

Step 3. Develop a comprehensive document retention policy that applies to each of the applications approved for business use. Employers have flexibility to establish a set retention period regardless of the platform in which the documents arise, or vary the retention period from one platform to another. The important benefit of this step, however, is simply to make a considered decision as to how best to manage the risks associated with each form of electronic communication.

Step 4. Implement the comprehensive document retention policy. Platforms vary in terms of their native capacities for retaining

messages, and it may be necessary in certain cases to utilize third-party applications to augment those capacities. Significant IT investment will be necessary to ensure that the document retention policy is uniformly enacted on all employees' devices, and this must be done in such a way to permit the suspension of deletion as necessary to comply with preservation obligations.

These four steps are significant, and represent a material increase in a franchisor's or franchisee's investment in document retention. The sorts of risks posed by a comprehensive document retention policy are quite different than those associated with a more limited policy. All the same, this author suggests that it is better for a franchisor or franchisee to institute a single, coherent document retention policy rather than relying on individual decisions made by a diverse workforce concerning when to delete or retain individual communications. ■

Developments in Non-Signatory Liability in Franchise Agreements: Where and When Does It Apply?

Continued from page 08

may be ordered against "other persons who are in active concert or participation with" the breaching party, or her officers, agents, or employees. The evidence before the Court indicates that these tax preparers at Defendant's location, if not her employees, are at minimum acting "in active concert or participation with" Defendant, and are thus subject to the covenants discussed herein.

Id. at 6. (internal citations omitted).

The Takeaways

The above cases suggest courts are willing to enforce a restrictive covenant against a non-signatory where:

- (1) A close relationship exists between the signatory and non-signatory
 - This generally looks like a spouse, relative, or close friend.
 - This generally does not look like an individual who, prior to involvement with the signatory, was not related to, did not

work for, or did not know the signatory.

(2) The former franchisee is actively involved in the new enterprise.

- This generally looks like sharing or lending resources, allowing a new entity to offer competitive goods or services out of the former franchisee's location, allowing use of equipment, providing financial assistance, or funneling clients to the new entity.
- This generally does not look like a passive interest in the success of the new enterprise (i.e. *Winmark*).

(3) The former franchisee holds herself out as affiliated with the new business enterprise.

- This generally looks like a statement that the former franchisee is associated with the new entity, even though, on paper, he or she may not be involved. ■

A Burger and a Side of Nutrition Facts, Please!

By Lauren Smith Madden, Corporate Counsel at Yum! Brands



Americans love restaurants. Between 2010 and 2018, the average American household increased its spending on food away from home by nearly 40%. <https://www.statista.com/statistics/237215/average-away-from-home-food-expenditures-of-united-states-households/>.

As Americans have increased the frequency of restaurant meals, the Food and Drug Administration (“FDA”) has taken a fresh look at nutrition labeling and the information being provided to consumers, which directly impacts most food related franchises. In response to the nutrition labeling provisions of the Patient Protection and Affordable Care Act of 2010, and citing concerns about obesity and empowering consumers to make informed

and healthy choices, the FDA drafted a rule requiring restaurants and other food and beverage establishments to provide consumers with clear and complete nutritional information. The final version of the rule was published in 2014 (21 CFR 101.11), and the effective date — delayed several times — was May 7, 2018 (the “Rule”). The FDA also issued supplemental guidance in May 2018 to help food and beverage establishments understand the Rule’s requirements. <https://www.fda.gov/media/108737/download>

What Food and Beverage Establishments Must Comply with the Rule?

The Rule applies to “covered establishments,” meaning chains with twenty or more locations that do business under the same name and offer substantially the same menu items for sale. (See 21 CFR 101.11(a)). Establishments are Covered Establishments regardless of the type of ownership, meaning that a franchisee owning two or three franchised restaurants is required to comply with the Rule if the franchise system includes twenty or more restaurants constituting a Covered Establishment. Covered Establishments may include quick service and full service restaurants, as well as (in certain circumstances) grocery and convenience stores, delivery services, entertainment venues, cafeterias, and coffee shops.

Establishments not meeting the criteria of a Covered Establishment may nonetheless choose to register with the FDA and comply with the Rule. (See 21 CFR 101.11(d)). Establishments are incentivized to register and to comply with the FDA Rule because they will then no longer be subject to non-identical state or local nutrition labeling requirements.

What Food and Beverage is Included in the Rule?

The Rule applies to standard menu items,



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including food and beverages that are routinely offered for sale on a menu or menu board or offered for self-service. (See 21 CFR 101.11(b)(1)). Standard menu items can also include combination meals of more than one food item, and variable items that come in different flavors or varieties. The Rule also applies to alcoholic beverages, except those that are on display and are not used in self-service (i.e. a bottle of liquor used to make mixed drinks). If different restaurants within the Covered Establishment serve different food or beverages, each restaurant must provide nutritional information for the food and beverage items they routinely offer.

The Rule does not apply to non-standard items, custom orders (orders that at the customer's request deviate from the Covered Establishment's usual preparation, not to be confused with variable items that are anticipated to be subject to the customer's choices), daily specials, food that is part of a customary test market (on the menu for fewer than 90 consecutive days in order to test customer acceptance), temporary items (on the menu for fewer than 60 days per year), general use condiments, and food not on the menu. (See 21 CFR 101.11(b)(1)). Further, written nutrition information need not be provided for packaged food for sale that otherwise complies with the FDA's nutrition labeling rules, such as a bottled soda or a package of cookies.

What is Required of Covered Establishments?

Under the Rule, Covered Establishments must do three primary things: (1) disclose calories for standard menu items on menus and menu boards; (2) make required statements on menus and menu boards; and (3) provide additional nutritional information to customers upon request. While these three requirements seem straightforward, the significant variety in food and beverage presentation and delivery means that the Rule is detailed and anticipates lots of different scenarios.

Requirement 1: Disclose Calories

Covered Establishments must disclose calorie information for food and beverages on menus and menu boards, and for food that is on display or available via self-service (such as buffets). (See 21 CFR 101.11(b)(2)). The calorie information must be for the menu item as normally prepared and served, and may be rounded to the nearest

5 calories up to 50 calories, or the nearest 10 calories for items above 50 calories.

On menus and menu boards, the number of calories must be placed adjacent to the name or price of the menu item. The calories may not be in a smaller type size than the name or price, and must be in the same color or an equally conspicuous color, and with the same contrasting background or an equally contrasting background. Further, "Calories" or "Cal" must be noted above the column with calorie information or adjacent to the calorie information.

Variable items like soft drinks or different size items can have calorie information presented individually, or as a range. If the menu lists each variety of an item, the calorie information for each must be included. But if the menu does not list each item and only includes a general description, a range of calories may be included (either with a slash for two options or a dash for a range of three or more options). The same principle applies to combination meals that include variable items. For multiple-serving items like pizza, the calories can be displayed for the whole item (the entire pizza) or for a single serving size, as long as the number of servings is included.

For display or self-service food setups, the Covered Establishment can place a sign with calorie information next to each item or on sneeze guards, or can place a single sign listing the calorie information for multiple items. In both cases, the calorie information must include the name (if not clear by its placement next to the item), serving size, and calorie information for the item. The calorie information must be in a type size no smaller than the name or price of the item, in the same or an equally conspicuous color, and with the same contrasting background or an equally contrasting background.

The Rule also distinguishes between menus, which are required to include calorie information, and marketing materials, which are not. Marketing materials have the primary purpose of encouraging customers to visit the restaurant. This may include advertisements featuring a specific menu item, or the restaurant generally. Menus are primary writings from which a customer makes a selection. Menus include standard written menus, electronic menus, menu boards above cash registers, and drive-thru menu boards.

Requirement 2: Include Mandated Statements

On menus and menu boards, or near the display of self-service foods, Covered Establishments must include a succinct statement concerning suggested calorie intake, and a statement that more nutritional information is available upon request. (See 21 CFR 101.11(b)(2)(i)(B),(C)).

Suggested calorie intake information must be provided to customers to give them a better context for dietary decisions. The statement must say “2,000 calories a day is used for general nutrition advice, but calorie needs vary.” (See 21 CFR 101.11(b)(2)(i)(B)). For children, this amount should be reduced to 1,200 to 1,400 calories a day for children 4-8 years of age, or 1,400 to 2,000 calories a day for children 9-13 years of age.

The statement must appear on the bottom of each page of the menu, or at the bottom of the menu board. The statement may be provided for display or self-service foods by a sign adjacent to the food itself or on a separate, larger sign or larger menu board in close proximity. The statement must be displayed prominently, and in a clear and conspicuous manner. It may not be in a smaller type size than the smallest calorie declaration on the menu or menu board, and must be in the same color or an equally conspicuous color, and with the same contrasting background or an equally contrasting background as the calorie declarations.

A statement of the availability of additional nutritional information must also be provided to alert customers of the additional information they may review. The statement must say “Additional nutrition information available upon request.” (See 21 CFR 101.11(b)(2)(i)(C)). It must appear at the bottom of the first page of the menu, at the bottom of the menu board, or on a nearby, separate sign for display or self-service foods. The additional nutrition information statement must meet the same size, color, and background requirements as the calorie intake statement.

Requirement 3: Provide Additional Nutritional Information Upon Request

Covered Establishments must have additional written nutritional information available to customers upon request on the Covered Establishment premises. (See 21 CFR 101.11(b)(2)(ii)). This additional written nutritional

information can be provided as a counter card, sign, poster, handout, booklet, binder, electronic device, in the menu, or in some other similar form. It must include (in this order and in the units designated) total calories (cal), calories from fat (fat cal), total fat (g), saturated fat (g), trans fat (g), cholesterol (mg), sodium (mg), total carbohydrates (g), dietary fiber (g), sugars (g), protein (g). And it must be provided in a clear and conspicuous manner, using a color, type size, and background that make the information readable and understandable by an ordinary individual under customary conditions. For variable items, nutritional information must be provided for the basic preparation of the item, and for each topping, flavor or variable component.

If the amounts of six or more of these additional nutrition items are insignificant, a simplified notation may be used to indicate that the item contains insignificant amounts of the applicable nutrition items. This simplified notation must include total calories, total fat, total carbohydrates, total sodium, the other nutrients that are present in significant amounts, and a statement that the item is not a significant source of the other nutrients.

Determining Nutritional Information

In determining the nutritional information for the standard menu items, Covered Establishments must have a “reasonable basis”. (See 21 CFR 101.11(c)(1)). This may include nutritional databases, cookbooks, laboratory analysis or other reasonable means. Regardless of the method, the nutrient declarations for standard menu items must be accurate and consistent with the specific basis used to determine nutrient values, and the Covered Establishment must take reasonable steps to ensure that the preparation and serving size are consistent with the manner in which the nutrient values are determined. For instance, if a menu item includes fully cooked, grilled chicken, the nutritional information must be similarly based on the same ingredient and method of cooking.

The FDA may request substantiation for the nutritional information for standard menu items, in which case the Covered Establishment must provide written substantiation within a reasonable time of the FDA’s request. The written substantiation must also include a certification

of a responsible individual that the Covered Establishment has taken reasonable steps to ensure that the method of preparation and serving size of the standard menu items offered adhere to the factors on which the nutrition information was determined.

Allocation of Responsibility Between Franchisors and Franchisees

In the franchise context, the responsibility for determining nutritional information may be a cooperative one. If a franchise system qualifies as a Covered Establishment, then franchisees must satisfy the FDA's requirements, on their own if not in cooperation with the franchisor. However, the FDA's response to comments during the rulemaking process appears to have left open the possibility of franchisor liability for franchisee compliance failures, as the FDA stated in response to a comment about vicarious liability for franchisors and licensors that "[p]ersons executing authority and supervisory responsibility over a restaurant . . . can be held responsible for violations" and that enforcement decisions are made on a case-by-case basis. 79 Fed. Reg. 71161 (Dec. 1, 2014)

In practice, the franchisor may choose to provide nutritional information to franchisees in the interest of consistency and accuracy, or because of the sensitivity or difficulty in determining nutritional information for proprietary ingredients. Customers expect their favorite foods from a franchised restaurant to have the same nutrition information at every location, and any confusion or inconsistency could negatively impact the entire franchise system. The allocation of these responsibilities may be addressed in the franchise agreement or some other arrangement between franchisor and franchisee.

Preemption of State and Local Rules

The FDA was not the first agency to address menu labeling requirements. Several states, (including California, New Jersey, Oregon, and Vermont) and cities (including New York City) have menu labeling laws in effect. The FDA Rule preempts states and localities from imposing different or additional labeling requirements on Covered Establishments or establishments opting in to FDA Rule compliance. (See 21 U.S.C. § 343-1(a)(4)). In addition to simplifying compliance

requirements, the FDA Rule's preemption reduces compliance costs by avoiding disparate state requirements and reduces consumer confusion by ensuring consistent information is provided to consumers.

Non-Compliance

If a Covered Establishment fails to comply with the Rule's labeling requirements, it can constitute a misbranding under the Federal Food, Drug and Cosmetic Act. (See 21 CFR 101.11(f)). Misbranding can result in criminal or civil penalties of varying severity.

However, in light of the COVID-19 public health emergency and the resultant impacts on restaurant business practices and supply, the FDA released a nonbinding temporary policy regarding menu nutrition labeling in April 2020. While the FDA still encourages Covered Establishments to comply with nutrition labeling requirements, the FDA does not intend to object if Covered Establishments do not meet the requirements during (but only during) the public health emergency related to COVID-19. <https://www.fda.gov/media/136597/download>

Conclusion

While the requirement to provide calorie and nutrition information is not complicated in theory, the variety in style, orientation and delivery in food service establishments results in a relatively detailed Rule by the FDA. Many food-related franchise systems are required to comply with the Rule. Any Covered Establishment, including a franchisee operating only a single outlet, is required to comply with the Rule. The most effective compliance may be achieved through cooperation and guidance between franchisor and franchisees to ensure that the information provided is complete, accurate, and properly displayed. With careful attention to detail and common-sense application of the Rule's principles, Covered Establishments can confidently serve up a side of nutritional information with every entree! ■

Secrets in Plain Sight: What a Mediator Sees that You May Not. How to Maximize Your Opportunity to “Win” at Mediation.

By Arthur L. Pressman, Arthur L. Pressman Dispute Resolution Services, LLC

Switching chairs from advocate to mediator affords a new perspective. As Michael Dady and others have reminded us over the years, what you see depends on where you sit (or stand). Conduct that I once thought was useful during my 40 years as an advocate, I now see as counter-productive as a full-time neutral. From where I sit as a mediator of franchise disputes, here’s a list of mediation behaviors lawyers should engage in to increase the likelihood of resolution.

1. Do not ask to skip the opening session.

How many times have you asked the mediator to dispense with a joint session for fear that participants will be angry with each other? Do you honestly believe that emotion will disappear when the parties move to caucus sessions? Or are you really signaling your own discomfort with emotion? If anger or other emotion is triggered by the dispute, moving the parties, and the emotion they feel into another room does not do anything to advance resolution. Let the clients be heard by the others; it may help everyone to understand why the dispute arose in the first place and how to resolve it now. Even the most straightforward collection action has a bible story at its heart. Lawyers are well-advised to give the clients, not themselves, the opportunity to give it voice. After all, it’s the client’s story, not the lawyer’s, to tell.

2. If, like most clients, your client is at mediation to settle a dispute, do not annihilate the opposing party in the opening session. The scorched earth opening, full of fire and brimstone, may momentarily thrill your client but is otherwise remarkably ineffective at facilitating settlement. I have never seen a party apologize and withdraw its claim after being on the receiving end of a lawyer-opening meant only for a client’s ears. I

have, however, seen a party (and his lawyer) walk out of mediation and set resolution back for months after being excoriated for bad faith, double-dealing, thievery and the like in a no-holds barred opening. Remember the story of Rashomon, or its Hollywood version “The Seven Samurai” – what you see does not make it so. Everyone has his or her own version of the past. Mediation is the time to look to the future, not the past.

3. Let your client be an active participant, particularly during the opening joint session.

Studies show that disputing parties evaluate the success or failure of a mediation less on whether their case settles, and more on whether they feel that they have been heard. Plaintiff or defendant, franchisor or franchisee, it makes no difference – each of them has a story to tell and is aching to get it out. The more the lawyer controls the airwaves, the less airspace is left for the client. In addition, as an advocate, you lose a valuable opportunity to see how your client presents in something other than the question-and-answer rhythm of examination in deposition. And, more importantly, clients, if silent, lose their opportunity to directly tell their counterparts how the dispute has affected them, and how much they hope that the parties come to accord. As it is in a trial, the lawyer is the painter and not the painting. Let it be about your client, not about you.

4. Ask your client honestly, why are you at mediation? Do you really want to settle the case, or do you want something else? Free-ish discovery, a second (or first) look at the other side, satisfaction of a mandatory step in a dispute resolution clause in a franchise agreement, or because a judge or arbitrator ordered, directed



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or strongly suggested you should? These are all plausible reasons why a client might be at mediation, but not likely why your client is there. In most instances, your client wants to settle the case. Only if the two of you are on the same page will a mediation work.

5. Treat your counterparty with respect. How hard is this, you ask? I've seen lawyers and clients (more lawyers, I admit) drip with sarcasm and contempt when addressing their mediation counterparties, and to what end? All it does is show a lack of self-control or worse for the offending actor and creates more work for the mediator to keep everyone dedicated to the task of resolution, and not heading for the elevators. In an international mediation, I once heard a US-franchisor refer to his Latin-American master-franchisee as "you people." Tone-deaf, ethnically-insensitive, contemptuous – you pick a description for it – but it did not build a bridge to resolution.

6. Remember, there's typically little or no independent value in being right. Ok, I've said it. This proposition is the hardest thing for lawyers to swallow, much less convey with conviction to their clients. In franchise disputes, we are not typically fighting against racial injustice or similar moral wrongs (where public pronouncement of right and wrong is important to us all); we are usually fighting in private over money, property and other coin of the realm where we balance multiple considerations, legal and non-legal, risk and expense, on our path towards a resolution with which we can live. The real value in resolution is finality, not that one party prevails over the other.

7. Consider choosing a mediator that the other side proposes. I submit that the mediator you want is the one who will help you settle your case. The best advice I can give is to let your opponent pick the mediator. That way, you'll end up with someone your opponent respects and to whom your opponent and her client will listen.

8. Make sure you bring the right people with you, and that opposing counsel does the same. In my first mediation as a mediator I found myself talking at midnight on the phone to the wife of a franchisee who was on the receiving end of a termination action by his franchisor. By that time, we had been mediating for almost 15 hours, and

at that moment I realized why our mediation was still going strong – the franchisee had been calling her at each point in the negotiation for input, and because she was not in the room with the rest of us, she did not really have a good sense of how the mediation was going. Her instructions only reflected what she wanted and not what was possible. I should have found out before the mediation that the franchisee's business was his family's business, and I should have pressed for her attendance. I now always ask in advance if all decision-makers and decision-influencers will be in the room. If key people on whom either side relies are not present, you will face a communication obstacle that may prevent resolution.

9. Most importantly, do your own risk analysis to show what's at risk if you don't settle at mediation, and what's your best (and worst) alternative to settlement. You need to understand how much it is going to cost you and your client to continue to trial if mediation fails – not what the client has already paid, or what you have already billed. That's sunk and should not really be part of the matrix for deciding whether to settle at mediation or go to trial. The real issue for you and your client is what your "going forward" expenses and fees will be. In addition to legal fees and costs, you need to discuss other costs of continuing the lawsuit, such as employee time and emotional energy. Then, you need to realistically consider the likelihood that you will prevail at trial – not a rose-colored glass view that only looks for support for your claims or defenses and dismisses all contrary evidence. If you only have a 50% (or less) chance to win, say it aloud to yourself and tell your client too. Then, be realistic about the potential damages range and other remedies. Do you have a low, middle and high range of expected damages if all, or less than all, goes your way at trial? Is there attorney fee shifting? Are there collection issues? The figures will give you a basic risk assessment that you should consider in deciding whether to accept offers at mediation. From this analysis, you'll arrive at your best and worst alternatives to a negotiated agreement. If you ignore data, and concentrate on gut instincts, you run a real risk of missing what was obvious had you only thought about it. ■

and, additionally, create some new opportunities for all of us. The main change in format is that the programs will be presented by computer video to your laptop, tablet, and phone over a 4 day period (intensive programs on day 1 and plenaries, workshops and other programming on days 2, 3, and 4).

The workshops will be both live-streamed to registrants during the Annual Meeting and made available on-demand for up to six months after the Annual Meeting to registrants at no additional cost. This means that you will be able to view more workshops (all 24 of them!), as you will not be limited to attending the programs during the meeting itself. And, CLE credit will be available for both live-streamed and later, on-demand viewing in most states. This is a significant value-add for our members. Like in any other year, registrants will also receive papers and PowerPoints before the workshop presentations through an internet link.

In addition to the 24 workshops, we will continue to offer two intensive programs, the State of the Forum and business meeting, the always popular Annual Developments presentation, and an engaging second plenary presentation. We will also have some fun virtual networking/social gatherings, and groups such as the Diversity Caucus and Women's Caucus will have an opportunity to meet.

A list of FAQs is available at https://www.americanbar.org/content/dam/aba/events/franchising/2020/forum_2020_faqs.pdf. Registration is open now at the following link: <https://www.xpressreg.net/eReg/ABALookupE-Reg.asp?rc=&aban=&p1=&li=>. Please register now and encourage your colleagues to register!

I, the Forum leadership, and many of you that I

have heard from are very excited about this year's Annual Forum Meeting and are embracing the opportunity to learn and network in a new way this year. I'm proud that the Forum is able to offer such a robust event to our membership (and beyond) at such a tremendous value.

At this year's Annual Forum Meeting, we will elect a new Forum Chair and new Governing Committee members; the election will be held during the business meeting at 11:20 am Eastern on Wednesday, October 28, 2020. The nominees are:

Forum Chair for a two year term commencing August 2021:

Ron Coleman, Parker Hudson Rainer & Dobbs LLP, Atlanta, GA

Members At-Large of the Governing Committee for three year terms commencing August 2021:

John D. Holland, Dady & Gardner P.A., Minneapolis, MN

Earsa Jackson, Clark Hill PLC, Dallas, TX

Heather Perkins, Faegre Drinker Biddle & Reath, LLP, Denver, CO

Elizabeth Weldon, Snell & Wilmer, P.A., Costa Mesa, CA

A big thanks to Eric Karp (Chair of the 2020 Nominating Committee), Deb Coldwell, Kerry Olson, Scott McIntosh, and Peter Greenfeld for their service on the Nominating Committee.

In closing, I want to sincerely thank all of you for your loyalty to, and support of, the Forum on Franchising. I look forward to seeing you in a few short weeks at Franchising in Focus 2020@Home and to those drinks and laughs (in person) in 2021!

Be well, and enjoy the final days of summer with your family and friends. ■

Message from the Chair

Continued from page 1

Message from the Editor-in-Chief

Karen C. Marchiano, DLA Piper LLP (US)



It has now been more than five months since the World Health Organization declared COVID-19 a global pandemic, and we began sheltering in place. We at The Franchise Lawyer are inspired by our

industry's resilience in these extraordinarily difficult times. However, I do not always feel resilient - you are not alone if this is a challenging time for you. ■

This is Associate Editor Len MacPhee's last edition of The Franchise Lawyer - we thank him for his tremendous editing contributions!

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